PUBLIC CHOICE CONCEPTS
AND APPLICATIONS
IN LAW

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CHAPTER 6

THE EXECUTIVE BRANCH AND AGENCIES

INTRODUCTION

Under the United States Constitution, the President is afforded broad powers through which to influence the creation, interpretation, and execution of federal laws. Article I, § 7, which articulates the processes through which Congress enacts statutes, provides the President veto power over bills approved in both Houses of Congress, thus making the President a de facto third legislative house. Article II, § 2 empowers the President, with the advice and consent of the Senate, to appoint Officers of the United States. While the Senate holds the power of advice and consent respecting cabinet level appointments (although not with respect to “inferior officers”) the President alone is charged with the power to remove cabinet officers who report to him unless the cabinet official is impeached. Finally, the Constitution provides the President the power, once more with the advice and consent of the Senate, to appoint Article III judges, who serve for a period of “Good Behaviour.” Among the most important practical consequence of this constitutional structure for modern analysis of government is the twentieth century growth of the vast administrative state. This includes the creation of a myriad of so-called independent agencies whose members are protected from removal by the President and whose internal decision making is to a considerable extent insulated from outside review. This chapter focuses on the internal operations of the executive branch, especially department and agency decision making and regulatory policy making within bureaucracies.

In terms of their influence on law and policy, administrative agencies have become the functional equivalent of a fourth branch of the federal government. For instance, as the 110th Congress was reaching its conclusion, it had passed 294 public laws. And the Supreme Court now decides fewer than 100 cases per year. By contrast, a recent count finds 319 administrative agencies. In 2006, the number of pages included in the

1. U.S. Const art. III, § 1. Relationships and interactions among the branches, including the executive veto, are discussed in chapter 8.

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Code of Federal Regulations was about six times that of the United States Code. The 2006 Federal Register, which lists agency-proposed regulations, rulings, and other activities, was 69,248 pages long!

The modern administrative state is premised on the intuition that addressing problems in the complex modern world requires reliance on disinterested experts insulated from the rough and tumble of electoral politics and market incentives. The civil service system, which insulates bureaucrats from political pressures and from the use of government resources for partisan political purposes, grows out of this tradition. This principle reached its apex in the United States during the first half of the twentieth century with the establishment of "independent agencies" such as the Federal Trade Commission and the Securities and Exchange Commission, with Commissioners who are appointed for terms of years, sometimes with rules that require partisan political balance. Unlike executive branch appointments, officers of independent agencies are substantially insulated from pressures associated with the prospect of presidential removal power. As you read the materials that follow, consider the extent to which the intuition that agencies facilitate expert government removed from political influence is borne out by current Supreme Court doctrines respecting matters such as the scope of removal powers and respect for agency rulemaking. Also consider whether the intuition is consistent or in tension with the models presented in this chapter. Does public choice help to test the underlying assumptions that motivated the rise and perpetuation of the administrative state? Why or why not? If you conclude that public choice analysis is not consistent with the original justification for the administrative state, does it nevertheless provide the basis for an alternative justification?

Given the central role that presidential politics plays in the direction of regulatory policy, our analysis necessarily begins by considering the nature of presidential politics itself. We begin with a spatial model that grows out of the median voter analysis presented in chapter 3, but then examine how the temporal staging of presidential elections into primaries and general elections changes the predictions of the basic median voter analysis and the implications of this analysis for the formation of federal policy, both at the agency level and through judicial construction of statutes. Unlike the basic median voter model, which predicts policy convergence by the two candidates, a two-staged election with parties predicts policy divergence between the two candidates. This analysis proves important in assessing the normative foundations, and implications, of agency deference rules that largely insulate both executive and independent agencies in their interpretation and implementation of federal statutes.

We then examine the preferences and motivations of bureaucrats in light of their institutional incentives. We begin with the general question, "What do bureaucrats maximize?" As before, we look at features of

4. See supra chapter 3, section 1.B.
institutional design that affect the motivations of rational policymakers operating within an agency setting. We also examine how the executive branch uses agency decision making to interact with other branches of government including, most notably, Congress. Finally, we examine the decision by Congress to delegate and the nature of such delegations. We close with several case studies that will allow you to test the various theories of bureaucratic behavior developed in this chapter.

Beginning with a series of cases concerning Congress’s power to limit the President’s ability to terminate officers, the Supreme Court has drawn a distinction between executive and independent agencies. Executive agencies are those in which the agency head (often a cabinet official) serves at the pleasure of the President. Given the direct political accountability of executive agencies, those who head them are obviously expected to pursue the President’s policy initiatives. Although executive agency heads are subject to congressional oversight, their more pressing concern generally is political accountability to the President. While there is undoubtedly agency cost slippage (meaning that the cabinet members have some power to depart from strict presidential preferences), the boundaries for pursuing objectives contrary to presidential preferences are more constrained than in the context of independent agencies.

Independent agencies are those in which the senior officials are protected by statute from unilateral executive removal power and thus from many of the direct political pressures experienced by those heading executive agencies. The Chairs and Commissioners on independent agencies—such as the Federal Trade Commission (“FTC”), Securities and Exchange Commission (“SEC”), and Federal Communications Commission (“FCC”)—are typically appointed for a term of years and otherwise removable “for cause” or some similar standard. Many independent agencies are required to have partisan balance or representation, thereby giving the party out of power minority representation and some corresponding influence over agency policy. The incentives of those who head independent agencies are more difficult to assess than for executive officials. It is not obvious to whom they are accountable, and regulatory oversight often appears to be weak. Historically, the consequences of agency scrutiny have varied considerably. The Civil Aeronautics Board (“CAB”) and the Interstate Commerce Commission (“ICC”), both of which were subject to intense media and political criticism, were eventually terminated. Other agencies that have been subject to similar scrutiny, such as the FTC, were dramatically reformed in the face of heavy political and public pressure. Still others, such as the SEC and the FCC, whose performance has been long criticized, have been subject to only modest reforms and remain a frequent target of criticism. What do these varied results suggest about the likely differences in agency slack as between

5. For a listing of executive and independent agencies housed in the executive branch, see Appendix A (available online).
executive and independent agencies? To whom are independent agencies accountable? What motivates or constrains those who head them?

I. THE MEDIAN VOTER THEOREM MEETS NON-MEDIAN PRESIDENTIAL CANDIDATES

In chapter 3, we introduced the median voter theorem. That simple spatial model demonstrates that in a system in which the head of state is selected through a direct election, the result is likely to be a stable two-party system. The model also predicts considerable, if not complete, policy convergence among the leading candidates, each of whom is motivated to capture a majority of the electorate, represented along a single dimensional ideological spectrum. A major difficulty that theorists confront is that within the United States, where the President is elected by the citizenry, rather than, for example, a minimum winning parliamentary coalition, there is often substantial policy divergence between the leading candidates. This difference between the predictions of the median voter model and observed political behavior is important not only for revisiting assumptions about how the President is elected, but also for considering the President's role in influencing the formation of regulatory policy.

The simple model of the median voter theorem predicts that the policy platforms of presidential nominees of two major parties will tend to converge toward the preferences of the median voter, leaving only narrow policy differences. In practice, however, the Democratic and Republican presidential nominees often hold sharp policy disagreements. This divergence between the predictions of the simple median voter model and observed electoral politics can be explained in substantial part by the two-staged electoral system by which presidential candidates are selected. This system combines primaries (or caucuses) with a general election among each party's primary winners. The two-stage election process creates countervailing pressures that pull the major party candidates toward and

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6. For a discussion of the differing implications of parliamentary designation of the head of state, see infra chapter 8, section II.C. This description leaves aside of course, the formality of the Electoral College.

7. See WILLIAM G. MAYER & ANDREW E. BUSCH, THE FRONT-LOADING PROBLEM IN PRESIDENTIAL NOMINATIONS 19-20 (2004). The authors note, "[U]nlike presidential primaries, which occur on a single, definite date, caucuses are multistage affairs, in which meaningful delegate selection decisions are made over a period of several months. ... (footnote omitted). As a consequence of the larger investment required to participate in a caucus versus a primary, what implications does the chance hold for the extent to which the results will be more consistent with the preferences of the median as base voters in the relevant party?"

away from the competing ideal points of their respective party base and of the general election's median voter.

The analysis explains why the prediction of the simple median voter model of candidate convergence does not hold in practice and why elections do not witness complete ideological fluidity of candidates moving as far in the direction of the party base as needed to secure the nomination and then all the way back to the general election's median voter to secure victory in the general election. After reviewing the basic two-staged model, which identifies factors that encourage just those sorts of identifiable ideological shifts, we set out a more detailed analysis that identifies factors that temper complete fluidity at each election stage. While the precise equilibrium—in both primaries and in the general election—will of course vary for each election cycle, as demonstrated below, the net effect of the combined processes is substantially greater candidate policy divergence than the single period median voter hypothesis predicts.

The sometimes sharp divergence between the policy positions of the leading presidential candidates has the potential to produce wide policy swings when the party of presidential administration changes hands. One might assume that the life-tenured federal judiciary would temper broad agency-driven policy swings. And yet, important administrative law doctrines related to agency deference have just the opposite effect of reinforcing the control of agencies over regulatory policy, thereby tending to amplify rather than dampen policy swings when the Presidency changes parties.

An important pair of administrative law cases holds that when an agency uses proper agency procedures to provide a reasonable construction of an ambiguous federal statute, a federal court is obligated to defer to the agency’s interpretation even if the result that the agency obtains contradicts what a federal court would have ruled as a matter of first impression.⁹ In a more recent case, the Supreme Court has gone further and held that even if the Supreme Court had previously construed an ambiguous federal statute in a manner that a federal agency later interprets differently, the agency interpretation, rather than the Court’s, controls.¹⁰ The combination of three factors—(1) potentially substantial policy divergence between leading presidential candidates, (2) significant presidential influence over the direction of agency policy, and (3) presumptive judicial deference to agency policy affecting the construction of federal statutes—demonstrates the importance of properly modeling the presidential selection process in an effort to better understand agency incentives.

A. THE MEDIAN VOTER THEOREM REVISITED

1. Predicting Complete Convergence in a Single-Staged Election

We begin with a single-stage presidential election and then introduce a two-stage election, including a primary and general election. The analy-


sis begins with figure 6:1, reproduced from chapter 3, which depicts the median voter theorem in a single period election. The model rests on the following premises: (1) a single dimensional liberal-to-conservative continuum; (2) two candidates whose ideal points (meaning their preferred set of packaged policy positions) occupy opposing ends of the ideological spectrum; and (3) presidential candidates who behave rationally in pursuit of winning the election. The Democratic candidate (D) occupies the liberal (L) end of the spectrum (to the left), while the Republican candidate (R) occupies the conservative (C) end of the spectrum (to the right).

Key:  
MV = Median Voter  
D = Liberal (Democratic) Candidate  
R = Conservative (Republican) Candidate

![Diagram](image)

**Figure 6:1**

Based upon these assumptions, the model predicts that as each candidate seeks to capture larger segments of the electorate, he or she will move toward the position embraced by the general election’s median voter (MV). The model further assumes that as each candidate takes on more moderate views relative to his or her ideal point (with R moving left and D moving right), those voters who prefer a more extreme candidate (or one whose ideal point occupies the relevant endpoint of the ideological spectrum) will continue to support a candidate who remains ideologically less distant, rather than vote for the opposite candidate (or not vote at all) as a result of the preferred candidate’s decision to moderate his or her views.

The median voter model helps to explain the persistence of the two-party system within the United States, as the major party candidates effectively squeeze out the necessary policy space that would allow a stable third party candidacy to flourish. And yet, as Donald Wittman has

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11. See supra chapter 3, section 1B.
12. Duverger's law predicts direct elections generally yield two party systems, a phenomenon that is closely linked to the insights of the median voter theorem. See Maurice Duverger, Political
observed, the model fails to explain the frequently observed divergence in party platforms in actual presidential elections.\textsuperscript{13}

2. Predicting Policy Divergence in a Two–Staged Election

Let us now adapt figure 6.1 to account for two-staged elections. Gilles Serra has extended Donald Wittman’s intuition that the median voter theorem fails adequately to capture the ideological distance observed between major party platforms by developing a two-staged election model operating in a single dimensional plane.\textsuperscript{14} We begin with a simple adaptation of the Serra model that accounts for ideological candidate location. In the discussion that follows, we begin with a simple two-staged model and then consider the implications of relaxing some of the underlying assumptions for the eventual ideological placement of the major party candidates in any given presidential election.

Figure 6.2 depicts a truncated ideological spectrum for each of the two major parties that emerge in the United States system of direct presidential election, and relates the primary spectrum for each party to the larger spectrum for the general presidential election, depicted in Figure 6.1.

\textsuperscript{13} See Wittman, supra note 8 at 143 (positioning that rational major party candidates who are motivated to win the general election will take positions during primaries to secure the party nomination that “maximize[] the expected utility of the party’s median voter”).

\textsuperscript{14} See Serra, supra note 8, at 6-8. Serra predicts that in a highly competitive primary race, the result is a commitment to the position of the party median voter, which can change in cases of incumbency. See id. at 13-18. Serra further explains that because incumbency limits primary competition, this poses a threat to the preferred ideological positioning of the party base. The essential difference between Serra’s model and the model developed here is that Serra assumes full voter participation and presents the spatial dimension of each party as starting at the extreme right or left and ending at the precise location of the general election median voter. Our analysis instead treats voter turnout as dependent on candidate location along the ideological dimension and further assumes that there are some crossover voters, which allows for some left of center Republican voters and some right of center Democratic voters. The authors thank Gilles Serra for his generous assistance in helping to develop portions of this discussion.
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Key:

GE = General Electorate
D = Registered Democratic Voters (as compared with General Electorate)
R = Registered Republican Voters (as compared with General Electorate)
MV = Median General Electorate Voter
MD = Median Democratic Voter
MR = Median Republican Voter

Figure 6:2

In this model, the Republican spectrum begins at the far right of the larger spectrum depicted in figure 6:1 and continues slightly to the left of MV, and the Democratic spectrum begins at the far left of the large spectrum and continues slightly to the right of MV. Notice that in this model, each primary spectrum includes at least some voters who are on the side opposite the party’s base constituency. As a result, the generally liberal Democratic Party includes some moderate to conservative Democratic voters, and the generally conservative Republican Party includes some moderate to liberal Republican voters. One benefit of this assumption, as shown in the next part, is that it allows for an observed phenomenon in actual elections, namely the ability of major party candidates to appeal to “crossover voters,” meaning those who in a given election might vote either for a Republican or Democratic candidate.¹⁵

In this simple model, the predictable result appears to be some degree of candidate divergence as each candidate positions himself or herself at or near his or her party’s median voter along the relevant truncated ideologi-

¹⁵. At various points in history, the degree of distance on the side opposite the party base has varied considerably. Southern Democrats, for example, potentially occupied positions quite far to the right of the general electoral median voter, while “Rockefeller” Republicans occupied positions substantially to the left of the general electoral median voter, at least over some issues. For an informative book that touches on these themes, see JAMES L. SUNKIN. DYNAMICS OF THE PARTY SYSTEM ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES (rev. ed. 1983). The empirical incidence of such voters is less important than is realizing that neither party cuts off at the precise point that represents the general election’s theoretical median voter. As a consequence, in any general election, crossover voters have the potential to support either major party candidate, based on any number of variables, including but not limited to ideological distance from his or her ideal point.
cal spectrum to secure the relevant nomination. The distance between the median Democratic and median Republican voter is considerably greater than the complete policy convergence that the single-stage application of the median voter theorem depicted in figure 6:1 predicts. If we continue to assume full electoral participation, this time within each party, then ultimately successful primary candidates will rationally move toward the median party voter as they compete with other primary candidates for the nomination. As in the single-staged median voter analysis, those voters within each party who prefer a more ideologically extreme candidate—generally thought of as the party base—will nonetheless vote for those candidates who have moderated their positions by moving toward the party's median voter, rather than declining to vote or voting for a primary candidate whose views are on the opposite side of the party's median voter.

Assuming that this analysis captures the dynamics of presidential primaries, it highlights a substantial difficulty for the nominated candidate. Once each major party candidate secures the nomination, the same analysis would suggest that he or she is rationally motivated to converge back toward $MV$ in an effort to win the general election. If the candidate is assumed to act rationally at each stage, then the model implies complete candidate fluidity as candidates will move along the single-dimensional ideological spectrum toward the party's median voter (or perhaps even further if, as suggested below, the party's base turns out to vote in disproportionate numbers), as needed to secure the nomination, and then back toward $MV$ as needed to win the general election. In this analysis, the two-staged model does no better at explaining major candidate divergence than the one-staged model.

3. Complexities in the Two-Stage Model

We now modify the two assumptions that undergird both the single-staged and two-staged electoral models to restore the intuition that introducing a primary (or caucus) stage produces a more stable policy distance between major party candidates than a single-stage election. The analysis demonstrates that while the precise issue locations of each candidate will vary from election to election, there are predictable forces that simultaneously pull toward the general electoral median voter and toward the extreme positions of each party's base. The predictable net effect of the two-staged system limits the probability of complete policy convergence by the major party candidates, thus reinforcing the basic intuition underlying the two-staged model.

a. The Voter Probability Distribution Function

The preceding analysis assumes an even distribution of voters across the ideological spectrum for the general election and also for the truncated spectra for the primary elections. Consider the possibility, however, that a larger number of voters occupy a relatively moderate ideological position than occupy the ends of the ideological spectrum in the general election. If
so, we can depict the general electorate in the form of a probability distribution function (PDF), which assumes a bell shape form. The PDF is shown in figure 6:3.

![Diagram of a bell-shaped PDF]

Figure 6:3

If we continue the assumption of full voter participation, this standard bell-shaped PDF would enhance the tendency of the candidates, after having secured the relevant party nomination, to move toward MV. Such moves would improve their efforts to capture a larger and larger number of general electoral voters. Moreover, as William Niskanen has demonstrated, it would give a potentially enhanced payoff because a "flipped" crossover voter is the equivalent of two votes—one vote gained plus one taken from the other side—whereas a voter lost due to diminished enthusiasm is simply one vote lost.16

Niskanen's intuition is strengthened to the extent that there are voters in each party whose positions are distant from the party base in a moderate direction, which enhances the possibility of appealing to voters registered to the other party as one moves in the direction of MV in the general election. If we continue to assume full voter participation, an assumption we relax below, these factors encourage moves toward MV as each candidate rationally seeks to capture potential moderate voters. Obviously, the result would thwart the interests of those who sought to secure a candidate committed to their party's core values. The question

thus arises how voter turnout however, may temper the candidate’s motivation to move toward the position of MV.

b. Non–Uniform Electoral Turnout (or Challenging the Assumptions of a Single Dimensional Scale)

A competing consideration for candidates seeking a major party nomination is that while ideologically extreme voters might be fewer in number, as demonstrated in the bell-shaped PDF, studies demonstrate that the party base participates in politics in a manner disproportionate to their numbers. Assuming that this higher incidence of general political participation translates into disproportionate turnout in general elections, then each candidate’s rational ideological placement might be endogenous to anticipated voter turnout. In this context, endogeneity means that rather than assuming universal turnout, candidates recognize that electoral turnout is a function of (or is endogenous to) where they position themselves along the ideological spectrum, and conversely, candidate positioning is a function of the expected impact on voter turnout.

This analysis provides an alternative perspective on Niskanen’s observation about the two-to-one payoff for “flipping” a moderate voter relative to turning out a voter from the candidate’s core constituency. In this analysis, the cost of flipping a moderate voter might be higher than that of securing two base voters because both major candidates are competing for general electorate’s moderate voters, while each candidate is alone in courting his or her base voters. It is also likely to be easier to appeal to the relatively more homogenous base voter constituency with targeted campaigning. Courting moderates also risks diminishing enthusiasm among the party base.

Assuming that voters holding more extreme ideological views tend to be more politically engaged, candidates also confront the risk that moving toward the center of the ideological spectrum during the general electoral cycle will have a disproportionate dampening effect on those eligible voters most likely to become actual voters in the general election. Political candidates ultimately are concerned with capturing a majority of actual voters as needed to win the general election, rather than with appealing to a majority of eligible or potential voters, only some of whom turn out at the polls. The tradeoff is reflected in figure 6.4 below.

17. For an article summarizing this literature, see Elisabeth R. Gerber & Rebecca B. Morton, Primary Election Systems and Representation, 14 J.L. Econ. & Org. 304, 309 (1998) (presenting studies that show “voters with strong partisan ties are much more likely to participate in political activities than are other voters”; that in 1988, voter turnout was about 50% but over 80% for strong partisans; and that “one group of party elites—convention delegates and caucus participants—have more extreme issue positions than the general electorate”). The authors claim that these studies imply that “the ideal point of the closed primary election median voter is likely to diverge substantially from the ideal point of the general election median voter.” Id. at 310.

18. See supra note 16 and accompanying text.
Figure 6:4

Figure 6:4, which focuses on the Democratic candidate, reveals the disproportionate tempering effect on more ideologically liberal voters as the candidate moves toward the ideal point of the general election’s median voter. Together, figures 6:3 and 6:4 reveal that while general election candidates seek to capture the larger percentage of eligible voters bunched toward the middle of the bell-shaped PDF (and the two-for-one arithmetic of flipped voters), they have to rationally weigh this incentive against the corresponding risk of sacrificing support among the “party base” or “party faithful,” meaning those voters who, although a smaller percentage of the general electorate, might be more likely to become actual voters than other registered voters. The question remains, however, whether the party faithful retain control over the party nominee past the point of nomination.

19. For an interesting, related study on the 2002 congressional elections, see Niskanen, supra note 16. Niskanen observes that in that election, candidates most “at risk” were those reputed to be moderates, a result that he claims is in tension with the median voter hypothesis. Niskanen attributes the failure of the median voter theory to explain the 2002 election results, which displaced some moderate incumbents, to the assumption underlying the median voter theorem that voter turnout is exogenous to a candidate’s ideological placement. Niskanen explains that if instead “the decision of whether to vote is (dependent) of the issue positions of the candidates,” then “candidates have an incentive to choose an issue position closer to the median of their party base than to the median of the total electorate (in the relevant constituency).” See id. at 239–40. Are there reasons why moderate congressional candidates might be more vulnerable in general elections than moderate presidential candidates, assuming such a candidate secures his or her party nomination? One interesting consequence of the Niskanen study is that it suggests that Congress as an institution is more politically polarized than the general electorate. Does this help to answer the preceding question? Why or why not? Might it matter that 2002 was an “off-year” congressional election with no presidential election, when overall turnout tends to be lower?
c. Two-Staged Presidential Elections as a Multi-Period Game

Assume that each two-staged election is a single-period game. This means that after each election cycle, voters experience a sort of collective amnesia and confront the next election cycle uninformed by what happened in the past. With this sort of electoral myopia, we might well imagine that the two-party system provides the party faithful no meaningful power to rein in their party’s nominee. Once the candidate is chosen, the voters confront anew the incentives set out in the single period model and are forced, in effect, to support their party’s candidate regardless of policy convergence, so long as the two major candidates do not cross paths with each other. The question then is why we do not witness complete convergence (or even flipping) along the relevant ideological spectrum? Are there mechanisms that reward candidates who adhere to commitments made in the primary campaign and that punish defections during the general election?

Consider the extent to which primaries allow a set of commitment strategies played out over multiple elections. If we view each individual election as a round of play in a multi-period game, this has the potential to raise the cost—which certainly does not eliminate all risk—of a candidate moving from the primary ideal point (associated with each party’s median voter) to a substantially more moderated position, closer to that of the general election median voter, during the general election. To what extent is the primary system, with the party base committing to active participation not only in the general election but also in later primaries, a vehicle for encouraging enforceable commitments? Does the two-staged election regime limit complete candidate fluidity not only in the primary (as moving too far toward the base is costly given the risk of having to renge in the general election), but also in the general election (as moving toward MV threatens diminished turnout among the base)?

Does treating the election as a multi-period game help to restore the intuition that the two-staged election system promotes meaningful policy distance between the leading presidential candidates? Can you identify particular devices at the primary stage that operate to bind presidential candidates from straying too far from positions taken to secure the party nomination?

d. Turnout and Dimensionality

The preceding discussion raises several empirical issues: (1) what is the ideological incidence of voters along the ideological spectrum; (2) how fluid is candidate placement from the primary to the general election cycle; and (3) to what extent are base voters willing to abstain in response to what they view as excessive moderation in the general election cycle. It is nonetheless fair to assume that the net effect of the factors set out above produces a result that is more consistent with the observed divergence between major party candidates in recent presidential electoral
cycles than the simple median voter hypothesis operating alone would predict.

Is it realistic to assume that base party voters will ever decline to support—some might say “punish”—a candidate by abetting when doing so is tantamount to supporting the candidate for the other side? Consider the possibility that such a strategy is rational if the liberal to conservative ideological spectrum does not capture the entire stakes for the party faithful. In this analysis, the question of turnout is equivalent to the question of dimensionality.\textsuperscript{20}

Consider the possibility that base voters care about retaining long-term control over the party and its ideological positioning even if that results in a loss in a particular general election.\textsuperscript{21} How plausible is it that base voters care more about control than electoral victory in a particular election cycle? Are those committed to such core issues as “right to life,” “freedom of choice,” and “anti-” or “pro-death penalty” behaving irrationally if they view themselves as “single issue” voters? Are single issue voters the sort of voters who elevate issues of party control over the concern for party victory in the general election?

Are there other factors that affect issues of party control? Available data demonstrate that during the 2008 Obama–McCain election, voter turnout was the most diverse in history, with African American voters setting a “historic first” by having the “highest turnout rate” among “young eligible voters.”\textsuperscript{22} The African American community had long been considered a core constituency of the Democratic Party. Does the differential turnout in the 2008 general election as compared with prior elections demonstrate that African American voters can be turned out in higher numbers than they have been historically—and to that extent are not captured—based upon the enthusiasm for the selected candidate and his or her policies? Why or why not? How might this relate to the broader question of dimensionality and party control?

Consider also state laws governing the nature of party candidate selection. States have adopted a variety of approaches to selecting candidates for general elections, including primaries, caucuses, conventions, or a combination. Some of these processes are “closed,” meaning that only registered party members can participate, while others are “open,” meaning that voters registered to other parties or as independent can also participate.\textsuperscript{23} What are the tradeoffs involved in selecting between open

\textsuperscript{20} For a discussion of dimensionality, see supra chapter 3.

\textsuperscript{21} For a related discussion, see David Brooks, Op-Ed., Road to Nowhere, N.Y. Times, Jan. 1, 2008, at A17 (positing that while Republican Party leaders supporting Mitt Romney knew that he would not win the general election if nominated, “some would rather remain in control of a party that loses than lose control of a party that wins”).

\textsuperscript{22} Mark Hugo Lopez & Paul Taylor, Pew Research Ctr., Dissecting the 2008 Electorate: Most Diverse in U.S. History 6 (2009). According to this study, which is based on Census Bureau data, “[v]oter turnout rates among black, Latino and Asian eligible voters were higher in 2008 than in 2004… The voter turnout rate among black eligible voters was 5 percentage points higher in 2008 than in 2004… “ Id. at 4.

and closed primaries? Caucuses versus primaries? Do closed primaries help the base retain control of the party even at the risk of defeat in general elections, or does it ensure higher levels of turnout by the party base? More generally, does the existence of a variety of mechanisms suggest that none of these options is necessarily "superior" to others? Should states be allowed to compel political parties to hold open primaries in which those registered to another party or as independents can participate? Why or why not? To what extent was the nomination of John McCain, viewed by many as a moderate Republican, helped by open primary voting? Does the foregoing analysis provide any guidance to a judge considering a constitutional challenge to a law requiring open, or blanket, primaries?  

**B. PRESIDENTIAL POLITICS AND REGULATORY POLICY REVISITED**

The various policy commitment strategies made during the primary stage—and specifically the predicted divergence between the policy positions of the major party candidates—has a potentially significant effect on the likely regulatory policies that the President and those he or she appoints to various agencies will pursue in the course of his or her administration. Securing the support of industry against environmentalists, or the reverse; the support of labor over management, or the reverse; the drug industry, or consumers seeking stringent drug regulations, have the effect of making departures from these positions costly as a political matter. While there is some observed policy convergence in the general election cycle, the two-staged electoral system makes complete policy convergence less likely. Judicial doctrine has developed so as to make candidate policy distancing highly relevant to changes in regulatory policy.

Under the *Chevron* doctrine, the federal judiciary is obligated to give deference to a reasonable agency interpretation of an ambiguous federal statutory provision. This holds even if that interpretation differs from the construction that the federal court would provide in the first instance. Under *Mead*, *Chevron* deference is not appropriate if an agency uses an insufficiently formal instrument to announce its interpretation, but an attenuated degree of deference (known as *Skidmore* deference) nonethe-

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24. Some state political parties have challenged state laws regulating the conduct of primary elections, including "open" primaries, which allow voters registered to one party to vote in the primary of the other party, or "blanket" primaries, which allow states to treat primaries of different parties uniformly for purposes of deciding who runs in the general election. For a recent case upholding Washington State's law requiring a blanket primary system, which demands that the two top vote-getters in the primaries run off in the general election without regard to their party affiliation, see Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184 (2008). In that case, the Court, with Justice Thomas writing, rejected the argument that the rule prevented parties from selecting their own candidates, allegedly in violation of the rule established in Cal. Democratic Party v. Jones, 530 U.S. 677 (2000), and instead ruled that the parties remain free to select their candidates outside the primary system but remain subject to the top vote-getting rule in the general election. *Grange*, 128 S. Ct. at 1192-95.


less may be applicable. And under National Cable & Telecommunications Ass'n v. Brand X Internet Services, the Supreme Court will even disregard its own prior interpretation of an ambiguous federal statute if an agency acting within the scope of its proper jurisdiction subsequently provides a different, yet reasonable, interpretation.

As you read the materials that follow, consider the impact of presidential elections in affecting the "meaning" of federal statutes as a result of the President's central role in staffing agencies. On one account of the preceding model, the primary system has the effect of preserving substantial policy distance between the two major parties with the predictable result of fairly considerable policy swings when the party controlling the White House changes hands. Judicial deference rules add one level of magnitude to the significance of these policy swings by effectively removing final interpretive authority over ambiguous statutory provisions from Article III courts and conferring it instead upon executive and independent agencies. Because the President has a more immediate effect in staffing agencies than in staffing the judiciary (given the life tenure of judges and thus the reduced incidence of replacements), the President has a greater likelihood of affecting administrative interpretations than judicial constructions of statutes.

Of course, the President does appoint federal judges (with Senate approval), but the effect of such appointments on the construction of statutes is likely to be felt over a longer period of time and often with the result of a considerable lag between presidential administrations. Within the federal judiciary, the Supreme Court's interpretation of statutes is otherwise final (barring congressional override), and presidential appointments to that Court arise stochastically.

27. 545 U.S. 967 (2005).
28. For a recent article that considers the implications of presidential policy swings from the ideal point of the general election's median voter, see Matthew C. Stephenson, Optimal Political Control of the Bureaucracy 197 Minn. L. Rev 53 (2006). Stephenson is not concerned with the causes of predictable presidential policy divergence from the preferences of the median voter. Id. at 83 n.81 and cites therein. Instead, he is concerned with the consequence of that divergence for the claim that tighter presidential control over agency policies promotes majoritarian bureaucratic accountability. Stephenson maintains that under specified assumptions some degree of insulation from presidential control is more likely, counterintuitively, to increase bureaucratic tracking of majoritarian policy preferences. Stephenson claims that those advocating a unitary executive, or what he terms strong presidentialism, commit the analytical error of equating "the expected value of the distance between two variables" with "the distance between the expected value of these two variables." Id. at 73 (emphasis in original). Because Presidents tend to represent ideal points, perhaps for reasons set out in the text that are closer to the median party voter and thus some distance to one side or the other of the general election's median voter, an insulated bureaucracy is more likely over time to track the true median voter's ideal point than is an agency increasingly subject to the control of changing presidential administrations. Stephenson's largely positive account rests on the premise that bureaucratic action is intended to reflect the preferences of the median voter, rather than, for example, that of the successful political coalition as one of the several means of encouraging democratic engagement.
29. The interaction between the judiciary and agencies does seem to matter, however, as there is some empirical evidence that judges act more deferentially toward regulations issues by a President of their own party, which might further exacerbate policy swings. See discussion infra at notes 178-186 and accompanying text.
Why might the Supreme Court have articulated a set of doctrines that effectively vests construction of statutes in the very agencies whose interpretations are subject to judicial review? Recall that under the Landes and Posner model, the independent judiciary prolongs the meaning of statutes as envisioned by the drafters, at least when compared with the alternative of a dependent judiciary.\textsuperscript{30} Recall also that in the Elhauge model, Chevron deference promotes political satisfaction as gauged against what he terms “enactable preferences.”\textsuperscript{31} Which of these models does the preceding analysis of the role of two-staged presidential elections in affecting policy change tend to support? Bear this question in mind as you read the rest of this chapter and consider the incentives of the bureaucrats themselves in the course of agency construction of statutes.

More generally, does the preceding analysis help to explain the nature of bureaucratic behavior? Does the answer to this question depend on whether we are discussing executive or independent agencies? Why or why not? We now turn to the second inquiry, namely, what motivates the agencies themselves.

II. CHARACTERISTICS OF BUREAUCRATIC ACTION

In chapter 5, we began with the premise that the overarching incentive of legislators is to be elected and re-elected. While legislators undoubtedly hold other, more lofty, objectives, in a competitive political system, those politicians unwilling to behave as if they are primarily motivated to be elected and re-elected will eventually fall off the radar of electoral politics. In this sense, the assumption that legislators act as if they are motivated by the goal of re-election is analogous to the assumption in the study of private markets that although firms might hold a range of objectives, to survive in a competitive market, they must behave as if they are primarily motivated to maximize profits, and thus their behavior can be modeled as if they consciously seek this end.\textsuperscript{32} Those that fail to act as if they are maximizing profits otherwise will be out-competed by those that do.

Unlike legislators, bureaucrats do not face direct electoral constraints, and unlike firms, they do not face external market pressures. The vast majority of governmental employees are non-political and are protected by civil service regulations from direct partisan political pressure.\textsuperscript{33} Senior governmental officials and agency heads typically serve at the discretion of

\textsuperscript{30} See also infra chapter 8, section IV.B (providing more detailed discussion of Landes and Posner model).

\textsuperscript{31} For discussion, see supra chapter 5, section II.B.3.

\textsuperscript{32} See Armen A. Alchian, Uncertainty, Evolution, and Economic Theory, 58 J. Pol. Econ. 211 (1950).

\textsuperscript{33} It is estimated that about ninety percent of civilian federal government employees are protected by the Civil Service Act. Herbert Kaufman, Major Players: Bureaucracies in American Government, 61 Pub Admin Rev. 18, 20-21 (2001).
those who appoint them (usually the President) or for a set term of years. But civil service protections limit the power of senior officials to hire and fire subordinates beyond their immediate staff members. In addition, within the United States, as in most countries, professional bureaucrats are relatively constrained in their ability to earn income beyond their fixed salary. Compensation is often seniority-based, and bureaucrats have limited opportunities for financial reward resulting from exemplary performance or for financial punishment for substandard performance. In general, therefore, bureaucrats are largely immune from the direct electoral or financial incentives that motivate either elected officials or private market actors.

The American administrative state dates back to the Progressive Era of the early twentieth century as embodied in the intellectual and political influence of Woodrow Wilson. Before entering politics, Wilson was a leading academic who urged the study of the “science of administration” and the implementation of policy by a trained corps of unbiased and disinterested experts, a model inspired by the German administrative state. The model of bureaucracy advanced during the Progressive Era implicitly assumed that unbiased experts, insulated from political and market pressures and guided by proper procedures and rules, would best discern and pursue the public interest. The civil service reforms and the creation of independent agencies, such as the Interstate Commerce Commission (1887), the Federal Trade Commission (1914), and later the multiple “alphabet soup” agencies created during the New Deal, were designed to produce the benefits of insulation from political pressure and to base government employment on merit-based criteria, such as competitive examinations, rather than through political party affiliation (the “spoils” system). Once insulated from improper influences, bureaucrats were expected to be able to identify and pursue the public interest in a relatively selfless and disinterested manner. These assumptions about bureaucratic motivations came to dominate analyses of agency decision-making during the first half of the twentieth century and reached their zenith in the proliferation of new expert agencies during the New Deal and continued (and even accelerated) through the Johnson and Nixon Administrations. Some recent commentators have applied the insights of public choice theory and the related field of “positive political theory” to suggest that even though the naive model of delegation may no longer be

34. Woodrow Wilson, The Study of Administration, 2 Pol. Sci. Q. 197 (1887); see also James M. Landis, The Administrative Process 46 (1938) ("The administrative process is, in essence, our generation’s answer to the inadequacy of the judicial and the legislative processes.").


36. For an informative discussion that claims the scope of regulatory expansions during the late Johnson and Nixon administrations eclipsed that of the New Deal, see Theodore J. Lowi, Two Roads to Scorched Liberalism, Conservatism, and Administrative Power, 36 Am. U. Int. L. Rev. 295, 298-99 (1987) (“Depending on who is doing the counting, an argument can be made that Congress enacted more regulatory programs in the five years between 1969 and 1974 than during any other comparable period in our history, including the first five years of the New Deal.”).
valid, continued delegation to agency specialists is consistent with public preferences.\textsuperscript{37}

As noted in chapter 1, public choice theory rejects the assumption that governmental actors are selfless, disinterested actors motivated purely by the pursuit of the public interest, even assuming we could agree as to how to define such terms. And yet, it is true that bureaucrats are not primarily motivated by the desire to maximize income and that they are not subject to electoral pressures. What then do bureaucrats maximize? There are three main hypotheses about what motivates bureaucratic action: (1) agency expansion, (2) autonomy maximization, and (3) congressional control. We review each in turn.

\section*{A. THE AGENCY-EXPANSION HYPOTHESIS}

Writing in the late nineteenth century, the German political economist Max Weber posited that in general bureaucrats seek to maximize power.\textsuperscript{38} Modern public choice theorists have essentially adopted, and elaborated on, Weber’s intuition, offering a number of specific corroborating studies.\textsuperscript{39}

In his 1971 book \emph{Bureaucracy and Representative Government},\textsuperscript{40} William Niskanen provided the first systematic effort to study bureaucracies within a public choice framework. Niskanen began by specifying the likely variables that influence a bureaucrat’s utility function: “salary, perquisites of the office, public reputation, power, patronage, output of the bureau, ease of making changes, and ease of managing the bureau.”\textsuperscript{41} Niskanen linked many of these factors to agency size. James Q. Wilson summarized Niskanen’s view, stating, “The utility of a business person is assumed to be profits; that of a bureaucrat is assumed to be something akin to profits: salary, rank, or power.”\textsuperscript{42} Wilson added: “Since both bureaucrats and business executives are people, it makes sense to assume that they prefer more of whatever they like to less.”\textsuperscript{43} Niskanen relied upon this utility function to model how a rational individual would behave

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{38} Max Weber, \emph{Bureaucracy}, in \emph{FROM MAX WEBER: ESSAYS IN SOCIOLOGY} 196, 233–34 (H.H. Gerth & C. Wright Mills eds., nms., 1946); see also Dennis C. Mueller, \emph{Public Choice III}, at 360 (2003).
\item \textsuperscript{39} Portions of the discussion that follows and the use of the term “empire building” summarize Niskanen’s views are adapted from Todd J. Zywicki, \emph{Institutional Review Boards as Academic Bureaucracies: An Economic and Experiential Analysis}, 101 Nw. U. L. Rev. 861 (2007).
\item \textsuperscript{40} William A. Niskanen, Jr. \emph{Bureaucracy and Representative Government} (1971).
\item \textsuperscript{41} \textit{Id.} at 38.
\item \textsuperscript{42} James Q. Wilson, \emph{Bureaucracy: What Government Agencies Do and Why They Do It}, at xviii (1989).
\item \textsuperscript{43} \textit{Id.}
\end{itemize}
\end{footnotesize}
within a bureaucratic environment. Niskanen's model predicts that bureaucrats are primarily engaged in "empire building," meaning that they seek to maximize the size of their budgets and the scope of their agency's jurisdictional domain.

Within Niskanen's model, rational bureaucrats seek to maximize the bureau's budget during a given bureaucrat's tenure in office. With the exception of two variables in the bureaucrat's utility function—the ease of making policy changes and the ease of bureau management, which also depends on the actions of others—the remaining variables are positively correlated to the "total budget of the bureau during the bureaucrat's tenure in office." As with public choice models of other governmental actors, it is not necessary that every bureaucrat share the same motivation. Some bureaucrats, for example, might seek higher salaries, others more power. Regardless of their ultimate motives, however, Niskanen argues that budget-maximization advances these other goals. After all, larger budgets permit a bureau to undertake more activities than they could with a smaller budget. Thus even public-interested bureaucrats will tend to favor budgetary expansion.

Niskanen suggests that in an important respect bureaucratic management is subject to the same sorts of "survivor" biases witnessed in electoral politics or market competition. Even if bureaucrats do not consciously seek to maximize agency budgets, only those bureaucrats willing to "play the game" of competing for larger budgets and power will survive in the sharp-elbowed world of political conflict. There is some empirical support for Niskanen's model. For instance, there is "ample evidence that bureaucrats systematically request larger budgets" and that they often succeed in having budgets set at the maximum politically feasible level. Bureaucrats also have a "substantial impact on budgetary outcomes," generally producing larger budgets.

Because of their independence, bureaucrats are largely insulated from direct public pressure. As a result, the two primary constituencies with whom bureaucrats interact are agency employees and members of Congress, who confirm nominations and provide administrative oversight. Niskanen contends that those constituencies also tend to support enhanced agency budgets. Agency employees will prefer agency expansions, especially into novel areas, to enhance their prospects for internal promotion as part of a growing enterprise and their post-government career prospects in the private sector. For example, attorneys who participate in regulatory drafting will be in high demand by law firms involved in advising clients on matters of regulatory compliance.

44. Niskanen, supra note 40, at 38 (emphasis omitted). Niskanen further observes that while the exceptional elements of the utility function are not primarily furthered by budgetary concerns, larger budgets ameliorate these concerns as well.


46. Id. at 358 (emphasis omitted).

47. The precise manner in which "revolving door" incentives might influence policy will vary among agencies. See Paul J. Quirk, Industry Influence in Federal Regulatory Agencies 143-74.
Congressional overseers also will tend to support larger budgets. Most regulatory oversight is performed at the committee level.\footnote{48} Committee membership typically is self-selected and, not surprisingly, legislators generally serve on committees that are considered most important to their constituencies. For instance, representatives of agricultural districts typically serve on agriculture committees; representatives from western districts serve on committees related to public lands; representatives of districts with military bases or large military contractors generally serve on military committees; and representatives of urban districts generally serve on committees dedicated to banking, housing, and welfare policy. Niskanen argues that this self-selection means that oversight committee members tend to support the missions of the agencies under their jurisdiction and thus to support larger budgets relative to the median legislator. Niskanen further observes that even the process of consolidating previously dispersed agency functions into a single department tends to result in increased expenditures rather than improved administrative efficiency.

Professor Tim Muris has offered an alternative explanation of increased regulatory expenditures that is linked to changes in the federal budget process.\footnote{49} Muris observes that “For most of our nation’s first century, a single committee in each house controlled almost all spending authority.” After reviewing the history of shifts between decentralization and centralized congressional spending power, Muris turned to the relevant modern history:

Unfortunately, the process of spreading spending jurisdiction among committees began anew in 1932 when the Reconstruction Finance Corporation was created and financed outside normal appropriations channels. Decentralization accelerated during the next four decades, particularly between 1965 and 1975. By the mid 1970s, most substantive congressional committees had authority to report legislation to the floor committing funds from the U.S. Treasury. In 1932, the Appropriations Committees controlled 89 percent of outlays through the annual federal budget process. By 1992, fewer than 40 percent of federal outlays resulted from decisions under the Appropriators’ control.

This balkanization of spending authority creates a “common pool” problem. When no one owns a common resource, such as the fish in a lake, there is an incentive for too much fishing, depleting the population. With the budget, the common resource is general-fund revenue. As the Appropriations Committee controls less and less


\footnote{49} Budget Process Reform: Hearing before the H. Comm. on Rules, 106th Cong., 1st Sess. 129 (1999) (prepared statement of Timothy J. Muris, Foundation Professor, George Mason University School of Law); see also W. Mark Crain & Timothy J. Muris, Legislative Organization of Fiscal Policy, 38 J.L. & Econ. 311 (1995).
spending, and, correspondingly, other congressional committees control more and more, no one committee has the incentive to restrain spending because the total level of spending is no longer the responsibility of any one committee. To the contrary, the resulting competition among committees to spend results in more spending than would otherwise occur, increasing deficit spending.50

Does this history counsel in favor of a renewed call for tightened central control of congressional budgeting processes, including centralizing all or most spending decisions to a single committee? Would such a change have the potential to improve not only fiscal discipline, but also regulatory discipline given the potential mismatch that might then arise between regulatory policy and the means with which to effectuate that policy? Why or why not?

Whatever the root cause, the process of agency expansion also provides congressional overseers with opportunities for rent extraction.51 Agencies can threaten regulatory activity, thus encouraging members of Congress to offer their constituents benign intervention by holding the agency at bay. Morris Fiorina notes that Congress can even initiate this rent-extraction process by enacting vague legislation, knowing in advance that the regulators will inevitably make mistakes, at which point Congress can intervene to “piously [denounce] the evils of bureaucracy” and set matters right: Fiorina claims that this process allows Congressmen to “take credit coming and going.”92 Once again, this process also provides oversight officials with regulatory expertise that proves of value in the private market.

Over time, Niskanen modified his model, claiming that bureaucrats seek to maximize their discretionary budget, rather than their overall budget. Thus, for instance, agencies would not necessarily seek to acquire large budgetary responsibilities connected to ministerial activities such as processing food stamps or Social Security checks, as these mechanical functions do not have a substantial discretionary component that will augment the agency’s power or prestige. Niskanen defines discretionary budget as “the difference between . . . total budget and the minimum cost of producing the expected output . . .”53 In effect, this is equivalent to the agency-cost slack between the legislature and the regulatory agency. The discretionary budget thus permits the bureaucrat to enlarge his perquisites and other benefits to the status of the agency. In general, enhanced agency budgets correlate with enhanced discretion since effective monitoring becomes more difficult as a function of agency growth. Niskanen argues:

51. For a related discussion, see supra chapter 2, section II.6 (discussing rent extraction).
53. Niskanen, supra note 48, at 245.
Some part of this discretionary budget will be spent in ways that serve the bureau, such as additional staff, capital, and perquisites. The remainder will be spent in ways that serve the interests of the political review authorities. The distribution of this surplus between spending that serves the interests of the bureaus and that which serves the interests of the review authorities, as in any bilateral bargaining, will depend on the relevant information, alternatives, and bargaining strategies available to the two parties.  

Niskanen’s model has been criticized on several grounds. Bureaucrats themselves do not obtain obvious direct benefits from increased agency budgets, thus raising questions about their incentives to seek larger budgets. Although growing budgets might offer greater opportunities for promotion for rank-and-file employees, salaries of governmental employees vary little based on agency size. Those who work in larger agencies are unlikely to earn higher salaries (or have opportunities for more nonpecuniary income, such as leisure) as compared with those who work in smaller agencies. Moreover, federal bureaucrats do not have particularly generous perquisites, such as ornate offices or cushy travel arrangements. As compared with the private sector, working conditions in governmental agencies are relatively spare. And yet, large and growing agencies might be intrinsically more prestigious thus provide greater opportunities for lucrative post-governmental employment. But even here there are exceptions. Comparatively small agencies such as the SEC are quite powerful and prestigious and provide substantial opportunities for lucrative post-governmental employment.

B. THE AGENCY-AUTONOMY HYPOTHESIS

James Q. Wilson has challenged Niskanen’s assumption that bureaucrats are primarily motivated to maximize budgets. He writes, “[B]ureaucrats have a variety of preferences; only part of their behavior can be explained by assuming they are struggling to get bigger salaries or fancier offices or larger budgets.” Bureaucrats might instead be motivated by ideological views or professional norms. Indeed, contrary to Niskanen’s predictions, agencies sometimes resist expansions to their authority and scope.

Wilson argues that rather than being imperialistic, bureaucrats tend to be averse to risk and conflict with other agencies. Bureaucrats thus tend to avoid pursuing larger budgets and responsibilities if the result

55. See Ronald N. Johnson & Gary D. Libecap, Agency Growth, Salaries and the Protected Bureaucrat, 27 ECON. INQUIRY 431 (1989); Robert A. Young, Budget Size and Bureaucratic Careers, in BUDGET-MAXIMIZING BUREAUCRAT, supra note 45, at 33.
56. WILSON, supra note 42, at xviii.
57. Spence & Cross, supra note 37, at 117.
58. See infra notes 67–69 and accompanying text.
generates conflict. Wilson claims that a more accurate model of agency behavior rests on “autonomy” or “independence,” rather than jurisdictional or budgetary expansion. Wilson defines autonomy as:

[A] “condition of independence sufficient to permit a group to work out and maintain a distinctive identity.” There are two parts to [this] definition, an external and an internal one. The external aspect of autonomy, independence, is equivalent to “jurisdiction” or “domain.” Agencies ranking high in autonomy have a monopoly jurisdiction (that is, they have few or no bureaucratic rivals and a minimum of political constraints imposed on them by superiors). The internal aspect of autonomy is identity or mission—a widely shared and approved understanding of the central tasks of the agency.

Autonomy takes many forms, such as independence from oversight, external constituencies, or rivalry from other agencies. According to Wilson, successful bureaucracies resist incursions onto their turf and avoid taking on tasks that are not at the heart of their institutional mission or that “will produce divided or hostile constituencies.” Rational bureaucrats will resist proposals to expand agency budgets or jurisdiction that risk creating conflict with rival agencies, undertaking new and difficult tasks, or producing problematic constituency relations.

Agency expansions thus have costs as well as benefits. A relatively small agency, for example, might have effective “monopoly” power in a given regulatory field, a satisfied clientele, and considerable policy expertise. Specialization allows the regulators to navigate congressional oversight procedures and to better manage potential jurisdictional conflict with other agencies. Agency expansion might provoke interagency conflict by forcing the agency into regulatory areas in which it lacks both expertise and clientele support. Wilson observes, for example, that when the United States Department of Agriculture (“USDA”) began to administer the Food Stamp program, it encountered new conflicts with various congressional oversight committees, interest groups, and clientele concerned with welfare programs for lower-income groups, as opposed to its previous clientele who were focused on farming and agricultural products. Agency expansions also threaten a less satisfactory and less cost-effective administration of assigned regulatory functions, thus inviting heightened public and congressional scrutiny. The combined effects might also harm the agency’s public reputation and bring its leaders under scrutiny, a foreseeable result that bureaucrats would prefer to avoid.

Wilson observes that these complications might lead agencies to resist expansion of their budget and authority if expansion compromises their autonomy or other beneficial aspects of agency culture. In contrast with

59. Wilson, supra note 42, at 182.
60. Id. (quoting Philip Selznick Leadership in Administration 121 (1957)).
61. Id. at 191.
62. For a largely complementary analysis, see id. at 179 (citing Morton H. Halpern, Bureaucratic Politics and Foreign Policy 51 (1974) (posing that bureaucracies “are often prepared to accept less money with greater control than more money with less control”)).
Niskanen, Wilson contends that "[g]overnment agencies are more risk averse than imperialistic. They prefer security to rapid growth, autonomy to competition, stability to change." Agencies pursuing expansion, he argues, are characterized by especially "benign environments—strong public support and popular leadership." The typical bureaucracy is "defensive, threat-avoiding, scandal-minimizing," not "imperialistic' or expansionist." In short," Wilson writes, "agencies quickly learn what forces in their environment are capable of using catastrophe or absurdity as effective political weapons, and they work hard to minimize the chances that they will be vulnerable to such attacks."

Contrary to Niskanen's hypothesis, Wilson argues that the typical bureaucracy will be reluctant to take on activities that embrace seemingly intractable problems and that are fraught with the danger of unintended consequences including regulatory failure and criticism. Wilson notes, for example, that the Federal Bureau of Investigation ("FBI") originally resisted investigating narcotics and organized crime because the potential costs (broadly understood) exceeded the benefits to the agency. According to Wilson, the FBI feared that narcotics trafficking could not be "solved" in the same way as kidnappings and bank robberies, thus risking public criticism. The Bureau also feared the potential for corruption associated with drug and Mafia investigations and the complex new demands that undertaking such responsibilities would pose, including undercover operations, which "make the internal management of the organization more difficult or even threaten the existence of its shared sense of mission."

The result of the FBI's resistance to agency expansion was the creation of the Drug Enforcement Agency ("DEA"). Thus, while Wilson agrees that "[a]ll else being equal, big budgets are better than small," his model is premised on the intuition that "all else is not equal" and that "[a]utonomy is valued at least as much as resources, because autonomy determines the degree to which it is costly to acquire and use resources." As a result, the agency is unlikely to sacrifice its autonomy to secure more resources or an enlarged jurisdiction.

The bureaucratic preference for autonomy over empire-building is also consistent with the greater opportunities of governmental employees to consume leisure or to shirk in performing one's duties compared to comparable workers in the private sector. Civil service protections not only insulate governmental employees from improper political and market pressures but they also weaken incentives for productivity and reduce accountability for rank-and-file bureaucrats. At a minimum, civil service

64. Id.
65. Id. at 378.
66. Id. at 377.
68. Id. at 182.
69. Id. at 195.
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protections reduce incentives to expend greater than average effort. In fact, government employees may self-select for positions that provide security and reduced accountability in place of the higher potential remuneration, greater accountability, and reduced job security that characterize comparable employment in the private sector.

Studies of government-owned corporations indicate that as compared with otherwise similar private market actors, government employees tend to work less and at lower efficiency, while drawing higher salaries for any given level of professional responsibility.70 Dennis Mueller reviewed seventy-one academic studies comparing work incentives in private firms and government bureaucracies. Mueller found that only five studies found that public firms operated with a greater level of cost effectiveness than comparable private firms and only ten found no difference in cost effectiveness.71 In each of the remaining fifty-six studies, “state-owned companies were found to be significantly less efficient than privately owned firms supplying the same good or service.”72 Mueller concludes, “The provision of a good or service by a state bureaucracy or by a state-owned company generally leads to lower residual profits, and/or higher costs and lower productivity.”73 Scholars have claimed that workers in firms in regulated industries protected from competition exhibit similar inefficiencies.74

Do you find these claims persuasive? Are there contexts in which a governmental employee’s output should be gauged against criteria other than efficiency? If so, what are those criteria? To what extent are the claimed findings of comparative bureaucratic or government-owned inefficiencies generalizable? Would you expect to find similar results in other areas of employment in which the incentives for productivity are attenuated, at least as compared with traditional firm settings, including, for example, university professors (especially those with tenure)? What about unionized work forces that provide relatively higher degrees of job seniority? What does the model suggest about the behavior of life-tenured judges?

C. CONGRESSIONAL CONTROL MODEL

Models of budget-maximizing, autonomy-maximizing, or leisure-maximizing bureaucrats assume that congressional oversight of agency activity is lax and passive, enabling bureaucrats to pursue their own agendas


71. Mueller, supra note 38, at 373.

72. Id.

73. Id. Mueller observes, for example, that the public school system in the United States has been criticized as “failing its citizens not by educating too many students, but educating them poorly” as compared with what he claims are more efficiently organized private schools.” Id. at 384 (citing John E. Chubb & Terry M. Moe, Politics, Markets, and America’s Schools (1990)).

rather than those of Congress or the public at large.\textsuperscript{75} Congress holds relatively few and generally perfunctory oversight hearings that focus primarily on such matters as budgets and confirmations of agency heads. This ineffective and \textit{ad hoc} oversight is said to result from three factors:

First, agencies control information from their policy area. Second, access to clientele fosters agency-clientele alliances to protect agencies from their nominal overseers in Congress. And third, the high cost of passing new legislation to redirect agency policy limits congressional action in all but the most important cases. The resulting bureaucratic insulation affords bureaucrats a degree of discretion which, in turn, is used to pursue their own private goals rather than the public purposes for which they were originally created.\textsuperscript{76}

Thus, it is argued that lax and ineffective congressional oversight enables inefficient agency expansion or deviation from preferred congressional policies.

Other scholars have questioned this model of congressional passivity, arguing that Congress, behaving rationally, will seek to limit agency departures from its preferred policies. Because bureaucrats and members of Congress are repeat players, it is unlikely that Congress would tolerate ongoing deception and inefficiency, as would be required to maintain continuous regulatory expansion or shirking.\textsuperscript{77} Moreover, when Congress decides to delegate authority to an agency, it should take into account any agency biases toward inefficient regulatory expansion.\textsuperscript{78}

In a case study of the FTC, Weingast and Moran argued that focusing on the absence of active formal oversight overlooks important informal dynamics in the relationship between agencies and Congress. Instead, the authors propose a "[c]ongressional dominance" model that focuses on the informal relationships between congressional committees and agencies.\textsuperscript{79} The authors describe the model as follows:

[C]ongressmen—or, more specifically, particular congressmen on the relevant committees—possess sufficient rewards and sanctions to create an incentive system for agencies. Agency mandate notwithstanding, rewards go to those agencies that pursue policies of interest to the current committee members; those agencies that fail to do so are confronted with sanctions. It follows that if the incentive system worked effectively, then agencies would pursue congressional goals even though they received little direct public guidance from their overseers. Congressmen on the relevant committees may appear ignorant of agency proceedings because they gauge the success of pro-


\textsuperscript{78} See Spence & Cross, supra note 37, at 117-18.

\textsuperscript{79} See Weingast & Moran, supra note 76, at 768.
grams through their constituents' reactions rather than through
detailed study. Public hearings and investigations are resource-inten-
sive activities, so they will hardly be used by congressmen for those
policy areas that are operating smoothly (i.e., benefiting congressional
clientele). Their real purpose is to police those areas functioning
poorly. The threat of ex post sanctions creates ex ante incentives for
the bureau to serve a congressional clientele.80

The authors claim that their view carries the following "striking
implication: the more effective the incentive system, the less often we
should observe sanctions in the form of congressional attention through
hearings and investigations."81 Stated differently, "direct and continuous
monitoring of inputs rather than of results is an inefficient mechanism by
which a principal constrains the action of his agent."82 In Weingast and
Moran's analysis, the absence of visible congressional monitoring counter-
intuitively suggests that the agency is abiding congressional priorities.
Only when informal constraints break down must Congress rely upon
formal oversight mechanisms. Thus, Weingast and Moran challenge the
inference that the absence of aggressive, public, congressional oversight
reflects agency independence from congressional control.

Weingast and Moran argue that congressional control over independ-
ent agencies actually is pervasive albeit not always visible. They identify
several mechanisms through which Congress influences agency behavior.
First, agencies are subject to a competitive budgetary process. Few agen-
cies stand in the position of a bilateral monopoly with Congress; instead,
the various agencies compete with each other for budgetary allocations,
and Congress should favor those that perform their duties in a relatively
more cost-effective manner. The resulting competition constrains individu-
al agencies seeking to increase their size and budgets and also reduces the
information asymmetries between Congress and the agency by forcing the
agency to explain its operations in order to justify its budget request.83
Second, Congress can and does exert formal oversight control when
necessary through hearings and investigations. Third, Congress can
"make life miserable for an agency by endless hearings and question-
aires."84 The best way to avoid this harassment is "to further congress-
sional interests."85 Finally, Congress can use its power to confirm appoint-
ments to negotiate with the President over nominations. Thus, even
though confirmation hearings often appear perfunctory, the formal hear-
ings do not necessarily reflect the extensive private negotiations that
precede the hearings.

80. Id. at 768–69.
81. Id. at 769.
82. Id.
83. See Donald A. Wittman, The Myth of Democratic Failure: Why Political Institutions are
84. McNellis, The Political Economy of Law, in 2 Handbook of Law and Economics 1651,
1705 (A. Mitchell Polinsky & Steven Shavell eds., 2007).
85. Id.
Although bureaus compete for congressional resources, members of Congress are motivated to reduce agency conflict and can use the committee process to do so. The congressional committee system allows individual members of Congress to create what amounts to a system of congressional mini-monopolies that oversee particular agencies and departments with minimal inter-jurisdiction conflict. As previously noted, self-selecting on committees gives members of Congress disproportionate influence over issues that matter most for electoral support. The committee system also reduces the information asymmetries between Congress and agencies by allowing committee overseers to develop the requisite expertise with which to effectively monitor agency performance.\(^{86}\)

Because oversight committees exert disproportionate influence over agency policy as compared with Congress more generally, Weingast and Moran predict that changes in committee preferences should translate into changes in agency policy. Conversely, stable committee membership promotes stable agency policy, even if agency leadership changes. The agency independence model would predict that agency leadership should matter more.

Weingast and Moran test their model with evidence of the FTC’s behavior in the late 1970s and early 1980s. During the late 1970s, the FTC aggressively asserted authority over broad segments of the American economy. The Commission launched investigations of “advertising aimed at children . . ., the used car market, the insurance industry,” and professional licensing organizations, as well as launching major antitrust suits against the nation’s largest oil companies and breakfast cereal manufacturers.\(^{87}\) After encouraging these efforts for many years, congressional overseers reversed course, publicly lambasting the FTC for overreaching and passing targeted legislation to halt several FTC investigations. At one point, Congress even refused to authorize the FTC’s budget, temporarily suspending the agency’s activities (the funding was later reauthorized). The FTC responded to this pressure by closing nearly all of its controversial rulemaking investigations and suspending what many considered its most ambitious and controversial antitrust prosecutions.

Weingast and Moran argue that the FTC’s behavior during this period contradicts the predictions of the agency independence model.\(^{88}\) Under the agency independence view, Congress intervened only after the FTC had operated independently for a decade, by which time it had severely strayed from preferred congressional policy. In this analysis, the FTC was the exception that proved the rule: Had it been more restrained in its

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87. Weingast & Moran, supra note 76, at 776.

activities, it could have continued to act indefinitely unimpeded by congressional interference. Most agencies, in contrast, operate unchecked by avoiding extreme positions that alienate important constituencies and congressional overseers.

Weingast and Moran instead claim that the FTC’s behavior is better captured by the congressional dominance model. In their analysis, the agency’s behavior in both the earlier activist and later retrenchment periods reflect congressional preferences or, more specifically, those of the relevant oversight committee members. Weingast and Moran demonstrate that the preferences of the oversight committee changed from supporting to opposing FTC activism, thus changing agency policies. Whereas in 1977, Congress “consistently criticized the FTC for lack of progress on their many investigations,” the authors observe that these were the “very investigations that drew so much criticism [two] years later.”

The change in the FTC’s behavior reflected the rapid change in Congress during this period:

Between 1976 and 1979, the dominant coalition on the relevant congressional committees changed from favoring to opposing an activist FTC. This resulted from the nearly complete turnover of those on and in control of the relevant Senate oversight subcommittee. None of the senior members of the subcommittee responsible for major FTC legislation and direction for the previous decade returned after 1976. Those previously in the minority took control of the subcommittee and began reversing the policies initiated by their predecessors. The 1979 and 1980 hearings were simply the most visible culmination of this process.

The congressional choice explanation suggests that the FTC initiated controversial policies because it got strong signals to do so from Congress. Far from roaming beyond its congressional mandate as an exercise in bureaucratic discretion, the FTC aggressively implemented its new authority in concert with its congressional sponsors. With the turnover in 1977, however, the FTC lost its congressional support and thus was vulnerable to the subsequent reversals.

In fact, Weingast and Moran observe that many of those on the FTC oversight committee during the 1970s were champions of consumer protection legislation who sponsored major pieces of pro-consumer legislation that characterized the era of regulatory expansion. Indeed, those members urged the FTC to be more active, as was reflected in the agency’s consumer protection agenda.

From 1977 to 1979, however, there was a dramatic turnover of membership on the Senate Commerce Committee and Subcommittee on Consumer Affairs that included a rapid replacement of liberals with conservatives. From 1966 to 1976, members of the subcommittee were substantially more liberal than the Senate as a whole. By 1979, however,
the pendulum swung in the opposite direction with the result that subcommittee members were substantially more conservative than the Senate as a whole. Weingast and Moran conclude that the FTC’s crisis resulted from changes in congressional preferences rather than the agency’s activities, a finding that is consistent with the congressional control model but not the agency independence model.

Other studies have corroborated substantial congressional influence over the FTC. Roger Faith, Donald Leavens, and Robert Tollison found that congressional influence helps to explain the pattern of FTC merger enforcement.¹¹ Unlike Weingast and Moran, however, Faith, Leavens, and Tollison concluded that constituent politics played a larger role than ideology. The authors found that an FTC merger challenge was significantly more likely to be dismissed if the headquarters of a merging firm was located within the district of one of the congressional oversight subcommittee members than if it was not.¹² They conclude that this finding is potentially consistent with either the budget-maximizing or congressional oversight models, but is inconsistent with the autonomy model. They further conclude that their analysis supports Richard Posner’s observation that Congress often spurred FTC antitrust investigations at the behest of firms located in their district in order to gain a competitive advantage.¹³

Timothy Muris, who served as Chairman of the FTC from 2001 to 2004, has challenged the congressional control model, claiming that it overstates congressional influence on FTC policymaking.¹⁴ Muris argues that agency outputs reflect the interaction of several internal and external constituencies: Congress, courts, the President, and the internal staff itself. Muris further notes that Congress itself does not speak with a unified voice. Indeed, its members represent different, and conflicting, constituent interests. In addition, the FTC responds to two other principals: the President (who appoints the Chairman), and the judiciary, which in proper cases ensures that FTC actions fall within the agency’s statutory mandate. Moreover, agencies have their own independent bureaucratic culture:

What Weingast and Moran miss in explaining the FTC, however, is the importance of the agency’s staff, both in its ideological character and in its career goals. During the early 1970s, for example, numerous liberal employees were drawn to the “revitalized” commission... [T]his new blood [made the agency more liberal], paralleling the increased [liberalism] of both the Senate and House committees

¹² Id. at 335-42.
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overseeing the FTC. While the composition of these subcommittees became more conservative in the late 1970s, the composition of the FTC staff remained liberal. Thus, contrary to the approach of Weingast and Morni, we would expect to find a more dramatic shift in FTC caseload in the early 1970s, when both Congress and the FTC staff changed politically, than we would find in the late 1970s, when only Congress changed. The evidence available supports this prediction.95

Muris thus argues that the agency bureaucracy has an internal dynamic of its own that is at least partially independent of congressional incentives. Sometimes congressional and agency preferences push in the same direction, thereby amplifying policy swings. Other times, however, they push against each other so that even if agency policy moves in the same general direction as Congress, the bureaucracy may moderate the extent of the swing.

Niskanen also has challenged the assumptions that underlie the congressional control model. From the perspective of individual members of Congress, monitoring is a public good because any resulting savings inure to the benefit of Congress or the nation as a whole.96 Like other public goods, monitoring is subject to collective action and free riding problems. Thus, although Congress as a whole might have incentives to monitor agency waste and inefficiency, individual members of Congress do not, or at least do not to the same extent.97 Agency monitoring is costly and requires allocation of time and staffing resources that could be rationally dedicated to other tasks that promote legislators’ interests more directly, such as constituent service or legislative activity. Niskanen contends that members of Congress will rationally monitor agency behavior only up to the point where a member’s private marginal costs exceed the member’s private marginal benefits. As compared with activities that produce discrete and excludable benefits for which members of Congress can claim credit with constituents, monitoring activities tend to be undersupplied. Rational legislators are likely to prefer responding to constituent complaints as a low cost source of information from which to sort potential targets of abusive or inefficient exercises of agency powers, often referred to as a “fire alarm” theory of oversight.

Which model seems to best explain the behavior of agencies and bureaucrats—the budget-maximization hypothesis, the autonomy hypothesis, or the congressional control hypothesis? To what extent are these models mutually exclusive and to what extent are they complementary? Are there conditions, or periods of time, when one of the models is likely to be more robust in explaining agency behavior than another? How, if at all, is your answer related to presidential and non-presidential election cycles? Why? How might these various models apply in other contexts,
such as managerial incentives in large, nonprofit organizations such as charities or universities?

Should these models, individually or in combination, influence the judicial response to agency activities? Should it affect, for example, agency deference rules under the *Chevron* and *Mead* doctrines? Should it affect the attitude of courts toward the so-called non-delegation doctrine? Why or why not? How does the selection among these models help to frame the inquiry as to which types of policy domains Congress is more prone to delegate to agencies and under which circumstances? Why? How might it affect whether particular regulatory policies are, or should be, vested in executive or independent agencies? Why?

**D. MONITORING BY THE PUBLIC**

Bureaucrats are probably even more insulated from effective monitoring by the public than are elected officials, and as a result, agencies are also potentially subject to a corresponding increase in interest group influence. Citizens do not vote directly for bureaucrats and as a result, the policymakers lack direct electoral accountability for their decisions. In general, federal agencies receive less popular attention than Congress and the complex regulatory labyrinth often makes the processes and outcomes of regulatory activity difficult for most people to comprehend. Moreover, the processes of agency rulemaking are more opaque than elections, and agency responsiveness to the general public is therefore all the more attenuated. Former Administrators of the Office of Information and Regulatory Affairs ("OIRA") Christopher DeMuth and Douglas Ginsburg have observed that as a practical matter, "public" participation in administrative rulemaking process "is limited to those organized groups with the largest and most immediate stakes in the results." They observe:

Although presidents and legislatures are themselves vulnerable to pressure from politically influential groups, the rulemaking process—operating in relative obscurity from public view but lavishly attended by interest groups—is even more vulnerable. A substantial number of agency rules could not survive public scrutiny and gain two legislative majorities and the signature of the president.

Judge Ralph Winter also has commented on the divergence of agency rulemaking from public preferences:

Much has been made of the consumer's inability to affect his market destinies and his lack of product information. Yet surely these criticisms are even more cogent where government is involved. A product which does not satisfy consumers is far more likely to disappear than a government ruling. When the [Interstate Commerce Commission "I.C.C."] prohibits new truckers from entering the market, consum-

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99. *Id.*
ers rarely know of the ruling—much less why it was made—and, of course, can do nothing to change it.\textsuperscript{100}

Moreover, even if citizens were able to acquire meaningful information regarding regulatory policy, the agencies themselves would still have minimal incentive to seek input from average citizens on regulatory matters. As Steven Croley has observed:

Direct citizen participation in regulatory decisionmaking is thus both rare—taking place only as often as elections for political representatives—and very crude—citizens vote for political candidates with very little information about those candidates’ positions on regulatory issues, and must moreover vote for a mixed bundle of such policies at once.\textsuperscript{101}

Croley concludes:

Because most citizens are largely uninformed about most regulatory decisions, and because they moreover lack incentives to become sufficiently informed to reward legislators who do not shirk, legislators do not—cannot—protect the broad regulatory interests of their constituencies. This is true because organized interest groups—industry groups, occupational groups, and trade associations—who are informed because they have an especially high demand for regulatory goods do monitor legislators, punishing those who consistently fail to provide such goods and rewarding those who provide favorable regulation. Thus interest groups capitalize on the opportunities created by principal-agent slack, made worse by most voters’ collective action problems, in order to buy regulatory goods that advantage them.\textsuperscript{102}

David Spence and Frank Cross have challenged this description of agency indifference to public preferences.\textsuperscript{103} They acknowledge that the public itself is rationally ignorant about agency activities; nonetheless, they contend that the public might support delegation on the belief that expert decision makers have more expertise on a given issue than Congress and that, as a result, the agency is more likely to get the “correct” answer. The median voter in the electorate often will have no particular substantive preference on a given issue, but instead will prefer that government experts select the policy that they determine to be best. Spence and Cross further argue that voters will prefer to rely upon skilled experts rather than generalist elected representatives to make these policy decisions. If so, voters will support broad discretion for agency decision-making even if congressional oversight is limited and bureaucratic control attenuated.

Consider Winter’s claim that citizens cannot move agency behavior. To what extent, if any, is this in tension with the history of the Gay

\textsuperscript{100} Ralph K. Winter, Jr., Economic Regulation vs. Competition: Ralph Nader and Creeping Capitalism, 82 YALE L.J. 890, 894 (1973).

\textsuperscript{101} Steven P. Croley, Theories of Regulation: Incorporating the Administrative Process, 96 COLUM. L. REV. 1, 38 (1996).

\textsuperscript{102} Id. (footnote omitted).

\textsuperscript{103} Spence & Cross, supra note 37; see also Bendor & Meirowitz, supra note 37.
Rights lobby on the issue of speeding up access to the AIDS cocktail through fast-track FDA approval? The result was to speed up approval of the AIDS cocktail relative to the ordinary regulatory processes, which are both extremely expensive and often take decades to accomplish. Does this example run counter to Winter’s thesis or does it confirm Winter’s thesis? Is the AIDS-activist lobby the type of group that Winter was describing? If not, what characteristics might distinguish this group politically and account for their success?

To what extent do the insights from these models help to explain opportunities for citizen watchdog groups? Do these groups emerge as political entrepreneurs who are able to capitalize on the inability of private citizens to effectively monitor agency conduct? Are such groups effective at harnessing citizen demand for regulatory reform? Why or why not? To what extent do activist monitoring groups have their own institutional interests in maximizing their group’s influence or budgets that might lead them to deviate from the interests of the public generally? Would you anticipate that such groups are effective in securing promises during presidential primaries that subsequently affect the direction of regulatory policy? If so, does this counsel in favor of or against agency deference rules? Why?

III. CHARACTERISTICS OF AGENCY BEHAVIOR

Public choice theorists generally claim that observed features of bureaucratic behavior are at odds with the public interest model of politics. Specifically, the motivation and opportunity to shirk produces incentives that depart from majoritarian or efficiency objectives. In this part, we address these claims.

A. SYSTEMATIC BIAS IN DECISION-MAKING

Economists have predicted that the incentive structure faced by bureaucrats will lead to unduly risk-averse decision-making, producing an inefficiently high level of regulation. The concepts of Type I and Type II error help to explain the precise nature of the competing risks that regulators seek to avoid.

Type I errors, also referred to as “false positives,” arise when a regulatory burden is sub-optimally high and, as a result, certain safe goods


or services are classified by the regulator as unreasonably dangerous. Type II error produces "false negatives," meaning an erroneous conclusion that dangerous goods are safe. Type II error arises when the regulatory burden is sub-optimally low and, as a result, dangerous goods are classified by the regulator as safe. Both types of errors—Type I and Type II—impose costs on consumers either by prohibiting the sale of safe goods or permitting the sale of dangerous goods. The total economic cost of a regulatory regime will include the sum of these two errors multiplied by the harm to consumers that the errors produce plus the administrative costs of making the decisions.

These error costs need not be symmetrical. For instance, for criminal law enforcement, the American legal system accepts as a foundational premise that the cost of false positives (the erroneous conviction of innocent defendants) exceeds the cost of false negatives (the erroneous acquittal of guilty defendants). This assumption is reflected in the aphorism that it is better to allow ten (or one hundred) guilty men to go free than to wrongly convict one innocent man.107 As a result of the asymmetrical assessment of these competing costs, the American legal system imposes a substantially higher standard of proof for convictions in criminal cases (beyond a reasonable doubt) than in civil cases (preponderance of the evidence).

Strict cost-benefit analysis suggests that social welfare is maximized when regulators act in a risk-neutral manner. This means that regulators are expected to weigh the opportunity costs of delayed approval in preventing suffering or saving lives equally with the costs to those who might be injured by premature approval of a drug. From the perspective of individual bureaucrats, however, private cost may not be aligned with public costs, and instead a bureaucrat might be systematically risk-averse. From the perspective of the individual bureaucrat, erroneously approving a harmful drug by setting the regulatory bar too low threatens public condemnation, regulatory oversight, and potentially major negative career consequences. In contrast, the delay of a useful drug for further testing, while also producing potentially significant social costs, might be harder to identify and thus be less likely to invite criticism. For instance, the Food and Drug Administration might be overly cautious in approving valuable new medications, requiring extensive testing and limiting the claims for which the new drugs may be approved even though the delay and even disapproval of a life-saving medicine results in harm to consumers (taking the form of Type I error), possibly of comparable magnitude to that resulting from setting the regulatory bar too low (taking the form of Type II error).

Empirical studies tend to support the theoretical claim that regulators are unlikely to be risk neutral as between these two kinds of error, and instead that regulation is systematically biased in favor of avoiding the more tangible harm associated with Type II error than the abstract and

generally unobservable harm from Type I error.\textsuperscript{108} For instance, one group of scholars has argued that this intuition explains resource allocation at the Immigration and Naturalization Service ("INS").\textsuperscript{109} Measuring the number of people caught illegally entering the United States is easier than measuring the number of illegal immigrants already present. As a result, it is argued, the INS tends to devote greater resources to preventing illegal entry than to capturing and deporting those who are here. Similarly, the Department of Housing and Urban Development ("HUD") tends to allocate funds to cities with less risky investment projects to avoid the criticism that funded projects have failed, notwithstanding the claimed goal of using program funding to help "distressed" cities. Not surprisingly, housing projects in cities that are distressed are far more likely to be characterized as high risk.\textsuperscript{110}

John Allison, Chairman of the BB & T Bank Corporation provides another example of how the risk aversion of bureaucrats can create agency costs that can contradict preferred Executive Branch policy.\textsuperscript{111} In September 2008, in response to the American financial crisis at the time, the government enacted the Trouble Asset Relief Program ("TARP"), which was intended to stabilize the financial sector and avert bank failures.\textsuperscript{112} The administrations of both President George W. Bush\textsuperscript{113} and Barack Obama\textsuperscript{114} stated that an additional justification for infusing capital into the financial sector was to encourage banks to make new loans. Allison, however, notes that the private incentives of ground-level bank examiners directly contradicted this goal. Whereas the President was encouraging greater lending in order to jump-start the economy, individual bank examiners were primarily motivated to make sure that the banks that they oversaw would not take any risks that might lead to failure and jeopardize their individual standing. As a result, the actions of local examiners were forcing banks to tighten lending standards and to curtail lending. Allison argues that one effect of the inspectors’ overly cautious attitude was to cause his bank to not make loans that it would have made otherwise, which probably caused some businesses to fail that otherwise would not have.

\textsuperscript{108} See Mueller, supra note 38, at 379–71.

\textsuperscript{109} Alberto Dávila et al., Immigration Reform, the INS, and the Distribution of Interior and Border Enforcement Resources, 99 Pub. Choice 327 (1999).


\textsuperscript{111} John Allison, Chairman, BB&T Corporation, Keynote Address, The Competitive Enterprise Institute’s 25th Anniversary Gala (June 11, 2006) (transcript on file with authors); see also Judith Burns, BB&T Chair Bashes TARP as a "Huge Rip-Off", Wall St J., June 12, 2009, http://online.wsj.com/article/SB124492152298411015.html (summarizing Allison’s remarks).


Does the assumption that risk neutrality is welfare enhancing always hold? Are there circumstances in which societal welfare is enhanced by discounting one form of error in favor of another? Is the different standard of proof in the criminal and civil context an illustration of this proposition? Why or why not? If it is, is that context unique, or are there other regulatory contexts in which the danger of false positives is greater than those of false negatives? Does the reverse also hold? Are there conditions under which the dangers of false negatives exceed those of false positives? Why or why not?

Political actors hold other biases that affect policy making. Senior political officials and legislators, for example, are predicted to exhibit a short term bias, selecting policies with benefits that materialize during the official’s expected tenure in office (or before the next election), with substantial discounting for costs that are incurred beyond her term of office. “Politicians and regulators ... have an incentive to maximize their political and financial support in the next electoral cycle, whether two, four, or six years” later. Persistent budget deficits that result from providing benefits today at the expense of voters in the future is perhaps the most obvious example. Other policy decisions also reflect this tendency toward short-run vote-maximization. Thus, for instance, the federal government historically has a poor record of managing federal lands for long-term benefit. Grazing, logging, and mining rights on federal lands traditionally have been sold for below-market prices to win political support from extractive business interests, leading to overuse of those resources. As a result of these subsidies, the direct costs of running those federal programs exceed the revenues generated. Although these subsidies are difficult to justify from an environmental or financial perspective, they appear to generate political benefits to regulators and their political overseers. As is the case with the tendency for the government to accrue budget deficits, federal resource policy thus tends toward the promotion of short-term political goals at the expense of long-term environmental and economic goals.

B. MARGINALITY AND COST EXTERNALIZATION

Commentators have also observed that bureaucrats tend to exhibit an imperfect understanding of marginal costs and benefits of regulation. Justice Stephen Breyer has argued, for example, that policy makers select issues for their regulatory agenda based upon such random factors as media attention, rather than based upon a systematic cost-benefit analy-

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sis. One barrier to effective cost-benefit analysis of regulation is the absence of a price signal to convey to regulators the relative benefits and costs. In addition, many regulatory costs are borne by private market actors, rather than by the agency, further inhibiting feedback signals concerning the optimal scope and form of regulation.

Numerous efforts have been made to identify substitutes for market valuation in the regulatory context. These include devices intended to provide proxies for marginal costs and benefits of regulations, such as the Paperwork Reduction Act, which aims to measure the administrative costs of regulations on private actors. While these methods improve estimates of the costs of regulation on private actors, they offer at best crude measures. Cost-benefit analysis is often inconsistently applied, thus producing unpredictable results. While some life-saving regulations are implemented at low cost, commentators observe that other regulations fail cost-benefit analysis.

Regulatory compliance also has distributional effects. For instance, certain types of regulation (such as command-and-control environmental regulation) impose compliance costs largely without regard to the scale of the firm installing it. Regulatory compliance requirements that demand fixed capital investments, therefore, tend to place disproportionate burdens on small businesses that must amortize those costs over a smaller production schedule as compared with larger competitors. Paperwork and other regulatory compliance measures also impose many fixed costs and studies have found that larger companies spend proportionately less on legal services (as a percentage of sales) than do small companies. In contrast, other forms of regulation deliberately take account of firm size, such as taxes on the volume of pollution emitted as a by-product of a factory's production. Taxes based on production tend to have less severe distributional consequences than those that impose burdens independent of output.

The focus on governmental regulation also might ignore alternative market-based means for accomplishing regulatory goals, such as investments in name brands and third-party rating agencies, such as Consumer Reports. Providing unsafe products or services, or simply products of low quality, can result in effective financial penalties from diminished


120. One estimate, for instance, found that complying with environmental laws was $717 annually per employee for firms over 500 employees and $3,229 per employee for firms under twenty employees. Loven & Mellor, supra note 5, at 69–70.


demand for those goods or services and a corresponding decline in the
value of the firm’s stock. The resulting financial losses often will greatly
exceed civil liability and government penalties and fines. Although
regulatory oversight undoubtedly provides important benefits in terms of
consumer safety in a broad range of areas, regulators might tend to
overlook or discount non-governmental alternatives that serve similar
functions, thereby leading to inefficient levels or types of regulation.

C. SELECTION BIAS AND COMMITMENT
TO REGULATORY MISSION

An additional potential problem for bureaucratic actors is a tendency
toward “tunnel vision,” meaning too narrow a focus on their particular
regulatory agenda at the expense of alternative policy goals. Over forty
years ago, Anthony Downs claimed that bureaucrats’ “views are based
upon a ‘biased’ or exaggerated view of the importance of their own
positions in the cosmic scheme of things.” This sense of regulatory
mission might be reinforced by a selection bias in the types of matters and
parties that regularly appear before regulators as a result of particular
agency objectives.

In some settings, bureaucratic tunnel vision might create or exacer-
bate risks in one sector while seeking to eliminate or to reduce it in
another. For instance, excessively rigorous, intrusive, and time-consuming
airport security regulations might dissuade some potential air travelers in
favor of longer automobile trips, with corresponding risks of highway
fatalities and the possible net result of raising the overall societal death
rate. Improving auto safety might cause drivers to feel more confident
and thus to drive faster and less cautiously, thereby increasing risks to
pedestrians. Increasing gas mileage requirements for cars also reduces
the marginal cost of driving, creating a “rebound effect” of encouraging
commuters to drive more, carpool less, or drive larger cars, thereby
offsetting some of the conservation benefits of improved gas mileage.
Increased environmental protection also might conflict with other goals,
such as economic growth or national security.

123. See Mark L. Mitchell, The Impact of External Parties on Brand-Name Capital: The 1982
Tylenol Poisonings and Subsequent Cases, 27 Econ Inquiry 601 (1986); Mark L. Mitchell &
Michael T. Maloney, Crisis in the Cockpit? The Role of Market Forces in Promoting Air Travel
124. See Breyer, supra note 117, at 10–19; see also Zywicki, supra note 39.
Gerrick Blalock et al., The Impact of 9/11 on Driving Fatalities: The Other Lives Lost to
March06/Sept11driving.pdf. Breyer provides the example of a proposed sewage disposal regulation
designed to save one life every five years but that would create incentives to incinerate the waste,
thereby causing two additional cancer deaths annually. Breyer, supra note 117, at 22.
128. See Zywicki, supra note 105.
Consider how government makes agriculture policy. The FTC has focused its efforts on improving consumer economic welfare and, as a result, has tended to favor increased competition and lower prices for agricultural products. In contrast with the FTC, the United States Department of Agriculture ("USDA") is highly concerned with the welfare of farmers, who are its primary constituency, even if policies that help farmers result in higher average consumer prices. Rather than pursuing policies designed to lower prices for all consumers, as the FTC does, the USDA might prefer reduced competition and higher agricultural prices with a food stamp program that maintains demand among low income consumers. Each agency tends to emphasize its particular regulatory mission and constituencies, even if those objectives conflict with other agencies.

Economic theory predicts that organizations will tend to attract individuals with a comparative advantage at—and a considerable interest in and commitment to—the tasks that they are called upon to perform. Employment generally provides two types of remuneration: monetary income and non-monetary or psychic income, such as intrinsic satisfaction or a sense of "doing good." As Spence and Cross observe, "That agencies are systematically more loyal to their basic mission seems persuasive, even obvious. People who are sympathetic to that mission are more likely to be attracted to work at the agency." A principled commitment to the value of an agency's mission also might reconcile the apparent anomaly that bureaucrats seek increased budgets even if they do not personally benefit. Larger budgets and a broader scope of authority will give the agency greater ability to pursue their desired regulatory objectives and to that extent reinforce a bureaucrat's sense of beneficial accomplishment.

Bureaucrats also pursue ideological and political objectives. One study of public employees in eleven countries found them to be more politically left of center than the general population and to generally support a larger government role in the economy. A study by Donald Blake also found a general tendency of government employees to lean ideologically left of center. This orientation might result from either self interest (within various governmental systems, political parties to the left of center generally tend to support larger public sectors) or ideology. The direction of causation is largely irrelevant, however, as the ideological orientation of employees might both reflect and cause a preference for larger and more activist government. For instance, Tim Muris has argued

129. This paragraph is based on Zywicki's personal experience at the FTC.
130. Spence & Cross, supra note 37, at 120 (emphasis omitted); see also id. at 115 n.76 (providing examples).
131. Blaise & Dion, supra note 45, at 356–57.
133. André Blais, Donald E. Blake & Stéphane Dion, The Voting Behavior of Bureaucrats, in BUDGET-MAXIMIZING BUREAUCRAT, supra note 45, at 205.
134. Donald E. Blake, Policy Attitudes and Political Ideology in the Public Sector, in BUDGET-MAXIMIZING BUREAUCRAT, supra note 45, at 231.
that one possible explanation for what he characterizes as the FTC's extreme activist tilt during the late-1970s was the influx of many new “Naderite,” ideologically-motivated consumer activist lawyers into the agency.\textsuperscript{135}

Regulators can also structure regulation so as to create ongoing demand for their services. As Richard Harris and Sidney Milksis have observed, “Because the lifeblood of bureaucratic entities is administrative programs, bureaucrats enhance their position by helping to develop new programs and protect their current position by opposing the destruction of existing programs.”\textsuperscript{136} Todd Zywicki has observed that by writing highly complex, detailed, and specific regulations, bureaucrats can build “obsolescence” into regulations, thereby requiring their ongoing services to update them.\textsuperscript{137} This might explain the historical preference among environmental regulators for economically inefficient, technology-based, command-and-control regulation rather than more cost effective decentralized market-based schemes. Technology-based standards place an ongoing demand for regulatory services as technology changes. Thus, Zywicki notes that each technological development will initiate a new round of conflict among competing interest groups, with some urging the adoption of the new technology and others supporting the status quo.

If these characterizations are sound, what do they suggest about the nature of those prone to pursuing careers as agency bureaucrats? Are agencies generally biased in favor of regulatory expansion? What about those who joined the ranks of federal bureaucracy during such conservative administrations as Ronald Reagan or George W. Bush?\textsuperscript{138} Did those administrations attract bureaucrats who enjoyed psychic income from pursuing deregulatory agendas? Consider also why the Reagan and Bush II administrations did not dismantle agencies whose earlier, more liberal, policies they sought to reverse, instead staffing those agencies with bureaucrats favoring a deregulatory agenda. Is this consistent with the theories advanced by Harris and Milksis, and Zywicki, that bureaucrats pursue policies that promote continued demands for their services? Dismantling an agency as a means of deregulation makes it more difficult for another administration to sharply reverse the direction of regulatory policy.\textsuperscript{139} By retaining the agencies but staffing with deregulators, however, these administrations were able to demand ongoing support to main-


\textsuperscript{136} Harris & Milksis, supra note 135, at 47.

\textsuperscript{137} Zywicki, supra note 115, at 894.

\textsuperscript{138} See Harris & Milksis, supra note 135, at 181-224.

\textsuperscript{139} Does this help to explain the phenomenon of “midnight regulations”? See Elizabeth Kolbert, Comment, Midnight Hour, New Yorker, Nov. 24, 2008, at 39, available at http://www.newyorker.com/talk/comment/2008/11/24/081124taco_talk_kolbert (discussing the history of midnight regulations since Jimmy Carter).
tain deregulatory policies over time. Do you find this analysis persuasive? Why or why not?

Do the same arguments concerning the absence of pricing mechanisms in affecting the level of governmental regulation and services apply to those bureaucrats who are inclined to pursue either regulatory or deregulatory agendas? Is it possible that the zeal for deregulation will be applied without adequate consideration of the costs of removing regulatory protections already in place? Why or why not? Which of the preceding models, if any, is most helpful in answering these questions? Why?

D. EXECUTIVE BRANCH RESPONSE TO AGENCY COSTS

The growth of the administrative state since the New Deal has created special challenges for the President in seeking to coordinate the various regulatory initiatives throughout the executive branch. Although it is difficult for the President to closely supervise the thousands of ongoing regulatory, adjudicatory, and other processes within the executive branch, in the end it is the President who bears political responsibility for those activities. Several departments and agencies may share overlapping jurisdiction over an issue, reviewing the same issue from a variety of perspectives and with different objectives and preferences.

This problem of creating coherent regulatory policy has been chronic, and Presidents have given this responsibility to different offices over time, including the Vice-President. In recent decades, the primary office performing this duty has been the OIRA. Growing out of an informal regulatory review process in Richard Nixon’s Office of Management and Budget, OIRA was established as part of the 1980 Paperwork Reduction Act. OIRA reviews all economically significant regulations proposed by executive branch agencies, and its central tasks have been supported by Presidents of both parties for the past thirty years. Sally Katzen, OIRA Administrator during the Clinton Administration, described the importance of its oversight process as follows:

The agencies focus like a laser, as they should, on their statutory missions—in the case of EPA, protecting the environment. The White House and OIRA take a broader view and consider how, for example, an environmental proposal will affect energy resources, tax revenues, health policy, etc. Stated another way, EPA is pursuing a parochial

140. See DeMuth & Ginsburg, supra note 98, at 1079-80.
interest; OIRA is tempering that with the national interest, as it should.143

Assuming this is correct, the analysis raises an important question: What does the head of OIRA rationally seek to maximize? To what extent does the preceding analysis imply that a given Administration’s regulatory priorities are likely to affect any seemingly independent analysis of the relative costs and benefits of various agency activities that have the potential to produce regulatory conflict? In the event that two or more agency programs conflict, how is that conflict likely to be resolved? To what extent is public choice analysis helpful in answering this question? To what extent is the spatial model of presidential selection that opened this chapter helpful in answering this question? Given the potential conflicts among agencies respecting overlapping areas, is it possible that the agency deference rules announced in Chevron and Mead promote a race to regulate first? Does this raise analytical difficulties for judicial deference? Why or why not? Keep these questions in mind as you review the next set of materials, discussing competing theories of delegation.

IV. DELEGATION

We now leave aside the question of bureaucratic incentives and constraints and turn to the congressional decision whether to delegate rulemaking authority to agencies in the first instance. Congress might pursue a course of delegation for benign reasons: to take advantage of an agency’s policy expertise, to minimize costly legislative processes, or to reduce its workload in an effort to focus its limited resources on higher priorities.144 Congress might also delegate for more problematic reasons: to avoid making hard choices, to avoid responsibility for unpopular decisions, or to facilitate a rent-extraction scheme. Even if delegation is done for beneficial purposes, from the legislature’s perspective, delegation raises the problem of agency costs, as bureaucratic decision-making might depart from Congress’s expected or preferred outcomes.

A. CONGRESSIONAL CONTROL OF DELEGATED AUTHORITY

Congress can reduce the problem of agency costs by making narrow and tightly circumscribed delegations, thus spelling out the scope of the delegation in precise detail. Narrowly-defined delegations circumscribe the discretion not only of the current bureaucracy, but also of future bureaucrats. Greater restrictions on agency discretion, however, might reduce the benefit to Congress of delegating in the first place. Restrictive delegations substitute congressional mandates for agency expertise and force Congress to expend more time and resources on articulating and enforcing limits on

143. Katzen, supra note 142, at 1505.
agency discretion, thereby reducing the anticipated workload savings resulting from delegation and reducing the agency's flexibility to respond to changing circumstances. Congress thus confronts a tradeoff in the decision to delegate: It must delegate enough authority to be able to capture the benefits of delegation, but at the same time it must constrain excess bureaucratic agency costs. Terry Moe summarizes the resulting tradeoff as follows:

The most direct way [to control agencies] is for today's authorities to specify, in excruciating detail, precisely what the agency is to do and how it is to do it, leaving as little as possible to the discretionary judgment of bureaucrats—and thus as little as possible for future authorities to exercise control over, short of passing new legislation....

Obviously, this is not a formula for creating effective organizations. In the interests of political protection, agencies are knowingly burdened with cumbersome, complicated, technically inappropriate structures that undermine their capacity to perform their jobs well.145

Once Congress has delegated authority to an agency, it can control agency discretion to deviate from Congress's preferred policy either through ex ante controls or ex post ongoing oversight. Ex ante controls involve "issues of agency design," such as reporting and consultation procedures that an agency must follow in making policy.146 Congress may also exert control over the establishment of new departments, the location of new agencies within the executive branch, and how far down the organizational hierarchy political appointments will reach. As with using narrow delegations to control agency discretion, ex ante controls are not costless. For example, greater constraints limit agencies from adapting to new situations.

Ex post controls include those institutional features that check agency actions on a regular basis, such as congressional oversight and annual budget appropriations. The federal judiciary also exerts ongoing control through the enforcement of administrative law requirements, and the President exerts control through his power of appointment (subject, where applicable, to the confirmation process).

Because exercising control (whether ex ante or ex post) has costs, Congress must anticipate a certain amount of agency slack. Thus, Congress will be more willing to delegate when it can exercise control at low cost and be less willing to delegate when ensuring compliance is costly. Congress also will be less willing to delegate discretion where there is a large information asymmetry between Congress and the agency, which further raises monitoring costs. Thus, the value to Congress of ex post oversight controls will increase as the anticipated disparity in policy preferences between Congress and the agency increases and as informa-

146. Epstein & O'Halloran, supra note 144, at 698-99.
tion asymmetries between Congress and the agency decrease.\textsuperscript{147} Where it is difficult to monitor and control the use of agency discretion, Congress will delegate less and stipulate more clearly what is to be done. When delegation occurs despite information asymmetries, such as where reliance on technical expertise is necessary, Congress tends to hold more oversight hearings to monitor agency behavior.\textsuperscript{148}

Tighter \textit{ex ante} controls, such as statutory precision or increased control over appointments, reduce agency costs by giving Congress greater control over agency policies. Conversely, narrow delegations raise the risk of "legislative" or "coalitional drift." Legislative drift is a change over time in regulatory policy from changes in the ideological composition of Congress or of the relevant oversight committees. Thus, if the median member of Congress or the applicable oversight committee changes, the desired scope of agency delegations and the preferred approach to agency oversight will change as well. In addition, as discussed in Chapter 2, one element of the willingness of interest groups to lobby for favorable legislation is the legislation's expected durability, i.e., how long the stream of benefits will be produced.\textsuperscript{149} Thus, interest groups will provide greater support for legislation with a long expected life than a shorter one. The fear that a future Congress will reverse the decision of the current Congress reduces the expected value of the legislation and hence the support that interest groups will provide. Rational members of Congress therefore are likely to prefer policies that reduce the threat of legislative drift in the future, thereby increasing the value of their services today.

The risk of legislative drift can be distinguished from "bureaucratic drift." Bureaucratic drift occurs when Congress delegates authority but the agency subsequently pursues policies inconsistent with the enacting Congress's expectations. Broader delegations reduce the risk of legislative drift by insulating the agency from subsequent changes in congressional preferences, but at the same time, increase the risk of bureaucratic drift. Congress can mitigate the risk of bureaucratic drift through monitoring and oversight. Doing so, however, is costly and difficult, especially with respect to those complex and rapidly changing areas of regulation where delegation is considered most appropriate. Thus, where delegations are not carefully constrained and specified at the outset, the risk of bureaucratic drift is most acute.

Legislative and bureaucratic drift are thus mirror images.\textsuperscript{150} David Epstein and Sharyn O'Halloran explain:

In order to check runaway bureaucracies, legislatures must structure agency decision-making to be responsive to congressional demands.

However, this ensures that future Congresses will be able to influence

\textsuperscript{147} Id. at 708.
\textsuperscript{148} See Epstein & O'Halloran, supra note 86, at 207–11.
\textsuperscript{149} See supra chapter 2.
\textsuperscript{150} Kenneth A. Sheple, Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey, 8 J.L. Econ. & Org 111 (1992).
policy outcomes, thereby exacerbat[ing the consequences of coalition- drif[. Thus, ex ante decisions about bureaucratic structur[ are intimately linked with issues of ongoing oversight.\textsuperscript{151}

There is a sharp difference between the two sets of monitoring tools. Tight ex ante controls can be reversed only by subsequent legislation, an expensive and time-consuming process. As a result, such controls risk becoming entrenched. Conversely, broader delegation with intensive ex post oversight requires discretion on the part of contemporary members of Congress, which might produce policy that departs from that preferred by the enacting legislature.\textsuperscript{152}

B. POSITIVE THEORIES OF DELEGATION

Epstein and O’Halloran conclude that these tradeoffs describe many observed patterns of delegation. They find that “Congress delegates less and constrains more under divided government” (when Congress and the Presidency are controlled by different parties) and thus when the risk of bureaucratic drift is high.\textsuperscript{153} Congress also tends to delegate less discretion when legislation is passed over a presidential veto or in the face of a presidential veto threat because the veto threat signals presidential hostility to the act and a high risk that the executive branch will use its discretion in a manner im[ical to the enacting Congress’s wishes. Finally, divided government also affects the structure of delegation. Under divided government Congress is less likely to delegate to executive branch departments and is more likely to delegate to independent agencies or even state governments. Thus, Epstein and O’Halloran conclude that Congress’s decision to delegate is not explained primarily by a desire to rely on agency technical expertise or constraints on Congress’s time. Instead, it is strategic: Congress is aware that agencies make political decisions and, therefore, Congress’s willingness to delegate depends on the degree of policy agreement between Congress and the President.

Congress might sometimes be forced to delegate more discretionary authority than it would prefer as the price for implementing a policy that it seeks to pursue but that the President at least initially disfavors. Epstein and O’Halloran claim that agriculture subsidies illustrate the idea.\textsuperscript{154} Farm subsidies as they exist today are widely viewed as a distributional “pork barrel” program that confers significant financial benefits upon farmers with little if any apparent public benefits. Congress often supports distributive programs that allow members to claim credit with their constituencies for conferring the legislative benefits while imposing dispersed costs that incur relatively minor political opposition. Farm subsidies require minimal expertise or discretion by the President and thus would seem to require little discretionary delegation. According to

\textsuperscript{151} Epstein & O’Halloran, supra note 144, at 712 (emphasis added).
\textsuperscript{152} Id. at 713.
\textsuperscript{153} See Epstein & O’Halloran, supra note 86, at 11, 121–62.
\textsuperscript{154} Id. at 220–21.
Epstein and O’Hallaron, however, the President has an unexpectedly high amount of discretion over the program’s implementation, which the authors explain as the President’s price for acquiescing in the congressional bargain. They contend that the President, who is elected by the nation as a whole, will be reluctant to endorse pork barrel projects that favor narrow regional interests, and thus will be reluctant to go along with the deal. The authors conclude, “The untold story of agricultural policy, then, is that it relies heavily on executive discretion for implementation, this authority being supplied as a bribe for presidential support of agricultural programs.”

Aranson, Gelhorn, and Robinson (“AGR”) challenge the conclusion that the President will be hostile to pork barrel legislation because the private goods nature of electoral processes applies with equal force to the President as to members of Congress. If it is true that the President has a high degree of discretion in implementing the farm subsidy program, how might AGR explain this fact? Can you explain why Presidents tend to be more supportive of free trade policies than Congress? McCubbins, Noll, and Weingast (“McNollGast”) argue that “because of the importance, visibility, historical significance and clear accountability of the office, the President’s personal reputation hinges much more on the broad performance of the government than is the case for legislators.” Does that help to explain this phenomenon? Does it seem correct in general? Why or why not?

Would a legislature specifically concerned about agency capture be more likely to prefer ex ante or ex post controls on agency decision-making? Terry Moe has argued, for instance, that in setting up the EPA, Congress spelled out voluminous and detailed ex ante procedural regulations that create a complicated and lengthy procedure for regulatory approval. The EPA gave environmental interest groups a substantial voice in the regulatory process through a variety of mechanisms for public participation. Complex regulatory procedures enable Congress to achieve substantive goals indirectly while also affording favored interest groups a de facto veto over adverse agency action. Can you explain why Congress might facilitate this result? Is it relevant that EPA was created in the early–1970s, at the time that policy makers were highly concerned with the risk of industry capture of the regulatory process? To what extent is this system dependent on the assumption that there are minimal agency costs between environmental interest groups and the public?

155. Id. at 221.
C. CONGRESSIONAL RESPONSES TO AGENCY DRIFT

In theory, Congress can rectify any agency deviation from its preferences with ex post oversight. McNelligast have argued, however, that reliance on ex post monitoring might not allow Congress to fully rectify bureaucratic drift because Congress frequently will be unable to "reproduce the policy outcome that was sought by the [original] winning coalition. . . ."\textsuperscript{160} As a result of congressional turnover, some members of the initially successful legislative coalition might no longer be in Congress, and the new members who replaced them might hold different preferences, leading to a shift in the preferences of the median member of Congress. The agency's regulatory policy might have mobilized a previously unorganized or dormant constituency that prefers the agency's selected policy. Some members of the original coalition might have changed their views to favor the new regulatory policy and thus oppose efforts to rein in the agency. As a result of congressional bargaining processes, including veto gates or negative legislative checkpoints (as described in Chapter 2), a successful exercise of blocking power by a member of Congress or a presidential veto is sufficient to protect agency policy against congressional override. Does this explain the popularity of the so-called "one-House veto"? Does it call into question the soundness of the Supreme Court decision invalidating this practice in \textit{INS v. Chadha}?\textsuperscript{161} Why or why not?

Consider McNelligast's analysis in the context of \textit{Mississippi Poultry Ass'n, Inc. v. Madigan}, presented in Chapter 5.\textsuperscript{162} Recall that the United States Department of Agriculture ("USDA") promulgated regulations governing poultry inspections that defined the legislative term "the same as" to mean "at least equal to." The initial statute was adopted with strong support, and some members of Congress criticized the USDA's regulatory interpretation when it was adopted on the ground that it deviated from the original intent of the statute. Despite this, no legislation was passed to overrule the agency interpretation. The USDA adopted Congress's apparent preferred meaning only when ordered to do so by the United States Court of Appeals for the Fifth Circuit. Does this case support McNelligast's intuition that it is more difficult for Congress to police departures from intended policy positions \textit{ex post} than to constrain agency discretion \textit{ex ante}? Why or why not?

Given the difficulty of attempting to reverse an agency action, McNelligast argue that one purpose of administrative procedures may be to "erect a barrier against an agency carrying out such a \textit{fait accompli} by forcing the agency to move slowly and publicly, giving politicians (i-}


\textsuperscript{161} 462 U.S. 919 (1983). For a more detailed presentation of Chadha and the one-house veto, see infra chapter 8. For a related analysis of how the one-house veto allows Congress to move the scope of delegation closer to its ideal point rather than that of the President, as compared with the post-Chadha regime, see William N. Eskridge, Jr., & John Ferejohn, \textit{The Article I, Section 7 Game}, 80 Geo. L.J. 523 (1992).

\textsuperscript{162} See supra chapter 5.
formed by their constituents) time to act before the status quo is changed. Administrative rulemaking requires cumbersome, but public and deliberative, processes. Before an agency can enact a new policy, it must first announce that it is considering a new rule and solicit the views of interested parties. This often takes the form of notice and comment rule-making, which requires the agency to publicize the proposed rule and solicit comments. In some cases, the agency must also hold public hearings. Finally, the agency must produce a record setting forth the reasons for its decision and explaining why it rejected alternative proposals. Often, legislation expressly mandates consultation with designated stakeholders elsewhere in the government, or with affected private interests, thereby entrenching interests that were part of the initial legislative coalition. The authors explain:

These procedures allow politicians to prevent deviations before they occur. The members of the coalition enacting the policy can adopt a blanket agreement to inhibit all possible deviations while the nature of the deviation is still in doubt and the coalition has not yet formed that might support the deviation. Delay gives the old coalition time to mobilize its constituents before the agency undermines it by enunciating a noncomplying policy that changes the status quo. Much bureaucratic delay is ascribed to the pursuit of other objectives, for example due process concerns, or to bureaucratic incentives or agency costs. McNollgast argue, however, that this delay and inefficiency might be intentional in order to slow the pace of agency action and thereby provide Congress and interest groups with the time and means to prevent departures from preferred policy outcomes before they occur.

Finally, Jonathan Macey has argued that through the use of agency structure, an enacting Congress can simultaneously address the problems of both agency and legislative drift. Macey argues that Congress can achieve this result by intentionally structuring agency jurisdiction and operations in a manner that increases the likelihood that it will be captured by identifiable special-interest groups. If a group that is favorably inclined toward the agency’s mission is essentially hard-wired into the agency’s architecture, then this will help to keep the agency focused on its mission.

Macey argues that the most effective vehicle for synchronizing agency mission with interest group monitoring is defining that mission narrowly, for example giving it jurisdiction over one identifiable industry, as is the case with the Securities Exchange Commission (“SEC”), Commodities Futures Trading Commission (“CFTC”), and Office of the Comptroller of the Currency (“The Comptroller”), rather than defining the agency’s scope by function, as is the case with the FTC. Macey explains:

163. McCubbins, Noll & Weingast, supra note 160, at 442 (emphasis added).
164. Id. (footnote omitted).
The ability to structure an administrative agency as a single-interest or a multi-interest organization enables Congress to exert greater ex ante control over the outcomes generated by the agency. Congress accomplishes this by controlling the ability of outside interest groups to exert political pressure on the agency, and by reducing the incentive of new interest groups to form to protest the agency’s actions.

In general, then, where a single interest group dominates the original decision-making process in Congress that leads to a particular legislative enactment, the resulting administrative agency will be a single-interest-group agency. Where the original decision-making process in Congress involves a compromise among a large number of interest groups, the resulting administrative agency will provide access to all of these groups. This is an as-yet-unrecognized manifestation of the well-known congressional tendency to create regulatory structures that “mirror” the political environment existing at the time of the initial statutory enactment.\textsuperscript{166}

Macey further explains:

The initial jurisdictional design of an agency will determine which interest groups will have ready access to the agency, and on what terms. In this way, the enacting legislators can, to a large degree, determine in advance the extent to which, and the terms on which, the agency will be “captured” by the groups it regulates. The enacting coalition therefore can minimize the amount of bureaucratic drift and legislative drift likely to occur.\textsuperscript{167}

Macey identifies several tools that the legislature has at its disposal when setting up an agency. First is the initial hardwiring of the agency to determine its degree of responsiveness to different interest groups. Macey offers as an example the establishment of a central bank. In general, there is an inverse correlation between the independence of a central bank from political pressure and the inflation rate: More independent central banks tend to have lower inflation rates. Macey notes that this has significant implications for the expected degree of influence debtors are likely to exert over monetary policy. Macey argues that if creditor interest groups have higher influence relative to debtor interest groups at the bank’s inception, then the bank will likely be more independent in its structure, and conversely, if debtor interest groups are more influential, then the bank will likely be less independent. The influence of interest groups through this initial agency hardwiring can then be reinforced, as desired, through agency procedural rules that may either enfranchise or disenfranchise interest groups to influence agency decision-making.

Macey argues that more specialized agencies are prone to interest group capture. An agency whose scope is defined by the industry it regulates, rather than the functions it performs, will be relatively more likely to be staffed by experts drawn from that industry. Thus, the

\textsuperscript{166} Id. at 99–100.

\textsuperscript{167} Id. at 100.
Comptroller is likely to be staffed by employees either drawn from, or by those who anticipate seeking post-governmental employment in, the banking industry. Such persons are likely to hold particular biases about the importance of the national banking industry and to draw on industry professionals and trade publications for information about the industry. Conversely, defining the agency's jurisdiction to regulate a number of competing industries will predictably reduce the likelihood that the agency will be dominated by the representatives of a single industry.

A final factor affecting Congress's choice of agency scope is the effect on inter-agency competition. Macey argues that affected industry under single industry agencies tend to become partisans for that agency, such that the interest group will support that agency in intra-governmental battles. Macey illustrates the point with the conflict among the SEC, the CFTC, and the Comptroller over the question of whether futures contracts for the delivery of securities should be treated as futures (subject to CFTC oversight) or securities contracts (subject to SEC oversight) for regulatory purposes. As might be expected, securities dealers argued that they were securities contracts and advocated for SEC regulation, while those interests regulated by the CFTC (such as the Chicago Board of Trade) argued for that agency's jurisdiction. Congress could have avoided these conflicts by combining regulatory authority over options, futures, and securities into a single agency, but elected otherwise. Macey thus suggests that by structuring an agency with a single-industry jurisdiction, Congress can simultaneously reduce agency and legislative drift. This in turn increases the expected durability of the legislation and thus the present value of the rents that the legislation is expected to produce. On the other hand, hardwiring the agency in this manner reduces agency discretion, with the attendant costs of reducing agency flexibility and subsequent opportunities for rent-extraction from regulated industries.

A related question is the initial decision by Congress whether to establish an agency's responsibilities according to "function-specific" regulation or "industry-specific" regulation. Function-specific regulation is defined with reference to the regulatory body's scope and function rather than a particular industry. Thus, the authority of agencies such as the EPA, the Occupational Safety and Health Administration ("OSHA"), Equal Employment Opportunity Commission ("EEOC"), and the FTC is defined by function and thus cuts across industry boundaries. Agencies that engage in industry-specific regulation define their jurisdiction by the industries they regulate, as illustrated by the SEC, CFTC, FCC, or the Comptroller.

Function-based versus industry-based regulation presents important tradeoffs. An industry-specific agency might have more expertise regarding the particular structure and idiosyncrasies of the industry but might also have a greater propensity to be captured by that industry, whereas the general jurisdiction agency might have a greater expertise in the

168. The Seventh Circuit finally held that the CFTC had exclusive jurisdiction over trading in investment vehicles that could be characterized both as securities and investment contracts. Chicago Mercantile Exch. v. SEC, 863 F.2d 537 (7th Cir. 1989).
application of the principles and policies it implements generally but less
detailed knowledge of specific industries. Consider the formation of
competition policy. Under federal law, there are a variety of agencies that
regulate mergers for compliance with antitrust laws. The FTC and the
Antitrust Division of the Department of Justice hold concurrent jurisdic-
tion over mergers. And this jurisdiction is also shared with many other
agencies on an industry-specific basis. For instance, the FCC reviews
mergers in the telecommunications industry, the Department of Transpor-
tation ("DOT") reviews mergers in the airline industry, and the Federal
Reserve Board reviews mergers in the banking industry. The FTC and
Antitrust Division might have more expertise in the application of anti-
trust law and policy, and the industry-based regulator might know more
about the particular industry but also might be more prone to industry
capture. From a public interest perspective, what factors would be rele-
vant in determining whether to regulate a given industry through a
specific sector-based agency or through a multi-industry, function-based
agency? Consider whether the same questions of capture apply to the
decision of whether to establish specialized courts to hear certain types of
cases, such as the Federal Circuit (to hear patent appeals) or Bankruptcy
Courts, versus having those cases heard by courts of general jurisdic-
tion.

V. JUDICIAL REVIEW OF AGENCY ACTION

The analysis of regulation has gone through three basic phases over
the past century: (1) the "public interest era" of the post-New Deal
period, (2) the "capture era" of the 1960s and 1970s, and (3) the modern
"public choice era" since the 1980s. What implication have these intel-
lectual changes had for law?

A. INFLUENCE OF REGULATORY
THEORIES ON COURTS

Thomas Merrill has argued that the intellectual development of these
three theories of governmental regulation helps to explain the evolution of
legal doctrine concerning judicial oversight of agencies during the twenti-
eth century. Even if judges did not consciously apply these theories in
their decision-making, Merrill suggests, judicial doctrines implicitly reflect the prominence of these underlying theories in different historical periods.

Merrill argues that at the dawn of the administrative state during the New Deal, courts were imbued with the ethic of the public interest model of government. As a result, they tended to exhibit substantial deference to agency decision-making and congressional delegation, based upon the Progressive Era presumption that regulatory policy should be made by disinterested experts. This mindset is reflected in the Legal Process School, described in Chapter 5.172 As a matter of judicial doctrine, this school stressed the need for transparency and procedural regularity in agency decision-making and exhibited great deference to resulting regulatory policies. Although Hart and Sacks did not imagine that regulatory experts were immune to special interest pressures, they encouraged judicial constructions that brought out the public interest elements of enacted regulatory policies. Otherwise, they favored a minimal role for judicial oversight of agency decision-making that emphasized the centrality of policy making by regulators and deference by judges.

Beginning in the 1960s, however, judges and scholars increasingly realized that regulatory results in practice often diverged from public interest objectives. This development led to a questioning of public interest theory and a shift toward capture theory. The capture critique of the administrative state corresponded with the consumer protection movement led by Ralph Nader, who bemoaned the capture of regulatory agencies by the business interests that they were established to regulate. Merrill argues that many of the judges of the D.C. Circuit during the 1960s and 1970s, who were themselves veterans of the New Deal and sympathetic to Nader’s goals, were distressed by the apparent evolution of regulation away from New Deal and Progressive goals. Some of these judges, including perhaps most notably J. Skelly Wright, came to implicitly embrace capture theory. A natural consequence of this reconceived understanding of agency dynamics, Merrill claims, was heightened judicial oversight of agency processes to try to prevent interest group capture of regulation. Judges influenced by capture theory, however, tended not to abandon their earlier intuitions informed by public interest theory as to the proper ends of government; instead, they were increasingly vigilant in ensuring that bureaucrats were not distracted from their regulatory missions by what they regarded as excessive interest group influence.

Merrill describes the intellectual transition from public interest to capture theory as follows:

Notice that capture theory ... also contains a theory of comparative institutional advantage. Implicit in capture theory is the understanding that the central problem of the administrative state is a relatively limited one. Only administrative agencies are subject to the unique pathologies of bureaucracy such as interest group capture. Rival institutions, like the legislature and the courts, were implicitly

172. See supra chapter 5.
regarded as being immune from these pathologies or at least as suffering from them to a significantly diminished degree. Moreover, in terms of interest group influence, the problematic actor was seen to be the business lobby. Other groups, such as labor unions or advocates for civil rights or the environment, were tacitly assumed to be champions of the public interest.

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

More importantly for present purposes, capture theory also suggests that aggressive judicial oversight and control of agencies is needed in order to counteract the distortions of the administrative process introduced by interest group capture and other pathologies. Specifically, by forcing agencies to adopt an administrative process that is more open and to give greater consideration to underrepresented viewpoints in that process, courts may be able to counteract the distortions emphasized by the theory.173

Merrill argues that the mid-1980s began the “public choice” era. During this time (which presumably continues today), there was a retreat from the capture theory-inspired position that had prompted robust judicial review of agency action. Merrill posits that the economic theory of regulation differs from capture theory in two significant ways. First, capture theory is narrowly focused on the dysfunctions of administrative agencies alone, whereas the economic theory of regulation applies its tools to governmental action generally, including the actions of legislatures and courts. Thus, capture theory accepts the public interest premises on which Congress establishes regulatory agencies in the first instance, but seeks to avoid what it regards as excessive interest group influence affecting the ends of agency regulation. Public choice theory, in contrast, questions the motivating goals of regulation, focusing on forms of regulation that ultimately benefit the very industries that agencies are called upon to regulate. Second, capture theory is concerned with the undue influence of one particular group—producers—whereas public choice considers the influence of all organized groups, “including not just business and producer groups, but also environmental groups, labor unions, civil rights groups, and rent control activists . . . .”174

173. Merrill, supra note 171, at 1051–52 (footnotes omitted).
174. Id. at 1069.
Merrill asserts that the interest group theory of regulation has motivated a judicial retrenchment from the activist agency oversight that typified the capture era. This followed from judicial and academic commentary expressing skepticism of all organs of government, including the judiciary. This retrenchment was not marked, however, by a return to the earlier era of deference to legislatures and bureaucrats that characterized those influenced by the public interest model. Merrill explains:

The decline of judicial assertiveness in the recent period, and the partial return of authority and autonomy to agencies ... cannot be considered in any sense a revival of the public interest conception of the administrative state, or a rehabilitation of administrative agencies as institutions in the eyes of the judiciary. Rather, it is a product of a deeper and more generalized pessimism about the administrative state, and in particular, of a spreading disenchantment with all forms of activist government. I ... refer to this shift in attitudes as a movement toward a “public choice” conception of the administrative state, although I hasten to add that I do not mean to imply that (most) judges have either studied or become practitioners of formal public choice theory.... I simply mean a conception that is skeptical about the capacity of any governmental institution to serve the public interest, primarily because all governmental institutions—agencies, legislatures, the White House, and even the courts—are subject to manipulation by organized groups, and hence cannot be regarded as dispassionate guardians of the public interest.\textsuperscript{175}

"In effect," Merrill concludes, "capture theory's pessimism about the performance of administrative agencies has been generalized to include all political institutions."\textsuperscript{176} Merrill further concludes that just as the pessimism of the "capture era" brought about recommendations to relocate some decision-making authority from agencies to courts, the "public choice era" brought about support for a more general reallocation of authority from government to private market actors and institutions.

If public choice identifies difficulties in the decision-making processes of agencies, Congress, and courts, might the theory counsel in favor of clear rules concerning which institution holds primary lawmaking responsibility? Does the Chevron doctrine, for example, improve political accountability by designating the agency as the central focus of administrative law making within its scope or does it reduce accountability by permitting Congress to shift responsibility for controversial decisions? Merrill maintains that if there is no basis for preferring one institution over another, then there is also no justification for reviving the nondelegation doctrine, which would shift decision-making authority from one flawed decision-maker (agencies) to another (legislatures). Do you agree with this conclusion? Why or why not?

\textsuperscript{175} Id. at 1044.

\textsuperscript{176} Id. at 1053.
Are Merrill’s intuitions about the extent to which public choice calls into question the institutional competence of each governmental institution persuasive? Does social choice provide a means of comparing institutions that avoids the claim that all institutions are inherently or equivalently defective?\textsuperscript{177} Are actors within institutions as likely to be aware of the limitations of their own institutional capabilities as they are of others? As a descriptive claim about judicial perceptions of institutional competence, whose analysis is more persuasive? Given that courts are not steeped in public choice, as Merrill concedes, is there reason to believe that courts might regard themselves as above the sort of interest group influences that some public choice theorists claim characterize agencies and Congress? Why or why not? If you conclude that they would, what alternative explanations might account for the reticence of courts in the public choice period to continue to ensure stringent rulemaking processes? Might judges be concerned that intervening to police rent-seeking activity might motivate interest groups to direct their efforts toward courts after having failed in the legislative process?

B. COURTS AND ADMINISTRATIVE RULEMAKING

Courts are also important players in the production of regulation as they interact with Congress and the executive branch. Thus, judicial attitudes toward regulation have a major impact on the formation of regulatory policy. Professor Richard Revesz has examined the role of judicial ideology in the judicial review of administrative decision-making. Analyzing rulings of the United States Court of Appeals for the District of Columbia Circuit on the validity of regulations issued by the EPA, Revesz concludes that judges’ ideology significantly influence that court’s decision-making on administrative law issues.\textsuperscript{178} Revesz finds that during periods in which Republican-appointed judges controlled that court, it was more likely to reverse an EPA rule when the challenger represented industrial interests and that when Democratic-appointed judges controlled the court, it was more likely to reverse when the challenger represented environmental interests. Revesz finds no evidence of a consistent pattern of deference to the EPA by judges of either party, as he claims would be the case if judicial behavior were motivated by a general theory concerning the relationships among the branches of government. If, for example, Republican judges were generally more deferential to the executive branch, then it should not matter who the challenging party is. Instead, for judges of either party, Revesz concludes that deference turns on the identity of the challenging party.

Revesz also finds ideological voting to be more prevalent in cases raising procedural rather than substantive challenges. Judges can impose

\textsuperscript{177} See generally chapter 3. For an article that addresses this question, see Maxwell L. Stearns, The Misguided Renaissance of Social Choice, 103 YALE L.J. 1219 (1994).

their ideological views through either substantive interpretation of enabling acts or by the degree of deference courts afford agencies on procedural grounds. By basing deference on procedural rules, courts can affect administrative outcomes without having to take responsibility for substantive rulings. Revez further hypothesizes that judges will prefer such procedural rulings to substantive rulings as the former are less apt to be reviewed by the United States Supreme Court. Revez argues that the use of procedural gambits to resolve controversial cases supports the intuition that judges not only are voting based upon ideological considerations but also voting in a strategic manner, disguising their decisions in a manner that reduces the effectiveness of further review.

Revez finds that individual judges are more likely to vote ideologically when there are other like-minded judges on the panel. For instance, in the cases that Revez reviewed, a Republican judge was much more likely to reverse in a case involving an industry challenge to an EPA regulation when there was at least one other Republican on the panel, and a Democratic judge was significantly less likely to reverse in such a case when there was at least one other Democrat on the panel. A Democrat sitting with two Republican judges tends to vote more conservatively than a Republican sitting with two Democrats. From this evidence, Revez concludes that while both individual ideology and panel composition have important effects on judicial behavior, the ideology of colleagues proves more significant than personal ideology in predicting actual voting patterns.

Revez concludes that because judges appear to take the likelihood of Supreme Court reversal into account before deciding whether to allow ideology to affect voting behavior, his findings support the hypothesis that "D.C. Circuit judges employ a strategically ideological approach to judging, versus either a nonideological or a naively ideological approach." Revez concludes that the different behavior exhibited in procedural versus nonprocedural cases indicates that D.C. Circuit judges "regard the Supreme Court as the primary reviewer of their decisions, rather than Congress." In a subsequent article, Professors Frank Cross and Emerson Tiller found further support for the claim that D.C. Circuit judges vote ideologically in cases reviewing administrative agency decisions. They conclude that the willingness of judges on the D.C. Circuit to grant deference to administrative agencies depends to a significant extent on whether the agency action is consistent with the ideological preferences of the reviewing judge. But the authors also find that judges on panels with judges all appointed by Presidents of the same party are twice as likely to vote ideologically as are judges on divided panels, meaning panels in which

179. Id. at 1766-67.

180. Id. at 1768. Supreme Court review of circuit court decisions is rare, however, suggesting that the constraining effect of even this review is attenuated.

judges are appointed by Presidents of different parties. The authors label this the "whistleblower" phenomenon, meaning that the presence of a potential dissenting judge on a panel who will signal that other panelists are following their ideological preferences rather than the law inhibits ideological behavior.

Recent research has confirmed the basic empirical findings of these studies. In *Are Judges Political? An Empirical Analysis of the Federal Judiciary*, 182 Cass R. Sunstein, David Schkade, Lisa M. Ellman and Andres Sawicki ("SSES") examine judicial decisions across a number of subject areas and confirm the basic findings that for most areas of law (including administrative law) judicial ideological preferences influence outcomes. SSES find that judges also are influenced by the ideological preferences of other judges on their panel, in some cases even more so than by their personal preferences. When three judges of the same party sit together, for example, they tend to vote more ideologically, a phenomenon that SSES refer to as "ideological amplification." 183 Where a judge of one party sits with two judges of another party, the minority judge tends to vote more like the majority judges. The authors label this effect "ideological dampening." 184 In addition, SSES find that judges are more likely to uphold the agency interpretations of administrations headed by members of the same political party as the President who appointed the judge to the bench (i.e., judges appointed by Republican Presidents are more likely to uphold agency interpretations by Republican administrations, and Democratic-appointed judges are more likely to uphold agency interpretations by Democratic administrations).

In a spirited response to the articles by Revesz and Cross and Tiller (and anticipating the later findings by SSES), then-Chief Judge Harry T. Edwards of the D.C. Circuit challenged the conclusions that the findings demonstrated strategic and ideologically-based judging. 185 Edwards argued that the claimed "panel composition effects" might reflect deliberative judicial processes rather than ideologically motivated decision-making. Edwards writes:

My own view is that if panel composition turns out to have a "moderating" effect on judges' voting behavior, this is a sign that panel members are behaving collegially: that is, they are discussing the case with each other and reaching a mutually acceptable judgment based on their shared sense of the proper outcome. In such a collegial deliberative process, we would expect to find that the presumed political views of different judges push the outcome towards the center of the spectrum (where there is a spectrum). The Revesz and

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183. Id. at 9.
184. Id. at 8-9.
the Cross and Tiller studies are both consistent with the phenomenon of collegiality.

In explaining my view of collegiality I start with three observations drawn from many years of working and talking with my colleagues on the D.C. Circuit. First, judges on my court who are convinced that the law requires a certain result in a case do not decline to take a position simply to avoid registering a dissent. Second, judges who are in the majority and convinced that the law requires a certain result do not moderate their views because they fear that a dissent will somehow draw attention to flaws in the majority opinion. Finally, the judges on a panel usually agree on the correct result in a case. And when there is initially no clear view as to what the judgment should be in a particular case, we normally work hard in our deliberations to find the correct result.186

Are you more persuaded by the explanation that judges vote strategically and ideologically or by Judge Edwards's response that the statistical findings demonstrate collegiality and compromise? Is there any empirical test that might distinguish Judge Edwards's theory of collegiality on one hand and the ideological and strategic-voting theories offered by Revesz and Cross and Tiller on the other?

VI. APPLICATIONS

A. DEFERENCE TO AGENCY DECISION-MAKING

Perhaps the most crucial and contested issue that arises with respect to agency decision-making is the degree of deference owed by courts to agency interpretations of enabling statutes. Two approaches have been offered: the "Chevron standard" and the "Skidmore standard." As you read the following two cases, consider the extent to which public choice theory provides support for one standard over the other and the extent to which public choice insights inform, or should inform, the Supreme Court's decision.

Chevron U.S.A. Inc. v. Natural Resources Defense Council187

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. is one of the most important Supreme Court cases of recent decades. Chevron arose in response to new regulations established by the EPA interpreting the Clean Air Act. The specific issue in Chevron was review of the decision by the EPA to amend its earlier regulatory definition of a "stationary source" of air pollution, which had defined each individual source of pollution in a plant (e.g., each smokestack) as a "stationary source," to instead allow a state to treat the entire plant as a "stationary source." The new regulation produced a figurative "bubble" over the entire plant.

186. Id. at 1358–59 (footnote omitted).
As a result, an existing plant that contained several pollution-emitting devices could install or modify one piece of equipment without meeting the permit conditions if the alteration would not increase the total emissions from the plant. The Court held that the change in the definition was permissible. Justice Stevens, writing for a unanimous Supreme Court, wrote:

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

“The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.188

After concluding that the regulation was not inconsistent with the statutory language or legislative history of the Clean Air Act, the Court also specifically noted that it would not second guess the policy conclusions of the EPA:

The arguments over policy that are advanced in the parties’ briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the “bubble concept,” but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.

In these cases, the Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex,

188. Id. at 842–44 (citation and footnotes omitted).
the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Judges are no: experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth.189

United States v. Mead Corp.190

In United States v. Mead Corp., the Supreme Court was confronted with the question of the scope of Chevron. The issue in Mead was whether a tariff classification ruling by the United States Customs Service should be afforded Chevron deference. Justice Souter, writing for the Mead majority, concluded that under the facts as presented in Mead, Chevron

189. Id. at 864-66 (citation and footnotes omitted).
deference would not apply. Instead, the Court applied the doctrine of *Skidmore v. Swift & Co.* that "the ruling is eligible to claim respect according to its persuasiveness." The Court drew the distinction as follows:

We granted certiorari in order to consider the limits of *Chevron* deference owed to administrative practice in applying a statute. We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent. The Customs ruling at issue here fails to qualify, although the possibility that it deserves some deference under *Skidmore* leads us to vacate and remand.

When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute. But whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. ""[T]he well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," and "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer...." The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertise, and to the persuasiveness of the agency's position. The approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other. Justice Jackson summed things up in *Skidmore v. Swift & Co.*:

"The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with

192. *Mead*, 533 U.S. at 221.
earlier and later pronouncements, and all those factors which
give it power to persuade, if lacking power to control.”

The Court concluded:

Underlying the position we take here, like the position expressed by
Justice Scalia in dissent, is a choice about the best way to deal with an
inescapable feature of the body of congressional legislation authoriz-
ing administrative action. That feature is the great variety of ways in
which the laws invest the Government’s administrative arms with
discretion, and with procedures for exercising it, in giving meaning to
Acts of Congress. Implementation of a statute may occur in formal
adjudication or the choice to defend against judicial challenge; it may
occur in a central board or office or in dozens of enforcement agencies
dotted across the country; its institutional lawmaking may be con-

fined to the resolution of minute detail or extend to legislative
rulemaking on matters intentionally left by Congress to be worked
out at the agency level.

Although we all accept the position that the Judiciary should
defer to at least some of this multifarious administrative action, we
have to decide how to take account of the great range of its variety. If
the primary objective is to simplify the judicial process of giving or
withholding deference, then the diversity of statutes authorizing
discretionary administrative action must be declared irrelevant or
minimized. If, on the other hand, it is simply implausible that
Congress intended such a broad range of statutory authority to
produce only two varieties of administrative action, demanding either
Chevron deference or none at all, then the breadth of the spectrum of
possible agency action must be taken into account. Justice Scalia’s
first priority over the years has been to limit and simplify. The
Court’s choice has been to tailor deference to variety. This acceptance
of the range of statutory variation has led the Court to recognize more
than one variety of judicial deference, just as the Court has recognized
a variety of indicators that Congress would expect Chevron defer-
ence.

Writing in dissent, Justice Scalia argued that Skidmore deference to
agency action was, among other things, inconsistent with the purposes of
permitting delegation in the first place, namely to allow Congress to rely
on agency expertise in crafting regulations. Moreover, by treating different
types of agency actions differently, the Court’s rule provides administra-
tive agencies with incentives to try to strategically manipulate their
rulemaking procedures so as to fit their rules into the preferred category.
He wrote:

Another practical effect of today’s opinion will be an artificially
induced increase in informal rulemaking. Buy stock in the GPO. Since
informal rulemaking and formal adjudication are the only more-or-

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193. Id. at 226-28 (citations and footnotes omitted).
194. Id. at 235-37 (footnotes omitted).
less safe harbors from the storm that the Court has unleashed; and since formal adjudication is not an option but must be mandated by statute or constitutional command; informal rulemaking—which the Court was once careful to make voluntary unless required by statute—will now become a virtual necessity. As I have described, the Court's safe harbor requires not merely that the agency have been given rulemaking authority, but also that the agency have employed rulemaking as the means of resolving the statutory ambiguity. (It is hard to understand why that should be so. Surely the mere conferral of rulemaking authority demonstrates—if one accepts the Court's logic—a congressional intent to allow the agency to resolve ambiguities. And given that intent, what difference does it make that the agency chooses instead to use another perfectly permissible means for that purpose?) Moreover, the majority's approach will have a perverse effect on the rules that do emerge, given the principle (which the Court leaves untouched today) that judges must defer to reasonable agency interpretations of their own regulations. Agencies will now have high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect.

Worst of all, the majority's approach will lead to the ossification of large portions of our statutory law. Where Chevron applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion. As Chevron itself held, the Environmental Protection Agency can interpret "stationary source" to mean a single smokestack, can later replace that interpretation with the "bubble concept" embracing an entire plant, and if that proves undesirable can return again to the original interpretation. For the indeterminately large number of statutes taken out of Chevron by today's decision, however, ambiguity (and hence flexibility) will cease with the first judicial resolution. Skidmore deference gives the agency's current position some vague and uncertain amount of respect, but it does not, like Chevron, leave the matter within the control of the Executive Branch for the future. Once the court has spoken, it becomes unlawful for the agency to take a contradictory position; the statute now says what the court has prescribed. It will be bad enough when this ossification occurs as a result of judicial determination (under today's new principles) that there is no affirmative indication of congressional intent to "delegate"; but it will be positively bizarre when it occurs simply because of an agency's failure to act by rulemaking (rather than informal adjudication) before the issue is presented to the courts.

One might respond that such ossification would not result if the agency were simply to readopt its interpretation, after a court reviewing it under Skidmore had rejected it, by repromulgating it through one of the Chevron-eligible procedural formats approved by the Court.
today. Approving this procedure would be a landmark abdication of judicial power. It is worlds apart from *Chevron* proper, where the court does not purport to give the statute a judicial interpretation—except in identifying the scope of the statutory ambiguity, as to which the court’s judgment is final and irreversible. (Under *Chevron* proper, when the agency’s authoritative interpretation comes within the scope of that ambiguity—and the court therefore approves it—the agency will not be “overruling” the court’s decision when it later decides that a different interpretation (still within the scope of the ambiguity) is preferable.) By contrast, under this view, the reviewing court will not be holding the agency’s authoritative interpretation within the scope of the ambiguity; but will be holding that the agency has not used the “delegation-conferring” procedures, and that the court must therefore interpret the statute on its own—but subject to reversal if and when the agency uses the proper procedures.

... I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency—or have allowed a lower court to render an interpretation of a statute subject to correction by an agency.... There is, in short, no way to avoid the ossification of federal law that today’s opinion sets in motion. What a court says is the law after according *Skidmore* deference will be the law forever, beyond the power of the agency to change even through rulemaking.

And finally, the majority’s approach compounds the confusion it creates by breathing new life into the anachronism of *Skidmore*, which sets forth a sliding scale of deference owed an agency’s interpretation of a statute that is dependent “upon the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”; in this way, the appropriate measure of deference will be accorded the “body of experience and informed judgment” that such interpretations often embody. Justice Jackson’s eloquence notwithstanding, the rule of *Skidmore* deference is an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers.

It was possible to live with the indeterminacy of *Skidmore* deference in earlier times. But in an era when federal statutory law administered by federal agencies is pervasive, and when the ambiguities (intended or unintended) that those statutes contain are innumerable, totality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation. To condemn a vast body of agency action to that regime (all except rulemaking, formal (and informal?) adjudication, and whatever else might now and
then be included within today's intentionally vague formulation of affirmative congressional intent to "delegate") is irresponsible. 185

**Discussion Questions**

1. From a public choice perspective, as a general rule, which form of deference, *Chevron* or *Skidmore*, makes the most sense? Does the Court in *Chevron* assume that when Congress delegates it does so based on the traditional model of delegation, rather than the strategic models of delegation suggested by some public choice theorists? In determining the deference owed to an agency interpretation, should it matter why Congress delegates?

2. The Court writes in *Chevron* that the reasons for Congress's decision to delegate rulemaking authority are unknown: Congress might have done so to make use of EPA's expertise, Congress might have done so without considering the policy question resolved by EPA and called into question in *Chevron*, or Congress might have done so after failing to resolve offsetting interest-group pressures and so the interests "on each side decided to take their chances with the scheme devised by the agency," a sort of regulatory "lottery." 186 More importantly, the Court argues that the reason why Congress chose to delegate is irrelevant: "For judicial purposes, it matters not which of these things occurred." Do you agree with that conclusion? If you think that the reasons for the delegation should matter, do you also think that judges are capable of determining such motivations? Assuming that Courts can distinguish delegations for "good" reasons (such as reliance on agency expertise) from "bad" reasons (as a result of interest-group capture or to play the "delegation lottery") should the degree of judicial deference to agency decision-making turn on the quality of the reasons for the delegation? Why or why not? If Congress delegates in order to avoid blame for enacting controversial policies, as some public choice theorists argue, should this have any implications for the appropriate degree of deference owed to an agency? Should judges try to prevent Congress from delegating in order to avoid political accountability? If not, should judges try to articulate rules that heighten agency accountability?

3. Prior to becoming a Judge (and later Justice), Justice Scalia edited the journal *Regulation*, a public choice-influenced academic journal that studies regulation and the regulatory process, suggesting at least some formal familiarity with public choice scholarship. As this chapter discusses, before joining the judiciary, Justice Breyer also had considerable scholarly familiarity with regulation and public choice scholarship. Yet as illustrated in *Mead*—where Breyer joined the majority opinion while Scalia, writing alone, dissented—these Justices disagree on fundamental questions of judicial deference to agency decision-making. To what extent, if at all, does their disagreement arise from differences in their understanding of the regulatory process and the ability of the judiciary to improve it? Can either of their views be said to be more compatible with the insights of public choice theory? Do either of their views tend to confirm Merril's hypothesis about the influence of public choice theory on judicial doctrine?

185. Id. at 246–50 (Scalia, J., dissenting) (citations omitted).
186. For an analysis of delegation as a form of "regulatory lottery" favored by interest groups and Congress when Congress is unable to strike a political coalition, see Aranson, Gelhorn & Robinson, supra note 156.
4. Justice Scalia argues that the *Skidmore* doctrine provides agencies with an incentive to “rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect.” Scalia’s concern implicitly assumes that agencies act strategically in the manner and timing of issuance of regulations. Is this statement consistent with public interest theories of delegation? Public choice theories? If agencies do act strategically in the issuance of regulations, should that affect whether, or the degree to which, judicial deference should be granted?

5. Which of the various agency delegation theories is most consistent with *Mead*? Do you agree with Elhauge that the combined *Chevron/Mead* regime promotes enactable preferences by allowing rules to develop consistently with the best available proxy for contemporary (but not necessarily contemporaneous) congressional intent? Why or why not? Do you agree that it is an appropriate normative benchmark? Why or why not?

**B. DEFERENCE TO AGENCY SELF INTEREST**

One area in which public choice insights have influenced governmental regulation involves judicial deference to agency decision-making in contexts that implicate agency self interest, a situation that arises in various settings. For instance, some cases directly involve an agency’s financial self interest, such as the interpretation of a contract entered into between an agency and a private party or the interpretation of a statute that may affect the agency’s contractual obligations. Sometimes an agency competes with private parties in the marketplace, and again the interpretation of relevant statutes potentially affects the agency’s competitive position.

A more interesting and far-reaching situation, however, is whether *Chevron* deference is owed to an agency’s interpretation of its jurisdiction, even before reaching the substance of its regulation. As a matter of public choice theory, the analysis turns on whether agencies are thought to seek expansion or autonomy and independence. As you read the cases presented, consider which of the theories of agency incentives by Niskanen, Wilson, or others, best explains the agencies’ decisions whether to assert jurisdiction. Consider also the normative question as to whether public choice theory suggests a need for a different degree of deference depending on whether an agency is seeking to expand or to contract its regulatory jurisdiction.

We present two cases: *FDA v. Brown & Williamson Tobacco Corp.* and *Massachusetts v. EPA.*

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197. See supra chapter 5, section II.B.3.
FDA v. Browne Williamson Tobacco Corp.\textsuperscript{201}

\textit{Brown & Williamson} addressed the question of whether the FDA had the authority to regulate tobacco and, specifically, to regulate cigarettes and smokeless tobacco as "devices" that deliver nicotine to the body. The FDA asserted the authority to do so, a position that the United States Supreme Court ultimately rejected.

Under the Food and Drug Act, the FDA must ensure that any product regulated by it must be "safe" and "effective" for its intended use. Thus, the Act generally requires the FDA to prevent the marketing of any drug or device where the potential for inflicting death or physical injury is not offset by the potential therapeutic benefit. In its rulemaking proceeding, the FDA determined that "'tobacco products are unsafe,' 'dangerous,' and 'cause great pain and suffering from illness.'"\textsuperscript{203} It further found that the consumption of tobacco products presents "'extraordinary health risks,' and that 'tobacco use is the single leading cause of preventable death in the United States.'"\textsuperscript{203}

Writing for the Court in \textit{FDA v. Brown & Williamson Tobacco Corp.}, Justice O'Connor determined that given FDA's statutory mandate and its factual findings respecting cigarettes and smokeless tobacco products, if those products were classified as "devices" under the statute, the "FDA would be required to remove them from the market."\textsuperscript{204} However, she noted, Congress has made clear its intent that tobacco products not be removed from the market and, in fact, had enacted several pieces of legislation since 1965 related to the problem of tobacco and health, legislation that was predicated on the assumption that tobacco products would remain legal. Justice O'Connor wrote:

In determining whether Congress has spoken directly to the FDA's authority to regulate tobacco, we must also consider in greater detail the tobacco-specific legislation that Congress has enacted over the past 35 years. At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. "[A] specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it [has] not been expressly amended."

Congress has enacted six separate pieces of legislation since 1965 addressing the problem of tobacco use and human health....

\textsuperscript{201} 529 U.S. 120 (2000).
\textsuperscript{202} Id. at 134.
\textsuperscript{203} Id.
\textsuperscript{204} Id. at 135.
In adopting each statute, Congress has acted against the backdrop of the FDA’s consistent and repeated statements that it lacked authority under the FDCA ["Food Drug and Cosmetics Act"] to regulate tobacco absent claims of therapeutic benefit by the manufacturer. In fact, on several occasions over this period, and after the health consequences of tobacco use and nicotine’s pharmacological effects had become well known, Congress considered and rejected bills that would have granted the FDA such jurisdiction. Under these circumstances, it is evident that Congress’ tobacco-specific statutes have effectively ratified the FDA’s long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products. Congress has created a distinct regulatory scheme to address the problem of tobacco and health, and that scheme, as presently constructed, precludes any role for the FDA.\(^{205}\)

Justice O’Connor further observed that until this case, the FDA consistently and expressly disavowed jurisdiction to regulate tobacco. In fact, Congress’s actions over time made clear “Congress’ intent to preclude any administrative agency from exercising significant policymaking authority on the subject of smoking and health.”\(^{206}\) For instance, when the Federal Trade Commission at one point moved to regulate cigarette labeling and advertising, “Congress enacted a statute reserving exclusive control over both subjects to itself.”\(^{207}\) The Court notes:

Taken together, these actions by Congress over the past 35 years preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate tobacco products. We do not rely on Congress’ failure to act—its consideration and rejection of bills that would have given the FDA this authority—in reaching this conclusion. Indeed, this is not a case of simple inaction by Congress that purportedly represents its acquiescence in an agency’s position. To the contrary, Congress has enacted several statutes addressing the particular subject of tobacco and health, creating a distinct regulatory scheme for cigarettes and smokeless tobacco. In doing so, Congress has been aware of tobacco’s health hazards and its pharmacological effects. It has also enacted this legislation against the background of the FDA repeatedly and consistently asserting that it lacks jurisdiction under the FDCA to regulate tobacco products as customarily marketed. Further, Congress has persistently acted to preclude a meaningful role for any administrative agency in making policy on the subject of tobacco and health. Moreover, the substance of Congress’ regulatory scheme is, in an important respect, incompatible with FDA jurisdiction. Although the supervision of product labeling to protect consumer health is a substantial component of the FDA’s regulation of drugs and devices, the FCLAA ["Federal Cigarette Labeling and Advertising Act"] and the CSHHEA ["Comprehensive Smokeless Tobacco Health Education Act

\(^{205}\) Id. at 143–44 (citations omitted).

\(^{206}\) Id. et 149.

\(^{207}\) Id.
of 1986""] explicitly prohibit any federal agency from imposing any health-related labeling requirements on cigarettes or smokeless tobacco products.

Under these circumstances, it is clear that Congress' tobacco-specific legislation has effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco.208

In addition to criticizing the FDA for this sudden reversal of position, the Court questioned whether Congress would have delegated to the FDA the authority to regulate or even to ban tobacco. The Court concluded that it was highly implausible that Congress would have impliedly delegated such a far-reaching authority to the FDA, especially in such a cryptic manner:

Finally, our inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under Chevron to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.

This is hardly an ordinary case. Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy. In fact, the FDA contends that, were it to determine that tobacco products provide no "reasonable assurance of safety," it would have the authority to ban cigarettes and smokeless tobacco entirely. Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejecting proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

...  ...

[We] are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion. To find that the FDA has the authority to regulate tobacco products, one must not only adopt an extremely strained understanding of "safety" as it is used throughout the Act—a concept central to the FDCA's regulatory scheme—but also ignore the plain implication of Congress' subsequent tobacco-specific legisla-

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208. Id. at 155-56 (citations omitted).
tion. It is therefore clear, based on the FDCA’s overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.

By no means do we question the seriousness of the problem that the FDA has sought to address. The agency has amply demonstrated that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States. Nonetheless, no matter how “important, conspicuous, and controversial” the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And “[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.”

Massachusetts v. EPA 210

A few years later in Massachusetts v. EPA the Supreme Court revisited the question of an agency’s authority to determine its jurisdiction, but in the context of an agency’s refusal to assert jurisdiction. The case arose when Massachusetts and several other states sued the EPA, requesting that it be ordered to regulate certain “greenhouse gases,” including carbon dioxide, that were alleged to cause global climate change that harmed the party states. Section 202(a)(1) of the Clean Air Act requires that the EPA “shall by regulation prescribe ... standards applicable to the emission of any air pollutant from any class ... of new motor vehicles ... which in the EPA Administrator’s judgment causes[s], or contribute[s] to, air pollution ... reasonably ... anticipated to endanger public health or welfare.” 211 The EPA refused to regulate on the basis that it was not authorized to do so under the Clean Air Act and that even if it had such power, it was a reasonable exercise of its discretion to refuse action in light of what it viewed as the uncertainty of climate change science as well as the practical difficulties associated with various proposed regulatory solutions.

Writing for the majority of the Massachusetts Court, Justice Stevens held that EPA did have authority to regulate under the statute and that its refusal to do so was not based on specific findings about the lack of scientific evidence. The Court opened by noting the high importance of the issue:

A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related.

209. *Id.* at 159–61 (citations omitted).
For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species—the most important species—of a "greenhouse gas."

Calling global warming "the most pressing environmental challenge of our time," a group of States, local governments, and private organizations, alleged in a petition for certiorari that the Environmental Protection Agency (EPA) has abdicated its responsibility under the Clean Air Act to regulate the emissions of greenhouse gases, including carbon dioxide. Specifically, petitioners asked us to answer two questions concerning the meaning of § 202(a)(1) of the Act: whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute.\textsuperscript{212} Justice Stevens first determined that the Commonwealth of Massachusetts had standing to present the challenge in its sovereign capacity and as owner of coastal property allegedly subject to erosion as a consequence of global warming. The Court also noted that it was taking the case despite reservations more generally about whether specific plaintiffs had standing because of the "unusual importance of the underlying issue..."\textsuperscript{213} The Court noted the immense international debate on the issue and ongoing efforts to address the issue through legislative and international action. The majority opinion continued:

Congress ... addressed the issue in 1987, when it enacted the Global Climate Protection Act. Finding that "manmade pollution—the release of carbon dioxide, chlorofluorocarbons, methane, and other trace gases into the atmosphere—may be producing a long-term and substantial increase in the average temperature on Earth," Congress directed EPA to propose to Congress a "coordinated national policy on global climate change," and ordered the Secretary of State to work "through the channels of multilateral diplomacy" and coordinate diplomatic efforts to combat global warming. Congress emphasized that "ongoing pollution and deforestation may be contributing now to an irreversible process" and that "[n]ecessary actions must be identified and implemented in time to protect the climate."

Meanwhile, the scientific understanding of climate change progressed. In 1990, the Intergovernmental Panel on Climate Change (IPCC), a multinational scientific body organized under the auspices of the United Nations, published its first comprehensive report on the topic. Drawing on expert opinions from across the globe, the IPCC concluded that "emissions resulting from human activities are substantially increasing the atmospheric concentrations of ... greenhouse gases [which] will enhance the greenhouse effect, resulting on average in an additional warming of the Earth's surface."

\textsuperscript{212} Massachusetts v. EPA, 549 U.S. 497, 504–05 (2007) (footnotes omitted).
\textsuperscript{213} Id. at 506.
Responding to the IPCC report, the United Nations convened the "Earth Summit" in 1992 in Rio de Janeiro. The first President Bush attended and signed the United Nations Framework Convention on Climate Change (UNFCCC), a nonbinding agreement among 154 nations to reduce atmospheric concentrations of carbon dioxide and other greenhouse gases for the purpose of "prevent[ing] dangerous anthropogenic [i.e., human-induced] interference with the [Earth's] climate system." The Senate unanimously ratified the treaty.

Some five years later—after the IPCC issued a second comprehensive report in 1996 concluding that "[t]he balance of evidence suggests there is a discernible human influence on global climate"—the UNFCCC signatories met in Kyoto, Japan, and adopted a protocol that assigned mandatory targets for industrialized nations to reduce greenhouse gas emissions. Because those targets did not apply to developing and heavily polluting nations such as China and India, the Senate unanimously passed a resolution expressing its sense that the United States should not enter into the Kyoto Protocol. President Clinton did not submit the protocol to the Senate for ratification.\textsuperscript{214}

After disposing of several questions involving standing, the Court turned to the merits of the case:

On the merits, the first question is whether § 202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a "judgment" that such emissions contribute to climate change. We have little trouble concluding that it does. In relevant part, § 202(a)(1) provides that EPA "shall by regulation prescribe ... standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." Because EPA believes that Congress did not intend it to regulate substances that contribute to climate change, the agency maintains that carbon dioxide is not an "air pollutant" within the meaning of the provision.

The statutory text forecloses EPA's reading. The Clean Air Act's sweeping definition of "air pollutant" includes "any air pollution agent or combination of such agents, including any physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air...." On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word "any." Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt "physical [and] chemical ... substance[s] which [are] emitted into ... the ambient air." The statute is unambiguous.

Rather than relying on statutory text, EPA invokes post-enactment congressional actions and deliberations it views as tantamount

\textsuperscript{214} Id. at 506–09 (citations and footnotes omitted).
to a congressional command to refrain from regulating greenhouse gas emissions. Even if such post-enactment legislative history could shed light on the meaning of an otherwise-unambiguous statute, EPA never identifies any action remotely suggesting that Congress meant to curtail its power to treat greenhouse gases as air pollutants. That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant when it amended § 202(a)(1) in 1970 and 1977. And unlike EPA, we have no difficulty reconciling Congress’ various efforts to promote interagency collaboration and research to better understand climate change with the agency’s pre-existing mandate to regulate “any air pollutant” that may endanger the public welfare. Collaboration and research do not conflict with any thoughtful regulatory effort; they complement it.\textsuperscript{215}

The Court then addressed the apparent inconsistency with \textit{FDA v. Brown \\& Williamson Tobacco Corp.}:

EPA’s reliance on \textit{Brown \\& Williamson Tobacco Corp.}, is \ldots misplaced. In holding that tobacco products are not “drugs” or “devices” subject to Food and Drug Administration (FDA) regulation pursuant to the Food, Drug and Cosmetic Act (FDCA), we found critical at least two considerations that have no counterpart in this case.

First, we thought it unlikely that Congress meant to ban tobacco products, which the FDCA would have required had such products been classified as “drugs” or “devices.” Here, in contrast, EPA jurisdiction would lead to no such extreme measures. EPA would only \textit{regulate} emissions, and even then, it would have to delay any action “to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance.” However much a ban on tobacco products clashed with the “common sense” intuition that Congress never meant to remove those products from circulation, there is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter.

Second, in \textit{Brown \\& Williamson} we pointed to an unbroken series of congressional enactments that made sense only if adopted “against the backdrop of the FDA’s consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco.” We can point to no such enactments here: EPA has not identified any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles. Even if it had, Congress could not have acted against a regulatory “backdrop” of disclaimers of regulatory authority. Prior to the order that provoked this litigation, EPA had never disavowed the authority to regulate greenhouse gases, and in 1998 it in fact affirmed that it \textit{had} such authority. There is no reason,

\textsuperscript{215} \textit{Id.} at 528–30 (citations and footnotes omitted).
much less a compelling reason, to accept EPA’s invitation to read ambiguity into a clear statute.

EPA finally argues that it cannot regulate carbon dioxide emissions from motor vehicles because doing so would require it to tighten mileage standards, a job (according to EPA) that Congress has assigned to DOT. But that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public’s “health” and “welfare,” a statutory obligation wholly independent of DOT’s mandate to promote energy efficiency. The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.

While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence. Because greenhouse gases fit well within the Clean Air Act’s capacious definition of “air pollutant,” we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.216

The EPA further argued that even if it had legal authority to regulate greenhouse gases, it was a reasonable exercise of its discretion to decline to act. The Court rejected this claim, writing:

Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time. If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so. That EPA would prefer not to regulate greenhouse gases because of some residual uncertainty—which, contrary to Justice Scalia’s apparent belief, is in fact all that it said—is irrelevant. The statutory question is whether sufficient information exists to make an endangerment finding.

In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore “arbitrary, capricious, ... or otherwise not in accordance with law.” We need not and do not reach the question whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA’s actions in the event that it makes such a finding. We hold only that EPA must ground its reasons for action or inaction in the statute.217

216. Id. at 530–32 (citations omitted).
217. Id. at 534–35 (citations omitted).
In one of two dissenting opinions in the case, Justice Scalia argued that nothing in the statute compels the EPA Administrator to determine whether a given substance creates a public health risk, only that the EPA must act if such a judgment is made. Thus, Scalia maintained, the EPA Administrator has discretion whether to make any such judgment in the first place, especially given the contentious nature of the underlying scientific claims about global climate change and the difficulties of identifying a workable regulatory solution to the problem. Scalia explained:

The provision of law at the heart of this case is § 202(a)(1) of the Clean Air Act (CAA), which provides that the Administrator of the Environmental Protection Agency (EPA) "shall by regulation prescribe ... standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." As the Court recognizes, the statute "condition[s] the exercise of EPA's authority on its formation of a 'judgment.'" There is no dispute that the Administrator has made no such judgment in this case.

The question thus arises: Does anything require the Administrator to make a "judgment" whenever a petition for rulemaking is filed? Without citation of the statute or any other authority, the Court says yes. Why is that so? When Congress wishes to make private action force an agency's hand, it knows how to do so. Where does the CAA say that the EPA Administrator is required to come to a decision on this question whenever a rulemaking petition is filed? The Court points to no such provision because none exists.218

Scalia continues, "I am willing to assume, for the sake of argument, that the Administrator's discretion in this regard is not entirely unbounded—that if he has no reasonable basis for deferring judgment he must grasp the nettle at once."219 But, he continued:

The Court dismisses this analysis as "rest[ing] on reasoning divorced from the statutory text." "While the statute does condition the exercise of EPA's authority on its formation of a 'judgment,' ... that judgment must relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.'" True but irrelevant. When the Administrator makes a judgment whether to regulate greenhouse gases, that judgment must relate to whether they are air pollutants that "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." But the statute says nothing at all about the reasons for which the Administrator may defer making a judgment—the permissible reasons for deciding not to grapple with the issue at the present time. Thus, the various

218. Id. at 549-50 (Scalia, J., dissenting) (citations omitted).
219. Id. at 550.
“policy” rationales that the Court criticizes are not “divorced from the statutory text,” except in the sense that the statutory text is silent, as texts are often silent about permissible reasons for the exercise of agency discretion. The reasons EPA gave are surely considerations executive agencies regularly take into account (and ought to take into account) when deciding whether to consider entering a new field: the impact such entry would have on other Executive Branch programs and on foreign policy. There is no basis in law for the Court’s imposed limitation.

EPA’s interpretation of the discretion conferred by the statutory reference to “its judgment” is not only reasonable, it is the most natural reading of the text. The Court nowhere explains why this interpretation is incorrect, let alone why it is not entitled to deference under Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc. As the Administrator acted within the law in declining to make a “judgment” for the policy reasons above set forth, I would uphold the decision to deny the rulemaking petition on that ground alone.220

On remand to the EPA, the EPA issued a Notice of Proposed Rulemaking that solicited comments on the possible health effects of greenhouse gases but refused to make any conclusions or findings on the issue.221 The Notice was prefaced with the following statement by the EPA Administrator:

EPA’s analyses leading up to this ANPR (“Advance Notice of Proposed Rulemaking”) have increasingly raised questions of such importance that the scope of the agency’s task has continued to expand. For instance, it has become clear that if EPA were to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act, then regulation of smaller stationary sources that also emit GHGs (greenhouse gases)—such as apartment buildings, large homes, schools, and hospitals—could also be triggered. One point is clear: the potential regulation of greenhouse gases under any portion of the Clean Air Act could result in an unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land.

This ANPR reflects the complexity and magnitude of the question of whether and how greenhouse gases could be effectively controlled under the Clean Air Act. This document summarizes much of EPA’s work and lays out concerns raised by other federal agencies during their review of this work. EPA is publishing this notice today because it is impossible to simultaneously address all the agencies’ issues and respond to our legal obligations in a timely manner.

I believe the ANPR demonstrates the Clean Air Act, an outdated law originally enacted to control regional pollutants that cause direct

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220. Id. at 552–53 (citations omitted).
health effects, is ill-suited for the task of regulating global greenhouse gases. Based on the analysis to date, pursuing this course of action would inevitably result in a very complicated, time-consuming and, likely, convoluted set of regulations. These rules would largely preempt or overlay existing programs that help control greenhouse gas emissions and would be relatively ineffective at reducing greenhouse gas concentrations given the potentially damaging effect on jobs and the U.S. economy.\footnote{222}

The Notice was followed by a Proposed Rule, issued after the intervening change in presidential administrations. The new Proposed Rule differed significantly from the previous Notice. It stated:

Today the Administrator is proposing to find that greenhouse gases in the atmosphere endanger the public health and welfare of current and future generations. Concentrations of greenhouse gases are at unprecedented levels compared to the recent and distant past. These high atmospheric levels are the unambiguous result of human emissions, and are very likely the cause of the observed increase in average temperatures and other climatic changes. The effects of the climate change observed to date and projected to occur in the future—including but not limited to the increased likelihood of more frequent and intense heat waves, more wildfires, degraded air quality, more heavy downpours and flooding, increased drought, greater sea level rise, more intense storms, harm to water resources, harm to agriculture, and harm to wildlife and ecosystems—are effects on public health and welfare within the meaning of the Clean Air Act. In light of the likelihood that greenhouse gases cause these effects, and the magnitude of the effects that are occurring and are very likely to occur in the future, the Administrator proposes to find that atmospheric concentrations of greenhouse gases endanger public health and welfare within the meaning of Section 202(a) of the Clean Air Act.\footnote{223}

The Administrator also proposed to find that the emissions of some greenhouse gases from motor vehicles contribute to the overall mix of greenhouse gases in the atmosphere: “Thus, she proposes to find that the emissions of these substances from new motor vehicles and new motor vehicle engines are contributing to air pollution which is endangering the public health and welfare...”\footnote{224}

**Discussion Questions**

1. In *FDA v. Brown & Williamson Tobacco Corp.*, the FDA asserted jurisdiction to regulate that the Court subsequently said that it lacked. In *Massachusetts v. EPA*, the EPA refused to assert jurisdiction that there was

\footnote{222. \textit{Id.} at 44,364–65.}

\footnote{223. \textit{Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act}, 74 Fed. Reg. 18,886, 18,886 (proposed Apr. 24, 2009).}

\footnote{224. \textit{Id.}}
strong reason to believe it possessed. Moreover, on remand to the EPA, the Administrator still refused to assert jurisdiction. Do any of the models discussed in this chapter provide a consistent explanation for the decisions of the agencies in these cases?

2. In Brown & Williamson the extreme public importance of the issue and the dramatic consequences that would flow from a ruling led the Court to infer that Congress did not intend for the FDA to regulate tobacco. In Massachusetts v. EPA, the Court noted the extreme importance of the issue and suggested that this might indicate Congress's intent to have the EPA regulate greenhouse gas emissions. Can the two cases—and the premises upon which the opinions rest—be reconciled? What does public choice and other theories of delegation say about whether Congress generally does or does not intend to delegate on extremely important and controversial issues?

3. In Massachusetts v. EPA, Justice Scalia argues that if Congress wanted EPA to regulate greenhouse gases, it could simply mandate that the Administrator make a judgment as required by the statute or alternatively simply order EPA to regulate. Scalia suggests that given the high-profile nature of the issue, Congress's failure to take such steps suggests that Congress did not intend for the EPA to regulate greenhouse gases. Do any of the models discussed in this chapter explain why the EPA Administrator refused to make this judgment? Or why Congress did not order EPA to make that judgment?

4. On remand, the EPA Administrator originally expressed the opinion that regulation of greenhouse gases is an issue that should be left to Congress and not undertaken by the EPA. Why do you believe that he expressed that view? Why might Congress be willing to allow the EPA to issue regulations on this issue rather than undertake to enact legislation as requested by the EPA Administrator?

5. Is it relevant to the determination of whether Congress intended EPA to act that the Senate specifically refused to ratify the Kyoto Treaty? Why or why not?

6. In Brown & Williamson, Justice O'Connor noted that on an issue as important and high-profile as the possible banning of tobacco, it would be illogical to assume that Congress would permit an agency to act without a clear expression of congressional intent. In Massachusetts v. EPA, in contrast, Justice Stevens stressed the public and economic importance of the issue and that when the Clean Air Act was enacted, given the scientific knowledge of the time, Congress could not have anticipated that greenhouse gases (such as carbon dioxide) might later be considered a pollutant. Justice Stevens further reasoned that when Congress delegates, it does so broadly in order to allow agencies to react to changing conditions. Based on the models discussed in this chapter, which of the underlying assumptions—those expressed by Justice O'Connor or by Justice Stevens—concerning congressional behavior is more plausible?

7. To what extent can the decisions in these cases be explained by the models of ideological judging discussed in this chapter? Keep this question in mind as you read the "attitudinal model" of judicial behavior in chapter 7.

8. In Whitman v. American Trucking Associations, Inc., 225 the Supreme Court addressed a nondelegation challenge to certain rules issued by the EPA

under the Clean Air Act. Under the Act, the Administrator of the EPA is required to set national ambient air quality standards (NAAQS) for each air pollutant for which “air quality criteria” have been issued. Once NAAQS have been promulgated, the Administrator must review the standard and the criteria on which it is based every five years. In 1997, EPA revised the NAAQS for particulate matter and ozone. The American Trucking Associations challenged the EPA action on the ground that the delegation of this authority to the EPA was made without an “intelligible principle” and therefore was an improper delegation under the Supreme Court’s precedent in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

Several states joined the American Trucking Association (the “ATA”) in challenging the rules. In *Massachusetts v. EPA*, the named plaintiff and several other states joined in bringing the action to try to force the EPA to regulate greenhouse gases (several other states filed an *amicus* brief supporting the EPA). In *American Trucking*, Michigan, Ohio, and West Virginia opposed the EPA’s regulation. In *Massachusetts*, the states bringing the action included California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. Those who filed *amicus* briefs opposing the action in *Massachusetts* included Alaska, Idaho, Kansas, Michigan, Nebraska, NOrth Dakota, Ohio, South Dakota, Texas, and Utah. Does public choice help to provide an explanation of the various states’ positions in these two cases?

Professor Todd Zywicki has offered the following hypothesis: Environmental regulation can be very costly. States that adopt stricter environmental regulations such as regulation of greenhouse gases, whether for practical or ideological reasons, thereby create a competitive disadvantage for in state businesses.\(^{226}\) Other states, notably rural states with low population densities, will be less concerned about issues of ambient air quality and greenhouse gases and will thus oppose strict environmental regulations for economic or ideological reasons. Producers of raw materials (such as coal) or other products (such as automobiles or auto parts) that are likely to be adversely affected by such regulations were they to be promulgated also will oppose stricter regulation.

On this account, states that unilaterally enact strict environmental regulations will support federal action that enables them to export the cost of their regulations onto states with different policy preferences, which Zywicki calls “political externalities.” Does this breakdown of state economic interests provide the basis for a persuasive account of the lineup of states in *Massachusetts* and American *Trucking*? If so, does Zywicki’s thesis provide any normative insight with respect to the nondelegation doctrine and the allocation of decision-making authority among Congress, agencies, and the courts? Which body is in the best position to respond to the inevitable distributional consequences of any proposed regulation? Why?

In *American Trucking*, Justice Breyer wrote a concurring opinion upholding the delegation. Breyer reasoned that the statute affords the EPA Administrator wide latitude to update the requirements of the Clean Air Act and to weigh those standards that "'protect the public health with 'an adequate margin of safety'" against other values such as economic effects and feasibility. Can those tradeoffs be resolved as a matter of "technical expertise"? Does the EPA's technical expertise include assessing the economic effects of its regulatory policies? Breyer also argues that given the substantial effect of ambient air quality standards on "States, cities, industries, and their suppliers and customers, Congress will hear from those whom compliance deadlines affect adversely, and Congress can consider whether legislative change is warranted." Should this "fire alarm" theory of delegation, meaning that in the event of a significant and unintended result, affected parties will notify Congress, be relevant to the question of whether a court should uphold a delegation? Why or why not?

227. 531 U.S. at 494.