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Changing Conceptions of Administration*

*Cass R. Sunstein***

The New Deal was a period of self-conscious reflection about the original constitutional structure. To the New Deal reformers, the traditional framework could not deal adequately with modern problems. In particular, the system of checks and balances seemed to be an obstacle to necessary change. Although the most radical suggestions for structural reform[1] were repudiated, the institutional learning of the New Deal manifested itself in a dramatic innovation: the modern regulatory agency, an entity that is largely independent of the constitutionally specified branches of government and that combines traditionally separated functions.

The current structure of the national government is in a period of rethinking and transition, raising basic questions about the institutional framework of both the original Constitution and the New Deal period. This article outlines the changes introduced into the constitutional structure during the New Deal period, describes some of the developments in the fifty-year period since the New Deal, and makes some suggestions for future reform. The task for the future is to achieve some of the original constitutional goals in a period in which limited government is no longer an unambiguous good. An increasing role in the regulatory process for the constitutionally specified branches of government is necessary in order to accomplish this task.

I. The Original Structure

The distribution of national powers, usually described in

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1. *See, e.g.*, W. Elliott, The Need for Constitutional Reform (1935); T. Finletter, Can Representative Government Do the Job? (1945); W. MacDonald, A New Constitution for a New America (1921).

terms of checks and balances or separation of powers, was of course a central feature of the original constitutional structure. The framers' basic strategy was to allow each branch a role in the workings of the other.[2] This strategy was highly distinctive and is currently controversial.[3] It will be useful to begin by describing the basic purposes of the original system.

The distribution of national powers serves two primary functions. Although these functions are in some tension with one another, they capture important strands in the theory underlying the Constitution. First, the distribution promotes efficiency in government. One of the central defects in the Articles of Confederation was the weakness of the national government, which lacked a distinct executive branch. The Constitution enabled government to act expeditiously while at the same time obtaining some of the advantages associated with a division of labor. The concentration of executive power in a single person eliminated the problems of indecision, delay, or stalemate often associated with a plural or deliberative body. In these respects, the original system should not be understood as producing a paralyzing "friction,"[4] but instead as facilitating government action.

Second, the distribution of national powers created a series of checks and balances producing what Montesquieu described as a natural "state of repose or inaction."[5] The ability of one branch to counter another would make it less likely that government might act to oppress the citizenry. This basic view can be divided into several component concerns which, in concert, tend to account for the intuition that the system of checks and balances is a safeguard against tyranny—a structural arrangement serving the same purposes as a bill of rights.

The first concern is a fear of factionalism: the risk that a well-organized private group might usurp governmental processes to redistribute wealth or opportunities in its favor. This fear played a prominent role in the framing of the Constitution and helped account for the desire to distribute powers into various branches over which no faction would likely have

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2. *See* THE FEDERALIST No. 48 (J. Madison).

3. *See generally* J. SUNDQUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT (1986).

4. *See* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

5. MONTESQUIEU, THE SPIRIT OF LAWS 172 (T. Nugent trans. rev. ed. 1902).

control.[6] A well-organized group might obtain power over one branch, but it would be unlikely that it would do so over all three.

The second concern is a fear that rulers might promote their own independent interests at the expense of the public as a whole. This might be called the problem of self-interested representation.[7] This possibility was prominent in the minds of the framers[8] and forms the central part of the argument of *The Federalist No. 51*.[9]

The third concern is founded in a belief in limited government. The framers believed that protections against government action constituted an important safeguard of liberty and property. Thus Madison described protection of "the divers[e] . . . faculties of men" as the "first object of Government," and suggested that protection of inequality in wealth was a necessary corollary of this duty.[10] The Constitution arose in part out of a concern that factionalism manifested itself in redistributive measures, including debtor relief laws, paper money, and efforts to equalize wealth.[11] There can be little doubt that protection of rights of private property was an important constitutional concern.[12] By making government action more difficult, the system of checks and balances tended to promote that goal.

The fourth and final concern underlying the distribution of national powers is a belief in deliberation and stability. The system of checks and balances tends to make rapid changes difficult to accomplish. In this respect the distribution of powers was consonant with Madison's own hostility to rapid change in government, captured in his antipathy to "turbulence,"[13] but disso-

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6. The classic statement is THE FEDERALIST No. 10 (J. Madison).

7. This phenomenon is reflected in recent work exploring the settings in which agents have interests independent of the interests of their principals. *See, e.g.*, Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308-10 (1976).

8. *See, e.g.*, THE FEDERALIST No. 78, at 524 (A. Hamilton) (J. Cooke ed. 1961) (justifying judicial review in part on the ground that agents should be made subordinate to principals).

9. THE FEDERALIST No. 51 (A. Hamilton).

10. *See* THE FEDERALIST No. 10 (J. Madison).

11. *Id.* at 65 (J. Cooke ed. 1961); *see generally* F. MACDONALD, NOVIS ORBUM SECLORUM (1986).

12. *See* Hofstadter, *The Founding Fathers: An Age of Realism*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 62, 69-70 (R. Horwitz 3d ed. 1986).

13. *See* Letter to Jefferson (Feb. 14, 1790), in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON (M. Meyers rev. ed. 1981).

nant with Jefferson's belief that turbulence is healthy for a republic.[14] By making it difficult for government to act, the system of checks and balances ensured a measure of stability in government.

In the framers' system, these components were closely allied. Factionalism consisted largely of efforts to redistribute resources in ways that intruded on the goal of limited government. *The Federalist No. 10* reflects this idea by stating that "a rage for paper money, for an abolition of debts, for an equal division of property, . . . [are an] improper or wicked object."[15] The fear of self-interested representation pointed to similar evils. Finally, turbulence and instability were, in the framers' view, identified with a system in which the distribution of wealth was put up for collective determination. The system of checks and balances was designed in large part to counter all of these risks, and to do so simultaneously.

II. The New Deal

The New Deal involved a radical departure from the original constitutional framework. New Deal reformers believed that the original structure was both substantively and institutionally inadequate to deal with the serious social problems arising from the depression.

The substantive critique emphasized the inadequacies in a system of laissez-faire.[16] That system, in the view of the New Deal reformers, was hardly natural or prepolitical, but instead amounted to a regulatory system.[17] For a wide variety of reasons, it was a failure as such. Some observers suggested that market ordering was inefficient and that governmental aid was necessary in the interest of national productivity.[18] Others stressed distributional goals. In this view, the problem with the laissez-faire system rests in the extremes of wealth and poverty that it created.[19]

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14. *See* Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), in The Portable Thomas Jefferson 415, 416-17 (M. Peterson ed. 1975).

15. The Federalist No. 10, at 65 (J. Madison) (J. Cooke ed. 1961).

16. *See* Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470 (1923); *see generally* J. Landis, The Administrative Process (1938).

17. Hale, *supra* note 16, at 470.

18. This was the impetus behind the National Recovery Act, described in K. Davis, FDR: The New Deal Years, 1933-1937, A History 236-37 (1986).

19. Consider Roosevelt's hope that minimum wage and maximum hour laws might serve distributive goals. *See id.* at 118-19.

Elsewhere, the New Deal reformers spoke the language of entitlement, and suggested that new sorts of rights must be vindicated. Thus President Roosevelt described a "second Bill of Rights" to include various forms of security. This new approach amounted to an attack on the original constitutional understanding of the rule of property in protecting "the divers[e] . . . faculties of men."[20] According to the New Deal reformers, such diversity could not be protected without active government involvement.

The substantive position of the New Deal led naturally to its institutional position, which amounted to a formidable challenge to tripartite government. The New Deal period saw a range of efforts to bring about radical structural change, usually in the form of a combination of traditionally separated functions or an expansion of the power of the President.[21] The most radical suggestions were rejected, but some of their basic purposes were satisfied by the creation of modern regulatory agencies—the most enduring institutional legacy of the New Deal period.[22]

The distinguishing marks of the modern regulatory agency are its independence from the three constitutionally specified branches, its combination of functions, its technical expertise, and its self-starting character. In the formulation of James Landis, the regulatory agency was to act like a business corporation, assisting the regulated industries and disciplining their excesses.[23] A corporation could hardly be subject to the checks of tripartite government; such checks would be inconsistent with its mission. So too, the regulatory agencies were to be authorized to make, execute, and interpret the law.

The modern agency is a natural outgrowth of the substantive position of the New Deal. If dramatic intervention by the national government is necessary, an institution unburdened by checks and balances seems highly desirable. In one sense the modern agency is consistent with the Madisonian scheme. During the New Deal period, as at the time of the Constitution's

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20. President's Message on State of the Union, U.S. CODE CONG. SERV. 1357, 1361 (January 11, 1944).

21. *See supra* note 2 and accompanying text.

22. Of course, some agencies were created before the New Deal period. *See* S. SKOWRONEK, BUILDING A NEW AMERICAN STATE 248-84 (1982). Nevertheless, they came into widespread use during and following this period.

23. *See* J. LANDIS, *supra* note 16, at 10-16.

framing, a measure of insulation from the citizenry was thought desirable in the interest of avoiding factionalism. In both cases factionalism was viewed as the power of well-organized private groups over governmental processes.[24]

But there were important differences as well. During the New Deal period, a premium was placed on the need for technical expertise. This concern played little role in the original constitutional structure. The New Deal reformers, by contrast, had great faith in the ability of technocrats to discern a kind of unitary public interest.[25] Another, and more important difference, was that New Deal reformers saw the insulation of government officials as a means of disrupting the status quo rather than of protecting it from change. The importance of this point cannot be overstated. The institutional learning of the New Deal thus served dramatically different purposes from those of the framing period. For this reason the framers found the system of checks and balances congenial, whereas the New Deal reformers regarded it as an unnecessary and sometimes debilitating obstacle to reform.

All this indicates that the New Deal period is rightly taken as a dramatic shift from the original constitutional structure, one that suggests that something akin to a constitutional amendment had taken place.[26] In the last quarter-century, however, the learning of the New Deal has itself been questioned. The belief in an autonomous administration has come under challenge from a number of directions, many of which invoke, usually quite inadvertently, some of the purposes that led to the original distribution of national powers.

Some have argued that proliferation of agencies with overlapping functions makes coordinated or coherent policy impossible.[27] For instance, more than a dozen agencies are responsible for national energy policy. According to proponents of this view, structural reform is necessary because of the multiplicity of agency functions and because, notwithstanding their technical

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24. *See generally* D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST (1984).

25. *See* J. LANDIS, *supra* note 16, at 23-46; Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1318-27 (1984).

26. *See* Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1051-57 (1984).

27. *See* Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1402-09 (1975).

expertise, agencies seem to reach widely varying results on the same issues.[28]

Others have suggested that belief in the value of technocratic administration has been undermined by the presence of factionalism in regulation.[29] In other words, regulatory agencies have shown themselves susceptible to the influence of well-organized private groups with important stakes in the outcome. The result is a perversion of the New Deal ideal, with regulation becoming a system of lawmaking by private groups. Sometimes this phenomenon produces over-regulation; at other times it results in under-regulation. There are numerous theories about the extent and cause of agency "capture."[30] But the existence of the problem has imposed pressure to bring about changes in the regulatory process.

An additional complaint suggests that administrators obtain interests of their own, and that their decisions are designed to promote those interests.[31] This idea is sometimes manifested in the view that administrators seek to expand their own budgets, power, and statutory authority. The result is a large distortion of the regulatory process.

If these critiques are correct, the abandonment of the system of checks and balances—celebrated as a virtue by the New Deal reformers—has been a vice precisely in its introduction of some of the defects that led to the original constitutional scheme. The result has been a period of dissatisfaction with the institutional learning of the New Deal. This dissatisfaction need not be accompanied by a rejection of the New Deal's substantive attack on limited government. Although efforts to police the administrative process have frequently been accompanied by enthusiasm for deregulation, they have sometimes been based on precisely the opposite belief—that the institutional wisdom of the New Deal is inconsistent with its substantive mission. In these cases, quite surprisingly, attacks on agency autonomy have been brought about by those seeking to increase regulatory intervention in the marketplace. To understand the effects of the

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28. *See id.*

29. *See* M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 117-20, 170, 263-67 (1955).

30. *See, e.g., id.*; M. DERTHICK, THE POLITICS OF REGULATION (J. Wilson ed. 1980); P. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES (1981); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

31. *See* W. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36-39 (1971).

New Deal on the current administrative structure, we must examine the recent institutional innovations in more detail.

III. The New Deal Agency in the Last Quarter Century

The various incursions on the institutional learning of the New Deal have come from four directions. First, federal courts have assumed an increasingly aggressive role in supervising administrative decisions in an attempt to ensure "legality." Second, the executive branch has increased presidential control of the bureaucracy, ultimately by authorizing the Office of Management and Budget (OMB) to assume considerable power over the regulatory process. Third, Congress has imposed a range of constraints on regulatory agencies, including detailed specifications of policy, procedural requirements, and judicially enforceable deadlines. Fourth, constitutional principles have been invoked as a barrier against independent administration. In concert, these developments amount to a broad rejection of administrative autonomy.

A. Judicial Control

During the last quarter-century, judicial review of administrative agencies has often been aggressive. Judicial control of regulatory behavior has come in the form of the "hard-look" doctrine, initially developed by the United States Court of Appeals for the District of Columbia Circuit,[32] and subsequently endorsed by the Supreme Court.[33] The hard-look doctrine has both procedural and substantive elements. Procedurally, it requires regulatory agencies to generate detailed explanations for their decisions, to consider reasonable alternatives, and to explain departures from past practices.[34] Substantively, the hard-look doctrine imposes a requirement that the agency's decision be reasonable on the merits.[35] Courts have frequently been quite

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32. *See* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851-53 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. Pa. L. Rev. 509, 511 (1974).

33. *See* Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983); Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505, 543 (1985); Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 Sup. Ct. Rev. 177, 181-82.

34. For a further discussion of the procedural element, see Sunstein, *supra* note 33, at 181-84.

35. *See, e.g., State Farm*, 463 U.S. at 57.

intrusive in using these requirements to limit agency discretion.[36]

The hard-look doctrine has been used both in the service of, and as a constraint on, the substantive goals associated with the New Deal. For example, in some cases courts have invalidated agency action as insufficiently supported by the facts, thus enabling regulated industries to fend off government intervention.[37] On occasion this has amounted to a judicially-imposed requirement of some sort of cost-benefit analysis.[38] Cases of this sort are reminiscent of those following the New Deal, in which an aggressive judiciary, using principles of both constitutional law and statutory construction, limited regulatory intervention into the marketplace. This judicial hostility to regulation increased the impetus for administrative management.

In other cases, courts have invalidated agency action or even inaction as insufficiently protective of regulatory beneficiaries.[39] Judicial scrutiny of deregulation has been a prominent example.[40] In this latter set of cases, the institutional learning of the New Deal has been repudiated precisely in the achievement of its substantive goals. From the standpoint of the New Deal itself, this development is ironic; but in light of the frequent allegations of agency "capture" by regulated interests, it should not be surprising. The purpose of judicial review is to ensure that regulatory statutes are not defeated in the implementation process. In the 1970s and 1980s, plausible showings of abdication by regulatory agencies have resulted in a range of decisions invalidating inaction and deregulation.[41]

In the present context, the distinctive feature of the hard-look doctrine has been the reinvigoration of the judicial role in the face of the institutional wisdom of the New Deal, which was hostile to the judiciary. That hostility resulted from many problems associated with judicial control. Those problems included costs, unwieldy procedures, delays,[42] and the absence of

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36. For a discussion in the environmental area, see R. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983).

37. *See, e.g.*, Aqua Slide 'N' Dive Corp. v. Consumer Prod. Safety Comm'n, 569 F.2d 831 (5th Cir. 1978).

38. *See id.* at 839-44.

39. *See* Garland, *supra* note 33, at 562-68; Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1197-98 (1982).

40. *See* Garland, *supra* note 33, at 535-36.

41. *See id.* at 507-10, 527-36, 562-68.

42. For a recent statement reminiscent of the New Deal position, see Stewart, *The*

coordination, centralization, expertise, or political accountability.[43]

Many of the arguments made by New Deal critics of judicial intervention have been recalled in modern criticism of the judicial role, although the recent criticisms have often come from those hostile to regulation. Critics suggest that the hard-look doctrine will produce delay and meaningless boilerplate,[44] that courts lack the technical sophistication to undertake review,[45] and that judicial policy preferences, undisciplined by the electorate, will pollute the reviewing process.[46] Perhaps as a result of such criticisms, there have been prominent recent signs of more judicial modesty.[47]

Full-scale retreat from the courts would be unfortunate. Experience has shown that the relevant risks are insufficient to justify abandonment of the hard-look doctrine. At least in its current form, the doctrine does not call for judicial displacement of policy choices except in extreme cases. The hard-look doctrine has operated instead as a safeguard against agency decisions that are inconsistent with statute or that are based on irrelevant or unarticulated factors. Above all, the hard-look doctrine has operated as a deterrent to careless or improperly motivated decisions.[48]

The appropriate degree of judicial review is hard to resolve in the abstract. The judgment must be based on a set of understandings about the relevant pressures on courts and agencies. The case for the hard-look doctrine thus depends on a belief that the pressures imposed on agencies frequently distort the implementation process and that new mechanisms of control are necessary to limit such distortions. A substantial basis exists for this belief.[49] In these circumstances, judicial independence has

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Discontents of Legalism: Interest Group Relations in Administrative Regulation, 1985 WIS. L. REV. 655, 678-79.

43. These themes are traced in J. LANDIS, *supra* note 16; Stewart & Sunstein, *supra* note 39, at 1220-29.

44. Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973).

45. Breyer, Vermont Yankee *and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833, 1845 (1978).

46. Scalia, *Two Wrongs Make a Right*, REGULATION, July-Aug. 1977, at 38, 40-41.

47. *See* Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984); Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87 (1983).

48. *See* C. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 589-91 (1941) (discussing the phenomenon of "anticipatory reaction").

49. *See supra* notes 39-41 and accompanying text.

been largely a virtue: insulation from factional pressures has enabled courts to correct agency decisions.

Moreover, it is important to ensure that regulatory beneficiaries are given the same type of legal protection accorded to regulated industries. A system of law that protects the latter but not the former tends to place skewed initiatives on administrators, who will be fearful of judicial intervention if they do too much, but will be immunized from control if they do too little. Such a set of incentives would likely produce outcomes inconsistent with the legislative intent in creating the administrative scheme in the first instance. An ironic fact of modern administrative law is that for most of the modern period, the rise of the regulatory state, representing a repudiation of common law ordering, has been accompanied by judicial doctrines owing their origin and shape to common law categories.[50] Some of these understandings persist in legal doctrine suggesting that regulatory beneficiaries should be restricted to political remedies.[51] A large task for the future is to bring the learning of the New Deal to bear on such doctrine. The result would be to entitle beneficiaries to the same protection accorded others.[52]

Even if the hard-look doctrine is accepted, and even if regulatory beneficiaries are placed on the same terms as regulated industries, judicial review is hardly a complete solution to the problem of implementation failure. Judicial review is intermittent; it is ad hoc; and it operates after the fact. It should not be surprising that other sorts of controls have been sought by the President and Congress.

B. Presidential Control

In the New Deal model of administration, a large measure of agency independence was desirable. Insulation from direct presidential control fit comfortably with the basic belief in the salutary effects of expertise and immersion in a particular industry. The institutional result was the modern "independent" agency, insulated from presidential control. Since the time of President Roosevelt, however, the absence of presidential con-

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50. *See* J. VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 67-69 (1978); Sunstein, *supra* note 33, at 177-78, 213.

51. *See* Heckler v. Chaney, 470 U.S. 821, 838 (1985); Allen v. Wright, 468 U.S. 737, 750-66 (1984).

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

trol of the bureaucracy has been a significant issue. The basic concerns are identical to those that fueled the original creation of a unitary rather than plural executive. These concerns fall into three categories.

First, the President is able to centralize and coordinate regulatory policy in a way that would be impossible if agency officials were free to set policy on their own. The claim for presidential control is thus independent of any particular view on the value of regulation. It stems from the need, all the more insistent since the New Deal, to ensure a measure of coordination in policymaking. The President is uniquely situated to ensure such coordination.

Second, the President is electorally accountable. His decisions have considerable visibility and attract a distinct kind of publicity. To be sure, agency heads are also subject to public scrutiny, and they are after all appointed by the President. But the President is subject to more in the way of continuous public supervision, and his institutional position tends to make him particularly concerned about public reaction. Moreover, the President is the only official in government charged with the administration of a "mass of legislation,"[53] and his broader responsibilities may make a supervisory role especially valuable.

Third, the President is able to energize and direct regulatory policy. This point is especially important in the beginning of a new term or when there is a consensus that national policy should be moved in a particular direction. The fact that agency heads are presidentially appointed may be helpful in this regard, but it is an imperfect check in light of the fact that agency heads may be subject to parochial pressures, including those imposed by well organized groups and by agency staffs. Some sort of presidential oversight may help to control these pressures.

Understandings of this sort serve to explain the efforts of Presidents Nixon, Ford, Carter and Reagan to increase presidential control over agencies. Two recent Executive Orders issued by President Reagan dramatically illustrate the point. Executive Order 12,291[54] authorizes OMB to review proposed rules for adherence to the basic principles of the President's regulatory program. Executive Order 12,498[55] requires agencies to submit for

53. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting).

54. 3 C.F.R. 127 (1982) *reprinted in* 5 U.S.C. § 601, at 431-34 (1982).

55. 3 C.F.R. 323 (1985) *reprinted in* 5 U.S.C. § 601, at 92-93 (Supp. III 1985).

OMB consideration an "annual regulatory program" describing proposed courses of action for the coming year.

These Orders accomplish both substantive and institutional goals. The substantive goal is to limit regulatory action, in part through the discipline of cost-benefit analysis.[56] Undoubtedly, one of the purposes of the reviewing process is to promote the operation of the free market.[57] The institutional goal is to promote electoral accountability and coordination by ensuring that regulatory policy is overseen by people close to the President. The point to be emphasized is that issues of regulation present conflicts of value, or politics, not solely problems of technical expertise. To this extent, the New Deal model of autonomous administration has been repudiated by these developments. The substantive and institutional goals are, of course, distinguishable. In a different administration, one might expect the institutional goals to be endorsed even if the President's position on regulation is far more hospitable.

The recent Executive Orders have been highly controversial, especially among those sympathetic to social regulation and fearful that OMB oversight will lead to a withdrawal of important regulatory safeguards.[58] Such fears have found some confirmation in practice.[59] The concerns about executive review extend to institutional matters as well. Critics have pointed to OMB's asserted lack of technical competence,[60] its capacity to delay regulation, and its alleged susceptibility to the influence of well organized private groups.[61]

It may be useful to understand the reviewing process as imposing on regulation a discipline akin to that used in developing the budget. The budgetary process followed a similar historical development, and it has largely been a success, at least compared with a system in which each agency submitted its budget

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56. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1982) *reprinted in* 5 U.S.C. § 601, at 431-34 (1982). In this respect, review might be understood as promoting technocratic as well as political understandings of administration.

57. *See generally* THE REGULATORY PROGRAM OF THE PRESIDENT (1987) [hereinafter REGULATORY PROGRAM].

58. *See, e.g.*, Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064-71 (1986).

59. *See* REGULATORY PROGRAM, *supra* note 57; Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1 (1984).

60. *See* Morrison, *supra* note 58, at 1066.

61. *See* Olson, *supra* note 59, at 13-14.

separately to Congress. There are, to be sure, some limits to the budget analogy.[62] A coordinating role by an institution close to the President, however, should improve the regulatory process, at least if the relevant institution is aware of the limitations of its role.

Restrictions on OMB follow from the basic case for executive control. OMB review should set out the basic framework for decision and should not displace authority placed in the relevant agency. The problems created by the absence of OMB specialization in the particular area tend to be most severe in ad hoc interventions. OMB should also implement controls limiting the risk of factionalism by, for example, controlling ex parte contacts. Alternatively, the reviewing power might be removed from OMB and placed in another entity—one located within or close to the White House but perhaps less likely to have an anti-regulatory bias. In particular, it might be useful to ensure that the entity entrusted with review acts as an initiator of regulation, not merely as an obstacle. In some areas overregulation is a serious concern; in other areas underregulation, in the form of inadequate or unlawful failure to implement regulatory statutes, is the basic problem. No current institution is well-suited to deal with this problem. Both judicial and congressional control tend to be ad hoc and intermittent.

Two points emerge from this discussion. First, the rise of presidential supervision is a significant inroad on the New Deal concept of administration, suggesting the importance of political accountability and political choice in the regulatory process. Second, a general oversight role is highly desirable, so long as the relevant officials are aware of the limitations of their role. There is no sufficient reason to prefer the ad hoc system that preceded the current period of organized presidential oversight.

C. The Role of Congress

Under the New Deal model of administration, Congress' role was largely one of identifying a problem and asking the agency to deal with it. Some of the relevant statutes, for example, asked the agency to act in "the public interest" or to prohibit "unreasonable" practices.[63] This pattern has, however,

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62. For a discussion of these limits, see Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 194-97 (1986).

63. *See* 47 U.S.C. § 202 (1982); 15 U.S.C. § 45 (1982).

changed over the last twenty years. Many modern regulatory statutes contain relatively clear guidelines for administrators to follow. For example, modern environmental statutes specify appropriate levels of pollution, set out deadlines, and allow courts to issue orders to bring about regulatory compliance.[64] The notion that Congress generally contents itself with broad platitudes has become anachronistic.[65]

It is not difficult to identify the impetus behind measures of this sort. Congress has been concerned that regulatory statutes might be defeated in the implementation process and has attempted to limit that risk. In the environmental area the effort to be precise stems from a fear that an insufficiently motivated agency will fail to bring about full enforcement of the law. The experience under Executive Orders 12,291 and 12,498 suggests that statutory specificity has been important in bringing about regulatory initiatives.[66]

This trend has its own risks as well. Congress may be inadequately informed; Congress is not immune to factionalism; and an agency's need for flexibility may argue in favor of a certain generality in delegations of power. Indeed, some have suggested that because of defects in the legislative process, it is desirable to delegate political decisions to bureaucrats.[67] Additionally, some forms of congressional control are impaired by a lack of legislative competence. In particular, efforts to identify statutory means, rather than statutory ends, may increase the power of well-organized groups or lead to irrationality.[68]

Notwithstanding these risks, the general direction marked out by the recent statutes is desirable. The familiar truism that basic value judgments should be made by Congress has much to be said in its favor. A firmer congressional role promotes accountability; it also decreases the likelihood that statutes will be defeated in the implementation process. The exact amount of desirable agency discretion of course cannot be decided in the abstract: it will depend on the context. The New Deal model, however, reflected no such contextual inquiry; it reflected in-

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64. *See, e.g.*, The Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982).

65. *See generally* M. REAGAN, REGULATION: THE POLITICS OF POLICY (1986).

66. *See* REGULATORY PROGRAM, *supra* note 57 (showing that agencies follow statutory constraints).

67. *See* Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. LAW, ECON. & ORG. 81 (1985).

68. *See generally* B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR (1981).

stead a generalized belief in the ability of insulated administrators to make regulatory choices. The rise of a greater congressional role has been a healthy reaction to this belief.

D. The Relationship Among the Various Forms of Control

As the preceding discussion illustrates, all three institutions of government have shown renewed interest in supervising the bureaucracy. But do these various initiatives fit well together? In some cases the answer is easy. Judicial review and congressional specificity are natural allies. The primary function of the judiciary is to ensure conformity to law. If Congress has been precise, that task is far easier to perform.

There is, moreover, no tension between presidential and congressional control, though the one may reduce the need for the other. The President must follow the constraints established in governing statutes. When those constraints are clear, presidential oversight is less necessary to achieve political accountability. But in light of the inevitable fact that value judgments must be made in the implementation process, some kind of broad supervisory role is likely to be helpful.

The most obvious tension is between judicial and executive control. The hard-look doctrine emphasizes the role of technocratic reason and legality in the regulatory process. By contrast, presidential oversight is justified largely by a belief in the political character of regulation and the need to ensure that value judgments are made by those subject to political control. Indeed, the Executive Order process is a partial surrogate for judicial control because it provides oversight of and detailed justification for regulatory intervention. On what premises is it possible to approve of both judicial and executive oversight?

The answer is found by examining the risks associated with both forms of control and the purposes of the original system of checks and balances. Even if the hard-look doctrine is accepted, it is at best an imperfect remedy for agency failure. Moreover, it introduces dangers of its own. In particular, judicial control is weakened by the lack of a general perspective on regulation and the absence of political accountability. Executive supervision is a salutary corrective. At the same time, recent executive orders have created a risk of having decisions made not only on the basis of statutorily irrelevant factors and illegitimate influences, but also with a general disregard for the appropriate claims of

expertise and legality.[69] In these circumstances, an aggressive judicial role is likely to be a salutary check. The two forms of control should therefore be regarded as complementary.

It would be a mistake to overstate the effects of institutional suggestions of this sort, for administrative behavior is affected by other considerations as well, including the constellation of interests before the agency, the role of the media, public opinion, and the caliber and good-will of agency officials. More dramatic changes might be called for as well.[70] Nevertheless, there is reason to believe that the complementary roles of the three branches, undertaking aggressive oversight of the regulatory process, will correct some of the defects in the New Deal conception of administration.

E. Constitutionalism

Most of the modern regulatory agencies are not, in a technical sense, "independent." The status of "independence" is reserved for agencies whose heads are immune from plenary presidential power of removal. The governing statute ordinarily says that commissioners may not be removed except for inefficiency in office, neglect of duty, or related misconduct. The independent agencies include the Federal Trade Commission, the Federal Communications Commission, the Securities and Exchange Commission, and the Consumer Product Safety Commission. In some respects, the independent agency is the model of the New Deal institution. In *Humphrey's Executor v. United States*,[71] the Supreme Court held that Congress has the constitutional authority to immunize some agencies from plenary presidential removal power.[72] Dicta in the case suggest that such agencies may be immunized from any sort of presidential control.[73]

In their basic functions, however, the independent agencies are hard to distinguish from executive agencies. Lawmaking, adjudication, and enforcement are undertaken by both types of agencies. Moreover, the notion that such agencies are "independent" is a gross oversimplification. Such agencies are subject to a

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69. *See supra* notes 41-42, 54-62 and accompanying text.

70. *See* Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86, 104-11 (1986); Stewart, *supra* note 30, at 1683-711.

71. 295 U.S. 602 (1935).

72. *Id.* at 631-32.

73. *Id.* at 625 (suggesting that commissioners are independent of the President "except in [their] selection").

large measure of control from both the President and Congress.[74] The difference is that the bar to presidential removal power tends to give commissioners some measure of insulation from day-to-day presidential supervision. The difference is one of degree, not of kind.

Recent constitutional attacks on the independent agency stem from a "formalist" understanding of constitutional interpretation. In the formalist view, the text of the Constitution and the intent of its drafters furnish clear answers to at least some constitutional questions. Formalism has received some prominent endorsements in recent cases.[75] In the present context, the relevant provisions can be found in Article II, which vests the executive power in "a President of the United States"[76] and requires the President to "take Care that the Laws be faithfully executed."[77]

These provisions, read against the background of the Framers' decision to create a unitary presidency, form clear foundations for a constitutional assault on independent administration. The basic argument is that the Constitution allows no room for a set of administrators operating autonomously of the President. The President is the constitutionally specified agent of Congress in the execution of federal law. The Constitution does not allow for an unaccountable and separate fourth branch of government entrusted with undertaking tasks analogous to those carried out by presidential aides.[78]

This argument should be read in the context of mounting disaffection with New Deal administration. The underlying notion is that issues of policy, or judgments of value, are at stake, and they cannot be resolved solely by application of technical expertise—the same argument that has led to mounting oversight by the three constitutionally specified branches. In these circumstances it becomes all the more important to ensure that regulatory choices are made by officials subject to the control of a politically accountable actor. The President is the logical can-

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74. *See* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587-96 (1984).

75. *See, e.g.*, Bowsher v. Synar, 106 S. Ct. 3181, 3186-89 (1986); INS v. Chadha, 462 U.S. 919, 951-59 (1983); Buckley v. Valeo, 424 U.S. 1, 120-37 (1976).

76. *See* U.S. CONST. art. II, § 1, cl. 1.

77. *Id.* § 3.

78. *See* Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 60-65.

didate. In this way, considerations of basic structure are brought to bear in the constitutional attack.

The formalist objection to independent administration may overlook some complications in the original constitutional framework. It is uncertain whether the original framework disabled Congress from immunizing some administrators from plenary presidential control.[79] Moreover, the argument has the vices normally associated with formalist constitutional approaches.[80] The framers' decision to create a unitary executive does not resolve the question; the idea that it does so overlooks the dramatic changes in the character of the presidency in the period since the New Deal.

In the original constitutional structure, the President's powers were sharply limited.[81] The growth of a massive executive branch, entrusted with both the making and executing of the law, has made it difficult merely to "apply" the framers' initial judgment. A recognition that Congress might immunize some agencies from plenary presidential control could increase compliance with basic structural commitments insofar as it works against the aggrandizement of power in any single branch. In this sense, "independent" administration might be consistent with the central purposes of the system of checks and balances. Such authorization might also be a necessary quid pro quo for the downfall of the nondelegation doctrine, which has allowed a large rise in presidential power.

These arguments raise difficult governing questions. Perhaps the best solution would be to interpret the governing statutes as granting the President some measure of control over the independent agencies. These statutes authorize the President to remove commissioners for specified grounds, including neglect of duty, inefficiency in office, and so forth. These terms might be construed as allowing some presidential exercise of supervisory power over the independent agencies. Such an interpretation would be consistent with the Supreme Court's interpretation of

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79. *See* Grundstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285, 290-97 (1950).

80. *See* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

81. *See generally* B. KARL, THE UNEASY STATE (1984); *see also* T. LOWI, THE PERSONAL PRESIDENT 28-35 (1985).

similar language in *Bowsher v. Synar*.[82] Moreover, such an interpretation would reform the basic structural commitment to electoral accountability and unitary execution of the laws. The interpretation would, however, recognize that Congress may structure the executive branch so as to impose some limitation on the degree of presidential oversight. Such a result would be consistent with the basic directions of practice and law in the period following the New Deal.

IV. Conclusion

The original constitutional structure was designed both to obtain the advantages associated with a division of labor and to create a series of checks on government action. In this latter respect, the original system usefully accommodated the efforts to limit government, to restrict the power of self-interested factions, to protect private property, and to reduce the risk that rulers might obtain and act upon interests adverse to those of the ruled.

The New Deal period dramatically rejected both the institutional and the substantive learning of the original structure. The New Deal period saw the rise of a new concept of rights. The new conception was no longer tied to the common law and to private property; active governmental involvement in restructuring legal entitlements seemed necessary. It was natural for the New Deal reformers to see a need for a new entity, unburdened by tripartite government, to engage in the necessary tasks. The result was the modern regulatory agency. An important part of this understanding was that neutral technocrats would be well-situated to design regulatory policy.

Although aspects of the substantive learning of the New Deal remain largely intact, its institutional agenda has come under sharp attack in the last quarter-century. The notion that impartial expertise might solve regulatory problems has come to seem naive. Political choices are implicated in regulation. Such ideas help to account for the dramatic increase in judicial, presidential, and congressional oversight of the bureaucracy. These various forms of oversight have made it anachronistic to speak of an autonomous set of administrators.

There is reason to believe the recent developments are steps

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82. 106 S. Ct. 3181, 3189-92 (1986) (justifying extension of Congress' power over the GAO).

in the right direction. To adopt a wholly political or wholly technocratic conception of administration would be a mistake. Both value choices and immersion in the facts ought to play significant roles. Sometimes a particular understanding of the subject will incline administrators with widely varying substantive positions in the same direction. Where value judgments are required, the central need is to ensure that they are made by politically accountable actors and opened up to public scrutiny and review. Redesign of the oversight roles of the constitutionally specified branches of government must be undertaken with such understandings in mind.

The task for the future is to achieve some of the purposes of the original constitutional structure—in particular, to guard against factionalism and self-interested representation—in a period in which the goal of limited government can hardly be seen as an unambiguous good. That task is a formidable one. But the recent institutional innovations may help begin the larger task of constitutional reconstruction in the wake of the New Deal.