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Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies

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Perhaps the most intriguing thing about the United States Constitution is the way that its basic principles keep recreating themselves in new and unexpected contexts. Quite recently, for example, the complex matrix of checks and balances under the constitutional separation of powers embodied in Articles I, II, and III has found new support in the work of scholars espousing positive political theory (PPT).

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Perhaps the most intriguing thing about the United States Constitution is the way that its basic principles keep recreating themselves in new and unexpected contexts. Quite recently, for example, the complex matrix of checks and balances under the constitutional separation of powers embodied in Articles I, II, and III has found new support in the work of scholars espousing positive political theory (PPT).

PPT shows why a robust system of checks and balances is particularly important in the modern administrative state. On the one hand, modern government could not function if Congress were prohibited from delegating large chunks of authority to administrative agencies. On the other hand, these delegations, coupled with Congress's remarkable sophistication at designing internal rules of organization to control agency behavior, puts added pressure on the courts and the executive to fulfill their roles in the constitutional scheme without undermining the ability of the state to operate.

PPT does not solve the venerable question of how the nonlegislative branches can fulfill their obligation to check and balance Congress without intruding on the constitutional authority of the legislature to make law. PPT does, however, reveal with remarkable clarity how this problem has reconstituted itself in the modern administrative state.

A recurring theme in the literature on PPT is how Congress can arrange its own structure and internal rules in order to control the actions of the administrative agencies to which they have delegated authority. The goal of Congress is to ensure that administrative agencies generate outcomes that are

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1. See, e.g., Murray J. Horn and Kenneth A. Shepsle, Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs, 75 Va. L. Rev. 499, 499 (1989) (employing "assumption of intelligent foresight" to conclude that elected politicians in creating agencies devise initial enactments which will protect against the influences of bureaucrats and subsequent political coalitions); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431, 481 (1989) [hereinafter McNollgast, Structure and Process] (legislatively imposed procedural constraints play a critical role in controlling bureaucratic agents); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, Administrative Procedures as Instruments of Political Control, 3 J.L. Econ. &
consistent with the original understanding that existed between Congress and the various interest groups that were parties to the initial political compromise. The problem facing Congress can be described as bureaucratic drift, which refers to changes in administrative agency policies that lead to outcomes inconsistent with the original expectations of the legislation's intended beneficiaries.

Perhaps the most obvious example of Congress's efforts to retain political control over administrative agencies, and thereby control bureaucratic drift, is the legislative veto. The legislative veto allows Congress to delegate rulemaking authority to an agency, but retain the right to invalidate agency action.

Other more subtle mechanisms for controlling bureaucratic drift exist. In particular, Matthew McCubbins, Roger Noll, and Barry Weingast (McNollgast) have observed that Congress has established complex systems of rewards, sanctions, and ex post monitoring to control agency behavior.2

A wide variety of rules of administrative law, including the prohibitions on *ex parte* contact, the legislatively mandated standards for judicial review, the assignment of burdens of proof in challenges to agency decisions, the allocation of discretionary budgetary funds, and the delay built into the administrative process, all contribute to the creation of a political environment that causes agency decisions to mirror the political equilibrium at the time of the original enactment and can be explained as efforts to control bureaucratic drift.3 Similarly, Congress can utilize what Matthew McCubbins and Thomas Schwartz refer to as "fire alarms," which are formal and informal mechanisms by which the targeted beneficiaries of legislation can notify politicians when an agency generates outcomes that deviate from the interests of the beneficiaries, thereby triggering formal investigations and other legislative responses.4

In an important critique on the PPT literature concerning bureaucratic drift, Murray Horn and Kenneth Shepsle argue that the strategies described by positive political theorists to control bureaucratic drift create a second

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2. See McNollgast, *Structure and Process*, supra note 1, at 434 (Congressional investigations into the performance of an agency may take place through annual budgetary process, the reauthorization of an agency's programs, and watchdog agencies such as the Office of Management and Budget and the General Accounting Office).

3. See McNollgast, *Structure and Process*, supra note 1, at 440-44 (discussing provisions of the Administrative Procedure Act, 5 U.S.C. §§ 553(b)-(c), 556-557 (1982), and other legislative measures as efforts to subject agencies continually to the types of political pressures in existence at the time of enactment).

sort of drift: legislative drift. Legislative drift results where the preferences of politicians evolve over time, creating a legislative environment inconsistent with the preferences of the original political coalition. The tension between bureaucratic drift and legislative drift observed by Horn and Shepsle arises because the strategies for monitoring and enforcing legislative deals described by positive political theorists such as McNollgast require the deployment of legislative staff or legislative authority by subsequent legislatures to monitor agency personnel. Increasing legislative authority over an agency reduces the potential for bureaucratic drift. As legislative authority over an agency grows, however, the agency becomes more vulnerable to the changing preferences of subsequent legislators.

In a recent paper, I attempted to extend the literature on congressional control of agency behavior by arguing that the politicians who create administrative agencies can constrain the behavior of bureaucrats not only by establishing the procedural and substantive rules under which the administrative agencies operate, but also through the original organizational design of the agency itself. Unlike the congressional monitoring and enforcement mechanisms described above, the structural designs I discussed do not involve the trade-off between bureaucratic drift and legislative drift described by Horn and Shepsle.

In particular, I argued that Congress’s ability to design and structure an agency will “hardwire” the agency to generate decisions that reflect the original understanding of the enacting coalition. Congress can set the jurisdictional parameters of an agency, thereby determining which interest groups will have access to the agency, and on what terms. In addition, Congress can affect the relative abilities of various interests to influence future legislative actions and control ex ante the outcomes generated by an administrative agency by controlling which industries and interests will be reflected in the agency’s staffing decisions, by determining how “independent” the agency will be from Congress, and by strengthening certain interest groups relative to others.

5. Horn & Shepsle, supra note 1, at 503-04 (arrangements that legislators craft to control bureaucratic drift necessarily allow future coalitions to intervene in agency implementation, but the involvement of future coalitions creates legislative drift).
7. Id. (manuscript at 48) (Congress in structuring agencies creates institutional mechanisms that will produce outcomes consistent with the political equilibrium existing at the time of initial delegation).
8. Id. (manuscript at 34, 39, 47-48) (congressional decisions as to whether an agency will exist independently or within the executive branch, whether an agency regulates a single industry or multiple industries, and whether an agency will have broad or limited discretion all influence what interest groups will be able to influence an agency and the extent to which they may do so).
The scholarship described above has focused extensively on the relationship between agencies and Congress; yet Congress's ability to control administrative agencies will be affected by the other branches of government. The role of these other branches in constraining or facilitating congressional control of agency decisions has not been considered. That is the goal of this article.

Consistent with the basic principle that the separation of powers is designed to raise the decision costs of government,9 I will describe the effects of judicial review of agency decisions and the effects of executive branch involvement in agency decisions, and will show that the involvement of these other branches seriously undermines Congress's efforts to design procedural, substantive, and structural rules to control agency behavior. In particular, despite generally granting great deference to agencies, the courts systematically act to broaden the array of interests with access to the administrative rulemaking process. But even the executive, whose actions are more politically motivated than the judiciary's, serves a salutary role in my analysis by reducing the benefits that legislators obtain from passing interest group oriented legislation, thereby raising the costs of rent-seeking. Viewing agency enactment legislation as a "deal" between interest groups and lawmakers, it is obvious that the value the interest group places on the legislation will increase symmetrically with the "deal's" durability. However, interference with the power of Congress to control administrative agencies impedes the ability of politicians to make credible commitments to interest groups. This in turn lowers the price politicians can demand for providing legislation to favored groups by reducing the willingness of such groups to pay for new laws.

In Part I of this article, I argue that judicial inquiry into administrative agency decisions reflects a delicate judicial balancing act designed to promote public-regarding legislation. The balancing act reflects a deep ambivalence on the part of judges about the nature of administrative law and about how to develop jurisprudential standards for administrative agencies that will serve the public interest.

In the Part II of the article, I argue that the executive branch also has responded to Congress's efforts to control administrative agencies through

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rules of structure, substance, and procedure. The President’s increasingly bold efforts to influence the outcomes of the administrative rulemaking process come in direct response to Congress’s increasing sophistication at developing techniques to control bureaucratic behavior. Thus, consistent with the very idea of the system of checks and balances that comprises the separation of powers, the executive and Congress are involved in a healthy, ongoing tug of war over control of administrative agencies. This struggle results in delegations to agencies that are more public-regarding, and, in agency rulemaking, less subject to capture by special interests than would be the case if the process were dominated only by one branch.

I. THE JUDICIAL RESPONSE TO THE ADMINISTRATIVE STATE: A PERSPECTIVE FROM POSITIVE POLITICAL THEORY

The problem facing courts is both subtle and complex. On the one hand, it would seem clear that courts should scrutinize agency deliberations with great care, granting little, if any, deference and generally hindering agency efforts to promulgate rules. This is because administrative agencies, like legislatures, are subject to substantial interest group influence. In order to prevent agency capture by special interest groups, the judiciary should subject agency action to rationality review and rigorous means-ends analysis.10

On the other hand, close judicial scrutiny of agency decisions may facilitate rather than impede interest group activities. Building a modicum of delay into the process of administrative agency rulemaking benefits poorly organized groups by providing them with the time necessary both to learn about proposed actions by administrative agencies and to galvanize into an effective political coalition to respond to those proposals. Courts have imposed a variety of requirements on the process of administrative rulemaking that result in the imposition of this modicum of delay.11 For example, the judicially imposed requirement of notice and comment periods, the requirement that agencies provide interested parties with the right to participate in an elaborate paper hearing process that generates a documentary record, and the requirement that agencies articulate the basis and purpose of their deci-

10. Macey, Promoting Public-Regarding Legislation, supra note 9, at 263-64 (because judges are immune from the political pressures that influence agency officials, rationality review and means-ends analysis of agency action by the judiciary can prevent agency capture).

11. Professor Richard Pierce has been the leading administrative law scholar to catalogue the delays that have followed judicial invalidations of administrative agency decisions. See Richard J. Pierce, Jr., The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s, 43 ADMIN. L. REV. 7 (1991) (describing how a series of federal courts of appeals decisions has constrained the Federal Energy Regulatory Commission’s (FERC) power to implement changes in regulatory policy); Richard J. Pierce, Jr., Unruly Judicial Review of Rulemaking, NAT. RESOURCES & ENV’T, Fall 1990, at 23 (judicial reversals of FERC rules have discouraged the FERC from engaging in systematic policymaking).
12. The Administrative Procedure Act (APA) imposes the basic requirements of notice and opportunity for public comment. 5 U.S.C. § 553 (1988). These requirements have been used by the courts to ensure that rulemaking will include participation by interested parties and be based on a careful and detailed record. See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 34, 56-57 (1983) (National Highway Traffic Safety Administration “failed to present an adequate basis or explanation” for rescinding requirement that cars be equipped with passive restraints, and therefore arbitrary and capricious standard not met); Macey, Organizational Design, supra note 6 (manuscript at 35-36).


tion's interpretation of a statute and upholding an agency's power to determine its own enforcement agenda. Nevertheless, the lesson of these cases, taken together, seems to be that regulatory reform efforts within agencies can only succeed if officials articulate a principled justification based on an understanding of the facts. . . . [G]enuine reform requires expertise and commitment.\textsuperscript{15}

Thus, while courts generally defer to administrative agencies' decisions, courts have acted in a variety of subtle but effective ways to drive a wedge between Congress and administrative agencies, thereby fulfilling their role in the constitutional scheme of raising the decision costs of government so as to make law more public-regarding. The purpose of this Part of the article is to describe the complex processes by which the federal courts accomplish this result. In Part I.A I examine the substance of judicial review of agency decisionmaking. I argue that, regardless of the standard of deference articulated by the courts, the courts are willing to overturn decisions and interpretations by administrative agencies even where such decisions and interpretations are within the scope of the agency's presumed expertise. Courts are particularly likely to take this initiative where an administrative agency's decision violates a court's intuitions about what is fundamentally fair or "reasonable."\textsuperscript{16} Courts' willingness to examine the decisions of administrative agencies under a reasonableness standard forces such decisions into the public spotlight and pushes agency rulemaking in a more public-regarding direction.

In Part I.B I examine the rules that the judiciary has created to determine whether interest groups have standing to challenge an agency's decisions. I show that, in addition to examining the substance and process of agency rulemaking under a reasonableness standard, courts have gone to great lengths to tailor the rules of standing to aid those groups that have been excluded from the initial legislative deal that generated the administrative agency in question. Exclusion from an initial legislative compromise puts the groups so excluded at a tremendous disadvantage in subsequent rulemaking.\textsuperscript{17} Courts respond to the exclusion of a group by Congress by adjusting their traditional rules of standing to provide these disenfranchised groups with some measure of review.

Thus, I contend that the entire body of law concerning whether interest


\textsuperscript{17} Macey, \textit{Organizational Design}, supra note 6 (manuscript at 29) ("The initial jurisdictional design of an agency will determine which interest groups will have ready access to the agency . . . .").
groups have standing to challenge decisions by administrative agencies can best be explained as an effort by the courts to protect groups that lost at the time of the initial deal between the interest groups and the Congress that designed the agency. Courts tend to grant standing to those groups that were excluded from the original deal; they tend to deny standing to those groups that were included in the original deal.

Courts are able to determine which groups were excluded from a deal by looking at the jurisdictional structure of the agency whose actions are being challenged. Interest groups that are repeat players before an agency are likely to be favored by an agency over groups that seldom interact with the agency. Single interest group agencies are likely to favor the interest groups they regulate over other groups. Courts' unwillingness to tolerate this favoritism raises the costs to interest groups of lobbying Congress to create administrative agencies that are structured to permit easy capture by those same groups. In this way, the Court's rules on standing move the law in a public-regarding direction.

Finally, in Part I.c I discuss the legislative veto, which is Congress's most blatant attempt to control the bureaucratic drift of an administrative agency. The Supreme Court's declaration that the legislative veto is unconstitutional provides the most direct evidence that the independent judiciary is sensitive to the threat posed by administrative agencies to the separation of powers and the system of checks and balances. The Court's decisions in \textit{INS v. Chadha}^{18} and \textit{Metropolitan Washington Airport Authority v. Citizens for the Abatement of Aircraft Noise, Inc.}^{19} provide strong support for the thesis that the judiciary does not want Congress to be too successful in its efforts to control administrative agencies. Rather, the Court consistently has acted to raise the costs of administrative delegations so that such delegations do not become too attractive to special interests.

\textbf{A. JUDICIAL ABdicATION TO ADMINISTRATIVE AGENCIES: CHEVRON}

Any analysis of the role of the federal courts in undermining legislative "hardwiring" of administrative agencies must begin with consideration of \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.}^{20}

This case involved a challenge to the Environmental Protection Agency's (EPA) "bubble" policy, which implemented a new method of measuring dis-

\begin{itemize}
  \item 18. 462 U.S. 919, 945-59 (1984) (legislative veto provision in Immigration and Naturalization Act found unconstitutional because it defeated the separation of powers as embodied in the Presentment Clauses and bicameralism requirement of the Constitution).
  \item 19. 111 S. Ct. 2298, 2301 (1991) (holding unconstitutional an act of Congress making creation of a board of review composed of members of Congress with veto power over agency decisions a condition to transfer of airport operating control to agency).
\end{itemize}
charges of industrial pollution under the Clean Air Act. Under the EPA's new policy, the agency could define the statutory term "stationary source" to mean an entire manufacturing plant. Prior to this reinterpretation, the EPA had treated the term "stationary source" to mean any polluting device within a plant. The new definition reduced the costs of complying with the Clean Air Act for manufacturers in certain states.

The issue in *Chevron* was whether the EPA's new definition of the term "stationary source" violated the Clean Air Act. The Supreme Court, exhibiting its traditional deference to what it regards as "reasonable" agency determinations, upheld the EPA's construction of the relevant statutory language. The Court noted that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." The Court held that so long as Congress has not directly addressed the issue before the agency and has not foreclosed the agency's interpretation, then the agency's construction of the statute should be upheld unless it is unreasonable or otherwise impermissible.

*Chevron* has been described as a case of monumental importance. In an important recent article, Professor Cass Sunstein characterized *Chevron* as "one of the very few defining cases in the last twenty years of American public law," and asserted that "[i]n its allocation of governmental authority and in its production of outcomes in the real world, the importance of the case far exceeds that of the Supreme Court's more celebrated constitutional rulings on the subject of separation of powers in the 1980s, probably even if all of these are taken together."

Clearly, the case is troubling for those who view the proper role of the judiciary as increasing rather than decreasing the costs to interest groups of implementing special interest oriented legislation. As Justice Scalia has observed, the decision appears to be "a striking abdication of judicial responsibility" and "quite incompatible with Marshall's aphorism that, '[i]t is

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22. *Id.* at 840.

23. *Id.* at 857.

24. *Id.* at 844 (footnote omitted).

25. *Id.* at 843-45.


28. *Id.* (footnote omitted).
emphatically the province and duty of the judicial department to say what the law is.'

But, as noted above, existing rules of administrative law that are designed to promote participation in the process of making administrative law would be undermined if judicial second-guessing of agency rulemaking allowed the administrative process to drag on for too long. To permit "appropriate political participation in the administrative process," that process must offer potential participants some reasonable prospects for closure. Otherwise, relatively diffuse, poorly organized or poorly funded groups will be at a great disadvantage relative to groups that are better organized.

In a previous article I described how Congress can organize administrative agencies so as to reduce the agency costs associated with congressional delegations to such agencies. To the extent that such delegations represent special interest oriented legislation, close judicial scrutiny of these delegations is in the public interest. To put the issue simply, to the extent that regulatory capture of executive agencies is a concern, robust judicial involvement in the decisionmaking process of agencies is an effective antidote. Complete judicial abdication to agencies would not serve the public interest.

On the other hand, the standard of judicial deference reflected in Chevron may be consistent with the public interest because it helps to limit the delays often associated with judicial review of agency rulemaking. An extremely broad reading of Chevron would create enormous possibilities for judicial abdication of agency decisions. This would reflect an extremely naive view of the administrative state: one in which courts view not only Congress, but also administrative agencies, as somehow sacrosanct, and one in which any interference by courts into the lawmaking process is antimajoritarian and therefore suspect.

In this respect, the result in Chevron is similar in force and effect to the result in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. In Vermont Yankee, the Court held that, while lower federal courts may review agency rules for arbitrariness and may remand for failure to provide sufficient explanation of their rules, agencies are not required to engage in rulemaking procedures beyond those imposed by the APA or other

29. Scalia, supra note 26, at 513-14 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
30. Scalia, supra note 26, at 517.
31. Macey, Organizational Design, supra note 6 (manuscript at 28-47) (describing how Congress may "hardwire" an agency to ensure that it continues to serve the preferences of the political compromise that leads to the initial delegation to the agency, thereby making the cost of such delegation low).
relevant statutes. Thus, the Court has established a time-bounded framework for agency action. The agency must move slowly enough to allow weak groups a chance to mobilize, but not so slowly that such groups will be unable to maintain an effective political coalition.

The result in *Chevron* should not be interpreted as reflecting the wholesale abdication by judges of their constitutional authority to decide what the law is. First, as the Court in *Chevron* itself made clear, courts may draw upon "traditional tools of [statutory] construction" when evaluating the interpretations of statutes formulated by administrative agencies. In particular, courts will decline to defer to administrative agencies when their interpretation of a statute contradicts the plain meaning of the law, the overall structure of a statutory scheme, the relevant legislative history, or even the underlying purposes of the statute.

As Professor Sunstein has observed, whenever a "court has a firm conviction that the agency interpretation violates the statute, that interpretation must fail. This is so even if a reasonable person might accept the agency's view." In other words, while the first part of the two-part test articulated in *Chevron* requires courts to defer to an administrative agency's construction of a statute unless that construction thwarts Congress's will, courts are not reluctant to find that an agency has in fact thwarted Congress's will. This illustrates that "the mere fact of a plausible agency view is insufficient for deference."

Thus, even after *Chevron*, courts have considerable latitude in evaluating the decisions and interpretations of administrative agencies. In particular, where Congress has passed a piece of special interest legislation and couched it in public interest terms in order to reduce the political costs associated with the enactment, courts are likely to find that an attempt by an administrative agency to interpret the statute in the way most favorable to a particular interest group contravenes Congress's intentions. For example, Congress

34. *Vermont Yankee*, 435 U.S. at 548, 558.
35. *Chevron*, 467 U.S. at 843 n.9.
36. See, e.g., *Dole v. United Steelworkers of Am.*, 494 U.S. 26 (1990) (overturning Secretary of Labor's interpretation of the Paper Reduction Act as inconsistent with the object of the Act); *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361 (1986) (overturning Federal Reserve Board's attempt to regulate NOW accounts and commercial loan substitutes as violative of the plain meaning of the underlying statute because such accounts and loans were outside the statutory grant of jurisdiction).
38. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (rejecting INS's interpretation of the statutory phrase "well-founded fear" on the grounds that statutory text and legislative history suggested an alternative meaning of this phrase); *id.* at 452-55 (Scalia, J., concurring) (since statutory text is clear, there is no justification for a discussion of whether deference to the administrative agency is warranted).
may pass a statute that is shrouded in public interest rhetoric, knowing full well that the enabling legislation creates an institutional dynamic within the relevant administrative agency that makes it more probable than not that certain interest groups will prevail in the interpretive process that gives life to the underlying statutory enactment. But it is this public interest rhetoric that will motivate the judicial inquiry into the statute, and will cause courts applying the *Chevron* principle to nullify agency decisions.

Often the decisions promulgated by an agency will be a better reflection of Congress's will than Congress's own articulation of its intentions due to the public interest rhetoric that accompanies an initial statutory enactment. Such public interest rhetoric may belie an underlying naked preference for a special interest group. This rhetoric may be ignored by the agency, but it will not be ignored by the courts. Ironically, courts will view the agency's construction as invalid on the principle that Congress retains the ultimate power to make law. Because courts take Congress at its word when it declares that a statute was enacted to serve the public interest, courts often will thwart the will of Congress by invalidating an agency order that is inconsistent with Congress's formally articulated public interest justification for a delegation to an agency.

In addition to the courts' persistent willingness in the wake of *Chevron* to find an agency's interpretation to be inconsistent with Congress's unambiguous intentions, under the second prong of *Chevron*, courts may decline to defer to agency decisions that are "unreasonable." While the term "reasonable" suggests that courts will give agencies "considerable latitude," the reasonableness requirement imposes a meaningful constraint on Congress's ability to enact wealth transfers costlessly:

> The reasonableness inquiry should probably be seen as similar to the inquiry into whether the agency's decision is "arbitrary" or "capricious" within the meaning of the APA. That inquiry requires the agency to give a detailed explanation of its decision by reference to factors that are relevant under the governing statute.

The requirement that agencies make detailed explanations of their decisions has two consequences. First, it undermines the ability of Congress to use agency resources to stifle poorly organized interests' efforts to monitor and control the behavior of administrative agencies. Second, the requirement that agencies make detailed explanations of their actions lowers the costs to poorly organized groups of finding out about what agencies are doing. Absent such a requirement, only highly organized, well-funded groups would have access to the administrative process. Thus, even if courts do not often

40. *See supra* notes 16, 21-25, and accompanying text.

41. Sunstein, *supra* note 27, at 2105 (footnotes omitted).
find that administrative agencies have acted unreasonably, the requirement that agencies give a detailed explanation of their actions makes it more difficult for Congress to hide special interest legislation by promulgating statutes that involve vague delegations to administrative agencies. Further, requiring agencies to make detailed explanations makes it difficult for Congress to structure an agency so that it is likely to be captured by powerful special interests.

Indeed, if one were to identify a manifestation of judicial unwillingness to review administrative agency action, it would not be *Chevron*: it would be *Heckler v. Chaney*.\(^4\) *Chaney* involved an attempt by death row inmates to cause the Food and Drug Administration to bring suit to stop the states' use of lethal drug injections in human executions on the grounds that such injections violated the Food, Drug, and Cosmetics Act.\(^4\) The Supreme Court declined to intervene on the grounds that an agency's refusal to initiate an enforcement proceeding is presumptively unreviewable.\(^4\) The Court reasoned that an agency's limited resources force it to make judgments about its agenda and priorities.\(^4\) Thus, an administrative agency may bring an enforcement action against one party despite the fact that the agency's enforcement strategy does not implicate similarly situated competitors.\(^4\)

Quite clearly, the courts' unwillingness to second-guess agency inaction enhances agency discretion. The costs to Congress of implementing wealth transfers through administrative agencies would be much greater if courts routinely substituted their own views on how agency resources should be allocated for those of the agencies themselves. However, even in the arena of agency inaction it is possible to underestimate the role of the courts in setting agency agendas. Courts are willing to intercede in nonenforcement decisions where such decisions result from a misapplication of substantive law rather than from an exercise of managerial discretion.\(^4\) Similarly, where Congress sets clear guidelines governing an agency's enforcement discretion, courts will review nonenforcement.\(^4\) Thus, in *Dunlop v. Bachowski*,\(^4\) the Court

\(^{42}\) 470 U.S. 821, 837-38 (1985) (an agency's decision not to take enforcement action is not reviewable by the courts, but rather is an issue for Congress).

\(^{43}\) *Id.* at 823.

\(^{44}\) *Id.* at 838 (an agency's refusal to take enforcement action falls within the APA's exception to reviewability provided by § 701(a)(2) because it is action "committed to agency discretion" (quoting 5 U.S.C. § 701(a)(2) (1988))).

\(^{45}\) *Id.* at 831 (in deciding how to use its resources, agency must "balance[e] a number of factors which are peculiarly within its expertise").

\(^{46}\) Moog Indus., Inc. v. FTC, 355 U.S. 411, 413-14 (1958) (in absence of a "patent abuse of discretion," Court could not hold Federal Trade Commission's cease and desist orders against particular firms in abeyance pending the entry of similar orders against similarly situated firms).

\(^{47}\) *Chaney*, 470 U.S. at 832-33 (presumption of unreviewability of agency inaction is rebutted when substantive statute provides guidelines for agency's exercise of enforcement powers).

\(^{48}\) *Id.* at 833 ("Congress may limit an agency's exercise of enforcement power if it wishes, either
upheld review of the Secretary of Labor's decision to decline to challenge a union election when the underlying statute had ordered the Secretary to bring suit where there was probable cause to believe there was a violation of the Labor-Management Reporting and Disclosure Act.\textsuperscript{50}

As the preceding discussion suggests, while courts generally defer to decisions and interpretations of administrative agencies, the judiciary has not abdicated its authority to overturn agency initiatives. Where an agency's decision or interpretation of a statute violates a canon of statutory construction,\textsuperscript{51} or where the agency's interpretation is inconsistent with the public interest patina of the original statute,\textsuperscript{52} or where a court deems the agency's action "unreasonable,"\textsuperscript{53} the agency's decisions will be accorded no deference.

Finally, and most importantly, the deferential standard of \textit{Chevron} must be interpreted in the context of the entire infrastructure of administrative law. In particular, the judiciary's insistence that administrative agencies afford interested persons the opportunity to participate even in informal rulemaking, and the transformation of notice and comment procedures into forums for granting hearings to outside groups greatly enhance the participatory nature of the administrative rulemaking process. Taken together, the judiciary has created a legal environment in which the process of administrative rulemaking contains mechanisms to ensure that the rulemaking process proceeds slowly enough for poorly organized interest groups to galvanize into effective political coalitions when the need arises, but does not become so fossilized that such groups are unable to maintain their cohesiveness.

\textbf{B. JUDICIAL "RE-ENFRANCISEMENT" OF CERTAIN DISENFRANCISED GROUPS}

Courts' sensitivity to the concerns of individuals and interest groups that were "structurally disenfranchised" by the creation of a particular agency has hampered congressional efforts to control administrative agencies through agency structure and design. As used here, the term "structurally disenfranchised" describes the situation of some interest groups after Congress creates an administrative agency. Those groups that were the winners in the struggle that culminated in the original enactment find themselves

\textsuperscript{49} 421 U.S. 560 (1975).
\textsuperscript{50} \textit{Id.} at 567 & n.7 (agreeing with court of appeals that because statute required action under some circumstances, the decision not to act was subject to judicial review).
\textsuperscript{51} \textit{See supra} notes 36-38, 47-50 and accompanying text.
\textsuperscript{52} \textit{See supra} notes 37, 41-42 and accompanying text.
\textsuperscript{53} \textit{See supra} notes 40-41 and accompanying text.
structurally enfranchised by the agency in a number of ways: (1) bureaucrats in the agency are drawn from the ranks of these groups; 54 (2) competition between the agency and other agencies for bureaucratic turf causes the agency to champion the interests of the groups it regulates over the interests of groups it does not regulate; 55 (3) Congress will authorize or command the agency to expend resources to reduce the costs of monitoring the agency's future performance; 56 and (4) Congress will further structure the agency's rulemaking process so as to tilt the odds in favor of certain groups and away from others. 57

But courts have been extremely sensitive to the concerns of groups that have been disenfranchised by an initial legislative enactment. This sensitivity has manifested itself in two ways. First, courts have declined to give the usual deference they accord to administrative agencies' interpretations when a disenfranchised interest group challenges a regulatory enactment. Second, courts have molded the rules of standing so as to allow these disenfranchised groups access to the courts, even when their interests are not within the group Congress ostensibly was regulating in the original legislation.

1. Broadening an Agency's Horizons

Courts' willingness to abandon their traditional deference to administrative agencies when such agencies are being inattentive to the interests of groups structurally disenfranchised in the initial legislative enactment seriously compromises Congress's ability to use agency structure and design to influence future agency action. *Citizens to Preserve Overton Park, Inc. v. Volpe* 58 is a powerful illustration of the phenomenon of judicial re-enfranchisement.

In *Overton Park*, the Secretary of Transportation approved the use of federal funds to finance the construction of a six-lane, high speed expressway through the middle of a 342-acre city park near the center of Memphis, Ten-

54. See Macey, *Organizational Design, supra* note 6 (manuscript at 37-39) (need for bureaucrats to be "experts" generally leads to regulators being selected from industry to be regulated; in addition, factors such as compensation and term of office can be set to favor certain industry participants).

55. *Id.* (manuscript at 40) (an industry generally opposes efforts by agencies other than its traditional regulator to exert authority over it, thereby causing the industry and its regulator to champion one another's cause).

56. *Id.* (manuscript at 35) (enabling legislation can raise or lower the costs of monitoring agency action).

57. *Id.* (manuscript at 48) ("The initial agency structure and design will also determine the nature of the agency's rulemaking process, thereby enabling poorly and meagerly financed groups to overcome their inability to monitor the day-to-day decisions of an agency and to maintain an effective political coalition after the initial compromise has been struck.").

The Court refused to defer to the Secretary's decision, and remanded the case for review to determine whether the Secretary of Transportation violated the Department of Transportation Act and the Federal-Aid Highway Act by granting federal funds for highway projects through public parks when a feasible and prudent alternative route existed.

Thus, Overton Park, along with similar opinions involving other regulatory agencies, can be best characterized as an example of "venturesome statutory construction" designed to force agencies to give weight to interests and concerns that they would not otherwise have considered. As Professor Richard Stewart has observed, the courts' protection of disenfranchised interests is not confined to the environmental area: a number of decisions reviewing the EPA's implementation of the Clean Air Act "reflect judicial disquiet with the EPA's disregard of the economic and other social costs in carrying out its environmental protection mission."

Professor Stewart recognizes that the special substantive and procedural restrictions imposed on certain administrative agencies do not appear to have been imposed on agencies selected at random. Rather, agencies such as the Nuclear Regulatory Commission, the Federal Power Commission, the Civil Aeronautics Board, and the Highway Transportation Department were singled out for particularly strict judicial scrutiny. Professor Stewart attributes this special attention to the fact that these agencies "pursue missions that threaten environmental quality, or [are] agencies with environmental responsibilities whose dedication to environmental quality is suspect." In other words, where an agency has authority over issues that affect the environment, but is structured in such a way that environmental interests are underrepresented, courts will be particularly sensitive to the environmental aspects of the agency's rules. Thus, courts use their authority to review administrative agencies' rulemaking to re-enfranchise disenfranchised environmental groups.

This judicial re-enfranchisement is not limited to the environmental area.

59. Id. at 406.
60. Id. at 411, 420 (plain language of both Department of Transportation Act and Federal-Aid Highway Act provides "clear and specific directives to Secretary, allowing judicial review of Secretary's actions"). Because the Secretary of Transportation made no formal findings, the Court could not determine whether the Secretary's decision satisfied the statutory standards. Id. at 420. On remand, the court would consider the entire administration record available to the Secretary at the time of the decision, as well as any testimony from administration officials it chose to require. Id.
61. Richard B. Stewart, The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons From the Clean Air Act, 62 IOWA L. REV. 713, 718 (1977) (observing that judges have been enthusiastic in construing statutes as conferring narrow agency authority in order to protect various environmental interests).
62. Id. at 720.
63. Id. at 719-20.
64. Id. at 719.
Professor Stewart observes that, contemporaneous with the decisions involving heightened protection for environmental quality

are analogous ones imposing similar constraints on agencies in order to protect a variety of nonenvironmental interests, such as those of television viewers, airline passengers, consumers of food, Indians, corporate shareholders, patients being treated with prescription drugs, the poor, classical music lovers, and the handicapped. The common theme that underlies all of these decisions is a developing judicial perception of agency bias or indifference towards the interests in question and a determination to promote more adequate consideration of these interests by administrators. These parallel developments suggest...a more general judicial concern to protect interests that are underrepresented in the administrative process or vulnerable to agency bias rather than a special solicitude for environmental values.65

The observation that “reviewing courts have attempted to curb agency bias and promote a more balanced agency consideration of all of the interests affected by its decisions”66 is strong support for the more general argument that courts do, in fact, serve as a check on the proclivity of the more politicized branches to trade legislation for political support. The courts use their ability to review agency action as a means of curbing administrative agency bias toward the group or groups that were structurally enfranchised in the original legislative enactment.

2. Enfranchisement Through Liberal Rules of Standing

Another mechanism by which judges enfranchise groups whose interests are antithetical to the interests likely to dominate a particular agency is by granting disenfranchised groups access to the courts to challenge agency rulings. As Professor Richard Pierce has observed:

Standing to obtain judicial review of agency action is a critical determinant of a party’s ability to participate effectively in the agency’s decisionmaking process. Agencies’ administrators recognize that they must respond to arguments made by parties that can challenge policy decisions in court, but they can ignore with relative impunity arguments made by parties that lack that power.67

65. Id. at 720.
66. Id. at 763.
67. Richard J. Pierce, Jr., The Role of the Judiciary in Implementing An Agency Theory of Government, 64 N.Y.U. L. REV. 1239, 1283-84 (1989). The arguments about standing presented here differ in certain important respects from Professor Pierce’s excellent treatment of the standing issue. Professor Pierce argues for a generally more expansive law of standing. Id. at 1284-85 (restricting administrative law standing will allow agencies to systematically favor special interests). I argue that existing doctrine already reflects a fairly expansive approach to the issue. In particular, I argue that the Court has been sensitive to disenfranchised groups when deciding standing cases, and is especially likely to grant standing to such groups. Finally, Professor Pierce views the law of stand-
In this respect, what is notable about the rules of standing fashioned by the Supreme Court is that the Court has allowed narrow special interest groups to challenge the outcomes generated by an administrative agency when that special interest group has been structurally disenfranchised from the decisionmaking process within the agency whose decision is being challenged.

*Investment Company Institute v. Camp* 68 is a striking example of the judiciary’s willingness to enlarge the law of standing to enfranchise special interest groups that have been structurally excluded from the process of administrative lawmaking. In *Camp*, the Court struck down a regulation issued by the Comptroller of the Currency that permitted commercial banks to operate certain types of mutual funds.69 The Court invalidated the regulations on the grounds that they violated sections of the Glass-Steagall Act, which separates commercial banking from investment banking and securities dealing.70 The mutual fund under review called for customers to tender between $10,000 and $500,000 to a commercial bank along with an authorization making the bank the customers’ managing agent.71 In exchange for the money and the authorization, the customers recovered “units of participation” reflecting the customers’ proportional interest in the fund’s assets.72 Customers were free to transfer and redeem these units of participation.73

The Comptroller of the Currency is a single-interest-group regulatory agency. That interest group is comprised of national banks, which have received the undivided loyalty of the Comptroller in their efforts to enter the business of dealing in securities.74 As I have pointed out elsewhere, the Court’s repeated invalidation of the Comptroller’s decisions illustrates the judiciary’s ability to place “severe obstacles on the efficacy and longevity of special interest legislation.”75 The Court’s willingness to strike down deci-

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68. 401 U.S. 617 (1971).
69. Id. at 639 (regulation allowing banks limited entry to mutual fund investment business violates liberal terms of Glass-Steagall Act).
71. Id. at 622.
72. Id.
73. Id.
74. Jonathan R. Macey, *The Political Science of Regulating Bank Risk*, 49 OHIO ST. L. REV. 1277, 1284-85 (1989) (Comptroller’s willingness to allow commercial banks to engage in behavior conflicting with the purposes of the Glass-Steagall Act demonstrates that the Comptroller has been “captured” by national banks).
75. Jonathan R. Macey, *Special Interest Groups Legislation and the Judicial Function: The Di-
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sions by the Comptroller strongly supports the proposition that the Court has not abandoned its constitutional role as a check on the power of the more political branches of government.

In addition to the substantive result reached in Camp, the fact that the Investment Company Institute was granted standing\textsuperscript{76} is, in and of itself, rather remarkable. This plaintiff was not just a narrow special interest group, but rather a professional trade association representing investment companies.\textsuperscript{77} The Investment Company Institute was not bringing suit to vindicate some generalized notion of the good. Instead, the group was seeking to prevent entry into the industry by a new and possibly more efficient competitor. In other words, the interests of the trade association seem directly contrary to the public interest, which usually rests on the side of increased competition in the mutual fund business.

The Court’s decision to grant standing in Camp relied on the analytic framework articulated in another case involving the Comptroller, Association of Data Processing Service Organizations, Inc. v. Camp.\textsuperscript{78} In that case, the Court permitted a trade group of data processors to sue to prevent the Comptroller from authorizing banks to enter the business of providing data processing services to retailers and other banks.\textsuperscript{79} The Court’s two-part test gives standing to interest groups challenging the actions of administrative agencies so long as: (1) the group would suffer harm, economic or otherwise, as a result of the agency’s ruling; and (2) the interest is “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”\textsuperscript{80}

In still another case involving the Comptroller, Clarke v. Securities Industry Association,\textsuperscript{81} the Court found standing to permit the interest group representing the securities industry to challenge the Comptroller’s decision allowing commercial banks to enter the discount brokerage business.\textsuperscript{82} Here the Court noted that the zone of interests test was “not meant to be es-

\textsuperscript{76} Camp, 401 U.S. at 620-21.
\textsuperscript{77} Id. at 618.
\textsuperscript{78} 397 U.S. 150 (1970).
\textsuperscript{79} Id. at 153-55 (data processors had standing to challenge regulation because they faced the possible injury of reduced profits due to new competition and because Bank Service Corporation Act was intended to protect competitors).
\textsuperscript{80} Id. at 152-53.
\textsuperscript{81} 479 U.S. 388 (1977).
\textsuperscript{82} Id. at 403 (interest group had standing to challenge regulation where its alleged injury implicated policies of the National Bank Act and where it is reasonably inferred that Congress expected and intended to rely on such challenges as a check on agency disregard of the law).
cially demanding,” but rather to prevent standing only when “the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.”

Interestingly, the Court’s willingness to grant standing to interest groups has not been transformed into a more general inclination to afford standing in cases where the structural bias does not exist. In particular, well-known cases such as *Simon v. Eastern Kentucky Welfare Rights Organization* and *Allen v. Wright* deny standing to seemingly deserving plaintiffs who wish to challenge Internal Revenue Service (IRS) rulings that clearly cause them harm. In *Simon*, the Court denied standing to a welfare organization and several indigent individuals who wanted to challenge IRS rulings reducing the amount of indigent care that hospitals must provide in order to retain their tax-exempt status. In *Allen v. Wright*, the Court denied standing to the parents of black children who attended public schools and who wanted to sue the IRS to force it to adopt adequate standards and procedures for denying tax-exempt status to racially discriminatory private schools.

Similarly, where the interest group challenging an agency’s action has not been disenfranchised, but rather enjoys regular and repeated access to the agency’s decisionmaking apparatus, standing will be denied even though the group is dissatisfied by the agency’s decision. Thus, in *Air Courier Conference of America v. American Postal Workers Union*, the Court denied standing to unions representing postal employees who were challenging a Postal Service rule suspending the Service’s statutory monopoly in the international remailing market. In the *Postal Workers* case the Court ruled that, despite a number of provisions in the Postal Reorganization Act improving the pay and working conditions of postal employees, such postal employees were not

83. Id. at 399.
86. 426 U.S. at 40-43 (while *Camp* weakened the requirement of injury, requirement still must be satisfied; welfare organizations lacked standing because no injury to themselves as organization, and indigent individuals lacked standing because injury at hands of hospital not clearly traceable to tax regulations).
87. 468 U.S. at 755, 758-59 (parent group challenging lack of effective standards to deny tax exempt status to racially discriminatory private schools lacked standing because it could not ground “injury” in mere government violation of the law, abstract stigmatic injury, or diminished access to desegregated education where causal link to injury not shown).
89. Id. at 918, 921 (while possible adverse effect on postal worker employment constituted injury in fact, unions failed to show that employment of postal workers fell within zone of interests protected by the Private Express Statutes creating the postal service monopoly).
within the zone of interests the postal monopoly was designed to protect.\textsuperscript{91}

The unions representing the postal workers were intimately involved in the elaborate political compromise that led to the 1970 Postal Reorganization Act, which reenacted the Private Express Statutes that create the post office's statutory monopoly.\textsuperscript{92} As a result, these unions had never been disenfranchised from the political process that led to the rule suspending the Postal Service's statutory monopoly in international remailing; thus, they hardly needed to be re-enfranchised by the Court.

A major, perhaps decisive, difference between the cases denying standing and cases granting standing to aggrieved groups is the nature of the administrative agencies involved in the underlying decisions. Standing is granted where the agency involved is likely to be structurally biased against the plaintiff-groups;\textsuperscript{93} the Court denies standing where the relevant regulatory agency is not structurally biased against the plaintiff-group.\textsuperscript{94} The IRS, unlike the Comptroller of the Currency, is not a single-interest-group regulatory agency. The plaintiff-taxpayers in \textit{Simon} and \textit{Allen v. Wright} were not disenfranchised by the legislation creating the IRS in the way that the plaintiffs in \textit{Clarke} were disenfranchised by the legislation that established the Comptroller of the Currency. That legislation led to the capture of the Comptroller's office by national banks, and to the systematic exclusion of other interests from the rulemaking process within the Comptroller's office. By contrast, the plaintiffs in \textit{Simon} and \textit{Allen v. Wright} were not disenfranchised \textit{ab initio} relative to other groups.

One might argue that the Court's liberal rules of standing are contrary to the public interest because they impede the ability of the Comptroller to help consumers by allowing banks to enter into a number of highly concentrated industries, particularly investment banking. Such entry would serve the pub-

\textsuperscript{91} 111 S. Ct. at 920-21 (to construe Postal Reorganization Statute as relevant statute in zone of interests analysis when violation of Private Express Statutes is crux of challenge would render zone of interests test meaningless).

\textsuperscript{92} \textit{Id.} at 916 ("[A] 'key impetus' and 'principal purpose' of the PRA [Postal Reorganization Act] was 'to implement various labor reforms that would improve pay, working conditions and labor-management relations for postal employees.'") (citing lower court findings).

\textsuperscript{93} \textit{See supra} notes 67-83 and accompanying text; \textit{see also} United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973). This case involved a challenge by law students to the Interstate Commerce Commission's approval of a freight rate that, in the view of the students, would be environmentally unsound because it would discourage the use of recycled materials. \textit{Id.} at 676. The students argued that they should be granted standing to sue because the rate increase would lead to more litter and to degradation of natural resources, and thus impair the students' ability to enjoy forests, parks, and natural resources. \textit{Id.} at 677. The Court recognized that this was an "attenuated line of causation," the students nonetheless were permitted to go forward with their suit. \textit{Id.} at 679, 686-89 (Court followed \textit{Camp} analysis to conclude that because student group alleged "specific and perceptible harm" from alleged violation of National Environmental Policy Act, group had standing, although Court did not address "zone of interests" issue).

\textsuperscript{94} \textit{See supra} notes 84-92 and accompanying text.
lic interest not only by leading to lower prices for investment banking services, but also by making the capital formation and allocation process more competitive, creating a generally more efficient economy. However, Congress, not the courts, is the source of the initial industry cartelization. Courts’ willingness to undermine these initial legislative deals by making it more difficult for interest groups to control the process of lawmaking by the administrative agencies they have captured means that Congress will likely enact fewer special interest oriented statutes.

Thus, the rules of standing, like the general procedural and substantive rules discussed in the previous section, reflect a judicial concern with interests that are systematically unrepresented in an agency’s initial structure and design. The willingness of courts to intercede on behalf of such structurally disenfranchised groups indicates that the independent judiciary serves as an important constraint on wealth transfers to special interest groups. The courts’ response promotes public-regarding legislation and complicates Congress’s ability both to design and structure administrative agencies so as to enfranchise those groups that dominated the initial process of legislative enactment and to disenfranchise those groups that lost when Congress passed the relevant legislation.

A prominent scholar of administrative law recently observed that those “who have studied the Supreme Court’s opinions on standing overwhelmingly concur with Kenneth Davis’s characterization: standing law suffers from ‘inconsistency, unreliability, and inordinate complexity.’”95 While this may be true in the abstract, the Supreme Court’s rules of standing are rational and coherent when viewed as a judicial response to the problem of special interest group capture of administrative agencies. In a nutshell, the Court tends to grant standing to special interests that were systematically excluded from legislative compromises if those compromises produced broad delegations to agencies easily captured by the interests that were part of the initial deal. In this way the Court impedes Congress’s ability to influence agency behavior through structure and design.

C. THE JUDICIAL RESPONSE TO THE LEGISLATIVE VETO

The Supreme Court’s response to congressional efforts to implement a legislative veto is perhaps the most obvious example of the Court’s practice of impeding Congress’ efforts to control administrative agency discretion. The legislative veto simply is a statutory provision that gives Congress (or some subpart of Congress)96 the authority to nullify the action of an administrative

95. Pierce, supra note 67, at 1275 (quoting 4 Kenneth C. Davis, Administrative Law Treatise § 24:1, at 208 (2d ed. 1983) (footnote omitted)).
96. The subpart may be one house, or just a committee of one house or the other.
agency. Creation of a legislative veto has typically followed a broad grant of discretion to an agency. For example, Congress delegated to the Federal Trade Commission (FTC) the authority to promulgate rules to regulate certain industry trade practices and to stop business practices it determines to be “unfair,” but retained the authority to nullify the FTC’s rules through legislative veto.97

Congress used the legislative veto with increasing frequency from its inception in 193298 until the Supreme Court’s decision in INS v. Chadha,99 which held the legislative veto to be unconstitutional.100 In Chadha, the Court was confronted with Section 244(c)(2) of the Immigration and Nationality Act,101 which reserved for either house of Congress the power to veto by resolution decisions of the Immigration and Naturalization Service and Attorney General to suspend deportation proceedings against aliens overstaying their visas.102 When Congress overturned a decision by the Attorney General to decline to deport Chadha, both Chadha and the Immigration and Naturalization Service (INS) sued to declare Section 244(c)(2) unconstitutional as contrary to the bicameral requirement of the separation of powers doctrine103 and violative of the Presentment Clauses.104 The Supreme Court affirmed the court of appeals decision that Congress’s retention of the legislative veto was unconstitutional.105 The Court noted that after previously employing an inefficient private bill procedure for making decisions on allowing deportable aliens to remain in the United States, “Congress made a deliberate


98. The first legislative veto was enacted when Congress gave President Hoover the power to reorganize executive departments. Stephen Breyer, The Legislative Veto After Chadha, 72 GEO. L.J. 785, 786 (1984).


100. Id. at 959 (legislative veto in Immigration and Nationality Act destroys “carefully crafted restraints” in Constitution meant to protect against arbitrary government action, and is therefore unconstitutional). Justice White, in his dissenting opinion in Chadha listed 56 statutes that contained legislative veto clauses, and noted that 200 laws containing a legislative veto had been enacted in the 50 years prior to Chadha. Justice White noted that 56 statutes containing a legislative veto were enacted between 1932 and 1939, 19 during the 1940s, 34 during the 1950s, 49 during the 1960s, and 89 in the first half of the 1970s. Chadha, 462 U.S. at 944-45, 976 n.12 (White J., dissenting) (quoting James Abourezk, The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives, 52 IND. L.J. 323, 324 (1977)). Judge Stephen Breyer has observed that “[s]ince 1932, veto clauses have proliferated like water-lilies on a pond (or algae on a swimming pool, depending on one’s point of view.” Breyer, supra note 98, at 786.


102. Chadha, 462 U.S. at 928.


104. Id. § 7, cls. 2, 3.

105. Chadha, 462 U.S. at 959.
choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority” to make such decisions.\textsuperscript{106} Congress could alter this earlier delegation of authority “in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.”\textsuperscript{107}

More recently in \textit{Metropolitan Washington Airport Authority v. Citizens for the Abatement of Aircraft Noise},\textsuperscript{108} the Court addressed Congress’s attempt to transfer operational control of Dulles and Washington National airports to the Metropolitan Washington Airport Authority (MWAA) from the Department of Transportation. The MWAA is an organization created by compact between the District of Columbia and the State of Virginia.\textsuperscript{109} Congress conditioned its transfer of operational authority over these airports upon the creation of a Board of Review which would have authority to veto any decisions made by the MWAA.\textsuperscript{110} This Board of Review was to be composed of nine congressmen “acting in their individual capacities” as users of these two airports.\textsuperscript{111} The Court struck down this attempt at giving veto power to congressional interests,\textsuperscript{112} thereby impeding Congress’s ability to control agency decisionmaking ex post. The Court made it clear that Congress’s power to make law is bounded by the separation of powers: Congress cannot exercise executive power, and it can only exercise legislative power in conformity with Article I’s bicamerality and presentment requirements.\textsuperscript{113} \textit{Airport Authority} and \textit{Chadha} provide good examples of how the courts thwart congressional efforts to retain control over administrative agencies. The legislative veto cases, like the standing cases, democratize the administrative process by strengthening poorly organized interest groups relative to well-organized ones.

Defenders of the legislative veto argue that the veto permits the broad delegations of congressional authority necessary to modern regulatory decisionmaking without abandoning the political accountability of Congress.\textsuperscript{114}

\begin{itemize}
\item 106. \textit{Id.} at 954.
\item 107. \textit{Id.} at 954-55.
\item 109. \textit{Id.} at 2301.
\item 110. \textit{Id.}
\item 111. \textit{Id.} at 2303 (proposed bills altered to provide that Board of Review members act in individual capacity after opinion from Department of Justice informed Congress that veto by Board of Review composed of Congressmen \textit{qua} Congressmen would constitute legislative action subject to Constitutional requirements of bicameralism and presentment).
\item 112. \textit{Id.} at 2312.
\item 113. \textit{Id.} at 2311 (Congress may neither invest itself with executive or judicial power nor exercise its legislative power in violation of the carefully crafted requirements of Article I of the Constitution).
\item 114. Breyer, \textit{supra} note 98, at 787-88 (legislative veto over regulatory actions effectuates needed compromise between political accountability and complex decisionmaking in administrative state).
\end{itemize}
This argument is flawed for a number of reasons. First, it assumes that Congress is accountable (presumably to the people) in some way when it utilizes the legislative veto to nullify the decision of an agency. In fact, the legislative veto is utilized by Congress to favor individuals or narrow interest groups. By definition, the subject of a particular legislative enactment is extremely narrow. It will commonly be a particular administrative act that has reached the attention of Congress, but rarely will be of such moment that it catches the attention of the popular press or the public. Consequently, the congressional veto inevitably will be the focus of interest group struggle, rather than public-spirited political debate. Thus, the legislative veto is not about congressional accountability to the people; it is about congressional accountability to special interest groups.

Second, the power to veto the actions of administrative agencies may be given to a single house of Congress, or even to a single committee within Congress, rather than to both houses acting together. There is no reason to believe that these committees are any more politically accountable to the general public than the agencies themselves.  

Finally, and perhaps most importantly, the political accountability argument in favor of the legislative veto criticizes the Supreme Court's decision in Chadha as formalistic, lacking in appreciation for "the purposes, the effects, [and] the practical virtues of the legislative veto." But this approach to Chadha fails to acknowledge that the Court's "simple reliance on the logic and letter of the Constitution" does not mean that the outcome cannot be defended on instrumentalist grounds. Indeed, the Court's seemingly formal emphasis on the Constitution's "single, finely wrought and exhaustively considered procedure" as specified in Article I is remarkably well-tailored to confront and respond to the fundamental obstacles to political accountability that Kenneth Arrow and others have advanced.


116. Breyer, supra note 98, at 790 (arguing that the Court's decision in Chadha is formalistic rather than functional).

117. Id. (recognizing Chadha's lack of concern with the "wisdom or utility" of a legislative veto).

118. Chadha, 462 U.S. at 951.

119. Under Arrow's Theorem, majority voting will lead to cycling results and therefore prevent consistent and coherent public policy. See William T. Mayton, The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies, 1986 DUKE L.J. 948, 950-51 (describing Arrow's application of Cordorcet's paradox to methods of collective choice). This failure to produce the community preference defeats political accountability. Mayton argues that the requirement of Article I counters the forces predicted by Arrow's Theorem to allow rational policymaking, a result of the "'order and stability' that the framers prized." Id. at 956.
In particular,

[O]nce legislation is proposed, because of the bicameral nature of the Congress, approval by what is, in effect, a supermajority of the legislators is required to pass the statute. Thus, to some extent article I establishes a decisional process that, by forestalling cyclical majorities, can yield coherent and consistent legislative choices.\textsuperscript{120}

Moreover, by creating an independent federal judiciary and a federal executive with authority to veto acts of Congress, the Constitution creates a system in which "each of the three branches of government must appeal to different constituencies for political support, thereby further reducing the power of interest groups to affect political outcomes."\textsuperscript{121}

Apologists for the legislative veto fail, then, to appreciate that the lawmaking process is only "politically accountable" when the requirements of Article I are met. Otherwise, the system of checks and balances is unable to operate, as in the case of the legislative veto. The consequence of failing to comply with the letter of Article I is that the high degree of consensus necessary for passing a statute will be lacking and the probability that the process will be tainted by special interests will be high. By strictly enforcing Article I, the Court in Chadha impedes Congress's efforts to lower the decision costs of government, making it easier for special interests to control the political process. Thus, the outcome in Chadha ultimately will produce more political accountability, not less. In this way, the Court's opinion reflects the principles that informed the very structure of the Constitution.

Without the legislative veto, special interest legislation will be less attractive to powerful special interest groups. To see why this is so, it is useful to return to Professor Shepsle's distinction between bureaucratic drift and legislative drift.\textsuperscript{122} Indeed, nowhere is Professor Shepsle's argument about the tension between bureaucratic drift and congressional drift more powerfully displayed than in the context of the legislative veto.

The interest groups most desirous of obtaining a legislative veto proviso as part of a special interest group compromise will be those groups least concerned about legislative drift relative to bureaucratic drift. Indeed, only those groups confident of their ability to control future legislatures will place a value on obtaining a legislative veto as part of a legislative package. Powerful, well-organized special interests, confident of their ability to maintain an effective, well-financed political coalition, will place a high premium on a legislative veto because such groups will expect to be able to control future


\textsuperscript{121} Id. at 510.

\textsuperscript{122} See \textit{supra} note 5 and accompanying text (describing bureaucratic drift and legislative drift).
Congresses or congressional committees. By contrast, poorly organized, poorly financed groups, who are able to galvanize into an effective political coalition in order to advance their interests in one piece of legislation, will be unable to exert a sufficiently sustained political influence over time to derive much value from the legislative veto. Similarly, these poorly organized groups probably will be unable even to monitor an agency’s decisionmaking process closely enough to know whether to advocate the utilization of the veto in a specific instance. Thus the Court’s decision in the legislative veto cases pushes the lawmaking process in a more public-regarding direction by advantaging poorly organized groups relative to well-organized interests, and by ensuring that legislative acts are not taken without achieving a high degree of consensus.

Because invalidating the legislative veto raises the costs to Congress of enacting statutes containing broad delegations of authority to administrative agencies, one of two possibilities will occur when Congress considers broad delegations after *Chadha*. In some instances, Congress may determine that the benefits of passing a particular statute are not worth the drawbacks. Alternatively, and probably more often, the additional costs on Congress imposed by *Chadha* will not result in Congress declining to pass a law, but rather in Congress delegating power to an agency unqualified by the possibility of legislative veto. In the latter case, weak groups will benefit relative to strong groups, because strong groups are better able both to monitor agencies and control Congress than weak groups. Without the ability to monitor agencies and Congress, the legislative veto is of little or no value to special interests.

II. THE ROLE OF THE EXECUTIVE

The President’s influence over administrative agencies further confounds Congress’s ability to control such agencies ex post. Indeed, even if we assume (counterfactually) that Congress somehow can perfectly control both bureaucratic drift and legislative drift, the presence of the executive, like the presence of the independent judiciary, impedes Congress’s ability to control agencies, and thereby raises the costs to special interest groups of obtaining broad-based delegations from Congress.

Presidential involvement in the regulatory process comes in direct response to congressional involvement in that process. In the post-World War II period, a relatively stable political equilibrium has emerged in which the Presidency is controlled by the Republican party, while the Congress is controlled by the Democratic party. Inevitably, the policy differences between Congress and the President have manifested themselves in the struggle for influence and control over the administrative state. In light of these policy differences, the executive’s ability to influence administrative agencies raises
the costs to Congress of enacting laws that include broad delegations of authority to agencies. Consistent with the theory of checks and balances inherent in the separation of powers, Congress will not engage in a broad delegation to an agency unless there is a high degree of consensus with the President with respect to policy. The necessity for a broad consensus lowers the probability that narrowly focused special interest groups will dominate the delegation process, because such groups will have to capture the executive branch as well as both houses of Congress to accomplish their goals.

Thus, a large part of the story of the modern administrative state is the story of the struggle between Congress and the President for control and influence of administrative agencies. Indeed, some commentators would take issue with McNollgast's basic assumption that Congress is the key policy actor with respect to administrative agencies.123 Defenders of close congressional control of administrative agencies identify three sources of executive interference with congressional control: the appointments power, the Office of Management and Budget, and executive control over agency money and staff.124

A. THE APPOINTMENTS POWER

The executive's influence over agency policy stems from the presidential appointments power.125 Critics of the way this power recently has been used cite such appointments as James Edwards to Secretary of Energy and Ann Burford to Director of the Environmental Protection Agency as examples of the executive appointing people who intended to dismantle the agencies they were entrusted to administer.126 Three comments are in order. First, there is no evidence that any of these people succeeded, or even came close to succeeding, in their alleged attempt to destroy the agency they administered. Second, as my colleague Cynthia Farina trenchantly has observed, the appointments power of the President is a "deeply considered and much debated attempt to balance executive and legislative involvement in the selection pro-

123. See, e.g., CLINTON ROSSITER, THE AMERICAN PRESIDENCY 26-28 (2d ed. 1960) ("[W]e may therefore consider [the President] to be the Chief Legislator.").


125. Id. at 494 (executive possesses power to appoint to agencies people who share executive's policy goal).

126. Id. at 494-95 (Secretary of Energy John Edwards admitted that he was given the job of dismantling the Department of Energy; applicant for Director of the Environmental Protection Agency was asked by its OMB budget director whether he would be willing to bring the agency "to its knees").
cess." The power of appointments was vested in the President by the framers because the Federalists thought that the legislature would abuse the power even more than the President, and not because the President was considered to be a particularly reliable repository for this authority. Indeed, from a balance of powers perspective, the question is not whether the President is abusing his constitutional power to make appointments, but whether an alternative institutional arrangement (such as vesting the appointments power in Congress) would be superior. There is no reason to believe it would.

Finally, if the appointments power vests too much power in the President, the fault lies with Congress, which has acquiesced in this usurpation of authority, rather than with the President, who simply is playing the political game as best he can and utilizing his appointments power along the way. After all, the power to withhold consent from appointments suggested by the President has the potential to make "the Senate a powerful (if not quite equal) partner with the President in choosing top administrators." Moreover, besides the obvious palliative of taking a more active role in confirmation hearings, the Senate could respond even more forcefully to any perceived usurpation of authority. For example, the Senate or a subcommittee of the Senate formally could recommend to the President specific people it deems appropriate to fill particular vacancies, and then demand that the President provide reasons for refusing to nominate somebody on the list. Alternatively, the Senate could condition funding for projects considered particularly important by the President upon the satisfactory performance of regulatory agencies' duties. Any balance of powers problem that may exist due to executive usurpation of congressional authority through the appointments process is due at least as much to the Senate's quiescence as to the executive's imperialism.

B. THE MYTH OF THE OMB "STRANGLEHOLD"

The same point can be made in response to the argument that the Office of Management and Budget (OMB) has further solidified the President's grip on the process of administrative rulemaking. Administrative agencies must

129. Farina, supra note 127, at 504.
130. John W. Selfridge, Senate Can Do More on Court Nominations, N.Y. TIMES, July 7, 1991, § 4, at 10. When Oliver Wendell Holmes retired from the Supreme Court in 1932, the Senate recommended specific successors to the President in the interest of maintaining balance on the Supreme Court. Id.
obtain OMB clearance for proposed legislation, as well as for legislative testimony, through the OMB Office of Information and Regulatory Affairs. Critics have charged that the powers given to OMB are "a powerful conduit for injecting the President's views directly into the rule-making process." However, as with the appointments power, the executive acting through OMB has only as much power as Congress is willing to allow. Congress has required Senate confirmation of the appointment of the director of the Office of Information and Regulatory Affairs, and in doing so has undermined the President's ability to usurp regulatory authority from agencies by using OMB as a filter for proposed legislation. The Senate's recent stubborn unwillingness to confirm a nominee to that position is clear evidence that, like the President, the Senate can play hardball to restore the balance of power when it so desires.

C. THE POWER OF THE PURSE

It is difficult to credit the contention that the executive can control agency behavior through its ability to deny agencies the money and staff they need to carry out their statutorily assigned functions. There are no credible examples of this having taken place, even at the height of the so-called "Reagan Revolution." Congressman Edward J. Markey (D-Mass.) has cited the refusal of OMB to allow the Federal Savings and Loan Insurance Corporation (FSLIC) to hire additional bank examiners in 1981 as evidence of executive use of the power of the purse to control an agency. However, Congress could have used its appropriations power to increase funding to the FSLIC in response to the growing severity of the savings and loan crisis. The truth is that Congress, not the executive, was the primary beneficiary of the delay in recognizing the savings and loan disaster. Individual Senators, including the "Keating Five" and congressmen such as Speaker Jim Wright, reaped huge political bonanzas—and paid a huge political price—for their participation in the scandals that caused the savings and loan debacle. It seems

132. Farina, supra note 127, at 506.
133. 44 U.S.C. § 3503(b).
134. Markey, supra note 124, at 495-96 (OMB refusal to grant more bank examiners to the FSLIC in a timely manner represented "blind pursuit of deregulation" in face of "pressing need for governmental intervention" occasioned by the savings and loan crisis).
that the problem here is not too much interference by the executive in the affairs of an agency, but too little.

The second example Congressman Markey gives of executive control of administrative agencies through its control over the purse involves the Securities and Exchange Commission (SEC).\(^\text{137}\) Congressman Markey claims that in order to retard the war on insider trading, "throughout the 1980s the SEC was consistently given less employees by the administration than in its budget request—hundreds of employees less."\(^\text{138}\) This account of the activities of the SEC in the 1980s is entirely counterfactual. First, the issue of insider trading actually moved to the top of the SEC's agenda in the 1980s.\(^\text{139}\) Immediately after taking office in 1980, John Shad, whom President Reagan appointed as Chairman of the SEC, gave several speeches announcing the SEC's tough new policy on insider trading. At one point he declared that the Commission would "come down [on insider trading] with hobnail boots."\(^\text{140}\) Indeed, during the 1980s the SEC's enforcement effort against insider trading increased exponentially, giving rise to several notorious scandals throughout that decade.\(^\text{141}\) The SEC's budget requests typically were granted during this period, and the budget consistently grew during a time of general fiscal belt-tightening.\(^\text{142}\) Thus, while Congress and the President were both applauding the SEC's efforts to combat insider trading, the SEC responded rationally by moving the fight against insider trading to the top of its regulatory agenda.

It is Congress, not the executive, that is in charge of appropriations. Budgetary appropriations to administrative agencies can only be a source of great congressional authority, not presidential authority.\(^\text{143}\) As Professor Harold Bruff has observed, Congress's "[y]early budgetary hearings in both houses provide an opportunity for the appropriations committees to review agency performance, and to affect future policy either by changing appropri-

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\(^\text{137}\) Markey, supra note 124, at 496 (SEC given insufficient number of employees to keep up with growth of Wall Street so that fewer than half of all insider trading complaints were investigated).

\(^\text{138}\) Id. at 496.


\(^\text{141}\) Haddock & Macey, supra note 139, at 333 (between January 1982 and August 1986, the SEC increased its rate of enforcement by 600%).

\(^\text{142}\) See Jonathan R. Macey, From Judicial Solutions to Political Solutions: The New, New Direction of the Rules Against Insider Trading, 39 A.L.A. L. REV. 355, 380 (1988) (the SEC's success in procuring such budget increases was partially a result of its own efforts to keep the law as vague as possible to maximize the demand for its services as an administrative agency).

\(^\text{143}\) Harold H. Bruff, Presidential Power and Administrative Rulemaking, 88 YALE L.J. 451, 457-58 (1979) (budgetary appropriations are explicit constitutional powers available to Congress to influence agency action).
The fact that Congress does not use its power effectively only reinforces the point that any perceived tilt in the constitutional balance of powers toward the executive branch is a result of congressional acquiescence as much as presidential usurpation.

It seems clear that it is more difficult for the executive branch, which is politically accountable to a national constituency, to be captured by narrow special interests than it is for a specialized administrative agency to be captured by such interests. Similarly, it is even more difficult for Congress, which is accountable to a vast number of overlapping constituencies, to be captured by special interests than it is for an agency. A fortiori, it is more difficult for special interests to capture an agency and Congress and the executive, than to capture any one of these entities alone. To the extent that the separation of powers requires the agreement of all three, then interest group capture becomes even more costly.

CONCLUSION

This article starts with the basic premise of positive political theory that Congress utilizes a variety of sophisticated techniques to control the behavior of the bureaucrats in administrative agencies (i.e., to control what Professor Shepsle has described as bureaucratic drift). In particular, Congress's ability to fashion complex procedural rules, rigid substantive rules, and basic organizational and structural rules establishes a regulatory infrastructure likely to produce regulatory outcomes that mirror the preferences of the parties to the legislative compromise that produced the original legislation. The purpose of this article has been to examine the impact of the Supreme Court and the President on Congress's efforts to control bureaucratic drift.

What this article illustrates is that, unfortunately for Congress and for special interest groups, the initial establishment of an administrative agency's organizational structure and jurisdictional parameters is not conclusive. The independent judiciary, which is not a party either to the original interest group deals that lead to the establishment of administrative agencies or to the structural enfranchisement of certain groups and the structural disenfranchisement of others, has no incentive to enforce such deals. Similarly, the President, who often is politically accountable to the public for the outcomes generated by administrative agencies, will want to pull the agency in a direction compatible with his own views of the public interest.

I also have responded to critics of the executive branch who charge that

144. Id. at 458 (footnote omitted). See 2 STAFF OF SENATE COMM. ON GOV'T OPERATIONS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION 18-43 (Comm. Print 1977) (describing techniques and processes used by the Appropriations Committee to oversee government agencies).
the balance of power between the President and the executive has shifted too much in favor of the President. As noted above, the struggle between the two political branches is a healthy one, and fully consistent with the framers' notion of a healthy balance of power. The executive's increased efforts to control the federal bureaucracy in recent years is both a consequence of the increasing power of that bureaucracy and a reaction to Congress's increasing sophistication in developing its own strategies for control of the administrative state.

Thus, consistent with the basic idea imbedded in the separation of powers that the independent judiciary and the executive serve as an important constraint on legislative excess and political dealmaking, both the courts and the executive branch have developed a number of devices for mitigating Congress's ability to disenfranchise certain groups. In particular, the courts' liberal rules of standing for structurally disenfranchised interest groups, coupled with the courts' general unwillingness to defer to administrative agencies that have been inattentive to disenfranchised groups, demonstrate that Congress's attempts at agency "hardwiring" through structure and design will not always be successful.