**A Positive Political Theory of the Reformation of Administrative Law[[1]](#footnote-1)**

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The administrative state has grown for more than a century and, with it, regulatory agencies that exercise a wide amount of public power over all aspects of economic and social life. Although the origins of regulatory administration lay in a Progressive era’s (and, later, New Deal era’s), faith in technocratic, apolitical agencies free from political and judicial control, the major story of the past four decades has been the erosion of the notion that agencies should exercise discretion free from external checks. The archetype of the New Deal agency, exercising neutral, technocratic expertise, is no longer tenable. Modern administrative law emphasizes the need for discretion tempered by both legality and fairness (Rodriguez, 2008). Indeed, as Richard Stewart (1975:1669) noted thirty-five years ago, administrative law “is undergoing a fundamental transformation . . .” Stewart went on to write that this transformation “[is] largely the handiwork of federal judges. . . .” The standard wisdom in legal scholarship is that federal judges came to the rescue of the administrative state, actively intervening in the regulatory process in order to preserve key values which had been threatened by an admixture of internal pathologies and external (read: “political”) threats.

In our view, this standard wisdom neglects key aspect of the major transformations in American regulatory politics during the past half century and, likewise, the critical role of Congress and the President in the reformation of both the American regulatory state and administrative law. Without doubt, judicial intervention through the “hard look” doctrine made an enormous impact on administrative policymaking, an impact depicted in a large contemporary literature on administrative law. Less examined, but no less important, however, was the impact of political changes in shaping regulatory administration. A more comprehensive account of the modern administrative state requires attention to these political changes.

To address these issues, our paper extends the work of McNollgast (2000, 1989, 1987)work that emphasizes the political structure of administrative processes. Specifically, McNollgast focuses on the role of process and procedure, deliberately engineered by Congress and the President to accomplish policy goals in the process regulatory administration. Although McNollgast provides a theory of how and why Congress shapes the regulatory process, it does not draw the implications for the “reformation” of administrative law described by Stewart and other leading administrative law scholars of the previous and current generation. The task of this paper is to bring together the political and legal story in a way that explains this reformation.

We argue that the conventional wisdom in the legal literature that courts implemented values and agendas separate from legislative aims, and hence *separate from politics*, is wrong-headed in important respects. While the mainstream of administrative law scholarship has emphasized the ways in which courts interposed themselves between the political branches and administrative officials through the development of shrewd legal doctrines, attention to the dynamics of regulatory policymaking through the lens of positive political theory provides a more complete account. With respect to Congress, the traditional depiction of a judge-led transformation neglects the important transformations, beginning in the 1960’s and continuing over the next two decades, in American national politics. During this period, a wide range of new interest groups and constituencies arose, including the environmentalists, consumerists, and various groups supporting regulatory reform of older, New Deal-era agencies. This emergence of new subjects of regulation and, along with it, new techniques of regulatory policymaking, reconfigured the relationship between the national and state governments; it also reshaped the relationships among Congress, the Presidency, and the federal courts. These general phenomena is well known. However, what persists is the view that the transformation in the legal doctrine governing agency performance – that is, administrative law – was accomplished principally through judicial interventions. The hard look era is seen as essentially an era in which judges substituted their judgments for the ill-considered decisions of rogue or captured agencies and absentee legislators.

The courts’ role in the reformation must be seen in this broader political transformation of the 1960s and 70s rather than in a court-centric perspective in isolation from the rest of the political system. True, as Stewart and others write, the courts acted to promote new interest groups’ participation in a wide range of regulatory agencies, including agencies promoting interests of older, established groups who sought to blunt the influence of the new groups. But these efforts – essential to the reformation – paralleled similar efforts by elected officials to represent new constituencies and give them legislative and administrative tools to further those interests. Congress and the president also responded to the transformation of interests and constituencies with a series of landmark legislation, changing the relationship of the national government to the economy. In short, courts acted in ways that complemented rather than opposed the trends in national politics.

We illustrate our thesis with nuclear power regulation. Initiated to promote the peaceful use of atomic power, the national government’s efforts in nuclear power began in earnest during the 1950s and 60s. By the late 1960s, however, environmentalists questioned nuclear power, seeking to intervene in the regulatory process to air their concerns. The agency promoting nuclear power, the Atomic Energy Commission (AEC), sought to prevent their intervention and proscribe the environmentalists’ influence.

In a series of cases, most notably *Calvert Cliffs* (1971), courts forced the AEC to allow environmentalist participation and to attend to environmental concerns. The result was a dramatic change in nuclear power, which came to a standstill by the mid-1970s. Moreover, this result seems consistent with the traditional view in administrative law of an agency captured by the industries it regulates, serving to promote those interests.

This view misses the essential role of political officials, however. New entrepreneurs in Congress sought to promote environment interests, and passed a series of major legislation, the National Environmental Policy Act of 1969, which created the now famous environmental impact statements, the Clean Air Act of 1970, and the Federal Water Pollution Control Amendments of 1972. Moreover, President Richard Nixon created the Environmental Protection Agency by executive order in 1969. This activity sought to promote environmental consideration, and with that, the influence of environmentalists. Champions of the environment in Congress routed the old guard promoting nuclear power, first dismantling nuclear powers’ promoters in Congress on the Joint Committee on Atomic Energy and then dismantling the AEC so that the commission’s promotion activities would be separate from its regulatory ones. Judicial expansion of environmental interests must be seen as a part of this larger transformation of environmentalism. Although *Calvert Cliffs* is often seen as an expansionary reading of NEPA (see Rodriguez and Weingast 2007), the courts would have been far more limited in their decision without that statute and its creation of the environmental impact statements.

Our paper proceeds as follows: In Part I, we fill out the basic logic and assumptions underlying the conventional wisdom of administrative law’s transformation as principally a court-centric effort. In Part II, we first describe the positive political theory of regulation and, next, analyze both the transformation in American politics during the period at issue and the structure of Congressional and judicial decisionmaking. This Part concludes with an assessment of the political equilibrium in which courts and Congress worked in partnership with one another to effectuate a reformation in administrative law. We illustrate this thesis in Part III with an extended discussion of nuclear energy policy during the 1960’s and 70’s. In the final Part, we return to our basic thesis, explaining how this political perspective on administrative law’s great transformation bears on both positive and normative debates in regulation and public law.

1. **The Conventional Wisdom in Administrative Law and**

**Its Basic Assumptions**

The conventional wisdom holds that, from the very beginning, courts have been assigned a critical role in supervising the administrative process through their power of judicial review of agency decisions. While the Administrative Procedure Act of 1946 codified this role in important respects, the essential function of courts in reviewing agency decisions for compliance with law has long been a linchpin of the constitutional structure of regulatory policymaking through administrative agencies. What emerged with fanfare in the 1970’s was a particular approach to judicial review, one both unconventional and controversial. The phrase “hard look” was coined by Judge Harold Leventhal to describe a new style of judicial scrutiny. Appellate judges began to undertake a searching, thorough look at the process and substance of agency decisionmaking in order to assure that the agency decision was adequately reasoned and supported (see Shapiro 1988). This new style of review reflected an important shift in administrative law; indeed, it reflected what Stewart characterized as a “reformation” in the relationship between courts and agencies.

Legal scholars typically describe hard look review in terms which pit three institutions against one other in a struggle for supremacy. First, administrative agencies are seen as more often than not “captured” by regulated interests; they sacrifice good administration and efficient regulation to goals configured by private-regarding groups who bring relentless pressure to bear on agencies (Merrill, 1997; Sunstein, 1986). Capture theory has a long history, including political scientists and historians (Bernstein 1955, Edelman, 1964, and Kolko 1965), and is most commonly associated in the legal literature in with the Chicago School economists focusing principally on agencies involved in economic regulation (Stigler 1971 and Peltzman 1976; but see also Kahn). These scholars focused on the traditional commission-form, economic regulatory agencies, such as the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Trade Commission.

 Second, Congress is seen as largely impotent in the face of these interest group demands. Drawing on this skeptical political-economic analysis, many scholars writing in and about what Lisa Bressman calls the “early” and “middle” periods of administrative law (2007: 1758-62), depict Congress as an assemblage of self-regarding legislators each preoccupied with reelection and disinclined, by strategic considerations more than by inertia, to superintend with serious care administrative agencies. Consistent with the basic elements of capture theory, legal scholars of the reformation viewed Congress as a “transmission belt” for interest group preferences (Stewart 1975: 1675). In the legislative arena, determined groups get what they want from regulatory policy. Congress dispenses these policy benefits through typically ambiguous statutes and with a minimum of formal regulatory processes. Oversight mechanisms, nominally designed to ensure agency decisions further the public interest, were instead crafted in the service of these interest groups.

 Third, the traditional wisdom sees courts, by contrast, as the sheriff who restores law and order to a less than orderly process. As Gerald Frug (1984) describes it, administrative law “assigns the role of police officer to the court [and] it is because we can trust the courts that we can trust the bureaucracy” (1373-74). The doctrines developed by the federal courts are variegated, sometimes focusing on the adequacy of interest representation in the administrative process, other times worrying about arbitrariness and accountability, and generally worrying about the influence of partisan and interest group political considerations in what should be a more “rational,” apolitical process (Garland 1985). The principal assumption underlying these diverse doctrines is that a sound administrative process requires reliable judicial intervention, through (among other methods) hard look review, to assure that deleterious interest groups and opportunistic political point-scoring is kept mostly at bay.

 The seminal case in modern administrative law which reveals this focus is *State Farm*. In 1983, the Supreme Court considered a decision of the Reagan administration’s transportation secretary to rescind soon after the election the passive restraints requirement for automobiles. The Court insisted that a hard look by a reviewing court of this decision should have found the rationale for the administration’s decision wanting. The principal failing was the absence of any serious consideration of alternatives to the rescission decision. Rather, the Court viewed the agency decision as one grounded principally in political considerations and therefore could not pass muster under the basic administrative law principle that agency decisions be neither arbitrary nor capricious.

Coming in the middle of the hard look era, *State Farm* was significant for two intersecting reasons: first, the Court made clear that the standard for satisfactory agency decisions was a *reasonable* agency decision[[2]](#footnote-2); second, the Court rejected the notion that a change of agency course could be defended mainly the grounds that political priorities within the executive (and presumably also legislative) branch have shifted. In crystallizing the purpose and logic of hard look review, *State Farm* was viewed by most commentators as the lodestar case for hard look review, as a case illustrating the courts’ unique role in curtailing the baleful influence of politics.

Roughly contemporaneously with State Farm, the Supreme decided *Chevron v. Natural Resources Defense Council* (1984), by consensus the most significant modern case on judicial review of administrative agency action. Legal scholars typically view *Chevron*’s basic logic through two separate lenses. On the one hand, it is viewed as a decisive victory for the proposition that agency discretion is proper and that, more specifically, when an agency undertakes to interpret its organic statute, the reviewing courts ought not to substitute their judgment for the informed judgment of the agency. In this regard, the decision harkens back to the Progressive-New Deal notion that agencies should be entrusted with the prerogative to manage its own business – unless Congress has clearly circumscribed these prerogatives by statute. On the other hand, *Chevron* is, as well, an accommodation to the reality of regulatory politics and, especially, to the prominent role of the President in superintending administrative regulation. The *Chevron* case, and its progeny (see, e.g., *Mead*, 2001) denotes broad acceptance of the idea that agency decisions could reflect choices made by political officials, including the President (see Barron & Kagan, 1999). Indeed, critics of this strong view of executive power see *Chevron* as problematic for just this reason (Farina, 1997).

 More recently, the Supreme Court issued an important administrative law decision in what appeared to be a similar vein. In *Massachusetts v. EPA* (2007), the Court rejected the claim by the agency that it lacked the authority under pertinent statutory guidelines to regulate climate change. While the Court’s analysis was focused on the somewhat technical statutory question of whether and to what extent the Clean Air Act and other statutes supported EPA’s claim, the Court hearkened back to its hard look decisions, including *State Farm*, to ground its skepticism about how the EPA reached its conclusion. Jody Freeman and Adrian Vermeule (2008) interpreted the Court’s decision as a victory for “expertise” over “politics,” channeling again the notion that courts properly stand ready to curtail agency influences and do so through a style of review that views political rationales in skeptical terms. [\*\*Dan: what does this sentence mean? Please rewrite:] In this account, the *Massachusetts* decision reinforces the idea that the judiciary was principally invested in rescuing public administration from the political process.

 Both cases are seen by many contemporary administrative law scholars, not surprisingly, as outlier cases. They are troubling cousins in the classic canon of “reformation” cases. And to the extent that primary objective of legal scholarship on administrative law is normative, not positive, some criticize them on the grounds that they disrupt what is otherwise a fairly coherent logic of judicial scrutiny and intervention in the service of administrative rationality and against political control.

 In speaking of the conventional wisdom, we paint with a broad brush. To be sure, many prominent scholars question the courts’ approach to reviewing agency decisions, often complaining of the so-called “ossification” of the administrative process and suggesting that hard look be reconfigured to recognize better strategies of regulation in a complex world (McGarity, 1984). Some of the most prominent contemporary analyses emphasize the value of alternative regulatory strategies, including collaborative governance (Freeman), regulatory negotiation (Harter), subsidiarity (Stewart), and other outside-the-box mechanisms. Moreover, the virtue of legislative and executive influences – that is, political influences – has been noted in creative ways by a wide range of important legal scholars (Bressman & Vandenberg, 2006). Administrative law scholarship is not monolithic; and Stewart’s depiction of the administrative law’s reformation, now thirty-five years old, has been reshaped for modern times.

 Old habits die hard, however. Much of the emerging literature still builds to a large extent on conventional positive story of political threats to sound governance and the value of lone ranger courts.

1. **Positive Political Theory of the Administrative**

**Process and Regulation**

The standard story sketched above is misleading in important respects. While regulatory decisionmaking has been fundamentally transformed, the nature of that transformation and the reasons for it differ from those embodied in the standard view of the so-called “reformation” of administrative law. We spell out our thesis by focusing first on Congress and next the courts. We frame our analysis around the expectations and strategies of each institution and what they mean for the processes of regulatory decisionmaking.

* 1. The Great American Political Transformation, 1960s and 70s

As mentioned, we argue that the reformation of administrative law must be understood in a broader context of the great American political transformation taking place at the same time. The political – as opposed to judicial – side of the transformation included three pieces: first, the rise of new interests, constituencies, and voting blocks that changed the electoral fortunes of political officials; second, the rise of new political entrepreneurs in Congress to champion these new constituencies; and, third, a series of landmark regulatory legislation passed by Congress to further the interests of these new constituencies that at once dramatically changed the federal system, the national government’s relationship to the economy, and the administrative process.[[3]](#footnote-3) The judicial component of this transformation must be seen along side of -- and in parallel to rather in opposition to – the three-part political transformation.

As is well-known, the United States experienced a major change in politics during the 1960s and early 70s. In the 1940s and 50s, political scientists classified interest groups into three major categories, business, labor, and agriculture (see, e.g., Key 1942). By the late 1960s, this categorization was obsolete. A huge variety of new groups had formed and become politically relevant in America, including the civil rights movement, the consumer movement, and the environmental movement. Political activism became far more widespread in American politics, and across all levels of government.

New political entrepreneurs arose who championed the new interests. In policy area after policy area, political officials responded to the new constituencies in an attempt to further their views and command greater political support for themselves. Examples of such political entrepreneurs included Senator Warren Magnuson (D-WA) on consumer legislation, Senator Edmund Muskie (D-ME) on environmental legislation, Senator Hubert Humphrey (D-MN) on civil rights, and Senator Edward Kennedy (D-MA) on health policy.

The policy response was dramatic, especially at the national level. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 dramatically altered race relations and representation (cites). President Lyndon Johnson sought in his Great Society legislation to address concerns of poverty, poor education, and urban blight. Medicare altered health care system for the elderly, creating massive new entitlements. A series of new policies addressed new concerns about the environment. A range of new consumer, safety and health regulation emerged, each empowering a new complex of interest groups and constituencies. Moreover, Congress enacted legislation dismantling many of the older economic regulatory agencies, agencies which were viewed as epitomizing regulatory agency capture, including the AEC, which we discuss below, the Civil Aeronautics Board, and the Interstate Commerce Committee.

President Richard Nixon illustrates the transformation of American politics. A pro-business conservative by nature, Nixon reflected the new political environment by championing new regulation in a host of areas. For example, Nixon and Senator Edmund Muskie became rivals in 1969 to see who could be more pro-environment, leading Nixon to create the new EPA by executive order and Muskie to help champion the National Environmental Policy Act of 1969 (Ackerman & Elliott, 1981).

The result of all these changes was a massive transformation in the regulation from a series or relatively unconnected, industry-specific agencies to agencies with authority over all or wide-spread pieces of the entire American economy. These changes altered the American system of federalism, putting the national government in the lead in so many policy jurisdictions once largely the realm of the states. The changing role of the national government led one scholar to call the transformation the “Nationalization of American politics” (Lunch, 1989). These changes also altered the relationship of the national government to the economy, placing it in a much more direct and omnipresent regulatory role.

 The great transformation in American politics had direct implications for the regulatory process and for the partnership between courts and Congress. First, the rise of new interest groups and governmental policy entrepreneurs and the corresponding legislative response reflects the PPT view that political officials, seeking reelection and a political legacy, respond to active constituencies, whether organized as not. Second, as the wide range of new constituencies arose, large numbers of political officials responded by championing the new constituencies’ interests. This does not mean that officials were mere transmission belts. Rather, they respond to a wide range of interests, and the diversity of America combines with geographic-specific system of representation to ensure that all active interests have their voices in Congress. Ambitious elected officials, often seeking higher office, have incentives to champion new interests as a means of promoting their own careers.

 Third, reorganization and reform occurred in Congress to blunt the influence of the old guard protecting the status quo. “Congressional reform,” as it became known, allowed younger, more liberal members of Congress to pursue more easily their policy agendas (see, e.g., Rieselbach 1986, Sinclair 1989). The reforms displaced the older system in which committee chairs – often conservative Southern Democrats – ruled their policy domains with an iron fist. This reform, combined with new constituencies, allowed political entrepreneurs to unseat or bypass uncooperative committee chairs, passing major new policies in both traditional areas and in new issues not present in 1965, as illustrated by energy and the environment.

The rise of the environmental movement in the 1960’s and into the 70’s illustrates these dynamics at work. Congress and the President were systematically engaged in the struggle over environmental policy. Environmental and administrative law scholars emphasize the key response of the federal courts to environmentalist concerns in the form of hard look review, describing these responses as part of the transformation of administrative law. But this court-centric view ignores the fact that Congress was engaged in exactly the same process at the same time. Indeed, the entire political system responded to these change in constituencies, interest groups, and the mass public.

* 1. Congress

While the standard legal account deemphasizes the role of Congress in superintending regulatory policymaking, members of Congress in fact care greatly about regulatory policy. The regulatory bureaucracy touches every aspect of citizen lives, and legislators have strong incentives to mold bureaucratic actions to suit the interests they represent (Fiorina 1977, 1981). Member of Congress and the president may disagree with one another about the content and direction of policy, but they all agree that policy matters to their objectives and agendas.

Regulation, and administration more broadly, is sufficiently important for all members of Congress that they have a compelling, joint interest in ensuring that administrative law serves their interest (McNollgast 1989, 2000). The central importance of administration to Congress implies that if the courts failed to articulate an administrative law consistent with the needs of Congress, Congress would refashion the law. As McNollgast (1987, 2000) explains, the form of administrative law serves both due process purposes *and* political ones. Indeed, the political implications of administrative procedures are surprisingly consistent with the needs of Congress. Rather than seeing courts, in opposition to the political branches, the PPT view argues that courts exist in a direct and strategic partnership with the political branches.

 Members of Congress express their interest in the regulatory process in several important ways. First, they create substantive content in fairly detailed ways. By contrast to the Progressive era and New Deal organic statutes, statutes enacted during the 1960’s and 70’s were especially prolix, containing action-forcing mechanisms and often direct policy instructions. None of this is to deny that much content was left to agencies to fill in; but, in contrast to the prevailing idea that Congress simply delegates broad, unchecked power to agencies to make policy, the pattern of regulatory policymaking in the modern era reveals a Congress deeply invested in the substance of policy.

Second, Congress protects its interests through the fashioning of extensive administrative processes, a phenomenon described by McNollgast (1987, 1997, 1999). Regulatory acts since the 1960s typically number in the hundreds of pages, most of which tailor procedures to the agency administering the act. These procedures bias agency decisionmaking in ways favored by the enacting coalition. They also limit agency policymaking freedom. The PPT account of the origins of the Administrative Procedure Act (McNollgast, 2000; see also de Figueiredo and Vanderberg, 2010) reinforces the idea that Congress implements strategies and tactics to ensure that agencies would be responsive to legislative objectives.

Third, Congress engages in ubiquitous oversight, through the use of both “police patrols” and “fire alarms,” to increase the likelihood that agencies will do their bidding (McCubbins & Schwartz; see also Aberbach 1990, Epstein and O’Halloran 1999). One of the most effective techniques of supervision is Congressional use of the appropriations process to fine-tune regulatory performance (Kiewiet and McCubbins 1991). Members of Congress tend to give their attention to problem areas of the bureaucracy, making life difficult for agencies and their administrators who fail to serve congressional interests. The fire alarm system gives agencies an incentive to avoid the attention of Congress. The APA (as amended) not only serves due process concerns, but also political ones. This act prevents agencies for presenting Congress with surprise attacks – abrupt realigning of interests and policies in ways that make it difficult for Congress to overrule. Two other procedural acts by Congress serve political purposes. The Freedom of Information Act (1966) and the Government in the Sunshine Act (1976) both improve the fire alarm process by increasing the ability of interest groups and constituencies to learn what agencies are doing. When these groups observe an agency going in a direction they deem undesirable, the trigger a fire alarm, bringing the attention of member of Congress, and with it difficulties for the agency.

Finally, Congress has weapons available to counteract judicial interventions that are inconsistent with their objectives. Statutes can and frequently do restrain the domain of judicial action by, for example, limiting standing, curtailing the sets of issues that can be evaluated by courts, and, in general, subjecting judicial decisions to ex post scrutiny. As the “new separation of powers” approach to American politics suggests, no part of the political systems exists in isolation (de Figueiredo, Jacobi, and Weingast 2006; Marks 1988). Courts do not act in a vacuum; each of the branches affects the others (see McCubbins and Rodriguez, 2006 and McNollgast, 2009 for recent surveys). Because the political branches are heavily involved in regulation and administration, judges must consider their actions in the larger context. In particular, because Congress and the president can override any judicial decisions based on statute, both judicial statutory interpretations and administrative law decisions must take into account the possibility of overrides (Marks, 1988). And, indeed, as Eskridge (1991) shows, congressional overrides are far more frequent than is generally supposed.[[4]](#footnote-4)

* 1. Courts

The function of the courts in the regulatory process is multifaceted. With respect to most questions of regulatory administration, the courts’ essential function is to ensure that agency decisions are consistent with both due process concerns and legislative directives. Of course, this role has long been viewed as only part of a much more complicated story. In the early days of administrative regulation, Congress famously delegated agencies wide discretion on both substance and procedure – the Federal Trade Commission Act, the Federal Communications Act, the National Labor Relations Act, and the Securities and Exchange Act, all centerpieces of the Progressive-New Deal belief in the wisdom of the technocratic administrative expert, contained relatively few clear directives on substantive regulatory policy; nor did they delineate elaborate administrative procedures. Compared to what would come decades later, these statutes became just one room, as Louis Jaffe (1965) put it, “in the magnificent mansion of the law.” Judicial review was instrumental for decades in establishing requirements for legally acceptable agency decisions. These requirements were represented in the broad terms of the APA (providing that agency decisions be “supported by evidence on the record” and that they be neither “arbitrary” nor “capricious”) and in judicial decisions articulating standards of acceptable decisionmaking. By any measure, the courts’ role was critical in shaping legal standards; at the same time, the extent of intervention into agency decisionmaking was, as Stewart noted in 1975, fairly modest.

By the mid-1960’s, however, circumstances had changed considerably. For reasons described above, interest on the part of political officials in the content of regulatory statutes grew considerably, and whatever pride of place assigned to the expert agency had given way to a much more political and Congress-centric view of regulation and agency discretion. The best evidence of that is found in the statutes themselves. Congress incorporated into its statutes elaborate procedure, often totaled into the hundreds of pages. As McNollgast (1987, 1998) has described, procedures have political consequences (McNollgast 1987, 1998). Congress writes complex procedures in order to favor their constituencies.

Courts intervene in the regulatory process through a variety of overlapping mechanisms. Although the courts pursue due process concerns, these mechanisms also tether administrative agencies to the procedures embodied in these statutes. By forcing agencies to follow these procedures, courts help serve congressional ends. In other words, hard look review becomes in part a means by which courts implement the basic regulatory objectives of Congress.

To understand why courts are concerned with facilitating legislative goals, we need to consider more systematically the incentives and interests of courts.

At the same time that Congress looks after its interests in regulatory policy, courts carefully guard their prerogatives to establish and maintain procedural rights, especially those instantiated in the Constitution, and to protect these rights where necessary against legislative neglect and threat. Courts attempt, as do other institutions in government, to ensure that their own power and prerogatives are preserved and, moreover, to protect the interests of concern to judges as parts of the larger federal judiciary. One matter of concern is the assurance of procedural fairness and individual rights through the maintenance of a well-functioning judicial process. Many of the key administrative law decisions of both the traditional and modern eras can be explained on these grounds. Perhaps the most historically significant administrative law decision was the 1932 decision in *Crowell v. Benson* in which the Supreme Court accepted that administrative adjudication could have the force of law, so long as there was an Article III court still available for judicial review of these decisions. Many of the modern decisions insisting on appellate review as a constitutional *quid pro quo* for administrative regulation follow this basic theme: Courts can protect their ability to safeguard individual rights through the final power of administrative review, an ability that facilitates their institutional interests. Moreover, the Court’s decision in *Crowell* has important political implications: Congressionally controlled agency decisions now have the force of law. *Vermont Yankee*, a seeming exception to hardlook-reformation era, has political implications as well. To the extent that procedures in regulatory legislation bias agency decisions, the *Vermont Yankee* says that courts cannot craft new ones out of thin air, but must limit procedural prescriptions to those found in statutes, the APA, and the Constitution. Because procedures shape policy choices, this decision places strong limits on the ability of the judiciary to invent new procedures with policy effects unintended by Congress.

A similar dynamic is at work in a lodestar case involving judicial scrutiny of so-called informal adjudication, *Citizens to Preserve Overton Park v. Volpe* (1971). In *Overton Park*, the Court articulated a rationale and a protocol for implementing searching and careful review of agency decisionmaking in adjudication. In doing so, the Court protected the essential prerogatives of courts in protecting individual rights; but, critically, these protections would be nested in a broad regulatory system, one in which the principal regulatory decisions would be made through a fundamental political process (Strauss).

*Overton Park*, like *Crowell*, illustrates the partnership between courts and Congress; indeed, as Supreme Court decisions, these cases sketch the template for this partnership for the benefit of reviewing courts. Congress gets its way with respect to key regulatory policy choices, a critical requirement given the configuration of constituencies within and around the legislative process. And courts maintain their prerogatives in constitutional matters and, especially, matters of individual rights.

Congressional decisionmaking in the regulatory process must be attentive as well to limits on legislative power; they must also realize the goals and strategies of other actors in the regulatory process, including the courts. “A question for the McNollgast theory,” writes Bressman (2007), “is why Congress, if interested in the monitoring function of the APA, left so much to judicial elaboration” [1771 n.131]. In our view, Congress leaves to courts a sphere of action which is within the scope of legislative power, except in one important respect: Courts may rely on constitutional rules to limit Congressional and administrative power. In the context of administrative procedure, the courts’ most important mechanism is procedural due process, a right protected by the Constitution’s fifth amendment and whose scope has been delineated in several key Supreme Court decisions. With respect to substantive regulatory policy, the Supreme Court has called into question the power of Congress to restrict judicial review of agency decisions on constitutional and statutory grounds. Both of these limits are important and, importantly, both are the result of judicial declarations, not Congressional choice. Although the line is not always an exact one, we should distinguish between “judicial elaboration” as a consequence of judicial ingenuity and elaboration that is contemplated by Congress.

* 1. The Political Regulatory Equilibrium

We bring together the interests of Congress and the courts to illustrate a thesis inconsistent with the standard “reformation” story. Regulation, and administration more broadly, is sufficiently important for all members of Congress that they have a compelling joint interest in ensuring that administrative law serves their constituencies (Fiorina, 1981, McNollgast, 1989, 2000, Weingast & Moran, 1983). Because of this brute fact, if the courts failed to articulate an administrative law consistent with the needs of Congress, Congress would rewrite the law. Courts are aware of this potential political reaction and are accordingly circumscribed in their judicial interventions. *Crowell*, *Vermont Yankee*, and *Chevron* illustrate this awareness most acutely; however, many other less famous administrative law decisions of the modern era, including the decisions involving nuclear power discussed below, are also illustrative.

 With respect to agency oversight, courts are engaged in a dynamic partnership with Congress. Take the example of the APA, a statute which has been considered at several different junctures in the law and PPT literature (deFigueredo &Vanderbergh, 2010, McNollgast, 1987, 2000). This statute serves important judicial purposes: It elaborates certain standards of procedural fairness and, indeed, speaks in due process terms. Beyond due process concerns, this act also serves important political implications and, indeed, is surprisingly consistent with the needs of Congress. While the reformation account stresses the ways in which the courts have expanded the requirements of the APA, we must not forget the brakes put on this development by the Supreme Court’s 1978 decision in *Vermont Yankee*, nor the rather limited interventions courts have pursued under the rubric of the APA’s procedural provisions.

 Beyond the APA, courts have used their review powers to fill out the dimensions of sound regulatory governance, but have done so mostly in partnership with Congress. As noted earlier, most judicial decisions (speaking here of appellate courts, not the Supreme Court whose interventions in the administrative process have been relatively rare) are undertaken in the shadow of regulatory statutes which are quite long and detailed and that proscribe in detail the procedures that agencies must follow and, frequently, the goals of the regulatory program. Where statutory guidance runs out, and when courts are therefore called upon to look closely at the agency’s reasoning process, the partnership between Congress and the courts can be tested. While acknowledging that courts occasionally push agency decisions away from Congressional preferences, the central question is how common are such results and, furthermore, whether and to what extent such strategies fundamentally rupture the fruitful relationship between Congress and the judiciary over regulatory administration.

Judges are not mere pawns in the legislature’s game, however. The regulatory partnership between Congress and the courts serves the interests of both parties. At the same time that Congress looks after its interests in regulatory policy, courts carefully guard their prerogatives to establish and maintain procedural rights, especially those instantiated in the Constitution, and to protect these rights where necessary against legislative neglect and threat. This is the principal lesson of watershed administrative law cases going back as far as *Crowell*, and continuing through *Overton Park* and other key cases that pit judicial interests against Congressional efforts to limit the domain of judicial discretion.[[5]](#footnote-5). Within important limits (such as *Vermont Yankee*), courts have considerable freedom to tailor details of administrative law, in particular, to ensure that procedural due process is respected and individual rights are thus protected. Courts must exercise this discretion, however, in a way that essentially serves Congressional interests so as to allow regulatory processes to respond to politically responsive constituencies. This does not grow out of the goodness of the courts’ hearts; rather, it is a result of the strictures on judicial discretion, most notably the capacity of Congress to overturn judicial decisions.

Where forms of hardlook review survive, and even thrive, they do so primarily where courts look with skepticism at how individual and group rights are threatened by legislative action. Our PPT-grounded model of administrative law sees a big role for both Congress and the courts, where neither dominates and where each specializes in a way that produced the reformation of regulatory policymaking over the past three decades.

The main PPT lesson for judicial decisionmaking in the statutory and administrative context is that courts do not exist in a vacuum. To the extent that the political branches are heavily involved and interested in regulation and administration, judges must consider their actions in a larger context. In particular, because Congress and the President can override any judicial decisions based on statutes, judicial statutory interpretations and administrative law decisions must take into account the possibility of overrides (Marks, 1988). In this view, judges strategically tailor their decisions so as to conform sufficiently to those sought by Congress (Ferejohn & Weingast, 1992; Ferejohn & Shipan, 1989; Tiller & Spiller, 1994). The reformation thesis’s suppositionthat courts act in fundamentally inconsistent ways with these goals is inconsistent with the positive political theory of law and regulation.

 In short, administrative governance reflects a partnership between Congress and the courts. Congress creates the agencies and the statutes they administer, including many of the procedures they must use to make their decisions. Congress also has a wide range of tools and techniques with which to influence on-going agency decisionmaking (McCubbins & Schwartz, 1984, McNollgast 1989, 1999, and Weingast & Moran, 1983). Courts have command of due process concerns and statutory interpretation, serving congressional interests through their substantive decisions and especially ensuring that agencies adhere to procedures established in legislation. Courts are not mere political lackies – they have made expansionary readings that alter the meaning of the original congressional bargain (Rodriguez & Weingast, 2007); and their decisions about procedural rights of due process often constraint Congress. But on average courts must ensure that political branches are better off under judicial decisions, lest they invite a major negative reaction from Congress.

1. **The Thesis Illustrated: Atomic Energy in the 1970’s**

In the years after World War II, the United States launched an ambitious program to promote the peaceful uses of nuclear power. The federal government, including many champions of nuclear power in Congress on the uniquely structured joint House-Senate committee, the Joint Committee on Atomic Energy (JCAE), created the Atomic Energy Commission (AEC) to promote and regulate the use of nuclear power. This new source of electricity initially appeared cheap and safe. Early proponents were sufficiently optimistic that some predicted nuclear power would make electricity so plentiful that it need not be priced (Noll).

This optimistic vision never materialized. The commercial market for nuclear power began in the early 1960s and then expanded. Utilities ordered over 20 new nuclear power plants per year from 1966 through 1974. Orders then dropped off precipitously, with the last nuclear plant ordered in 1976. The average time from application to commercial status in the regulatory process increased from an estimated 86 months for an application in 1966 to 122 months for an application in 1970 (Weingast 1980, table 2).

Eventually, procedural delays became so long and costly that nuclear power was no longer commercially viable (Cohen 1979, Montgomery and Quirk 1978). By the mid-1970s, utilities stopped order new plants; between 1974 and 1976, utilities cancelled twenty-seven existing orders (Montgomery and Quirk 1978).

Environmentalists proved a major factor in these delays. Beginning in the mid-1960s, environmentalists began to participate in AEC regulatory proceedings to challenge the AEC’s granting of construction permits and operating licenses. Environmentalists raised a wide range of contentions, arguing that the methods for cooling nuclear power plants disrupted the local environment; the AEC failed to take into account the potential human and environmental effects of low probability accidents; the arrangements for storing spent nuclear fuel were inadequate; and, more generally, the AEC had not determined whether nuclear power was safe for the environment.

During this period, the AEC and its promoters in Congress on the JCAE acted to prevent the environmentalists from having say in nuclear power regulation, and where not possible, to blunt their influence. The commission sought to promote nuclear power commercialization; it viewed the environmentalists as an impediment to that goal and therefore sought to cut them out as much as possible. The conjunction of the agency, the industries involved (utilities, nuclear power vendors, and their suppliers), and their promoters and protectors in Congress appeared as another case of regulatory capture.

Cohen’s empirical results reveal two dramatic conclusions. First, the AEC denied nearly all of the environmentalists’ contentions. Of the 103 non-process issues raised by environmentalists before the AEC from 1966-73, 89 were rejected or set aside, 3 were granted but considered minor, 7 resulted in a decision to monitor or test, and only 4 were granted and considered major (Cohen 1979, Tables III and IV).

Second, the ability of the environmentalists to participate dramatically lengthened both the construction permit and operating license processes. Cohen’s empirical study reveals two findings: she showed that environmentalist challenges to an EIS rarely succeeded; nonetheless, on average, contesting the EIS added months to the approval process.

At first glance, the history of nuclear power seems consistent with the traditional reformation thesis. Without the courts prodding the AEC, environmentalists would not have had as significant an influence on nuclear power. Indeed, courts took actions to force the AEC and later the Nuclear Regulatory Committee (NRC), to allow the environmentalists to participate meaningfully in regulatory proceedings. Perhaps the most famous case is the 1971 *Calvert Cliffs* decision in which environmentalists sought to challenge the AEC’s failure to undertake an environmental impact statement (EIS). The commission refused to do so, arguing that because it considered all effects of nuclear power plants in its various decisionmaking forums, it adequately took into account environmental issues and had no need to use the additional procedures.

The court disagreed and forced the Commission to undertake EISs, allowing environmentalists manifold new opportunities to participate in and contest regulatory decisions. This participation added considerable delay to the nuclear plants in the process for which the AEC had failed to undertake an EIS. According to Bupp and Derian, (1978:132,134), “Reactor licensing came to a standstill for 18 months” following *Calvert Cliffs.* “In the aftermath…, the issue became the overall social acceptability of reactors,” an issue seemingly settled from the 1950s to that time. Cohen (1979) estimated that nuclear plants early in the regulatory process were least affected, with their costs increasing by ten percent; but plants far along in the process were hardest hit, with their costs increasing by up to twenty-five percent.

This story seems consistent with the reformation thesis. Activist courts forced the AEC to undertake an EIS for each plant, allowing considerable participation by environmentalists at various stages. By forcing the AEC to undertake environmental impact statements, they granted environmentalists the major procedural tools to participate in nuclear regulatory proceedings, to have their issues herd, often in considerable detail. Forcing the agency to undertake EISs helped the environmentalists’ delay existing plants in the pipeline and giving the environment legal means to participate, contribute, and contest the EIS process.

Without the court’s bold ruling in *Calvert Cliffs,* the AEC would have successfully skirted the EIS process, allowing it to prevent a significant increase in environmentalists’ participation and contribution in regulatory proceedings.

We hold a different view of the events surrounding *Calvert Cliffs.*  Although we agree on the importance of the court’s ruling in forcing the AEC to perform EIS and to allow environmentalists’ participation, we contest the traditional wisdom’s account that this participation occurred largely as the result of the courts acting against agencies *and* Congress.

Most obviously, the courts did not invent the EIS so favorable to the environmentalists. Rather, Congress created the EIS process through passage of the National Environmental Policy Act of 1969. The act required that all agencies of the federal government consider environmental issues “to the fullest extent possible”. In addition, the act required that “all agencies of the Federal Government Shall … include in every recommendation or report on proposals for legislation and other major Federal actions … a detailed statement… on – (i) The environmental impact of proposed actions, (ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented, [and] (iii) Alternatives to the proposed action” (quoted in Anderson, 1973:294). As Anderson (1973: 6) argues, “The legislation placed an environmental imperative upon those agencies which had earlier contended that they lacked authority to consider the environmental effects of their actions.”[[6]](#footnote-6)

Environmental advocates in Congress designed NEPA to grant environmentalists procedural means to contest a wide range of agency proceedings, including nuclear power. Although the provisions about EIS and their implications for each agency were ambiguous, and the court ruling in *Calvert Cliffs* seems to have expanded the meaning of the act (Rodriguez and Weingast, 2007), the EIS provisions in particular forced every agency to undertake these new evaluations of their environmental impact. *Calvert Cliffs* therefore complemented congressional action: both Congress and the courts sought to allow environmentalists greater participation and influence in nuclear power.

Recall the atmosphere in Washington surrounding environmentalism in 1969 and 1970 when, seemingly overnight, environmental issues went from a fringe to a mainstream issue. As mentioned, a contest emerged between President Richard Nixon and Senator Edmund Muskie (D-ME) about who would where the mantle of the most pro-environmental elected officials (See Ackerman & Elliott 1981). This contest helped to publicize environmental issues, bringing them to the attention of millions of citizens.

Nonetheless, the JCAE remained steadfastly pro-nuclear power and sought to prevent the influence of environmentalists and their champions in Congress. But congressional environmental leaders used other means to promote environmental interests that skirted the power of these committees (McNollgast 1990).

As further evidence for our thesis, consider the intra-congressional battles over nuclear power between the environmental advocates and the old guard champions of nuclear power, as represented in the JCAE. In the five years following NEPA, congressional champions of environmentalism completely routed the congressional old guard. In concert with Democratic leaders, environmentalists in Congress dismantled the regulatory apparatus in both Congress and the bureaucracy so as to blunt its promotional activities. First, Congress dismantled the JCAE and parceled its policy jurisdiction to other committees less favorable to promoting nuclear power. Second, Congress dismantled the AEC. Because of the conflict of interest between the commission’s promotion and regulatory mandates, Congress passed the Energy Reorganization Act of 1974, dividing the two functions into two new and separate agencies. The Energy Research and Development Administration (later to be incorporated into the new Department of Energy) encompassed the AEC’s promotional activities; while the NRC, encompassed the AEC’s regulatory activities

Rather than seeing the transformation of nuclear power as a result of heroic courts working against Congress captured by interest groups and forcing errant agencies to attend to the concerns of environmentalists, our approach suggests a different view. In the late 1960s and early 1970s, environmental entrepreneurs in Congress worked along the courts to foster the influence of the new groups virtually unknown in 1965.

To summarize, the role of the courts was instrumental in the transformation of nuclear power regulation from its long-term promotional actions, as *Calvert Cliffs* illustrates. But so too were critical actions in Congress, creating NEPA in 1969 and dismantling both the AEC and the JCAE in 1974., Congress and the Courts transformed nuclear power together, not in opposition. The congressional-court collaboration reflected the larger transformation of the American political system. This transformation encompassed a wide range of new interests was across-the-board, reflecting in the overthrow of the old guard committee chairs in Congress. The Congressional reform process allowed younger and more liberal Democrats greater influence and power to respond to new interests and constituencies, such as civil rights, consumers, environmentalists.

1. **The Reformation Revisited**

Reframing the Congress/court relationship as a partnership born of mutual interest and comparative advantage sheds light on the weaknesses of the conventional view expressed in the legal literature of court-centric administrative law and judges as antidotes to noxious regulatory politics. Indeed, it points to a different model, one which builds on the insights of the emerging law and PPT movement. The first building block is the basic PPT view of regulation. Congress responds to attentive interests and constituencies. This approach yields an important comparative static: As the interests and constituencies in a policy area change, so too do congressional interests in regulatory policy.

 This insight is supported by the dramatic changes in politics beginning in the 1960’s and continuing through the next decade or so. Members of Congress, presidents, and the judges all responded in significant ways to the huge transformation of interests, constituencies, and politics during this period. Congressional and presidential champions of new groups emerged at precisely the same time as judicial champions of these groups emerged. Critically, both courts and Congress responded to these changes. The reformation of administrative law, therefore, ought not to be seen as principally the product of courts and judges “going rogue,” but as a multi-institutional process in which Congress and the President reacted to key political changes, agencies carried out their functions in the shadow of these political dynamics, and courts pursued their objectives through attention to devices that are connected closely to judicial goals, such as procedural fairness and due process, and deference of the considered judgments of political officials in the legislative and executive branches. These judicial decisions central to the reformation of American administrative law were carried out under the terms and purposes of new legislation which reflected the successful efforts of the very same interest groups to whom judges responded in the hard look era.

We argue that, given the great transformation of American politics of the 1960s and 70s, the reformation of administrative law was inevitable. Had judges not played their role, Congress and the president would have collaborated to reform administrative law in a similar way, if with less attention to due process rights. Specifically, Congress and the president sought during this era to expand participation to include a wide range of new groups and to force existing agencies to attend to these new groups’ interests. As we illustrated in the case of nuclear power, the old guard fell away: new interests replaced the interest groups who once dominated AEC proceedings and new member of Congress with different goals replaced the promoters in Congress on the JCAE. Variants on this same pattern can be seen in other major regulatory venues; for example, the ICC’s regulation of surface transportation and the CAB’s regulation of the airlines.

The judiciary participated in this massive transformation of American politics with a series of landmark cases, also reflected the transformation in new constituencies. But, further, the transformation was an across-the-board, system-wide effect. All aspects of American politics were affected. Courts alone did not drive either the larger American political transformation or the reform of regulatory administration. Rather, voters, interest groups, parties, Congress, the President, and the courts all participated, and none dominated or can be said to have initiated this process. In short, we need to see judicial actions during this period within the larger political context. Court actions parallel those elsewhere, including those of elected officials.

In the end, we see the mainstream of administrative law scholarship growing out of Stewart’s depiction of the “reformation” of American administrative law as partially accurate, as having captured a portion of the larger political transformation. Courts more actively safeguarded individual rights and ensured adequate participation through constitutional review and “expansionist” interpretations of regulatory statutes and, occasionally, the APA (Metzger, 2010). The judicial role should not be underestimated. At the same time, courts seldom acted as free-floating promoters of sound governance, largely in opposition to Congress and the president. Rather, they acted very much within the structure of the American political system and its myriad incentives, and in parallel with Congress and the president. As elsewhere in American public law, courts can function successfully only insofar as there was in a place a self-governing equilibrium, composed of incentive compatible rules, an equilibrium which reflects the multidimensional interests of various political actors.

By neglecting the key political dynamics of the modern regulatory era, administrative law scholars are left with an anachronistic picture of New Deal-era administrative agencies working hard to craft public policy in a vacuum left by broad delegations. In this picture, courts are seen as the institution best suited to safeguard the public interest in the face of legislative acquiescence and interest group pressure. Whatever merits such a view had in an era in which this regulatory structure was ascendant, the modern regulatory system is considerably different. Indeed, it is defined by the massive, system-wide transformation of American politics during the 1960s and early 70s, a transformation which affected not only politics, but American federalism and the relationship of the national government to the economy. Administrative law scholars of the reformation miss that the judiciary did not transform the administrative process in isolation. Instead, the judiciary was part of a much more complex system that created a new American administrative state.

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1. Earlier versions of this paper were presented at the Searle Center Conference at Northwestern Law School (co-sponsored by Stanford and Texas), October 2010, at Center for the Study of Law & Politics Conference at California Institute of Technology and USC Gould School of Law, January 2010, and at 2009 workshops at Emory and Northwestern Law Schools. [↑](#footnote-ref-1)
2. See Shapiro (1988) for the proposition that this reflects a “synoptic” conception of agency decisionmaking. [↑](#footnote-ref-2)
3. Major legislation includeds the Civil Rights Act of 1964, the Clean Air Act of 1970, the National Environmental Protection Act of 1969, the Airline Deregulation Act of 1978, the National Traffic and Motor Vehicles Safety Act of 1966, the Consumer Product Safety Act of 1973, the Energy Reorganization Act of 1974 separating the AEC’s promotional activities from the regulatory activities; the Occupational Safety and Health Act of 1970, creating OSHA and regulating safety and health in the workplace; the Motor Carriers Act and the Stagger’s Rail Act of 1980, dismantling the ICC”s truck and railroad regulation; the Toxic Substances Control Act of 1976; Pesticides Control Act of 1972. [↑](#footnote-ref-3)
4. The absence of overrides is often taken, as it appears to be in the administrative law literature, as a sign of Congressional deference to judicial judgments. An alternative interpretation is that judicial decisions are sufficiently close to those sought by political officials that the need to override doesn’t arise. In this view, the judges strategically tailor their decisions so as to conform sufficiently to those sought by Congress so as to prevent an override. [↑](#footnote-ref-4)
5. See, e.g., *Block v. Community Nutrition Institute*; *Webster v. Doe*. [↑](#footnote-ref-5)
6. **Error! Main Document Only.**Further, Anderson (1978: 6) suggests, “Evidence for this position appears near the end of the Sen hearings on S. 1075, where Dr. Caldwell suggested: ‘In the Lic'g proc of the various agencies such as the Atomic Energy Commission or the Federal Power Commission or the Federal Aviation Administration there should also be, to the extent that there may not now exist fully or adequately, certain requirements with respect to environmental protection.’ "Prompted by Dr. Caldwell's testimony, Committee Chairman [Senator Scoop] Jackson indicated that instead of trying to revamp the operating statutes of the various agencies within the jurisdiction of a number of different committees, it might be better to `lay down a general requirement that would be applicable to all agencies that have responsibilities that affect the environment rather than trying to go through agency by agency.'" [↑](#footnote-ref-6)