Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development

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1. INTRODUCTION

What explains the shape of the administrative decision processes that we observe? Why are administrative functions structured in particular ways by special and general statutes, agency rules, and judicial decisions? What is the role of "administrative law," by which is generally meant "administrative procedure," in the modern administrative state?

1.1. THE WORLD OF THE LEGAL IDEALIST

Answers to these questions abound in the legal literature. In an influential article, Stewart argues, for example, that much of modern American administrative law is constructed to facilitate pluralist participation in administrative decision-making. More recently, Sunstein (1986) has argued that administrative law is designed to promote the republican value of deliberative rationality and to limit the influence of special-interest pleading. Indeed, the legal literature bristles with claims concerning the purposes of administrative process and processes, ranging from "fairness" to "efficiency" and utilizing a host of other ideas as well—"openness," "accountability," "legitimacy," and "rationality," to name but a few.

There has been little attention to the structure of these claims. This
inattention is perhaps explained by noting that, whatever their distinctive normative perspectives, lawyers’ arguments about how administrative processes should be constructed or understood proceed from a basic methodological agreement. On this view, call it the “idealist’s vision,” administrative processes are part of the general fabric of American public and constitutional law. The law of administrative procedure contributes, as does all such law, to the construction of an operationally effective and symbolically appropriate normative regime. To put the matter slightly differently, administrative procedural requirements embedded in law shape administrative decision-making in accordance with our fundamental (but perhaps malleable) images of the legitimacy of state action. That is administrative procedure’s purpose and its explanation.

Not all administrative lawyers subscribe to this idealist vision of a general (and largely judge-made) law of administrative procedure that is based on normative premises having a constitutional or quasiconstitutional status. Some, for example, assert the hegemony of substance over process, and reject the notion of anything like a unified administrative law (Gellhorn and Robinson, Rabin). While recognizing a common rhetoric in administrative procedure talk, these dissenters contest the meaningfulness of process discussion divorced from some program-specific context. And, at that level of specificity, the more discrete actions of Congress and administrators begin to take center stage. This literature focuses attention on the situational flexibility (and, hence, the potential meaninglessness) of the normative concepts that inhabit a general administrative law. Yet, the dissenters’ project within administrative law has produced largely coursebook (Robinson and Gellhorn, Breyer and Stewart) expressions of what a substantively situated administrative law would look like. The dissenters’ claim that there may be no administrative law—only labor law, environmental law, welfare law, and the like—has never been developed further to explain how procedure in these substantive areas is generated or sustained.

The explanatory notion implicit in the “legal dissenters” literature, however, seems to be one of decision processes developed to meet the “needs” of particular substantive regimes. Thus, in one plausible interpretation of its behavioral assumptions, the dissenting, like the mainstream, view presumes that process forms emerge as part of a normative program (Breyer, 1982). The dissenters, too, are functionalist, procedural idealists who see process as

1. The paradigmatic case of the legal profession’s court-centeredness is, perhaps, the annual review of administrative law cases in the Journal of the Section of Administrative Law and Regulatory Practice of the American Bar Association. The title is always “Administrative Law Cases During [the past year.]” Statutes and agency actions are almost completely missing from the discussion in the citations of these reviews of the development of administrative law. To read them is to be led to believe that what courts say simply is administrative law and process (Schwartz).
constitutive of and supplementary to the elaboration of a normatively appropriate legal order. For them that legal order is merely the more particularistic one found in specific statutory regimes, rather than in some overarching normative structure of American public law.2

1.2. Realist Critiques

One need not, of course, have taken a particularistic turn to find much of the conventional lawyerly discussion of administrative process less than revealing. Attention to the content of the norms summoned up by ordinary legal discourse leads quite easily to the suspicion that something more is afoot here than the rhetoric reveals. How could such open-textured terms as “rationality” or “fairness” possibly structure or constrain administrative action? Given resourceful packaging could not any process be said to further one, or all, of the ideas that populate administrative law’s normative universe—particularly if these notions must be “balanced” against each other in application. Surely, this is merely law as comforting ideology, not law as a set of conceptual tools that can be used to generate determinate processes for the control of administrative action. Institutional behavior need not be investigated in any detail to suspect that the normative discourse of administrative process is inadequate to the tasks of legal control that are its putative purpose (Edelman).

Whatever the complexity of its normative preoccupations, therefore, administrative law scholarship seems to exhibit a touching naivete. In carrying forward its interpretive enterprise, it has tended to ignore behavioral questions about how its concepts are generated, structured, and maintained. It has failed to ask hard questions about whether its ideological pretensions are in any way connected to the realities of bureaucratic governance. That is, like most fields of law, administrative law remains ripe for a continuing “realist” revolution that focuses attention on administrative process as the product of political struggle, rather than as the product of normative, idealist elaboration.

In the current intellectual climate, critical legal studies (CLS) and

2. To be sure, lawyers are not always as “elevated” as this account suggests when discussing administrative procedure. The strategic use of procedure is the lawyers’ stock in trade, and shrewd procedural judgments are often what distinguishes the accomplished practitioner from the neophyte. Lawyers know in their bones that administrative process is about power as well as about justice, democracy, or efficiency. As lobbyists they might often be happy to let opponents write the substance of a bill, so long as they get to write the procedures governing the new law’s implementation. Yet these professional intuitions or concrees have never formed the basis for a general behavioral account of why administrative processes take the particular forms that they do. This sort of process knowledge tends to be held at a concrete, anecdotal, or “clinical” level. It would not be offered, even by most practitioners, as an explanatory or predictive guide to the overall structure of American administrative procedure. Such an account might be offered, however, by a law-school-based political scientist (Shapiro).
positive political theory (or "political economy" or "social choice theory") are
the principal contenders for the realist throne. And so it has come to pass
that Gerry Frug, in an elegant CLS critique, has explained how the normative structure of administrative (and corporate) law serves to maintain an ideology of bureaucracy that both legitimates and masks coercion (Frug). Administrative procedure assures us of the objectivity of administration even as it subjects us to the discretionary dominion of administrators. As such, the law's stories of bureaucratic legitimacy are preeminently "mechanism[s] of deception" (Frug:1278).

Positive political theorists, in particular, Mathew McCubbins, Roger Noll, and Barry Weingast, have weighed in with a similarly bleak view (McCubbins et al., 1987, 1989). They argue that administrative processes can be understood as the means by which political victors maintain the gains from successful interest-group struggle at the legislative level. Administrative decision structures are the devices through which legislative principals control the actions of potentially deviant administrative agents. Legislatures can thereby deliver on the electoral deals that maintain them in office. In both the CLS and positive political theory (PPT) accounts, the normative rhetoric of the law, the crucial data analyzed in both the legal literature and judicial opinions, is largely epiphenomenal—a product or constituent of more fundamental underlying material processes that are obscured, if not misrepresented, by lawyers' talk.

1.3. TOWARD A COMPARATIVE TEST

To a degree, idealist and realist explanations of administrative procedure are noncomparable perspectives of the same phenomena. Lawyers and legal scholars provide an internal interpretation of process purposes and goals articulated in the normative vernacular of American political and constitutional ideology. Realists are "external" or "critical" observers looking past the law's internally prescribed rhetoric to explain process phenomena in terms of material interests and political power. Idealists, by ignoring issues of behavioral motivation, seem to view expressed intentions as relatively non-problematic guides to what is being done and why. Realists tend to combine rhetoric, objective interests, and concrete behaviors to construct both their what's and their why's, either through the development and testing of behavioral hypotheses (PPT) or through the reflexive or dialectical examination of

3. I agree with Cass Sunstein that standard academic and judicial talk about administrative law makes no predictive claims concerning judicial behavior or the behavior of others. Nevertheless, there are certain necessary behavioral conditions for anyone to take this interpretive activity seriously. If the interpretations provided by courts and commentators, for example, are either hopelessly vague or, are for other reasons, largely irrelevant to administrative practice, then the processes that we observe cannot sensibly be understood as examples of the normative commitments embedded in the interpretive pronouncements of administrative law.
rhetoric and practice (CLS). These two perspectives not only look at different data—idealists at expressed purposes; realists at implicit (sometimes hidden) interests or ideology, but they have dramatically different methodologies for the interpretation of behavior, and conflicting ideas of what could count as a reason for action.

Given this radical disjunction between the two approaches (to say nothing of the intellectual gulf that divides CLS and PPT realists), mediation of their rival claims may be impossible. If methodology determines both evidence and its interpretation, then to ask who has the best explanation of American administrative processes may simply pose an issue of taste. Each explanation may be adequate within the terms of its own methodology, but hopelessly inadequate, or indeed obviously false, from the perspective of the alternative visions. The “best” explanation then becomes the one that best fits the analyst’s own preferences concerning the style of explanatory stories.

But perhaps methodological bias might also provide a way past methodological relativism. If what we see depends upon what we look for and how we look for it, then the choice of evidentiary base and interpretive stance should privilege the theory whose methodology is chosen. Precisely because of this privileging, there emerges a possible test of the power of administrative process (and perhaps other sorts of legal) storytelling. For, if we privilege one style by adopting its methods, and it still fails to beat its competitors, then we should at least be very skeptical of its adoption as the primary account of the phenomena to be explained. Can such a comparative test be constructed?

Comparative testing across methodologies requires a somewhat heroic act of translation. Stories emerging out of different intellectual commitments must be given structures that are both coherent in their own terms and that can be accommodated by the privileged methodology. Moreover, once that is accomplished, some divergent implications from each type of story must emerge—otherwise, we will have no test. The task in Section 2 of this article, therefore, is to attempt to provide the necessary translations and to describe the process implications of each theory as translated. In Section 3, I will attempt to marshal some evidence concerning which process implications are best confirmed.

As mention of “testing” and “confirmation” in the previous paragraphs perhaps already suggests, the methodology to be privileged here is that of positive political theory. The attempt is to specify coherent models of the purposes for procedural arrangements and then to describe the sorts of processes that would be likely to implement those purposes. Each model of

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4. To put the matter crudely, critical theory has an internal as well as an external aspect (reflexivity) and a liberating, not merely a descriptive or predictive, purpose. Indeed, critical theory to some degree defines itself in opposition to the positivism and individualism that are crucial features of PPT (Geuss).
process purpose and associated procedural techniques will state a standard
behavioral hypothesis of the form: “If the purposes to be served are these,
then we should expect the procedures we observe to be like this.”

I choose to privilege the positive political theory’s behavioral approach for
several reasons. First, a positive model has already been developed from this
perspective by others, and that makes the task of specifying procedural
implications much easier. Second, that methodology is familiar and well-
adapted, at least in its own domain, to adjudication among competing ex-
planatory hypotheses. Third, legal-normative and CLS approaches do have
empirical presuppositions that should, in principle, be translatable into
positive theory terms. Fourth, I believe that the PPT model, at least as
currently constructed, needs refinement. Choosing to pursue the analysis
from the perspective of positive political theory, thus, at least holds out the
prospect of contributing to the further elaboration of that perspective. And,
finally, the attempt to force other theories into the “if-then” mode of
positive theory may illuminate and sharpen our understanding of them, even
if we admit that to “translate” is in some sense to falsify.

2. MODELS OF ADMINISTRATIVE PROCEDURE

2.1. IDEALIST VISIONS OF LEGISLATION, ADMINISTRATION,
AND ADMINISTRATIVE LAW

Let me oversimplify. During the crucial middle decades of this century (say,
the 1930s through the early 1970s), the vision of legislation and administra-
tion that seems to have dominated legal consciousness was a vision of gov-
ernment as a well-ordered input/output machine. Into the machine went
social problems and political values; out of the machine came legislative
programs that would make social reality conform to social ideals. The new
activist state was purposeful and pragmatic. Collective purposes—visions of
the public interest—were shaped by the macropolitical processes of elec-
toral and legislative debates. Concrete realizations of those purposes were
achieved through the practical application of the expertise possessed by
administrators to whom various policy domains were delegated.

Over this period dramatic changes took place in the social vision of just
which public problems were most pressing and which institutional devices
most efficacious in addressing them. New Deal problems of infrastructure
disorganization, economic distortion, and worker insecurity gave way to the
Great Society’s focus on the negative externalities of superabundance and
the incompleteness of the welfare state. The image of expert administration,
meaning an independent commission operating as a specialized tribunal, was
replaced by the image of a technocratically expert bureau, acting through
techniques that were primarily quasilegislative. However, throughout these four or five decades, skeptics to the contrary notwithstanding, the dominant images in both our political and our legal rhetoric celebrated the progressive translation of widely approved public ideas into concrete programmatic benefits. Failures to realize public purposes were viewed as failures of imagination—either poor conceptualization of problems or an improper fit between social issues and institutional techniques (Breyer).

This idealist vision also encompassed an idealist administrative law. From this perspective, legal control of administration effectuated basic liberal or pluralist democratic values. To be sure, administrative law was a flexible regime that accommodated great variety in institutional designs and in allocations of administrative power. This flexibility was crucial to the overall picture of political programs as exercises in pragmatic problem-solving. Rigid delimitation of legislative and executive functions, for example, was rejected. Virtually complete delegations of policy choice from the legislature to administrators were permitted in the interests of programmatic efficacy. Nor did the separation of powers demand executive control over officers whose independence and expert judgment might be compromised by political interference [Humphrey’s Executor v. United States, 295 U.S. 602 (1935)].

Yet administrative law was not all flexible accommodation to the administrative enthusiasms of the moment. Judicial review was designed to keep administrators within their jurisdictions and harnessed to the values and purposes expressed in the macropolitical processes of legislation and electoral accountability (Jaffe). Moreover, procedural protections for both individuals and groups, backed again by judicial enforcement, reinforced the image of citizens as rights holders in the new administrative state, and supported participation in the micropolitical processes of administration (Stewart).

Mediation of the tension between the ideals of governmental efficacy and of self- or participatory, governance defined the central issues for administrative law and administrative lawyers. Working out how democracy was to be structured and maintained in this new activist, administrative state was

5. Indeed, the shift toward “pragmatism” was the great triumph of the New Deal’s administrative lawyers. Beset by vigorous, sometimes vicious, attacks from conservative lawyers (Report of the Special Committee), and even leading academic theorists (Pound), they responded by burying the critics in facts [Landis; Jaffe; and, particularly, the Attorney General’s report (Administrative Procedure in Government Agencies)].

6. As is generally well-known, the Supreme Court has invalidated a delegation of authority as too broad in only two cases in its history: Panama Refining Co. v. Ryan, 293 U.S. 398 (1935); and Shechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Although the Supreme Court’s statements concerning the vitality of the nondelegation principle both before and since 1935 suggest a rigorous constitutional restraint [see e.g., Field v. Clark, 143 U.S. 649 (1892)], the doctrine is in fact very nearly an empty formalism. [See Yakus v. United States, 321 U.S. 414 (1944); Arizona v. California, 377 U.S. 546 (1963).]
hardly easy. But there seemed little doubt that the construction of an effective public law for the pursuit of public purposes motivated and guided the enterprise. The activist administrative law that emerged over this period, and that still provides the dominant image of what administrative law is about, was something of a pastiche of liberal and pluralist political programs. A closer look at how these two normative visions differ, and yet can be combined, will provide a sharper picture of contemporary idealist legal consciousness and its implications for administrative process.

Liberal democratic ideals of limited government and citizen rights, ideas that had supported ideological opposition to the rise of the administrative state (Patterson),7 were eroded but not wholly supplanted during the middle decades of this century.8 Liberal democratic legality in administrative decision-making can be envisioned as entailing a number of connected institutional arrangements aimed at preserving individual rights through the maintenance of the “rule of law.” Fundamental to that essentially Madisonian program is policy choice firmly attached to a constrained legislative process—that is, one accountable to the electorate, one subject to the checks of bicameralism and the presidential veto, and one confined by the substantive limits prescribed in federal power-sharing arrangements.

Limited, accountable, and “checked” policy-making cannot, however, eliminate all conflict between state power and individual rights, nor are these structural, constitutional features self-implementing. Liberal democratic constitutionalism demanded further that decisions affecting individual rights to be made in accordance with due process of law [Joint Anti-fascist Refuge Committee v. McGrath, 341 U.S. 123 (1951)], and that there be an opportunity for judicial testing of the legality of any exercise of power altering those rights [School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902)]. Implementing these notions of procedural regularity and substantive legality in the administrative sphere dictates many of the subsidiary features of administrative process—including at least (a) process transparency (published norms, open proceedings, and reason-giving), and (b) decision rationality (adequate fact-finding and objective rationalization of decisions in terms of the relevant statutory norms and the evidence of record). The lynchpin of the whole enterprise is judicial review to assume that substantive and procedural rights are protected (Jaffe:320–94).

According to the now standard story, as New Deal state activism triumphed in the postwar years over laissez-faire constitutionalism, liberal

7. Indeed, this opposition had arisen during the progressive era and had been expressed by the leaders of the bar (Root, Goodnow). This opposition was not just opposition to a progressive social program. It included a liberal legal ideology that focused as much on procedure and remedies as on the substance of programs (Paul, Chase, Hewart, Beck).

8. New Dealers themselves admitted that the law must maintain protection for individual freedom notwithstanding the need for collective governmental action (Frankfurter).
legality in administrative law beat a hasty retreat. The demand for a tight connection between legislative choice and administrative action expressed in statutory standards or criteria collapsed.\(^9\) A similar fate befell the idea that “due process” entailed judicial, or at least formal adjudicatory, process (Kadish; Mashaw, 1985). In the hands of progressive judges, the notion of individual rights became as much a shield for administrative discretion as a protection for private interests (White). Judicial review for solid record evidence and cogent instrumental rationalization of decision-making gave way before deferential invocations of expertise and the translation of legal issues (for courts) into questions of fact (for administrators) [NLRB v. Hearst Publications, 332 U.S. 111 (1944)].

Yet this apparent relaxation of legal constraints on administrative decision procedures neither wholly jettisoned liberal democratic ideas nor abandoned the defense of dominant constitutional presuppositions against the corrosive proliferation of administrative discretion. That defense, however, was coming to be understood in terms of a new model of normative pluralism (Lowi). And, within that model, old ideas were given a new shape and new forms of implementation.

The demand for statutory standards via the “nondelegation” doctrine might be more formal than real, but administrative legality still entailed nonarbitrariness—the articulation of reasons connecting discrete decisions to general norms or policies. Where were those policies to be found if not in statutes? The answer was in administrative rules (Davis) and prior administrative adjudications (Friendly, 1962). Administrators could be expected, indeed required, to generate their own law, and they could then be held accountable to it. Moreover, this process of administrative law-making need not be wholly self-referential. Indeed, it could not be if “administrative accountability” was to be more than a fiction.

There thus emerged a complex idea of procedural legality or process rationality comprised of several elements. One strand of this notion focused again on substantive rights, not as impediments to the development of substantive policy, but as claims to procedural protection from error in the application of that policy. Moreover, these substantive rights, now backed by judicially constructed procedural defenses, were themselves the product of state action, the creations of particular regulatory and social welfare regimes. Administration thus came to entail the procedural inclusion of clients and claimants whose legal interests were an artifact of the administrative state (Reich, 1964, 1965).\(^10\) Process claimants might only have the substantive “rights” that the state gave them, but courts policing administrative legality

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9. However, see discussion in note 6.
10. These ideas were relied upon explicitly by the Supreme Court in Goldberg v. Kelly, 397 U.S. 254, note 8 (1970).
could insure that the provision of legal rights carried with them access to the procedural levers necessary to make those rights meaningful (Friendly, 1975; Rendleman).

As significant as those protections might have been, formal process rights attached to individual adjudications could have left administrative policy development via general rule-making adrift in a legal void of pure administration discretion. The courts experimented with a host of techniques to fill that void. The Administrative Procedure Act was reinterpreted to create new "rights" to judicial review that evaded the old rights-based limitations on standing [Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970)], ripeness [Abbott Laboratories v. Gardener, 387 U.S. 136 (1967)], and reviewability [Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)]. Procedural innovation at the judicial level sought to align the fact-gathering and reason-giving of the administrative policy process more with the judicialized techniques of agency adjudication (Williams). Judges defended universal access to rule-making policy processes by extraordinarily rigorous demands for notice of proposed administrative action and rational justification for policy choice in the face of vigorous protest by agency opponents (Mashaw and Harfst). Putative beneficiaries of agency protection or largess were given increasing power to force policy development from lethargic or recalcitrant administrators (Mashaw and Merrill).

While these developments can be described in a terminology reminiscent of liberal legality—as attempts to limit administrative discretion by rendering administrators accountable to the substantive demands of statutory regimes and to the procedural requirements of the Constitution and APA—the particular form of control employed (call it "proceduralism") has other normative bases. The proceduralist project in administrative law is the micro-political analogue of Ely’s currently popular vision of the function of constitutional adjudication. In this view, judicial review is justified by the necessity to maintain reasonable access for all groups to a political process whose democratic character consists precisely in its responsiveness or potential responsiveness to the wishes of those groups. Similarly, the normative, pluralist vision of administrative processes sees both process design and judicial policing of the implementation of those designs primarily as devices for providing policy access to relevant political forces or interests. Administrative legality entails policy-making that accommodates these interests procedurally by giving them serious consideration in the development of substantive norms.

Given the conventional “new wine in old bottles” techniques of legal development, it is perhaps not surprising that the pluralist and liberal projects can be carried on using essentially the same legal concepts. Demands for process transparency and decision rationality can be used both to protect rights and limit government (liberalism) and to assure access and an appro-
appropriate accommodation of interests (pluralism). This may be a happy feature of administrative law: new arrangements can be accommodated without the stress of developing a new politicolegal vocabulary. However, from the vantage point of our current project—the description of the procedural implications of a normative account of administrative law—the capaciousness of the legal categories is something of a problem. It suggests that legal structures and processes may be given multiple normative interpretations. Their purposes, therefore, remain ambiguous.

Consider, for example, the administrative process implications of the basic commitments of liberal legality and normative pluralism. Liberal legality, as we have said, features the protection of individual rights. Normative pluralism, on the other hand, is primarily concerned with the accommodation of competing interests. It might be imagined, therefore, that institutional designers seeking to implement these two different normative programs would produce quite different process or decision-making structures. A rights-protecting administrative process, for example, might demand formal procedures of a familiar sort: specific notice of claims contrary to existing private rights; allocation of the burden of proof to the state where it proposes to diminish or withdraw rights; full disclosure of all facts and arguments that support the state’s claim; full opportunity for rights-holders (but not others) to contest claims and arguments by confrontation and cross-examination; decision-making by a neutral adjudicator; decision-making based wholly on the facts and arguments of record in the proceeding; and so on.

By contrast, interest accommodation would seem to imagine an informal process. Here, for example, there need be no clear specification or division between participants and “deciders.” Sharply defined burdens of proof, rights of confrontation, or limitations to record evidence would get in the way of a negotiated resolution which takes account of the interests of all parties. Indeed, interest accommodation seems to require a highly flexible process of political bargaining in which facts and values are not kept critically distinct, and in which “parties” may be added or subtracted freely as subject matter shifts or is redefined. While the formal adjudicatory proceeding is restricted to those who, strictly speaking, have claims of right with respect to determinate remedies, the informal process is one in which “stakeholders” arrange and rearrange themselves with respect to a proposed outcome, which is itself subject to debate, negotiation, and (perhaps) radical revision.

Looked at in this way, the administrative process implications of liberal legalism and normative pluralism seem remarkably distinct. We should be able to scan American administrative procedures to see whether they seem constructed on one or the other model. But, alas, the facts are difficult to find.

On the one hand, we do find numerous instances of formal adjudication in American administrative law. It is often both a feature of statutory regimes and a requirement of the Constitution. The structure of American admin-
istriptive law thus evidences a commitment to the rights-protection ideals of liberal legalism. On the other hand, most administrative policy processes are characterized by an extraordinary degree of flexibility. Informal rule-making processes, for example, generally take place over extended periods with multiple parties, shifting agendas, and eventual compromise. No one has a right to any particular outcome, nor are "rights" at stake (Graham).

In addition, rights to formal process in American administrative law are seldom, if ever, nonproblematic. At the constitutional level, they entail a sort of cost–benefit analysis that weighs the general interests of groups who claim particular process rights against other social interests in the effectuation of administrative programs (Mashaw, 1976, 1981). Moreover, administrative capacities to redefine issues in general rather than specific terms, and thereby to determine the substantive relevance of individual facts and circumstances to administrative decision-making, make formal hearing rights almost wholly dependent on the necessities of administration within particular programs [Heckler v. Campbell, 461 U.S. 458 (1983)]. Individual procedural rights in American administrative law thus have a social basis, which is inseparable from the overall accommodation of interests developed in the implementation of substantive public purposes.

These interpretive uncertainties suggest that there may be major difficulties in developing a set of determinate and specific process characteristics that would implement the major visions of constitutionalism and administrative legality to which legal idealists have traditionally subscribed. It may be possible to interpret every instance of administrative structure or process as furthering the goals of liberal legality or normative pluralism, or of both simultaneously. This is particularly true if we allow procedures also to be compromises between, or syntheses of, these often simultaneously held visions.

The interpretive capaciousness of legal idealist categories does not, of course, eliminate the possibility of distinguishing liberal or pluralist normative commitments, and their procedural analogues, from radically different ones. Secret and coercive state processes—without minimal aspects of notice, opportunity to participate, reason-giving, and the like—could hardly be part of either a liberal or a pluralist normative administrative program. Thus, on some grosser dimensions of process explanation, such as who has control over the structure of decision processes, liberal legality and normative pluralism may have implications that differ sharply from their realist competitors.

11. The examples are legion. See also, for example, Peter Schuck’s description of how the Federal Energy Regulatory Commission transformed its regulatory functions from a system requiring formal adjudication to one relying almost exclusively on informal waivers (Schuck). Such stories can be told for virtually every federal agency of the U.S. government that requires formal hearings.
Liberal legality, for example, should certainly be highly skeptical of administrative procedural discretion. The protection of rights, including procedural rights, requires that other institutions, in particular courts, have effective control over the way in which decisions can be made. It is this feature of liberal constitutionalism that has made judicial review, at least in the American context, virtually the exclusive topic of constitutional theory. Does the normative-pluralist strand of legal idealism give similar prominence to court control of administrative process?

Pluralist processes might be thought, on the contrary, to feature broad discretion on the part of administrative decision-makers to modify and adapt processes to accommodate relevant interests. Yet the pluralist vision of administrative law in post-New-Deal America has hardly de-emphasized courts as the source of process norms. The role of courts has not been so much reduced as shifted, from the control of administrators' substantive discretion to control of their procedural discretion. Thus, for example, the “due process revolution” in administrative adjudication (Mashaw, 1985) and the construction of a new “rational process” paradigm for administrative rule-making (Diver, DeLong) have been described in the legal literature largely as court-centered activities. Moreover, “rights” to participation in both formal and informal processes of agency policy-making were broadened and enforced by permitting dramatically broadened access to courts, who could then both structure and police the process rationality of administration (Vining).

Thus, although a normative pluralist vision may imagine administrators to be engaged in broad-based interest accommodation, that accommodation must be legitimized by a process of decision-making that confers judicially enforceable participatory rights on affected interests. And both structuring and protecting those rights is a preeminently judicial function, accomplished via interpretation of legislation, the Constitution, and the “common law” of administrative procedure.

The liberal-pluralist compromise that has shaped the legal idealist vision of American administrative procedure thus seems to require courts capable of structuring and controlling a process of legislative and agency procedural innovation that is directed at interest accommodation, but subject to conditions of widespread procedural rights-holding. The idealist conception of administrative law presumes, indeed features, control of administrative procedure by courts, rather than by agencies or legislatures. Furthermore, on this dimension, if no other, it differs from the models to which we now turn.

2.2. THE POSITIVE POLITICAL THEORY OF ADMINISTRATIVE PROCESS

A group sometimes designated by the awkward label “rational choice political economists” has, in recent years, asked us to jettison our vision of governance as a benign input/output machine for the definition and effectuation of
the public interest.\textsuperscript{12} In its place, one branch of this literature has described governmental action as nothing more than self-interested political bargaining in the pursuit of individual or group material interests. The black box of macropolitics and bureaucratic decision-making has been pried open to reveal copious opportunities for “rent-seeking” behavior both by the people’s representatives and by the “experts” in charge of public programs. Moreover, if ubiquitous free-rider difficulties induce rational ignorance in voters and radically skew the structure of pluralist, interest-group activity, then the self-interested manipulation of both legislative and administrative processes can go on largely unchecked by electoral restraints.

This revised, principal-agent perspective has reenergized a focus on institutional design, and has generated explanations of the activist, administrative state radically different from those embedded in Legal Idealism. Rather than effectuating the public good while maintaining liberty and democratic control, public institutional arrangements are virtually all explained as devices to facilitate private gain at public expense. On this view, broad delegations of power and limitations on executive control structure politics in the interest of “iron triangles” of self-aggrandizing representatives, bureaucrats, and interest groups. Judicial review cements the gains from the private deals for the use of public power, and agency processes are designed primarily to permit “capture” by the already advantaged. Pursuit of “the public interest” as a guide to an understanding of the structure and behavior of public institutions is thus replaced root and branch by hypotheses featuring pursuit of private material gain. By 1984 an article in the American Economic Review could plausibly claim that “the economic theory of regulation long ago put public interest theories of politics to rest” (Kalt and Zupan).

To be sure, the empirical record of this branch of PPT is one that should induce the utmost caution in its practitioners (Farber and Frickey; Panning; Kelman, 1988; Hovenkamp). However, PPT practitioners are not all wedded to interest-group explanations. Indeed, they work with a host of models, having quite different assumptions and emerging out of differing “public choice” traditions. Their familial relationship is difficult to capture save in a core general presumption that political behavior is to be explained as the outcome of rational (and often strategic) action by relevantly situated individuals within some set of defined institutionalized boundaries. This variety, however, hardly makes PPT a nonstarter as a basis for constructing a good explanation of administrative process. What is needed is a more detailed theory with determinate procedural implications for testing. In the field of administrative process, the most ambitious effort to date is what I will call

\textsuperscript{12} The literature is enormous. Many of the seminal works and later important studies are cited in Levine.
the “McCubbins–Noll–Weingast (MNW) Hypothesis” (McCubbins et al., 1987, 1989).

The MNW thesis is relatively straightforward and, in the abstract, quite plausible. Electorally accountable officials, the President and the Congress, have a difficulty. They must often put the implementation of public programs in the hands of other nonaccountable officials who may have their own designs on the programs. Monitoring is always costly, as is the application of sometimes cumbersome sanctions. Moreover, the deviation of bureaucrats from politicians’ desires may be inherently uncorrectable so long as the bureaucrats’ actions remain within that set of options that might have been approved ex ante by some winning coalition. How can politicians control bureaucrats? The MNW answer is “through administrative process.”13

MNW posit that the two major control issues facing the Congress are problems (1) of information asymmetry and (2) of the erosion of an original legislative coalition over time. We will take the latter problem first because it illustrates a serious issue of vagueness in the model that is provided. The problem with the MNW analysis, as it currently stands, is that it may be nontestable.

To solve the problem of eroding legislative coalitions, administrative procedures would need to provide an opportunity whereby the constituencies that motivated the original legislative coalition could themselves act on implementing agencies to preserve the bargain that was struck at the legislative level. MNW hypothesize, therefore, that legislators will “stack the [administrative] procedural deck” in favor of the winning coalition. So far so good, but there are some troublesome loose ends in this scenario.

For example, why would the political controllers want to preserve the original policy position in the face of the erosion of the original legislative coalition? If the legislative coalition is one that is derivative from the demands of constituencies, then a change in the preferences of the legislative coalition should signal a change in the preferences of the constituencies. Since the desire for political control in this model seems to be to service relevant constituencies, rather than to preserve some preferred policy on other grounds, it is difficult to understand why the political principals want

13. This surely makes sense as well. Structure, or at least location, often matters. The regulation of pesticides in the Department of Agriculture is likely to be quite different than its regulation in EPA. The National Highway Traffic Safety Administration is likely to behave differently as a part of the Federal Highway Administration than it would as a separate bureau. Moreover, procedures can be devised that obstruct administration that the whole character of an administrative program is substantially different than would have been imagined from reading the substantive sections of a statute. See, for example, Wirtz v. Baldor Electric Co., 337 F.2d 518 (D.C. Cir. 1964) (which severely undermines the Labor Department’s implementation of the Walsh–Healy Public Contracts Act by enforcing the so-called “Fulbright Amendment” to that statute). See also Merrill and Collier.
to preserve the old coalition at the administrative level when a new winning coalition of voters or interest groups desires a different policy. This just seems a good way for legislators to lose the next election.

MNW's refinement of the idea of "erosion" in their most recent article does not solve this problem (McCubbins et al., 1989:435–40). Even if the legislature's inability to rectify administrative deviations is entirely a function of a change in the status quo point at which legislative bargaining begins, the status quo point for constituent interests has also changed. Hence, the politically effective winning coalition for constituents will also have changed. Why it is politically advantageous to thwart this coalition must still be explained. The answer that legislators would want to prevent deviation ex ante in order to increase the value of the original deal merely raises further questions. The most important is this: If so, why were the administrators given the discretion to deviate from an ex ante known preferred position?

At another point in their discussion, MNW seem to address the issue of why administrators are given sufficient discretion to deviate from what appear to be the legislators' original objectives by suggesting that political controllers want to use administrative procedure as an "auto pilot" (McCubbins et al., 1989:263–4). By this they mean that administrative processes should allow dominant coalitions of constituents to work their will at the administrative level as their preferences change, without further activity on the part of legislative or presidential politicians. One can certainly imagine this being a desire of political principals. However, it would presumably be accomplished by quite different processes than those that "stack the deck." Hence, no matter what procedures we find (either procedures that enfranchise original coalitions to resist alteration of legislative policy or procedures that permit flexible adaptation of policy pursuant to the coalition's new demands), we should presumably find the theory "proved." On this reading, there is no null hypothesis here.

It might be, of course, that MNW are claiming that the same processes can be used both to stack the deck in favor of policies adopted at the behest of particular constituencies and simultaneously to provide those same constituents with the opportunity to force policy shifts as their preferences change. If so, then the theory suggests that we should be looking for processes that somehow enfranchise particular constituencies or interests independently of the relationship of procedural requirements to possible substantive outcomes. This might be evidenced, for example, by statutory provisions creating special personal access or decisional control for identifiable constituencies. But these sorts of statutes are quite rare at the federal level. Certain regulated agricultural marketing arrangements might qualify [see Block v. Community Nutrition Institute, 467 U.S. 340 (1984)]. However, we should not forget that it was the specter of balkonized, constitute-
ducer control of economic policy that energized the nondelegation doctrine in the 1930s (Jaffe:60–6).

If statutes fail to identify specially enfranchised constituents explicitly, then the determination of whether procedures satisfy the MNW hypothesis becomes difficult indeed. That some interests turn out to have an advantage in employing particular procedures is not very good evidence that they were the constituencies meant to be served by the legislation. Over time, one would expect some such groups to emerge with respect to any statutory scheme. And historical inquiry into whether those benefitted were really members of the dominant coalition for passage of a particular statute is almost certain to founder on the inadequacy of the written record, if not on prior issues of how to operationalize the idea of “coalition” or what should count as evidence of “membership.” Much modern legislation passes by lopsided majorities after extensive compromise that includes widely divergent viewpoint within the “winning coalition.”

For present purposes, however, it is not necessary to solve these problems. If the MNW thesis is decoupled from the notion that legislator preferences are a function of constituent or interest-group preferences, we can start simply by assuming that legislators do have preferences. Moreover, in the MNW spirit, the legislators that vote for programs can still be hypothesized to prefer that administrators carry out their instructions as specified in the statute. Furthermore, because monitoring and control is costly, legislators should wish to reduce their own monitoring costs by empowering others to monitor administrators for them, whether or not those “others” were a part of the political coalition that motivated the legislation. This might be accomplished through standard forms of administrative procedure: the provision of specific beneficiary rights or statutory interests; defined processes through which these rights may be defended, if the agency attempts to deviate from them; and judicial review for their protection where procedures are inadequate at the administrative level.

For our “comparative testing” purposes, we need then only specify some implication of the MNW perspective that points toward different procedural implications than does an idealist vision. Here again, the obvious suggestion is the location of procedural control. While idealist legality seems to presume judicial control over process, the MNW thesis, both originally and as modified here, posits legislative control. After all, it is the need for low-cost legislative monitoring through control over procedural or structural design that motivates the behavioral hypothesis.

The requirement of retained or operative legislative control over process is particularly pointed with respect to the second (and as yet undiscussed)

14. It will also accommodate other theories of the legislative process and of legislator motivation (Krehbiel).
monitoring difficulty that MNW posit as ubiquitous in the congressional-bureaucratic principal-agent game: the bureaucracy’s control over information. Thus, for example, if we find the Congress structuring administrative processes in ways that require agencies to divulge politically relevant information to congressional monitors or their surrogates, then we may have some confirmation for the MNW thesis. To be sure, there is some overlap here between this information-divulging idea and the openness and transparency demands of idealists’ view of administrative law. However, from the principal-agent perspective, the important element ought to be not just that information is made available, but, what kind, to whom, and at whose request. If administrative law makes most information available to others, for example, in forms not particularly useful for congressional or legislative monitoring, and through processes outside legislative control, then the MNW information thesis would not be confirmed.

It may be objected that this description oversimplifies the PPT vision. Legislators might employ courts and constituents as continuous monitors. Hence, provisions for judicial review or revelation of information to citizens through FOIA requests could satisfy legislative monitoring requirements without any active oversight by the legislature itself. This is, indeed, possible. But if monitoring or access by anyone is to count as legislative control, so long as it is in any way facilitated by legislation, then we are back to the problem of nons falsifiability. Everything will count as legislative control. It remains to be seen, therefore, whether some more discriminating criteria can be developed to discern whether processes evidence legislative control or control primarily by others.

2.3. A Critical Approach to Administrative Procedure

The CLS description of administrative law is not substantially different from the description given by the idealist legal literature. The critical project is, after all, one that works from within the conceptual structure of legal regimes to expose the ways in which that structure fails in legitimation that it has set for itself. Moreover, the CLS approach recognizes that the task of legitimation has a relationship both to the concrete exercise of power and to the intellectual stories that describe the way in which power is structured, checked, and controlled. The normative task of administrative law is simultaneously to explain and to construct a legal regime that will effectively control state power. Conceptualization and implementation are separated only with difficulty, and than at the cost of a certain artificiality.

Hence, when a critique of a legal domain is proposed from a perspective that takes a “critical” stance, that enterprise, too, has tightly connected empirical and conceptual dimensions. The critique is one of how the con-
cepts put in place by an existing legal regime fail in practice to exercise the constraints or controls that they purport to establish. But critical analysis goes further to demonstrate the ways in which the conceptual structure itself contains contradictions, or unresolvable tensions, that presumably defeat its practical program. There is implicit in critical analysis a causal linkage between the inadequacy of conceptual structures and their failure to provide the forms of legal constraint or empowerment that they advertise.

This causal linkage between conceptualization and practical operation is obviously problematic. Many would assert that it is just the case that individual consciousness and social life are both deeply compromised, perhaps inherently contradictory. Yet both individuals and societies cope, even thrive. There is, thus, no necessary connection between the adequacy of the conceptualization of a political or legal ideology and its stability, legitimacy, or success (Marmor et al., 1990). This latter view, of course, also controversial. For present purposes, however, it is not necessary to focus on the linkage between conceptualization and action—the praxis problem—that haunts critical theory and energizes its critics. Nor need we worry too much about the reflexiveness of critical method or its liberating objective. It is, for now, enough to recognize that there is embedded in critical analysis of legal institutions a set of empirical presuppositions about the structure of legal concepts and their effects in action.

The critical story of administrative process is, in this "translated" view, relatively straightforward. Administrative law, like corporate law and perhaps other fields, confronts a basic conflict between individual freedom and bureaucratic control (Frug). The function of the law is the maintenance of freedom within an apparently "necessary" bureaucratization of social, and particularly economic and political, life. This story is, as we have said, highly reminiscent of the conventional lawyers' and legal academics' story of administrative process. However, it takes that story to a more fundamental ideological level. To put the matter somewhat abstractly, bureaucratic domination is avoided in the legal idealists' vision of legality through legal constraints or legal structures that rely on either decisional impersonality or rational consent. These two basic approaches work themselves out in four models or paradigms of explanation, which can be developed historically (Frug) or conceptually (Mashaw, 1985).

The crucial claim of critical legal studies for our purposes is that none of these legitimation stories work. Although they attempt to render bureaucratic power nontaxing, and in operation to check and structure such power so that human freedom is maintained, they fail. Moreover, they all fail for the same reason: the impossibility of separating objective and subjective

15. For general discussion of the CLS project, see Kelman (1989) and Unger.
spheres of decision-making and, therefore, of confining bureaucratic discretion to objective judgments that preserve the citizens' (or employees') subjective freedom.

The plausibility of this critique can be appreciated by looking at a single example. One way of maintaining objectivity in administration is through a "formalist" explanation of the exercise of administrative power. In this view, bureaucratic implementation is a form of pure instrumental rationality. The goals of administration are prespecified in statutes. Those goals are objective in the sense that they are socially common and specified through a process of democratic choice. The task of administration then is itself liberating. It allows us to pursue our predetermined goals efficiently, while preserving social resources for the pursuit of other social ends. The coerciveness of any exercise of bureaucratic power is but an act of self-paternalism; it imposes on us decisions that we have already made—and which represent our best collective judgment of what our social purposes should be.

To state the formalist theory in this way is virtually to reveal its defects. No selection of statutory goals can perfectly represent our collective desires even if the underlying legislative process was itself an exercise in ideal democratic choice. Not only are there gaps and "unprovided for cases," the purposes stated in any one bit of legislation are likely to work at cross purposes with those articulated in others. Bureaucratic coordination and gap-filling will, at the very least, provide occasions for exercises of judgment and discretion which are in no strong sense "controlled" by statutory language.

The doctrinal articulation of this formalist approach to legitimation, the "nondelegation doctrine," itself contains contradictions which recognize the impossibility of formalist legality. After all, one of the purposes that we may choose by legislation is to delegate flexible authority to administrators. Thus, the administrators' subsequent and better understanding of the problems giving rise to collective action can produce better and more sophisticated policies than we could have constructed at the time of legislating. Hence, the notion that legislators may not delegate legislative authority to administrators must also contain within it the idea that they should delegate legislative powers to administrators. Nondelegation must permit delegation. Furthermore, in order to accommodate both ideas, the nondelegation doctrine must be conceptualized as a set of standards that are sufficiently abstract to permit the continuing dialectic of constraint and flexibility in the actual practice of administrative judgment.

This is, of course, to say that the legal "rules" that maintain formalist legality are inadequate precisely to the task of maintaining formalist legality. They contain contradictions that can be managed only through the exercise of a decisional competence that cannot be explained by, or controlled by, the Janus-faced legal rule. We noted this double aspect to administrative law in
our earlier discussion of the conventional normative approach. There we described mediating the competition between efficacy and legality in the benign rhetoric of “a continuing task” for administrative law. From the critical perspective this task is viewed, not only as continuous, but as impossible, and as simultaneously masking its impossibility through the rhetoric of legal standards.

Thus, there is at least one straightforward empirical implication of the critical approach. The structure of administrative law doctrine, legal institutions, and legal processes should be one that, whatever its normative rhetoric, maintains the power of bureaucratic officials to exercise state power, constrained largely only by bureaucratic imperatives. Therefore, although critical theorists are committed to the seriousness of intellectual or conceptual dialectic, and to its imminent relation to practice, their critique seems to lead in a thoroughly “realist” direction. Like Karl Llewellyn, their analysis implies that the power of the law is in the hands of those “who have the doing in charge” (Llewellyn).

We have emerged from our excursion through normative, positive, and critical theories with three divergent implications about the structure of administrative decision-making. Legal idealist theory describes control over administrative process as if it were preeminently a judicial task. Positive political theory posits an administrative process constructed by the legislature as a solution to its principal-agent problems concerning bureaucrats. Critical theory suggests that because of the contradictions of formalist legality, administrative process will remain firmly within the control of the bureaucracies themselves.

3. ASSESSING THE EVIDENCE

At the level of “testing” the power of these hypotheses, some further methodological problems become acute, for it is not entirely clear that even in their translated (“as if” form) these three theories attempt to explain the same things. The normative idealist story may be a story that presumes only “ultimate control by the courts,” not day-to-day judicial shaping of administrative procedure. The implications of the critical legal studies approach might not challenge the idealists’ “ultimate control” thesis, yet suggest that it is insignificant in the ongoing operations of the administrative state. The positive political theory approach, by contrast, may claim only that ceteris paribus, and at the margin, the Congress will attempt to control agency action through procedural design.

On this interpretation of the three explanations, the normative idealist and positive political theory approaches do not challenge the CLS interpretation concerning the core reality of administrative governance. But if so, they would thereby cede to CLS the function of elaborating the dominant
images of American administrative law. Because I do not believe that normative idealist explanations or PPT analyses mean to abandon this ground, I will interpret all three theories as contesting the relevant terrain—that is, as competitors for providing the dominant heuristic through which we are to understand the structure of American administrative law. Indeed, if "the facts" prove recalcitrant, the competition to provide the primary interpretive image of administrative (and other) law may be the only game worthy of anyone's candle.

What then is to count as evidence of the plausibility or persuasiveness of one or another view? At one level the answer to that question is obvious. We are looking here for evidence of who has control over administrative procedures. We need then a definition of procedure and a definition of control. By "procedure" I mean any structural or procedural characteristic that may affect administrative decision-making. This includes a huge number of potentially important structural or procedural issues: such things as an agency's organization, its location departmentally, the types of legal powers that it is provided, the internal procedures whereby those powers are exercised, the relationship between the agency decision process and the actions of other institutions (Congress, president, and judiciary), the conditions and forms of access to the agency by outside persons, the evidentiary and decision process rules applicable to particular types of decisions, the forms of decisions, the structure of internal agency review and monitoring mechanisms, and so on. We are here using administrative process both in the broad sense, which administrative lawyers would understand, and as being synonymous with "the structure of decision-making." (This broad view of process seems consistent across all three literatures.)

By "control" is meant both the formal power to shape agency decision process and the use of that power to exclude procedural control by others. Moreover, we should be looking for exercises of formal authority over process that seem to have some significance in terms of the decision processes actually used. The search is for controls or powers that shape behavior.

Assessing the descriptive or predictive power of our three competitive approaches over the vast array of procedural issues that populate the administrative process landscape, and in relation to the myriad agencies that occupy that some space, is a job for Ronald Dworkin's legal Hercules. I can here give only an impressionistic analysis of the strengths and weaknesses of the legislative control, judicial control, and agency control hypotheses. Whether a more scientific or systematic inventory is possible or useful I must leave for others, or to another time. To simplify matters, we will consider only our privileged competitor, PPT, and focus primarily on the sorts of evidence that have been marshalled in support of the MNW hypothesis.

The World According to PPT. One would expect to find a Congress that is
using administrative process to insure the fidelity of agencies to the congressional will to be intensely involved at all the levels of procedural design that we have mentioned. In addition, one would expect the legislature to draft the procedural elements of statutes in great detail in order to control procedural meddling by the president (or the executive office of the president), the courts, and agencies themselves. Procedures should be specific and hand-tailored, not general and off-the-rack.

There is, indeed, some evidence for this view of legislative procedural design. The establishment of federal agencies' basic purposes, their structure within the executive branch or as independent agencies, and the articulation of their legal powers, are always a matter of statutory specification. These fundamental aspects of the articulation of agency process are never within the control of the agency itself. Moreover, while subject both to judicial review and judicial revision via construction, the statutory provision of administrative purposes, structures, and powers is a staple of congressional debate at the formation of new administrative agencies. These topics are often also revisited and subjected to legislative modification as experience accumulates over time. It is difficult to find any agency that has not had its charter legislatively modified in these respects, sometimes frequently. Moreover, save in extreme cases [Bowsher v. Synar, 478 U.S. 714 (1986); Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982)], the courts permit the Congress to make these arrangements free from external judicial control.

Similarly, it is not uncommon to find congressional legislation saying something about agency internal structure, the participation of affected outside interests, required evidence for decision-making, decision analytic techniques, and procedures for external review. However, as we move into these more particularistic aspects of agency process, hand-tailored legislative control seems to recede by comparison with generic provisions, which leave huge areas for agency discretion, or for judicial or presidential specification.

I do not mean to suggest that one cannot find congressional attempts to control almost any aspect of process in some agencies at some times (McCubbins et al., 1989:445–81). The Congress’s restructuring of the National Labor Relations Board in the Taft–Hartley Act is a notorious example (Gross). Moreover, this restructuring reached fairly minute levels of procedural detail, such as who would write draft opinions for administrative law judges or the Board. Indeed, any agency’s processes may, because of political saliency, bring forth specific congressional action. Thus, for example, the Congress has statutorily specified such minutiae as the frequency of disability reexaminations by the Social Security Administration. And, having tasted the bitter political fruits of its handiwork, Congress quickly returned to the Social Security Act to provide yet a further set of decision process details to rescue the disability decisional structure from virtual collapse (Mashaw,
1988). One suspects that a close look at the history of any agency will reveal some such episodes. If not, the agency has been leading a quiet political life indeed.

Yet these detailed and process-specific incursions into administrative process seemed dwarfed by the degree to which the Congress acts generically and leaves the crucial details of procedural implementation to agencies, courts, and perhaps the President. Indeed, from the viewpoint of administrative lawyers who work with and observe the changes in agency processes, agency strategic control of process would seem to be the rule. All agencies have the (usually explicit and always inherent) power to adopt procedural and evidentiary rules. Quite often these rules radically alter the apparent procedural and evidentiary situation that one would have imagined from examining the legislative provisions. The Food and Drug Administration, for example, seems to be burdened with an impossible hearing procedure for removing ineffective drugs from the market. Yet by deft articulation of evidentiary requirements the agency has managed to banish thousands of drugs under the 1962 New Drug Amendments while, in 27 years of operation, providing the statutorily “required” hearings to only two manufacturers (Ames and McCracken).

An agency’s substantive policy-making also may render irrelevant precisely those factual issues about which constituency interests most wanted an opportunity for elaborate procedural protection. The examples of these devices are legion. The FCC has done it to broadcasters [United States v. Storer Broadcasting Co., 351 U.S. 192 (1956)]; the FPC has done it to gas producers [Federal Power Commission v. Texaco, 377 U.S. 33 (1964)]; the Social Security Administration even does it to the disabled [Heckler v. Campbell, 461 U.S. 458 (1983)]. Procedural control from the legislative level is an extremely uncertain enterprise.

This is doubly or triply true when one recognizes that judicial review and central executive branch controls often proceduralize in ways that both are unanticipated by legislators at the time of enactment and have general effects across a number of policy domains. It seems virtually undeniable that the major procedural developments in American administrative law, from the Administrative Procedure Act to the present, have been the work largely of the courts or of the Chief Executive. The extension of hearing rights to new interests in both old and new domains (Mashaw, 1985), the proceduralization of rule-making (DeLong), the liberalization of standing rights (Vining), the subjection of administrative inaction to judicial review that approximates review of administrative action (Sunstein, 1985), the routinization of cost–benefit analysis (Olson), and the centralized coordination of agenda-setting [Executive Order No. 12,498, 50 Fed. Reg. 1036 (1985)], have all had profound effects on the strategic leverage of various groups that participate in the administrative process. But none of these developments
contained an important legislative element, nor is there much evidence of
effective congressional action to limit agency, executive, or judicial pro-
cedural creativity.

Indeed, one of the striking things about American administrative process
is the degree to which the Congress has proceduralized by generic rather
than by particularistic or even agency-specific provisions. In addition to the
Federal Administrative Procedure Act and the Freedom of Information Act,
the Congress has within the last couple of decades made decision-process
demands on agencies through the Privacy Act, the Government in the Sun-
shine Act, the Federal Advisory Committee Act, the Regulatory Flexibility
Act, the Intergovernmental Cooperation Act, and the National Environmen-
tal Policy Act. However, again, the crucial implementing details of these
general statutes have been left almost exclusively to courts, to agencies
themselves, or to centralized executive actors, such as the OMB. Thus, for
example, the occasions for, and content of, environmental impact statements
have been shaped largely by judicial construction (Anderson). And the sali-
ence of the environmental impact statement within particular agency pro-
cesses is largely a function of the agency’s own structural and procedural
choices (Bardach and Pugliaresi). Similarly, the demands of the Freedom of
Information Act seem to be a joint product of judicial construction, the
litigating guidelines established within the Justice Department concerning
the defense of FOIA claims, and agency internal processes for information
disclosure (Robinson; Mashaw and Merrill, 1985:164–6).

These latter points are particularly important to the argument that MNW
make concerning the use of administrative process to solve information
asymmetries between agencies and the legislature. In the MNW view, the
procedures for rule-making in the Federal Administrative Procedure Act,
and the demands for administrative openness in the Freedom of Information
Act and Government in the Sunshine Act, are designed to protect political
overseers from information asymmetries that arise because of bureaucrats’
potential monopoly on information (McCubbins et al., 1989:256–60). How-
ever, it is very hard to make a plausible case for this story.

First, the APA requirements on rule-making are extraordinarily modest.
They require only that the agency put a notice of a proposal in the Federal
Register and allow 30 days for comments prior to its adoption (5 U.S.C.
§553). Since there is no requirement that the agency notice any rule-making
proceeding early in its deliberations, the APA itself would permit agencies to
evade congressional control simply by waiting until they were well-prepared
to act and then moving, 30 days after the original notice, to adopt their final
regulations. Thirty days, of course, is a nanosecond on the “geologic” con-
gressional calendar. (Congress can, of course, act later by statutory amend-
ment or otherwise, but in doing so it will have received no benefit from the
rule-making provisions of the APA.)
Moreover, to the extent that the comment period is supposed to provide a way of knowing something about the political saliency of particular proposals, the APA is very badly designed to inform the Congress. The comments all go to the agency, and may be docketed in ways that are inaccessible without substantial effort. There is no requirement that these comments be simultaneously forwarded to the Congress or that they be indexed, summarized, or otherwise made transparent to outsiders before the agency acts. To the extent that these simple APA requirements have been made more onerous since 1946, they have been made more onerous largely by judicial interpretation, not by anything that the Congress has done.16

But there is a more fundamental difficulty with viewing the Administrative Procedure Act, even as interpreted by the courts, as providing an opportunity for the Congress to surmount information asymmetries that inhibit political control. The same procedures that to some degree promote information revelation simultaneously disable political intervention. Congressional intervention, other than through additional amendatory legislation, must take place on the administrative record [Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981)].17 Moreover, the requirements of rationalization of decisions in terms of that administrative record mean that “political” concerns cannot be given weight unless the factual record and statutory purposes justify it [Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co., 463 U.S. 29 (1983)].

Similar points can be made about the Freedom of Information Act. There is nothing in the FOIA that gives the Congress preferential access to agency information. Nor does the statute require that the agency disclose anything that would not in any event have been required to be disclosed to the Congress as a practical political matter on the request of a relevant committee or subcommittee. The channels for information from bureaus to the Congress do not need lubrication by the Freedom of Information Act. If any “grease” is required, it is provided instead by factional disagreements within

16. Indeed, the process did not really begin until about 1970 in Automotive Farts and Accessories Association v. Boyd, 407 F.2d 330 (D.C. Cir. 1968). For further developments, see DeLong, supra note 75.

17. Strictly speaking, this is true only to the extent that the congressional intervention raises issues that are of material relevance to the final agency decision. However, most agencies are unwilling to risk the possibility that some undocketed congressional contact will be determined subsequently by a reviewing court to have had “material relevance.” Hence, by regulation they often bind themselves to memorialize all contacts as a part of the record. (Indeed, they conventionally protect themselves against the most abusive forms of congressional special pleading by reminding representatives that their comments must become a part of the public record.) OMB has similarly bound itself to make its contacts with agencies transparent to all participants for fear that the failure to do so would cause reviewing courts to upset agency judgments with which OMB agrees. See Memorandum of Wendy Gramm, Director of OMB’s Office of Information Regulatory Affairs (June, 1986), reprinted in Mashaw and Merrill (1989-Supp. 118–9).
most agencies themselves. As the General Counsel of the Food and Drug Administration once said to me before a legislative hearing, "I hope I’ve been allowed to see all the FDA internal memoranda that Senator Kennedy has."

To be sure, judicial policing of political pressure through procedural or substantive invalidation is not perfect. Diligent private interests, informed via FOIA requests, might apprise the Congress of information about which it would not have known to ask. My point is rather that, if these general administrative procedures are designed to deal with information asymmetries between the Congress and bureaus, they are very badly designed indeed. How much better for the Congress to have required that all regulations be laid on the table for 90 days, or 6 months, or some longer period, prior to being adopted. How much better for the Congress to have demanded, as the President has demanded for the Executive Branch, that agency agendas and large amounts of information and analysis be submitted directly to the Congress both before and during the course of rule-making.

On this account, the MNW, principal-agent, legislative-control model seems, at best, radically incomplete. Moreover, the fact that the bureaucracy must take account of at least two political principals is glossed over as if it were of little importance. Yet, in the life of agencies and in the design of administrative structures, the Congress and the President seem to view this issue as of fundamental importance. The President is not just a participant in a legislative coalition. Or, if so, s/he is a participant who notoriously defects from the legislative understanding of the agreement, often as early as at the time that s/he signs the bill. Moreover, s/he is a defector who has independent power to shape agency process and structure. And, where multiple principals are involved in the development of processes and structures, the directions of political controllers might easily be self-canceling. Competition between or among principals may eliminate, at least reduce, the power of all political principals (Wilson). A model that takes the principal-agent paradigm seriously must confront this issue.

Finally, not only do the courts, the President, and federal agencies themselves act as independent developers of agency procedure—developers who many observers are likely to view as more important to most agencies, at least on procedural issues, than is the Congress, but the Congress also has the peculiar habit of delegating huge amounts of responsibility for the development of administrative processes to states and localities. Although federal spending as a proportion of gross national product has nearly tripled since the Eisenhower administration, the number of federal civilian employees as a percentage of the overall population has actually shrunk. This is true in

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18. For other criticisms of the model and its application, see Robinson.
19. From the Statistical Abstract of the United States it appears that in 1952 federal domes-
part because the federal government during those years has constructed hundreds of programs administered by states and localities under state-qualifying statutes and subject to the variety of state administrative requirements that inhabit both state administrative procedure acts and state common law. Why would a congress desiring to control the implementation of federal programs (or federal spending) through administrative process make these vast delegations to agencies whose structure within state government and procedural requirements within state administrative law are almost completely outside its control?

If monitoring adherence to the specific preferences of a dominant legislative coalition were the principal, even a very important, explanation for the specification of administrative structures and processes, this would indeed be a monumental puzzle. One might, of course, posit that the dominant coalition in all these programs was composed of the implementing states and localities—or of others who preferred to wage administrative warfare at the state or local level. These hypotheses might even (sometimes) be true. But the story would have to be investigated in great detail in every case to rebut the plausible presumption that a congress intent on the use of procedure as a monitoring device would not delegate huge chunks of procedural discretions to 50 separate legal and political systems.

I can only conclude that major insights into the structure and processes of federal administrative agencies as they actually operate are unlikely to flow from viewing agency structure and process primarily in terms of the monitoring and sanctioning problems that political controllers have with federal bureaucracies. That the MNW story has something to tell us I have little doubt. But the convincing parts of that story will not persuade aficionados of idealist or critical explanation that their modes of analysis should be abandoned.

4. CONCLUSION

Given the methodology employed here, we cannot assess the power of our other competitors without another act of translation into a newly privileged approach. Nevertheless, I am suspicious that administrative law and administrative processes present a much more complex interaction (if not systematic confusion) of principals and agents than any of our three story-telling traditions suggests. It seems perfectly plausible, depending on context, to

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put the legislature, courts, or agencies themselves at the forefront of stories about the design and operation of administrative processes. Indeed, the history of many administrative regimes is likely to bear all three interpretations. Moreover, the President (or the executive branch) is largely missing from all of these tales. Yet because the effects of presidential action on administrative agencies are themselves complex and obscure, adding the President to the mix hardly simplifies matters. Attempts to articulate a presidential-control hypothesis are not likely to provide a more convincing central heuristic than the three analytic traditions we have, in part, explored.21 So where does that leave us?

When in a cheerful mood, the inadequacy of simple stories concerning the origins and evolution of administrative processes suggests to me that the modern administrative state is a construct of which Madison, Hamilton, and Jefferson might justly be proud. It is checked and balanced, motivated and constrained in ways so complex and continuous that there are no final victories in the political competition to control the exercise of administrative power. On more somber days, however, I am troubled by the possibility that the inadequacy of our theoretical perspectives may simply mean that we cannot recognize the degree of which the founders' hopes for combining individual liberty with effective governance have been disappointed by the growth of modern, bureaucratic administration.

REFERENCES


21. Richard Pierce has argued recently that the central struggle for control of agency action is now between the President and the federal judiciary. Pierce believes the President will win because of the Supreme Court's inability to control its troops in the field (i.e., the Courts of Appeals) (Pierce).


Schuck, P. 1984. "When the Exception Becomes the Rule: Regulatory Equity and