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A REPLY TO *JUDICIALIZATION*

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In a recent article in this *Journal,* Judge Loren A. Smith describes and criticizes a trend towards "judicialization" in administrative law.[1] Judge Smith perceives two types of judicialization. One is the "active participation of the courts, through extensive judicial review, in the decisions of executive bodies."[2] The second involves the "expanding use of trial-like procedures for making governmental decisions, and, more generally, . . . overproceduralization and excessive complexity in the process of making public policy decisions."[3]

Judge Smith sees in the trend towards judicialization a failure of public confidence in government institutions. Since the traumatic days of Vietnam and Watergate, he observes, the public has come to question whether government experts really know what they are doing, and to worry that government is too big and too involved in private affairs. At the same time, he notes, citizens have come to expect government to solve all manner of difficult policy questions. "People want safer *and* cheaper products. They want cleaner air without any loss of jobs in heavy industry. They want economic growth, but not industrial or commercial development of the areas where they live and play."[4]

The political reaction to these developments, Judge Smith suggests, has not been to reduce the power of executive agencies directly, but to increase, in various ways, procedural constraints on administrative action.[5] This reaction, he argues, embodies a false premise: "To the extent

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1. Smith, *Judicialization: The Twilight of Administrative Law,* 1985 DUKE L.J. 427.

Judge Smith served for four years as Chairman of the Administrative Conference of the United States. Since his article was published he has been appointed as a Judge of the United States Claims Court.

2. Smith, *supra* note 1, at 428.

3. *Id.*

4. *Id.* at 443-44 (emphasis in original).

5. *Id.* at 441-42.

that we judicialize government, we necessarily tend to see the failures of economic and social programs not as manifestations of wrong-headed policies, but as bad technique or the flawed work of wrong-headed administrators."[6] This approach, Judge Smith claims, confuses "decisions of will"—discretionary political decisions by administrative officials based on their subjective evaluations of the costs and benefits of a policy—with "decisions of logic"—legal, judicial decisions marked by a sense that there is an objectively correct answer to a problem.[7]

To counter the trend towards judicialization, Judge Smith suggests that we reevaluate fundamental notions of administrative law. Most essentially, he proposes that, given the American preference for the free market system, we should adopt a presumption against government intrusion into the private ordering of economic and social affairs.[8] Implementation of this presumption would involve deregulation in many areas.[9] For the remaining areas, Judge Smith proposes a dramatic reduction in procedural restrictions on agency action. Judge Smith suggests, for example, that Congress should reconsider the Government in the Sunshine Act because of its excessive burden on the process of making public policy decisions.[10] In addition, he maintains, the courts must reassess fundamental assumptions of administrative law insofar as they lead to overproceduralization. Procedural due process rights have expanded too far, he argues. As a solution, he proposes that courts give up the notion that citizens have the "right" to a more or less formalized hearing in every administrative proceeding.[11] Instead, courts should re-

6. *Id.* at 430.

7. *Id.* at 430-31.

8. *See id.* at 435.

9. Judge Smith applauds, for example, the deregulation of the airline industry, which has already taken place. *See id.* at 458 & n.102. His preference for deregulation, however, extends much further. In another article dedicated to this subject, he suggests:

> There are many people who feel that the role of government is to do for the society all the things that need to be done. They feel that if there is racial discrimination, sexual discrimination, poverty, pollution, or unsafe products on the marketplace, it is the ultimate responsibility of government to eliminate them. To the extent that there is a lack of consensus, I think there is a significant intellectual position that accepts the view that those problems are not the problems of government.

Smith, *Judicial Review of Administrative Decisions,* 7 HARV. J. L. & PUB. POL'Y 61, 65 (1984). In particular, Judge Smith has called for the repeal of the Occupational Safety and Health Act. *Official Questions Whether OSHA is Really Needed,* ENGINEERING NEWS-RECORD, Dec. 16, 1982, at 7.

10. The Administrative Conference, under Chairman Smith, questioned the desirability of the openness in government required by the Government in the Sunshine Act. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1984 RECOMMENDATIONS AND REPORTS 17-19 (1984) (ACUS RECOMMENDATION 84-3). *See also* Smith, *supra* note 1, at 428 & n.4; ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1982 REPORT 2 (foreword by Chairman Smith) (suggesting that Federal Advisory Committee Act, Privacy Act, Paperwork Reduction Act of 1980, and 1974 amendments to the Freedom of Information Act have also unduly burdened agencies).

11. *See* Smith, *supra* note 1, at 459-60.

turn to their traditional role as the defenders of recognized property rights, an approach that would embody a clear distinction between "rights" and "privileges."[12]

Because Judge Smith's approach suggests such sweeping changes in administrative law, we cannot simply test it on the level of any particular policy suggestion. The answer to the question whether the Government in the Sunshine Act should be repealed, for example, would not completely validate or invalidate Judge Smith's theory. Instead, we must examine both his description of the state of modern administrative law and his normative judgments as to the proper functions of administrative law. We can then compare the fundamental assumptions underlying Judge Smith's approach with those embodied in modern administrative law. I propose, in this article, to develop this comparison in three parts.

Part I considers the theory and practice of judicial review. The questions here are threefold. How much do courts interfere with agency decisions? What is the justification for judicial review of agency decisions? Is this justification valid? Part II considers the contours of procedural rights under the Administrative Procedure Act and under the due process clause. Here, the questions are twofold. What are the procedural rights afforded participants in agency proceedings? Are these rights necessary? Finally, Part III considers the specific problem of deregulation. Does Judge Smith's suggested presumption in favor of private ordering automatically lead to the conclusion that major areas of government regulation should be dismantled? Assuming that deregulation is desirable, what role should the courts play in deregulation? The answers to all these questions suggest that Judge Smith has mapped out a position that is fundamentally at odds with the modern approach to administrative law.

I. JUDICIAL REVIEW

To begin to evaluate Judge Smith's claim that judicial review in administrative cases has become excessive, we must first describe the extent

12. *See id.* at 460 n.105. Judge Smith, in another context, has described this theory of administrative law based on private rights as a "natural law" approach:

> I think it behooves groups that are interested in restoring the health of our constitutional system to focus on the resurrection and the perpetuation of [the notion of natural law]. Natural law provides a most important tool in helping us rethink the problems we face in ensuring a legal and constitutional system that governs the administrative state. The problems of agency abuse of power and regulation run riot, recorded so long ago in *Schechter,* and opposite, equally serious concerns, of a judiciary on a binge of hyperactivity can only be fully understood on the common ground of a general theory of constitutional government. Natural law theory provides such a conceptual common ground for understanding the dilemmas we face in the judicial control of administrative agency action.

Smith, *supra* note 9, at 67.

to which courts interfere with agency action. We must take note both of raw statistics on judicial review and of the precise circumstances in which intervention is most likely.

On the most basic statistical level, we can say without hesitation that courts only rarely upset agency decisions. A recent report from the Administrative Office of the United States Courts indicates that, in administrative appeals, circuit courts reversed agencies in only 11.2% of the cases.[13] The significance of this statistic appears by comparing it to the figures for other types of judicial review. In appeals from district courts in civil suits involving the United States, for example, circuit courts reversed in 25.1% of the cases.[14] Moreover, the 11.2% figure excludes the large numbers of administrative cases in which courts did not even directly review agency action. More than half of the administrative appeals were terminated other than "on the merits."[15] Presumably most of these cases were dismissed for lack of jurisdiction.

To describe the extent to which courts interfere with agency decisions we should also consider in which cases the courts are most likely to exercise their authority. Unfortunately, precise statistics are not available in this area, possibly because it is difficult to categorize cases consistently. I have suggested, however, that courts essentially apply a sliding scale for review of agency decisions.[16] This scale provides for three levels of scrutiny; which level applies depends on the type of error allegedly committed by the agency. The first, and most intense, level of scrutiny applies to procedural errors.[17] The second, a middle level of scrutiny, involves alleged errors in statutory interpretation. In such cases, at least in those in which the congressional directive is less than clear, courts consider and often defer to the statutory interpretations of the agencies charged with administering a congressional program.[18] Finally, in reviewing substantive policy decisions, a court operates under the greatest measure of constraint.[19] The general outlines of this sliding scale have been confirmed in several recent court decisions.[20] Since the decision in

13. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 261 (1985). This report includes administrative appeals decided during the one-year period ending June 30, 1985. The figure represents the results from all circuits. The United States Court of Appeals for the District of Columbia Circuit reversed agency decisions in only 9.3% of administrative appeals. *Id.*

14. *Id.*

15. Of 2760 administrative appeals, only 1256 were terminated "on the merits." *Id.*

16. McGowan, *Reflections on Rulemaking Review,* 53 TUL. L. REV. 681, 691-92 (1979).

17. *Id.*

18. *Id.* at 692.

19. *Id.*

20. Although I originally illustrated this sliding scale with cases from my own court, *see id.* at 691-92 (citing Weyerhauser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978)), recent Supreme Court

Heckler v. Chaney,[21] moreover, we may now add yet another point on this sliding scale, one where courts should almost never interfere with an agency. In *Chaney,* the Supreme Court held that the Administrative Procedure Act (APA)[22] requires that courts grant a presumption of unreviewability to an agency's decision not to initiate an enforcement action.[23] For such decisions, the Court noted, which are uniquely within the discretion of the agencies, the question whether courts should interfere is "in the first instance for Congress."[24]

It is not important, at this point, to describe the precise workings of—or to explain the justifications for—each level of scrutiny. We may say generally, however, that the divisions of the sliding scale follow from the spheres of expertise of courts and agencies and the clarity of the directions given by Congress.[25] What is important is that we recognize how infrequently courts actually interfere with agency proceedings. When courts do interfere, moreover, they do so largely out of concern for the fairness of the agencies' procedures or for fidelity to congressional directives, not because they wish to substitute their judgments on essential policy questions for those of the agencies.[26]

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opinions also fit comfortably into this framework. The highest level of scrutiny is illustrated by Schweiker v. McClure, 456 U.S. 188 (1982), in which the Court considered the propriety, under part B of the Medicare program of the Social Security Act, of using private insurance carriers to administer the payment of claims. The Court closely scrutinized the evidence concerning the risk of erroneous decision in the absence of a neutral hearing officer and the probable value of any additional procedure. *Id.* at 198-200. Even with this searching inquiry, the Court concluded that due process did not demand any additional procedure. *Id.* at 200.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), demonstrates a middle level of judicial inquiry. The Court there held that, in interpreting a term in the Clean Air Act that Congress had not specifically defined, it was appropriate to defer to the view of the agency charged with administering the statute: "[T]he question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Finally, the greatest amount of deference accorded an agency is illustrated by Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87 (1983), in which the Court reviewed a series of generic Nuclear Regulatory Commission rules designed to evaluate the environmental effects of a nuclear power plant's fuel cycle. The Court insisted only that the agency decision be "within the bounds of reasoned decisionmaking." *Id.* at 104. As justification for this deferential approach, the Court noted that "a reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science." *Id.* at 103.

21. 105 S. Ct. 1649 (1985).

22. 5 U.S.C. §§ 551-559, 701-706 (1982).

23. *Chaney,* 105 S. Ct. at 1655-56.

24. *Id.* at 1657.

25. *See* McGowan, *supra* note 16, at 692.

26. Indeed, courts frequently reiterate that it is not their function to make any of the policy choices consigned to the agencies. *See, e.g.,* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 803 (1978); Bowman Transp., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285 (1974); National Small Shipments Traffic Conference, Inc. v. CAB, 618 F.2d 819, 826 (D.C. Cir. 1980).

Having described the relatively limited extent to which courts interfere in agency proceedings, we may now consider what justifications exist for even this limited interference. What purpose does judicial review of agency action serve? The answer to this question is simple and clear. Judicial review serves as a check on the power of the administrative agencies. Given that Congress has the power, as in *Chaney,* to abolish judicial review in some areas of administrative law, the path chosen by Congress seems clear. Rather than directly controlling the agencies, Congress largely has chosen to use the courts as a check on administrative power.[27]

Is judicial review necessary to provide this check? The question is really one of alternatives. Should agencies be allowed to operate entirely on their own? Should Congress control them? Or should the President provide the necessary oversight?

Our system of administrative law has long accepted the notion that agencies may not be left entirely to their own devices. In the original anti-delegation opinions, the Supreme Court enshrined this as a constitutional principle: delegation of Congress's legislative powers to an agency violated the separation-of-powers concept embodied in our Constitution.[28] Although the Supreme Court quickly softened the edges of that doctrine,[29] at least some vestiges of the doctrine remain,[30] and it may someday be revived.[31] Even though the need for checks on administra-

27. *See* McGowan, *Congress, Court, and Control of Delegated Power,* 77 COLUM. L. REV. 1119, 1131 (1977) ("The pattern of the recent past has been that of a Congress largely content to rely upon the courts.").

28. *See* Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-30 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388, 420-21 (1935).

29. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), and Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935), are the only two examples of invalidation by the Supreme Court of delegation by the Congress to an executive agency. As Justice Marshall has observed:

> The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes, at least in the absence of a delegation creating "the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of [constitutionally] protected freedoms . . . ."

Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring) (quoting United States v. Robel, 389 U.S. 258, 272 (1967) (Brennan, J., concurring)).

30. Since 1935, the Court, while not invalidating any delegation of legislative power, has at least inquired whether Congress provided standards to control the exercise of executive discretion. *See, e.g.,* United States v. Southwestern Cable Co., 392 U.S. 157, 167-78 (1968) (upholding FCC rules promulgated pursuant to "public convenience, interest, or necessity" standard); Yakus v. United States, 321 U.S. 414, 425 (1944) (holding that Emergency Price Control Act of 1942 did not involve unconstitutional delegation of legislative power).

31. There is at least a glimmer of support for revival of the doctrine in several recent Supreme Court opinions. *See, e.g.,* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 672-76 (1980) (Rehnquist, J., concurring).

tive power has long ceased to operate as a significant constitutional doctrine, the practical concern that agencies may, if left unchecked, abuse their powers, remains a potent one. It was precisely this concern that motivated Congress to adopt the APA in 1946.[32]

There is little reason to believe that this concern will ever dissipate. Indeed, the concern does not depend on one's political stripe. For example, those who favor more government regulation as a means to protect the less powerful express concern that a government bureaucracy, if left to itself, might become "captured" by well-organized private groups who could use government power for their own ends.[33] Those who favor less government regulation, however, should fear the converse. An administrative agency, charged with a general mission to regulate in some area, may develop a zeal for regulation that exceeds the bounds of the original congressional scheme.[34] From either perspective, the response is the same: administrative agencies must be controlled by some external authority. But where to find that control?

Congress long ago recognized that it often could not directly regulate in the complex modern American social and economic environment. It therefore delegated power broadly to administrative agencies; the Supreme Court has upheld such delegations since the late 1930's.[35] In-

32. *See, e.g., Federal Administrative Procedure: Hearings Before the House Comm. on the Judiciary,* 79th Cong., 1st Sess. 2 (1945) (statement of David A. Simmons, President, American Bar Association) (agencies "threaten[] to develop a 'fourth branch' of the Government for which there is no sanction in the Constitution"), *reprinted in* ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, 79th Cong., 2d Sess. 48 (1946); 92 CONG. REC. 2151 (1946) (statement of Sen. McCarran) ("I desire to emphasize the . . . provisions for judicial review, because [they are] something in which the American public has been and is much concerned, harkening back, if we may, to the Constitution of the United States, which sets up the judicial branch of the Government for the redress of human wrongs . . . ."), *reprinted in* ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, 79th Cong., 2d Sess. 305 (1946); S. REP. NO. 752, 79th Cong., 1st Sess. 31 (1945) ("[T]he enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts . . . . Judicial review is of utmost importance . . . . It is indispensable since its mere existence generally precludes the arbitrary exercise of powers or assumption of powers not granted."), *reprinted in* ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, 79th Cong., 2d Sess. 217 (1946). Several commentators of the period expressed this same concern. *See, e.g,* Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review,* 33 A.B.A. J. 434, 435 (1947); McCarran, *Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review,* 32 A.B.A. J. 827, 827-29 (1946); Sherwood, *The Federal Administrative Procedure Act,* 41 AM. POL. SCI. REV. 271, 271-72 (1947).

33. *See* Note, *Incorporation of Independent Agencies into the Executive Branch,* 94 YALE L.J. 1766, 1769 & n.25 (1985).

34. The Federal Trade Commission is, perhaps, the agency most often accused on this score. *See, e.g.,* Weingast & Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission,* 91 J. POL. ECON. 765, 775-77 (1983).

35. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 37 (1965); Neustadt, *The Administration's Regulatory Reform Program: An Overview,* 32 AD. L. REV. 129, 129-30 (1980); Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1667, 1695 (1975).

deed, efforts by Congress to regulate directly in areas ordinarily assigned to administrative agencies have been generally unsuccessful.[36] But are there other methods by which Congress could control the agencies, perhaps not by displacing them in directly determining the course of regulation, but by pruning unwise or misdirected policies? The most prominent proposal for such congressional control, the legislative veto, is no longer available as a result of the decision in *INS v. Chadha*.[37] Even assuming that *Chadha* does not foreclose other means of legislative control over the agencies,[38] it is apparent that Congress has neither the resources nor the inclination to exercise more than occasional oversight of administrative proceedings.[39] Almost by definition, congressional oversight cannot treat unfairness or overreaching in the ordinary case. Congress's attention will be focused only on widespread problems or truly egregious cases. In my judgment, such occasional oversight is not enough. What, then, of presidential oversight?

Every President since Richard Nixon has sought to impose presidential oversight on administrative agencies.[40] In his first term, President Reagan issued Executive Order 12,291,[41] the most far-reaching of

36. One prominent example of such failure is the Clean Air Act. *See* Graham, *The Failure of Agency-Forcing: The Regulation of Airborne Carcinogens Under Section 112 of the Clean Air Act*, 1985 DUKE L.J. 100, 115-42; Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 748-51 (1983).

37. 462 U.S. 919 (1983). In *Chadha*, the Supreme Court held the legislative veto unconstitutional. Because the legislative veto did not require the approval of both Houses and never required the signature of the President or a supermajority of both Houses to override his veto, the Court believed it violated procedural requirements explicitly mandated by the Constitution for valid legislation. *Id.* at 944-51.

38. Judge Stephen Breyer, for example, has recently advanced a creative solution to the *Chadha* problem:

> Legislators might be able to create mechanisms that function like the veto but comply with the constitutionally prescribed form of legislation. For example, Congress might decide to delegate power to an agency but allow the latter's action to take effect only if Congress later passes a special law confirming it.

Breyer, *Reforming Regulation*, 59 TUL. L. REV. 4, 11 (1984). With this approach, the agency would merely propose a regulation. Congress would have to enact the proposal into law.

39. *See* R. LITAN & W. NORDHAUS, REFORMING FEDERAL REGULATION 60-81 (1983); Stewart, *supra* note 35, at 1695 n.128.

40. The Nixon Administration used a "quality of life" review process—implemented by Office of Management and Budget Circular A-95—that, although not taking the form of an executive order, served much the same regulatory oversight function as the later Ford, Carter, and Reagan executive orders. *See* 1 A. REITZE, ENVIRONMENTAL LAW 112 (1972); McGowan, *Regulatory Analysis and Judicial Review*, 42 OHIO ST. L.J. 627, 632 (1981). President Ford signed Executive Order 11,821, 3 C.F.R. 926 (1971-75 Compilation), which required executive agencies to prepare Inflation Impact Statements when preparing major legislative or regulatory proposals. Executive Order 12,044, 3 C.F.R. 152 (1979), signed by President Carter, imposed a detailed regulatory analysis requirement on executive agencies undertaking major regulatory proposals. *See* McGowan, *supra*, at 632 (describing Nixon, Ford, and Carter oversight orders).

41. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

these attempts at presidential oversight. The Order's principal provision requires that federal agencies perform cost-benefit analyses prior to implementing any major regulatory proposal.[42] For several reasons, however, even this relatively ambitious program of oversight has not had a significant impact on federal regulation.

Executive Order 12,291 does not affect the independent agencies.[43] Nor does it apply to regulations that are not "major."[44] With respect to those few regulations that are actually reviewed, moreover, the Order does not appear to change the character of regulations with any frequency.[45]

Even if cost-benefit analyses were extended to all agency regulations, and more stringently applied, as Judge Smith apparently favors,[46] the beneficial effects are highly uncertain. Cost-benefit analysis is notoriously imprecise.[47] In particular, cost-benefit analysis generally emphasizes economic values and fails to account satisfactorily for intangible concerns, such as aesthetics or freedom from safety risks.[48] If strictly enforced (and especially if applied to already-existing rules), cost-benefit analysis could work effective deregulation in many areas. Perhaps deregulation is desirable in some of these areas. But, if so, cost-benefit analysis is not the best way to implement it. Cost-benefit analysis simply adds a procedural hurdle to the rulemaking process.[49] Is this not precisely the type of "judicialization" with which Judge Smith finds fault?

Aside from the question whether cost-benefit analysis is a desirable control over administrative discretion, it may be that any form of presidential oversight of the administrative process will prove inadequate. Neither the President nor his staff will ordinarily have the time or exper-

42. *Id.* § 2, 3 C.F.R. at 128.

43. The Order specifically exempts the independent regulatory agencies from coverage. *Id.* § 1(d), 3 C.F.R. at 128.

44. "Major" regulations include those imposing costs of $100 million or more. *Id.* § 1(b)(1), 3 C.F.R. at 127.

45. *See* PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF, REAGAN ADMINISTRATION REGULATORY ACHIEVEMENTS 55 (1983) (only one-ninth of regulations reviewed under Order during 1981 and 1982 were revised or returned to agencies for further consideration); *id.* at 64 (only one percent of regulations reviewed were withdrawn).

46. *See* Smith, *supra* note 1, at 451-52, 451 n.82 (citing statutory proposals for cost-benefit analyses with apparent approval).

47. *See* Fisher, *Controlling Government Regulation: Cost-Benefit Analysis Before and After the* Cotton-Dust *Case,* 36 AD. L. REV. 179, 182-83 (1984).

48. *See* Landey, *The Federal Regulatory Process: An Overview of an Enervated System,* 36 AD. L. REV. 75, 80 (1984).

49. *See* Fisher, *supra* note 47, at 203-04.

tise to review all proposed regulations.[50] Such oversight, moreover, invites wild swings in administrative policy, changing as often as every four or eight years, with each new administration. Not only are such swings undesirable as a policy matter, but, to the extent that they reflect an administration chafing under congressional directions, they also highlight the potential constitutional infirmities of presidential oversight.[51]

That there are significant disadvantages to entrusting the regulatory process entirely to self-policing by the administrative agencies, or to congressional or presidential oversight, seems certain. Nevertheless, various forms of such controls do exist, and may provide useful adjuncts to judicial review as means of controlling the regulatory process. Naturally, our system of administrative law should not reject any such alternate forms of control out of hand. The point advanced here, however, is that due to lack of fully effective alternatives, judicial review must remain the central means of ensuring that agencies do not abuse their administrative powers.

II. OVERPROCEDURALIZATION

Judge Smith's second main contention is that the administrative process has become "overproceduralized," and that the courts and Congress have increasingly insisted on trial-like procedures before an agency may act.[52] The response to this contention must be formulated on two levels, the descriptive and the normative. The descriptive question asks

50. *See* DeMuth, *Constrain Regulatory Costs, Part I: The White House Review Programs,* REGULATION, Jan.-Feb. 1980, at 13, 16 (describing the cross-delegation between agencies within executive branch of responsibilities for implementing regulatory review programs).

51. The argument over the legality of presidential oversight focuses on the separation-of-powers doctrine. The Executive is empowered to implement legislative enactments, but not to create them unilaterally. If the President imposes, for example, a cost-benefit analysis requirement on executive agencies and hence on the statutes they administer, it is tantamount to adding statutory requirements that Congress neither included nor desired. Such an addition could be seen as an executive encroachment on the legislative prerogative in violation of the separation-of-powers principle. *See* Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291,* 80 MICH. L. REV. 193, 195-220 (1981). *But see* Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291,* 23 ARIZ. L. REV. 1235, 1243-62 (1981). Indeed, at least one court has invalidated a portion of Executive Order 12,291 on precisely these grounds. *See* Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 570 (D.D.C. 1986).

52. Judge Smith at points appears to distinguish between overproceduralization in general—or "government delay and waste"—on the one hand, *see* Smith, *supra* note 1, at 459, and excessive reliance on trial-like procedures on the other, *see id.* at 461-64. This distinction is rather unsatisfactory. Under the rubric of overproceduralization, for example, Judge Smith remarks that "[t]he right to a more or less formalized hearing has come to be held as an article of faith." *Id.* at 459-60. At other times, however, Judge Smith has equated overproceduralization with the excessive use of trial-like procedures. *See* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1981 REPORT 2 (chairman's foreword). For convenience of discussion, I will assume that overproceduralization is

what procedures are currently required in administrative proceedings. The normative question is whether these procedures are necessary.

A description of the procedural restrictions imposed on administrative agencies must begin with the blunt reality that most administrative action is informal, taken without any trial-like procedure whatsoever.[53] For the remaining group of formal agency actions, moreover, commentators have observed a marked trend away from the use of the trial-like procedures embodied in the APA's sections 556 and 557.[54] Instead, agencies have increasingly used the "notice and comment" rulemaking allowed by section 553. This trend is a direct response to the need to make administrative proceedings more efficient.[55]

Another major event helping to streamline the administrative process was the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*.[56] In *Vermont Yankee,* the Court considered a challenge to an Atomic Energy Commission (AEC) rule specifying which spent-fuel hazards the AEC would consider in making adjudicatory decisions to license specific plants. The AEC followed a notice and comment rulemaking procedure in promulgating the rule. The Natural Resources Defense Council challenged the rule, claiming that the AEC should have permitted discovery and cross-examination and that these procedural requirements could be imposed upon the agency by a court.[57] The Supreme Court emphatically rejected that position, holding that a court could not overturn a rule on the basis of procedural devices not specifically required by the APA.[58] Since *Vermont Yankee,* the Court has reiterated the point that courts may impose proce-

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the general problem, and that excessive use of trial-like procedures is one specific example of that problem. The focus of my response, however, is on the use of trial-like procedures.

53. Professor Davis gives an estimate of the figures on informal action:

> Probably about ninety percent of all administrative action involves a combination of (1) informal action, that is, action taken without trial procedure, (2) discretionary determinations that are mostly or altogether uncontrolled or unguided by announced rules or principles, and (3) lack of judicial review in fact, whether or not the action is theoretically reviewable.

2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8:1, at 158 (2d ed. 1979). *See also* Gardner, *The Procedures by Which Informal Action is Taken,* 24 AD. L. REV. 155, 156 (1972).

54. *See* 1 K. DAVIS, *supra* note 53, § 6:8, at 475 ("The fundamental movement away from rulemaking on the record has been strong and pervasive.").

55. *See, e.g.,* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform,* 118 U. PA. L. REV. 485, 516-17 (1970) (explaining FTC's justification for its use of rulemaking: "[I]n general, rulemaking is likely to be more efficient . . . than adjudication . . . ."); Verkuil, *The Emerging Concept of Administrative Procedure,* 78 COLUM. L. REV. 258, 297 (1978) ("[T]he trend towards rulemaking reduces the time and expense of the ratemaking process . . . .").

56. 435 U.S. 519 (1978).

57. *Id.* at 545.

58. *Id.* at 545-48.

dural requirements beyond those specified in the APA only in extraordinary circumstances.[59] The consequence of the trend towards notice and comment rulemaking and the *Vermont Yankee* decision is clear: agencies are increasingly free to choose less complicated methods of action.[60]

This trend towards fewer procedural restrictions on agency action appears in the Supreme Court's interpretation of the due process clause as well. Although the Court's decision in *Goldberg v. Kelly*[61] may have suggested to some that a formalized hearing would be required whenever an agency denied or revoked benefits under an entitlement scheme[62]—disability, Medicare, and unemployment, for example—the Court has made clear that no such absolute rule applies. In *Mathews v. Eldridge*,[63] the Court announced that it would balance the following three factors in determining whether an agency's procedures satisfy the requirements of due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[64]

Since *Eldridge*, the Court has expanded the notion of due process as a balance between the costs and benefits of procedural restrictions. Thus, the Court applies this balancing approach not only to determine whether a hearing will be required, as in *Eldridge*, but also to determine how formal the hearing, if required, will be.[65] Indeed, the Court has even begun to apply this balancing approach to problems entirely unrelated to the questions whether a hearing is required in agency decisionmaking,

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59. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 312 (1979).

60. *See* Byse, Vermont Yankee *and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1823 (1978) (suggesting that *Vermont Yankee* provides "a needed corrective to an unwholesome trend in the lower federal courts" towards requiring additional procedures in agency action).

61. 397 U.S. 254 (1970). In *Kelly*, the Court held that a pretermination evidentiary hearing was required before state officials could terminate welfare benefits. *Id.* at 264.

62. *Cf.* Diver, Book Review, 94 YALE L.J. 1529, 1529 (1985) (noting that *Goldberg* did not bring about a "due process 'revolution' ").

63. 424 U.S. 319 (1976).

64. *Id.* at 335. The issue in *Eldridge* was whether due process required the recipient of social security disability payments to be afforded an evidentiary hearing prior to termination of benefits. The Court balanced the three factors and determined that a hearing was not required. *Id.* at 349.

65. *See, e.g.*, Hewitt v. Helms, 459 U.S. 460, 476 (1983) (indicating that due process is a flexible concept); Ingraham v. Wright, 430 U.S. 651, 680 (1977) ("[E]ven if the need for procedural safeguards were clear, the question would remain whether the incremental benefit could justify the cost.").

and if so, what type. In *INS v. Lopez-Mendoza,*[66] for example, the Court ruled that the exclusionary rule does not apply in a deportation proceeding. In doing so, the Court deliberately weighed the social costs and benefits of extending the rule beyond its original criminal law context.[67] Far from increasing the procedural requirements for agency action, the Supreme Court has in the past few years adopted a balancing approach, the main effect of which is to make the due process concept extremely flexible.

With this description of the current state of the law concerning administrative procedure, we may now ask the normative question: are the procedural restrictions that remain in effect really necessary? We may begin to answer this question by making explicit the assumption that the goal of these procedural requirements is to increase the fairness and accuracy of agency decisions. Even Judge Smith acknowledges that these procedural restrictions are intended to serve some purpose. His point, however, is that there are costs associated with additional procedure, including delay, costs to the government in providing the procedures, and costs to the parties participating in agency proceedings.[68] Surely we can concede that there is a trade-off between fairness and efficiency without automatically concluding that fairness must go. Rule by a single dictator at each agency might be an extremely efficient method of procedure, but one with very little prospect of fairness. Conversely, requiring an agency to prove in a court of law that it has considered all relevant factors before making any decision might guarantee nonarbitrary decisionmaking, but would paralyze the administrative process. The question is where to draw the line between these two extremes.

Unfortunately, the answer to this question is a complicated empirical one. The fairness and costliness of procedures can be accurately as-

66. 468 U.S. 1032 (1984).

67. *See id.* at 1046.

68. In his first report as Chairman of the Administrative Conference, Judge Smith wrote of the trade-off between accuracy and costs:

> We know that administrative procedures, even the most informal are not cost-free. Professional time is expensive, and the demands for it escalate rapidly as we move to ever more judicialized, adversary-type proceedings. Delay, too, is expensive. . . .
>
> On the other hand, administrative expedition may involve different costs. Too often, agencies are perceived as not having sufficiently thought out the consequences of proposed courses of action. . . .
>
> There is no easy answer to this dilemma. But surely it is a step forward to recognize that the principal test of a particular procedure or of a procedural system is: Does it produce generally accurate results with an expenditure of societal resources appropriate to the issue involved?

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1981 REPORT 2-3 (chairman's foreword). *See* Smith, *Foreword,* 18 NEW ENG. L. REV. 777, 779-80 (1983) ("I take justice to be the most important of all procedural values . . . . Justice is not a free good. . . . Who is to pay and how much justice are we willing to pay for?").

sessed only in the context of the entire regulatory system. We cannot simply consider a single egregious example, like the infamous "peanut butter" case,[69] as indicating a need to reduce administrative procedure. Instead, we must try to find a measure of the value of fair procedures, and compare that value to the costs of implementing these procedures on a government-wide basis.

We can illustrate the difficulty of such a calculation with a specific example, the National Environmental Policy Act of 1969 (NEPA).[70] NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) for all major actions significantly affecting the environment. The EIS must disclose and evaluate alternative actions and their environmental consequences.[71] Since its enactment, NEPA has been attacked as imposing paperwork burdens and delays, creating procedural traps for the unwary, and failing altogether to affect agency decisions.[72] Critics have also complained about NEPA's less than satisfactory performance as a tool for decisionmaking on particular projects.[73] Despite these theoretical criticisms and complaints in individual cases, for years no comprehensive study of NEPA procedures was ever undertaken.[74] When such studies were finally completed, the results showed that NEPA procedures did have a positive effect on agency decisionmaking, one sufficient to justify their continued use, despite their obvious costs.[75]

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69. In 1959, the Food and Drug Administration began a proceeding to determine whether peanut butter should have 87% or 90% peanuts. Nine years later, after a transcript of 7736 pages had been amassed, *see* 1 K. DAVIS, *supra* note 53, § 6:8, at 475, the rule finally issued, and was later upheld. *See* Corn Products Co. v. FDA, 427 F.2d 511 (3d Cir.), *cert. denied,* 400 U.S. 957 (1970).

70. 42 U.S.C. §§ 4321-4347 (1982).

71. *Id.* § 4332.

72. *See, e.g.,* Fairfax, *A Disaster in the Environmental Movement,* 199 SCIENCE 743 (1978); Sax, *The (Unhappy) Truth About NEPA,* 26 OKLA. L. REV. 239 (1973).

73. Perhaps one of the most often criticized applications of the NEPA procedure was the Westway project in Manhattan. *See, e.g.,* N.Y. Times, Jan. 26, 1985, at 20, col. 1 (noting 12-year delay and cost of project); N.Y. Times, June 4, 1984, § II, at 1, col. 1 (discussing Westway as example of paralyzed government). The plan for Westway, a replacement highway on the west side of the city, was originally formulated in 1971. Litigation began almost immediately, and centered on the need for a detailed assessment of the potential environmental consequences of the project. The litigation continued for the next 14 years, until the Second Circuit rejected a final supplemental EIS for the project. Sierra Club v. United States Army Corps of Eng'rs, 772 F.2d 1043 (2d Cir. 1985). Thereafter, the project was abandoned.

74. In 1975, Professor Stewart expressed his concern on this point: "There is a pressing need for rigorous empirical study of the effects on agency decisions of procedural requirements such as those fashioned by the courts on the basis of NEPA." Stewart, *supra* note 35, at 1780 n.526.

75. The Council on Environmental Quality first performed such a study in the mid-1970's, concluding: "Environmental assessments and impact statements have substantially improved goverument decisions over the past six years . . . ." COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENTS: AN ANALYSIS OF SIX YEARS' EXPERIENCE BY SEVENTY FEDERAL AGENCIES 2 (1976). A follow-up study by the Environmental Protection Agency focused on two specific types of projects. The EPA reported that NEPA procedures resulted in at least one

More such empirical research should be undertaken.[76] The results of such studies, of course, may suggest that certain procedures are not valuable enough to justify the costs of implementing them. That debate is for another day. For now, the question is only whether we have sufficient information to conclude that major changes in the procedural framework for administrative decisions are warranted. I submit that we do not.

III. DEREGULATION

Throughout the *Judicialization* article, Judge Smith emphasizes that there is a presumption in favor of the private ordering of social and economic affairs, and that this presumption supports deregulation in many areas.[77] How far, and by what means, should we implement that presumption? The question invites a complicated, extended philosophical and political debate that would venture well beyond the scope of my intended remarks. For these purposes, I am content to note that the public, politicians, and political analysts all hold widely divergent views on the question of deregulation.

One can see the extent of the disagreement in the developments, over the past few years, in the effort to deregulate. In the late 1970's, the Carter Administration proposed deregulation in several industries—airlines, energy, trucking, railroads, banking, and telecommunications.[78] Some of these proposals were eventually implemented.[79] Two common features of these deregulation efforts were that they concerned economic,

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major positive change in the design of 50 out of 51 waste water treatment facilities and 8 out of 9 coal-fired power plants reviewed. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY-1980, at 371-72 (1980). The EPA also compared the costs of these additional procedures against the benefits:

> After calculating project cost increases resulting from an EIS and project cost savings resulting from an EIS, EPA found that even though costs increased in a majority (31) of the [waste water] plants, the savings in the 19 other plants, where costs were reduced, more than offset total increases. The net savings as a result of EISs for 49 plants was $34.5 million. One EIS achieved extraordinary savings of $438.4 million because a plant was redesigned on a much smaller, more appropriate scale than the one originally proposed.

Id. at 372.

76. In another recent essay, Judge Smith describes many of the costs of judicialization of the administrative process. Smith, *Judicialization of the Administrative Process: The Fine Print*, in 2 THE LEGAL SYSTEM ASSAULT ON THE ECONOMY 32-36 (1986). This essay, however, does not answer the empirical question whether such costs outweigh the benefits of administrative procedures.

77. *See, e.g.*, Smith, *supra* note 1, at 435.

78. *See* Neustadt, *supra* note 35, at 134-35.

79. *See, e.g.*, Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.); Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified in scattered sections of 49 U.S.C.).

as opposed to social,[80] regulations, and that they were implemented by congressional action. With the change of administrations in 1980, both of these features of deregulation changed. The Reagan Administration promised deregulation on all scores, both economic and social.[81] In addition, the new administration implemented much deregulation by administrative fiat, rather than at the behest of Congress.[82]

Both of these features of the new approach to deregulation create conflict. Although the public has generally been supportive of deregulation in the economic fields, there is much more vocal and widespread opposition to the current administration's proposals to deregulate in the social context.[83] Efforts to delay or rescind regulations, moreover, may conflict with explicit and implicit directions from Congress. Should the courts be involved in resolving these conflicts?

A classic illustration of this problem appears in the Reagan Administration's effort to rescind a rule requiring "passive restraints" in new automobiles. In 1977, the Department of Transportation's National Highway Traffic Safety Administration (NHTSA) issued a regulation requiring the installation of passive restraints, either airbags or passive seat belts, in large cars by 1982 and in all cars by 1984.[84] In February of 1981, however, the new Secretary of Transportation reopened the rulemaking, citing changed economic circumstances and, in particular, economic difficulties in the automobile industry, as justifications for reconsidering the rule.[85] Two months later, NHTSA ordered a one-year delay in implementation of the standard.[86] Several months later,

80. One can generally distinguish between social and economic regulation. Social regulation includes the federal programs that use regulatory techniques to achieve broad social goals—a cleaner environment, a safer workplace, safer and more effective consumer products, and equal employment opportunities, for example. Economic regulation involves government intervention in the marketplace—for example, price controls, route allocations, and subsidies. Further distinctions in these general categories may be possible. *See, e.g.*, O'Reilly, *Judicial Review of Agency Deregulation: Alternatives and Problems for the Courts*, 37 VAND. L. REV. 509, 510-12 (1984) (distinguishing economic, safety, environmental, and income-transfer regulations).

81. *See, e.g.*, ECONOMIC REPORT OF THE PRESIDENT 42 (1982) ("Many government programs, such as detailed safety regulation or the provision of specific goods (rather than money) to the poor, are best described as paternalistic.").

82. The Reagan Administration began, for example, by "freezing," as of Inauguration Day, 1981, many rules enacted or pending during the final days of the Carter Administration. Postponement of Pending Regulations, 46 Fed. Reg. 11,227 (1981).

83. *See, e.g.*, THE CONSERVATION FOUNDATION, STATE OF THE ENVIRONMENT 1982, at 425 (1982) (poll indicating public support for environmental regulation); Neustadt, *supra* note 35, at 132 ("[T]he public still wants to achieve the goals of regulation—especially in environment, health, and safety—but wants the process better managed.").

84. 49 C.F.R. § 571.208 (1978).

85. 46 Fed. Reg. 12,033 (1981).

86. *Id.* at 21,172.

NHTSA rescinded the rule altogether.[87] The agency reasoned that the passive restraint standard would not create the safety benefits that had been originally predicted. The agency determined that the industry response to the standard would be to install passive belts rather than airbags. Such belts, however, could be detached by the consumer. This possibility, the agency concluded, dramatically decreased the likelihood of obtaining safety benefits sufficient to justify the costs of implementing the standard.[88]

State Farm Mutual Automobile Insurance Company and others petitioned for review of the rescission order. In *State Farm Mutual Automobile Insurance Co. v. Department of Transportation* (the *Airbags* case), the United States Court of Appeals for the District of Columbia Circuit held that NHTSA's rescission was "arbitrary and capricious," but remanded to permit the agency to provide satisfactory reasons for the rescission.[89] The Supreme Court, although not accepting all of the reasoning in the court of appeals opinion, concluded that the agency had failed to supply a "reasoned analysis" for its change in policy.[90] The Court found that NHTSA had arbitrarily refused even to consider whether the standard could be maintained in some form (by making airbag technology mandatory, for example).[91] In addition, the Court concluded that NHTSA had too quickly dismissed the potential safety benefits of automatic belts. The agency had failed, for example, to consider the option of requiring nondetachable automatic seatbelts.[92]

Judge Smith deeply disagrees with the result reached in the *Airbags* case. He views the issue as "a classic political controversy,"[93] and thus would have the courts exercise minimal review. Although the Court considered the issue a procedural matter, he notes, the effect of the decision was to reverse a "decision of will" made by the Administration.[94]

Having outlined the problem, and Judge Smith's objection to the Supreme Court's resolution, we may now consider the question illustrated by the *Airbags* case: what should be the courts' role in decisions to deregulate? We may begin with the broad concession that it is pro-

87. *Id.* at 53,419.

88. *See id.* at 53,421.

89. State Farm Mut. Auto. Ins. Co. v. Department of Transp., 680 F.2d 206, 230-41 (D.C. Cir. 1982), *vacated sub nom.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

90. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

91. *Id.* at 48.

92. *Id.* at 55.

93. Smith, *supra* note 1, at 453.

94. *Id.* at 454-55.

foundly *not* the duty of the courts to resolve policy questions. That a majority of the public disfavors deregulation in social areas, for example, could not have been the grounds for invalidating the rescission of the passive restraints rule. But that is not Judge Smith's objection to the *Airbags* decision.

Judge Smith objects to the *Airbags* decision, not because the Court ruled directly on policy grounds, but because the Court's approach "has the potential to convert a procedural review into at least temporary control over substantive policy."[95] This objection, at least as phrased, seems wide of the mark. The same criticism could apply to any court decision that invalidates agency action on procedural grounds. Suppose, for example, that the head of NHTSA had decided to rescind the passive restraints rule because the automobile manufacturers had bribed him, and suppose that this fact could be proven. There is no doubt that the decision could be invalidated in a court of law. Yet there is also no question that an order invalidating the rule on those grounds would have an effect on substantive policy.

Judge Smith means to say more than this. His real attack is on the fact that the Court required the agency to give a satisfactory explanation for its decision to rescind the rule. This test, he suggests, "can be used not only to overturn egregiously arbitrary acts, but also to intrude into the realm of legitimate discretionary agency decisionmaking."[96] According to Judge Smith, there is no "bright line" between the two.[97]

At bottom, then, Judge Smith disagrees with the Court's *Airbags* decision because he simply does not think that an administrator should have to explain a "decision of will" to a court. Yet reviewing such decisions is precisely the role, I believe, that courts should perform. Let me briefly elaborate on that point. First, it is important to disabuse ourselves of the notion that judicial review interferes with pure "decisions of will." Return for a moment to the *Airbags* case. The NHTSA officials there contended that there were changed circumstances —i.e., new data—that justified a change in policy. These officials did not simply bring new auto safety commandments down from the mountaintop. And well they could not. The true "decision of will" is the congressional directive itself. These officials were merely implementing that directive—Congress has not empowered these officials to implement its directives one way today and another way tomorrow, depending on whim. Rather, Congress gives directions, and the agency must implement them. The initial agency implementation—i.e., new regulations—may be tested for com-

95. *Id.* at 454.
96. *Id.*
97. *Id.*

pliance with the congressional directive. Similarly, when an agency changes its implementation strategy, it must again demonstrate that it is complying with the congressional directive. Such determinations are for the courts. As we have seen, no other branch of government is fully capable of ensuring that agencies remain faithful to congressional directives.

Let us observe, second, that the *Airbags* decision did not dictate the course of auto safety policy. Instead, in reaction to the Court's direction, the agency suspended the passive restraints requirement for a year, to allow the agency to formulate a response.[98] A little over a year after the *Airbags* decision, the agency successfully implemented a new rule calling for passive restraints by model year 1990 (as opposed to the 1984 deadline in the original rule), with the possibility that no standard would become effective if a sufficient number of states passed mandatory seatbelt usage laws.[99]

Finally, let me suggest that the *Airbags* decision has not substantially increased the intrusion of the courts into the discretion of the agencies. We should note, in this regard, that courts have long required an explanation for departures from a settled course of agency policy or interpretation;[100] the *Airbags* decision merely places the Supreme Court's imprimatur on this settled doctrine. In addition, although no trend has been conclusively established, there is little to indicate that courts have used the *Airbags* precedent to reverse agency decisions at any higher rate than normal.[101] Whatever the theoretical significance of the *Airbags* decision, in practice courts have continued to review agency decisions in the same fashion as before.

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98. 48 Fed. Reg. 39,908 (1983).

99. 49 Fed. Reg. 28,962 (1984).

100. *See, e.g.*, Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1050 n.23 (D.C. Cir. 1979); Local 777, Democratic Union Org. Comm., Seafarers Int'l Union of N. Am. v. NLRB, 603 F.2d 862, 882 (D.C. Cir. 1978); International Union, UAW v. NLRB, 459 F.2d 1329, 1341 (D.C. Cir. 1972); Columbia Broadcasting Sys. v. FCC, 454 F.2d 1018, 1026-27 (D.C. Cir. 1971); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

101. *See, e.g.*, Salt River Project Agriculture Improvement & Power Dist. v. United States, 762 F.2d 1053, 1064 (D.C. Cir. 1985) (citing *Airbags* decision and affirming agency order); Central & S. Motor Freight Tariff Ass'n v. United States, 757 F.2d 301, 320 & n.113 (D.C. Cir. 1985) (same); New York State Comm'n on Cable Television v. FCC, 749 F.2d 804, 808 & n.3 (D.C. Cir. 1984) (same); Wold Communications, Inc. v. FCC, 735 F.2d 1465, 1477 (D.C. Cir. 1984) (same); *see also* Virginia State Corp. Comm'n v. FCC, 737 F.2d 388, 399 (4th Cir. 1984) (*Airbags* case cited in dissenting opinion; majority affirms agency order); Western Coal Traffic League v. United States, 719 F.2d 772, 784 (5th Cir. 1984) (same). *But see* National Black Media Coalition v. FCC, 775 F.2d 342, 355 & n.16 (D.C. Cir. 1985) (citing *Airbags* decision and reversing agency order); Maryland People's Counsel v. FERC, 761 F.2d 780, 785 (D.C. Cir. 1985) (same).

IV. CONCLUSION

Judge Smith has written a "deliberately provocative" article.[102] In it, he suggests that administrative law has become rudderless, that we need to develop a new theory for administrative law.[103] His proposed replacement theory, although only dimly apparent in the *Judicialization* article, is that agencies are generally best left to function on their own. In particular, he suggests that judicial review is generally unnecessary, except to protect vested property rights.[104]

The real value of Judge Smith's essay is to force us to reassess the theory and practice of administrative law. That area of law has undergone a large transition. Administrative law is no longer simply about property rights.[105] It is, instead, a system for allocating power. This allocation of power generally follows the scheme of our tripartite system of government: Congress grants power to the agencies and gives them direction, the agencies implement these directives, and the courts ensure that the agencies are faithful to their duties under the law. This allocation of power also means that the agencies may not act in a vacuum. Citizens have been permitted to influence the administrative process by participating in agency proceedings. Here, again, we see a movement away from administrative law as strictly a system for protecting property rights.[106]

To recognize these developments is to suggest the character of reforms needed in the administrative process. First, we need to recognize that the administrative process is shaped largely by statutory restrictions on agency action. When regulatory circumstances change, statutes may become outmoded. Agency officials, however, cannot change direction on their own. Congress needs to monitor the administrative environment

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102. Smith, *supra* note 1, at 427 (editor's abstract).

103. *Id.* at 457-58.

104. *See* Smith, *supra* note 9, at 67 (advocating a return to the "concept of natural law as a remedy for judicial activism").

105. *Compare* Lochner v. New York, 198 U.S. 45, 57 (1905) ("It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract.") *with* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937) ("[F]reedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards.") (quoting Chicago, B. & Q.R.R. v. McGuire, 219 U.S. 549, 567 (1911)).

106. This movement is most evident in the demise of the right/privilege doctrine. That doctrine held that a citizen was not entitled to due process unless he held a liberty or property right. *Compare* McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (1892) (Holmes, J.) (finding "no constitutional right to be a policeman") *with* Board of Regents v. Roth, 408 U.S. 564, 571 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights.").

and respond to change. One valuable tool to aid this monitoring function is the "Sunset" bill, which requires periodic review of all regulatory statutes.[107]

Second, we must adopt a healthy balance between regulatory efficiency and public participation in the regulatory process. In particular, we need to remember that procedures that are fair and necessary in one context may not be appropriate in another. The passage of the Regulatory Flexibility Act of 1980, which provided some relief to small businesses, was a healthy step in that direction.[108]

Finally, we need to realize that the administrative process was not designed to attack only a single problem, or to function only for the short term. If we abandon judicial review to permit deregulation today, we also abandon it under another administration that wishes to increase regulation. We must, instead, take the long-term view. Improvements in the administrative process will require universal support. We should be guided by the twin stars of fairness and efficiency, no matter what political course we choose to steer.

107. *See* S. 2, 96th Cong., 1st Sess. 125 CONG. REC. 168-75 (1979).

108. 5 U.S.C. §§ 601-612 (1982). *See* Verkuil, *A Critical Guide to the Regulatory Flexibility Act,* 1982 DUKE L.J. 213.