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The New Deal Regulatory Model: A History of Criticisms and Refinements

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INTRODUCTION

When the Roosevelt administration took office in March 1933, the nation was suffering from the onslaught of the Great Depression. The complex set of economic and regulatory policies constituting President Franklin Roosevelt's "New Deal" focused primarily on restoring health to the economy and secondarily on achieving a modicum of income redistribution. The Roosevelt administration, however, possessed neither a clear understanding of the causes of the Depression, nor a coherent, stable, and workable scheme for ending it. Nevertheless, that administration's tenure produced widespread federal economic regulation and brought ferment, imagination, and creativity to theoretical and practical regulatory techniques.

Regulatory models designed to combat the effects of the Great Depression have been thoroughly analyzed and criticized in the years following the New Deal. The models' basic assumptions of administrative independence and expertise have been severely discredited; procedural rules and mechanisms aimed at reducing administrative discretion have been developed. In addition, the 1960s witnessed the development of new regulatory approaches more sensitive to different types of economic problems and market dysfunctions, although these newer approaches have also proved to be flawed. These more recent regulatory approaches, however, evolved from the basic structure and subsequent criticism of New Deal administrative regulation. Accordingly, the regulatory approaches of the New Deal remain integral to an understanding of the present law governing federal regulatory agencies.

To recognize that the Roosevelt administration lacked the practical and theoretical tools to end the Depression is not to criticize its efforts. The wisdom of hindsight permits identification of mistakes and faulty perceptions that were not readily
apparent in the 1930s. Insights as to the complexities of the problems faced during the New Deal have greatly enhanced the ability of contemporary analysts to identify false economic assumptions and organizational deficiencies that affected the performance of New Deal administrative agencies. What was apparent in the 1930s, and what remains apparent in the 1980s, is that the Roosevelt administration faced an array of economic problems of staggering complexity and had the courage to act despite incomplete and uncertain information and theory.

This Article focuses on the New Deal regulatory responses to the Great Depression and the subsequent criticisms, modifications, and improvements of regulatory approaches. Part I presents the theories and policies, and methods of implementation of the New Deal regulatory model. Part II examines the critical reaction in the 1950s and early 1960s. Part III discusses the procedural and substantive changes in administrative regulation that have occurred in the last twenty years.

I. THE NEW DEAL REGULATORY MODEL

A. THEORIES AND POLICIES

The Roosevelt administration employed two major regulatory mechanisms to combat what it perceived as the two causes of the economic problems of the 1930s: establishment of cartel mechanisms to increase returns for production and administrative fine-tuning to remedy market malfunctions.

The administration proposed regulations to increase returns to the factors of production based on its perception that the Depression was in large part attributable to a general malfunctioning of the American economic system: prices rapidly adjusted to falling demand but costs did not. As a result, business enterprises could sell only a small portion of their capacity at prices that exceeded their costs. The administration's initial regulatory remedy was to increase prices through the establishment of government sponsored or approved cartels or cartel mechanisms. This approach was embodied in the National Industrial Recovery Act (NIRA),\(^1\) and subsequently in the Agricultural Adjustment Act (AAA)\(^2\) and the successor Ag-

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ricultural Adjustment Act of 1938, and also in the Bituminous Coal Conservation Act of 1935.

The economic theory underlying these attempts to increase prices is complex. The Roosevelt administration apparently believed that if costs fell as rapidly as demand, each industry would have readjusted its output to a new equilibrium level which would have significantly exceeded its output level when demand fell but costs did not. Although this belief was correct, artificially raising prices through cartel mechanisms results in output restrictions. Thus, the administration must have believed that the new demand curve was relatively inelastic—that price increases brought about by a cartel policy would increase the benefits to producers proportionately more than it would decrease output. Hence, the cartel mechanism was an attempt to redistribute income in favor of producers.

Although the administration’s policy was primarily aimed at raising prices above costs, it also included a goal of raising some costs, specifically labor costs. The NIRA included labor in its attempt at income redistribution. Codes of fair competition established under the NIRA generally provided for minimum wage levels to be paid to workers. After the Supreme Court invalidated the NIRA, Congress imposed minimum wage obligations on employers in the Fair Labor Standards Act of 1938.

The second stage goal of these efforts at income redistribution was the stimulation of demand. The administration thought that increased employer and employee incomes would ultimately lead to increased demand for goods. Increased demand would in turn generate increased outputs, and, hence, increased employment.

In addition to regulation designed to increase demand by increasing returns to the factors of production, the Roosevelt administration also endorsed regulation designed to remedy

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4. Ch. 824, 49 Stat. 991 (also known as the Guffey Coal Act), declared unconstitutional in Carter v. Carter Coal Co., 298 U.S. 238, 288 (1936). The price-fixing provisions of the original Act, however, were reenacted in the Bituminous Coal Act of 1937, ch. 127, 50 Stat. 72 (repealed 1966), which was upheld in Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 393-404 (1940).
specific types of market dysfunctions. The major efforts were aimed at providing adequate market information, preventing excessive competition, and employing modified market mechanisms to achieve social goals. In an effort to reduce or eliminate false and misleading information provided to investors by entrepreneurs, promoters, and underwriters the administration endorsed and Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934. These Acts conferred upon a newly established “independent” agency, the Securities and Exchange Commission, the task of overseeing new statutorily imposed duties of investment-related information disclosure. The Acts were enacted in response to the unregulated market’s inability to provide accurate and comprehensive information about the national securities markets. Together with the Investment Company Act of 1940 and the Investment Advisers Act of 1940, these Acts were intended to raise the level of investor confidence in the operation of the capital markets, thus facilitating the flow of capital to investment projects. By promoting the flow of accurate information, the Acts also reflected an effort to raise the quality of investment decisions, thus improving the ability of the capital markets to allocate investment resources to capital projects.

Under analogous market-malfunctioning rationales, entry and price regulations were established for nonrail transport. Motor transport was brought under federal control by the Motor Carrier Act of 1935 and entrusted to the supervision of the Interstate Commerce Commission (ICC). Extension of entry and rate controls to motor carriers was necessary to prevent competition by motor carriers from undermining the ICC-supervised rate structure governing rail transport. Regulation

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13. During the New Deal period, the enactment of the Natural Gas Act, ch. 556, 52 Stat. 821 (1938) (codified as amended at 15 U.S.C. §§ 717-717z (1982)), extended federal regulation over the interstate transportation of natural gas. The Act was intended to aid state regulation which, under governing Supreme Court decisions, could not extend to controls relating to the wholesale price of gas shipped in interstate commerce. See, e.g., Missouri v. Kansas Gas Co., 265
over motor transport was further justified as a means of avoiding “excessive” or “cutthroat” competition, which an unregulated market would have stimulated. This justification previously had been accepted as a basis for railroad regulation, where excessive competition was believed to discourage roadbed and other necessary maintenance. The Civil Aeronautics Act of 1938\textsuperscript{14} brought the airline industry under similar price and entry regulation administered by the newly created Civil Aeronautics Board (CAB). Airline regulation was based on a similar rationale of preventing excessive competition. Without regulation, competition in these industries would force rates down to short-run marginal cost. Because the airline and railroad industries were capital intensive, short-run marginal cost would always fall below average cost. As a result, in the absence of regulation maintaining prices at profitable levels, investment in these industries would be discouraged. Thus, regulation was seen as a means of correcting the tendency of an unregulated market in capital-intensive industries to subordinate society’s long-term needs to the demands of short-run rivalry; by maintaining rates above long-term average cost, regulation encouraged the development and growth of transport, which was seen as essential to industrial growth and national well-being.

Regulation of the transportation industries illustrates a basic logic underlying much of the New Deal regulation whereby significant planning and developmental responsibility devolved to the government. If regulation is required in order to prevent excessive competition, which would drive prices below average cost and thereby discourage investment, then regulation ultimately is justified as a means of fostering new capital investment and hence takes on the role of overseeing industrial growth. Thus, planning and supervision of growth are logical outcomes of price and entry regulation.

Regulation of transportation was also justified by the common-carrier model of regulation. The common-carrier model

\textsuperscript{14} Ch. 601, 52 Stat. 977 (repealed 1958).
assumes that the public interest is furthered when transportation is provided at times and between localities at nonremunerative rates, and that the losses that carriers incur in providing such services will be subsidized with revenues derived from other profit-generating services. The model ultimately is based on the subsidization of services for a minority of patrons by the majority, thereby making transportation services available to people and areas that would not otherwise be served. Because services are allocated otherwise than by market demand, however, the aggregate cost of all services rendered is necessarily greater than it would be if the service providers were free to respond to the market. Moreover, because the common-carrier model prevents or limits price competition between service providers, the public, particularly the majority constituting the most intensive users of the services in question, is denied the benefits of downward pressures on price which such competition would produce.

During this period the Communications Act of 1934 continued and strengthened the federal licensing of radio broadcasting which had begun under the Radio Act of 1927. These Acts were based on an engineering rationale: access to the radio spectrum had to be controlled in order to prevent interference by one broadcasting station with another—interference that the market was incapable of preventing. Indeed, the market possessed the potential of encouraging interference by attracting newcomers to frequencies that previous broadcasters had cultivated, thereby destroying incentives to develop programming. Although the basic rationale of broadcast licensing was to establish conditions in which the market would furnish the primary incentives to broadcasters, administration of broadcast regulation by the newly created Federal Communications Commission (FCC) was soon permeated by long-lasting efforts to encourage the development of local programming and

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15. Although this "cross-subsidization" factor has been cited to justify airline regulation, it appears that at least since the early 1950s the actual cross-subsidization has been minimal. See ABA COMM'N ON LAW & THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 74 (Exposure Draft 1978); R. Caves, AIR TRANSPORT AND ITS REGULATORS 435-36 (1962). See also Breyer & Stein, Airline Deregulation: The Anatomy of Reform, in INSTEAD OF REGULATION 19 (R. Poole Jr. ed. 1982). Instead of cross-subsidization, supracompetitive fares have stimulated excessive service competition which has eroded profits. The result has been noncompetitive prices with none of the benefits sought by either the carriers or the public. See id. at 14.


17. Ch. 169, 44 Stat. 1162 (repealed 1934).
to discourage excessive dependence on national networks.\footnote{\textit{See, e.g.}, Columbia Broadcasting System v. United States, 316 U.S. 407 (1942) (FCC regulations with respect to granting of licenses for broadcasting stations contracting with networks); National Broadcasting Co. v. United States, 316 U.S. 447 (1942) (same).}

\section*{B. Administrative Implementation}

\subsection*{1. Regulatory Mechanisms}

The techniques employed by New Deal era administrative agencies differed according to the type of regulation attempted. Where production restriction was attempted, regulation tended to take the form of producer cartels. Thus, the NIRA established codes of fair competition drafted by industry groups and subject to approval by the President.\footnote{\textit{See National Industrial Recovery Act, ch. 90, § 3, 48 Stat. 195, 196 (1933) (describing method for establishing codes); supra note 1.} \textit{See also B. Kirch, THE NATIONAL INDUSTRIAL RECOVERY ACT OF 1933, at 42-44 (1933).}} In addition, the NIRA authorized industry groups to set and administer production controls.\footnote{Section 4(a) of the NIRA authorized the President to approve “voluntary agreements between and among persons engaged in a trade or industry, labor organizations, and trade or industrial organizations, associations, or groups, relating to any trade or industry, if in his judgment such agreements will aid in effectuating the policy of [the NIRA].” \textit{National Industrial Recovery Act, ch. 90, § 4(a), 48 Stat. 195, 197 (1933).} The goal of this provision was to permit the restriction and allocation of production at higher prices. \textit{See id.} § 5, 48 Stat. at 198 (exempting such agreements from the antitrust laws). \textit{See also supra note 4.} \textit{See also supra note 4.}} The Bituminous Coal Acts established local regulatory boards composed of industry representatives,\footnote{\textit{See Bituminous Coal Act of 1937, ch. 127, § 4(a), 50 Stat. 72, 76; Bituminous Coal Conservation Act of 1935, ch. 824, § 4(a), 49 Stat. 991, 994. Both Acts provided for twenty-three “district boards of code members” to administer the price-fixing provisions of the Bituminous Coal Code. These local boards were subservient, however, to the National Bituminous Coal Commission, none of whose seven members could be practicing producers. See \textit{Bituminous Coal Act of 1937, ch. 127, § 2(b), 50 Stat. 72, 74; Bituminous Coal Conservation Act of 1935, ch. 824, § 2(b), 49 Stat. 991, 992. \textit{See also supra note 4.}} \textit{See also supra note 4.}} and the various Agricultural Adjustment Acts authorized extensive participation by farmer members in implementing regulatory mechanisms.\footnote{These farmers decided the extent of the acreage to be left uncultivated or of the production to be restricted or directed to sources other than its primary market. \textit{See, e.g., Agricultural Adjustment Act of 1938, ch. 30, § 101(b), 52 Stat. 31, 32 (providing for the election of local, county, and state committees of farmers to assist the Secretary of Agriculture in promulgating acreage restrictions).} Industry leaders had a great deal of input into the production decisions of these administratively maintained producer cartels.

Conversely, price and entry regulation was generally entrusted to a government agency, frequently an “independent”
commission modeled after the ICC, the first of the major federal regulatory agencies, and the Federal Trade Commission (FTC). A governing body composed of members appointed by the President and confirmed by the Senate to serve for fixed terms presided over these agencies. This structure reflected, in part, an attempt to remove the ICC and the FTC from executive control and current political controversy. Continuation of this structure in the New Deal agencies emphasized the lack of formal policy direction from above. Some of these agencies were and are statutorily prohibited from having more than a specified number of members of one political party serving on their governing boards. In the earlier parts of the present century, the independence fostered by this structure was often described as facilitating the development of dispassionate expertise by the agency and its members; during the New Deal era the active role of these agencies in policy development was widely recognized, although courts and others continued to attribute to them substantial amounts of regulatory expertise. Indeed, Dean James Landis, one of the New Deal’s foremost administrative law theorists, asserted that all or most regulatory bodies developed expertise in their tasks, which resulted in practical independence from executive direction. According to Landis, even agencies located in major executive departments tended to function independently in practice because only a small group of officials actually exercising day-to-day regulatory supervision fully understood the economic problems of the regulated industry. Hence, it was this group of officials that effectively responded to industry’s needs. Direction from above necessarily was formal and theoretical; substantial direction required understanding and knowledge lacking at higher levels.

Information scarcity provided a major justification for conferring broad discretionary powers on regulatory agencies and for judicial deference to agency judgments. Under the conventional wisdom, administrators were said to possess expertise developed from their experience in regulating as well as from their ability to draw on their staff of technicians. Because the

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27. Id. at 25.
public, the legislature, and the courts did not possess this expertise, agency judgments were said to command significant deference. In a famous reference to administrative expertise, Judge Learned Hand once stated that courts must defer to the National Labor Relations Board's conclusions because

of its putative specialized experience in the field of labor relations: an experience that is thought to enable it to appraise causes and consequences that escape the perception of those less widely acquainted with those relations. Thus, we accept the conclusions of a specialized tribunal, made upon evidence that would not prove them to an ordinary, or "lay," court, so to say. This involves imputing to the specialized tribunal an access to valid general propositions which make sequences causal that are not causal to untutored minds.28

Because nonspecialists lacked significant information about industrial conditions, it was believed they were unqualified to interfere with the decisions of specialist administrators.

Economic regulation of particular industries, such as that which had previously been imposed on the railroad industry, and which during the New Deal period was imposed on the trucking, airline, coal, drug, agriculture, and other industries, was perceived at the time as casting government into the role of planner and promoter. Landis described the progression of government involvement as moving from an initial stage in which problematic behavior within a particular industrial field is brought under governmental supervision to a second stage in which "the economic well-being of an industry" becomes the chief goal of regulation.29 As the second stage is reached in various industries, the government assumes "supervision over the economic integrity of [these] industries and their normal development."30 This view is not merely an extrapolation of the attribution of expertise to government regulators, it is also suggested by the agencies' role in regulating industry price and entry to avoid excessive competition and thereby to facilitate investment and growth.31

2. Judicially Compelled Modifications of New Deal Regulatory Mechanisms

Early New Deal regulatory mechanisms were substantially altered by judicial decisions. The Supreme Court in one of the more famous episodes in the history of administrative law in-

29. J. LANDIS, supra note 26, at 16.
30. Id.
31. See supra notes 12-14 and accompanying text.
validated the NIRA, the AAA, and the Bituminous Coal Conservation Act of 1935. One of the Court's primary stated rationales for these decisions was Congress's failure to provide standards to the officials who administered the Acts' programs. The Court reasoned that Congress, in the absence of such standards, was delegating its lawmaking powers to other officials contrary to Congress's legislative responsibility under article I of the Constitution.

Despite the Court's stated rationale, it is noteworthy that each of the invalidated regulatory Acts vested the effective administration of production-restriction mechanisms in industry representatives. Indeed, in Carter v. Carter Coal Co., the Court expressed its concern not only that an unstructured delegation had been made but that it had been made to industry representatives. It is not surprising that the Court's anti-delegation decisions involved regulatory acts that established cartel-type production controls under effective industry administration. Producers participating in cartels have varying costs and capacities and face varying external constraints from market to market. As a result, cartel decisions are necessarily made through a process of bargaining. This process effectively prevents justification of cartel decisions through rationales relating them to legislatively provided standards—the traditional way in which government agencies and officials have supported their decisions. Because of the wide scope of considerations implicated in the cartel decisionmaking process, industry-administered cartel regulatory mechanisms tend to be connected with the broadest and most visible delegations. Consequently, courts are severely impeded in narrowing the apparent scope of these delegations by incorporating traditions of prior administration, case law, or custom into the statutory grants of power to the regulators.

The Court seemed to be evidencing its concern in the anti-delegation cases that regulation be kept out of the hands of the

35. See Schechter Poultry Corp., 295 U.S. at 541-42 (too much discretion delegated to President in approving or prescribing codes of fair competition). See also Carter Coal Co., 298 U.S. at 311-12 (delegation to largest coal producers of power to set industry-wide wage and hour standards violates the fifth amendment rights of smaller producers).
37. Id. at 311.
parties most immediately affected and that Congress provide at least an appearance that the regulations it imposes are designed to further the overall national interest. This interpretation of the anti-delegation cases seems most compatible with the Court's acceptance of broadly phrased delegations to independent and executive agencies. In addition, this interpretation recognizes the practical limitations of the judicial power to invalidate statutorily established regulatory schemes—limitations that the Court must have been aware of when it invalidated the NIRA, the AAA, and the Bituminous Coal Conservation Act of 1935.38

Except in the agricultural sector where the complexity of the regulation, the involvement of interests other than producers', and the substantial participation of government officials pursuant to articulated standards has significantly limited the extent to which producers alone can determine production quotas, the anti-delegation cases have resulted in a congressional tendency to avoid explicit cartel-type delegations. Traditional types of regulation, employing the so-called independent agency model which emphasizes administrative expertise, replaced the industry cartel model, even when the governmentally administered agencies actually administered cartel-type controls.

II. PROCEDURAL AND THEORETICAL REACTIONS TO THE NEW DEAL ADMINISTRATIVE MODEL IN PRACTICE

A. ADMINISTRATIVE PROCEDURES IN THE NEW DEAL PERIOD AND THEIR REFORM

During the entire New Deal period, no statutory code governed the procedures of federal administrative agencies. Agencies entrusted with legislative rulemaking power could issue rules after such consulting with affected interests and after employing such other information-generating devices as they saw fit. Only the Food and Drug Administration (FDA) was required to employ formal rulemaking procedures; the FDA was required by statute to establish the factual basis for its rules in an on-the-record proceeding resembling a judicial trial.39 Many

38. But see Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940) (Court upheld the Bituminous Coal Act of 1938 in part because price-fixing power had been delegated not to the coal industry but to the National Bituminous Coal Commission, a government administrative body).

39. ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, FINAL RE-
agencies, however, used a case-by-case method, following the decisionmaking model used by the courts in building the common law based on precedent.40

The substantial expansion of the scope of federal government regulation during the New Deal period, combined with a perceived lack of procedural constraints and judicial deference to decisions of federal agencies, generated unease within segments of the legal profession and the public.41 This unease was at least partially attributable to a widespread change in public perceptions regarding the extent to which the decisions of administrative agencies were based on nonpolitical agency expertise. By the late 1930s, it was widely recognized that the expertise of federal regulatory agencies was not apolitical but rather was often permeated with the goal of aggressively furthering New Deal policies. The extent to which many agencies relied upon this expertise as a substitute for evidence or for a careful, dispassionate evaluation of the evidence was sometimes unclear; this uncertainty engendered an element of distrust of agency decisionmaking.

Growing recognition of the political aspects of administration did not necessarily signal a widely shared dissatisfaction with regulation. Rather, it generated pressures for the development and articulation of a consensus governing the proper scope of the political element of administration and its proper location within regulatory procedures as well as a consensus concerning the corollary matter of how individualized fairness could be accommodated within administration containing this political element.42

President Roosevelt responded to these pressures in 1940 by establishing the Attorney General's Committee to Study Administrative Procedure. After conducting intensive studies of federal agencies, the Committee issued its final report in 1941.43 Interrupted by the war years, reform efforts began anew in 1946

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40. See Attorney General's Report, supra note 39, at 110.
when the needed consensus, drawing on the majority and minority views expressed in the Final Report of the Attorney General's Committee, emerged in the Administrative Procedure Act (APA). Recognizing that the policy element in administration consists largely in the formulation of generalized approaches, the APA established a notice-and-comment procedure for all legislative rulemaking. This procedure was designed to ensure that agencies issuing rules were well informed about the relevant facts; the APA imposed no additional procedural constraints on general rulemaking, except where specific statutes required on-the-record proceedings.

In individualized proceedings where agency decisions were required by statute to be made "on the record" after an opportunity for a "hearing," the APA established elaborate procedural requirements. These procedures were carefully differentiated, however, so as to afford greater procedural protections, analogous to those of a trial court, in cases where an individual respondent was accused of wrongful or improper behavior than in ratemaking and other cases involving technical matters and no accusation of wrongdoing.

The scope and use of economic regulation increased significantly during World War II, resulting in the development of new procedural devices. The government took over the direct allocation of materials useful to the war effort and, through the Office of Price Administration (OPA), controlled the prices of almost all commodities. Legislation contemplated freezing prices as of a specified base period and required sellers to justify price changes on the basis of increased costs or special circumstances. Sellers seeking permission to vary their prices.

45. 5 U.S.C. § 553(b) (1982).
46. Id. §§ 556(a), 558(c). See also Auerbach, supra note 42, at 17.
48. The OPA was created by the Emergency Price Control Act of 1942, ch. 26, § 201(a), 56 Stat. 23, 29.
49. The rationales for government regulation were that the market was ill-adapted to allocating strategic goods essential to the vigorous prosecution of the war and that rationing and price controls were required to prevent the scarcities engendered by governmental allocations of goods and materials from undermining the social fabric with rampant inflation. Id. § 1(a), 56 Stat. at 23-24.
50. See id. §§ 2(a), 2(b), 56 Stat. at 24-26. When the government, through the OPA, established price control over most commodities, it assumed responsibilities that taxed its capacities to perform—and that would ultimately have
from an applicable OPA-set ceiling were required to "protest" that ceiling, with supporting documentation, to the OPA within sixty days of its establishment. The OPA was required to specify its reasons for rejecting any protest and to list the facts on which it relied and of which it took official notice. The record of the protest proceeding provided the basis for any judicial review sought by the protestant. This set of procedures was designed to force early challenges to OPA actions and to facilitate speedy judicial review. The OPA procedures were regarded as unnecessarily condensed for peacetime use, however, and were ignored in the drafting of the APA.

B. CRITICISMS OF THE ADMINISTRATIVE MODEL

The myth of administrative competence began to erode in the post-World War II period. Ultimately, erosion of this myth upset the consensus represented by the APA, but not until the early 1970s. During the 1950s, the administration of laws designed to exclude subversives from government and defense-related employment and to prevent their immigration revealed the fallibility of well-intentioned officials and illustrated anew the inherent dangers of allowing officials broad discretion in evaluating on-the-record evidence. Administrators often evaluated such evidence with the aid of off-the-record sources of information, a procedure which the APA would have prohibited.

exceeded them had price control been carried on indefinitely. Price control is a form of regulation in which each change begets a multitude of resultant changes. When each such change or proposed change must pass official evaluation, the number of issues requiring official approval increases exponentially over time. Accordingly, price control is a form of regulation that demonstrates empirically the inherently limited capacities of officials to regulate. The existence of price control regulation during World War II—and for a brief period during the Korean War—undoubtedly contributed to the current of growing skepticism about the efficacy of regulation that developed in the 1950s and 1960s.

51. Id. §§ 2(a), 2(b), 203, 204, 56 Stat. at 24-26, 31-33. See also Bowles v. Willingham, 321 U.S. 503, 514-16 (1944); Yakus v. United States, 321 U.S. 414, 427-31 (1944); Direct Realty Co. v. Porter, 157 F.2d 434-40 (Emer. Ct. App. 1946); Auerbach, supra note 42, at 63. The 60-day time limit was eliminated by the Stabilization Extension Act of 1944, ch. 325, § 203(a), 58 Stat. 633, 638.


54. 5 U.S.C. § 554(a) (1982) exempts from the APA's procedural require-
The APA, however, did not apply to much decisionmaking concerning loyalty issues involving government employment and security clearances, and was made inapplicable to immigration proceedings by statute in the early 1950s. The use of off-the-record information in these proceedings, although distinguishable from the prewar use of nonrecord expertise to evaluate record evidence by economic regulatory agencies, nonetheless bore enough of a resemblance to that practice to lay the groundwork for a renewed distrust of official decisional competence in all areas.

The theories of agency "life cycle" and administrative "capture" were developed during the 1950s. Professor Marver Bernstein, the most prominent regulatory agency theorist of this period, argued that regulatory decisions necessarily involve significant policy choices which are essentially "political" in the sense that knowledge and technical skill alone are insufficient to resolve them. Therefore, he argued, the path followed during the New Deal of granting agencies broadly phrased mandates was misguided; that path rested on the asserted belief that administrators would employ dispassionate "expertise." If expertise was insufficient, however, administrators were necessarily making political choices.

ments a number of matters, including employee tenure, military or foreign affairs, certification of worker representatives, and decisions resting solely on inspections, tests, or elections.

55. See, e.g., Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), aff'd by an equally divided Court, 341 U.S. 918 (1951) (nonadjudicatory dismissal of a government employee on the basis of disloyalty).


58. M. Bernstein, supra note 42, at 258.

59. This view received great impetus from Landis, see J. Landis, supra note 26, at 23-24, and was used to justify not only expanding the powers of existing agencies, but increasing the number of agencies as well. Austern, Expertise in Vivo, 15 Ad. L. Rev. 46, 48 (1963).

60. See M. Bernstein, supra note 42, at 114.
used this insight to develop a theory of the life cycle of an administrative agency. He argued that during the early years of an agency the data collected in legislative hearings, the public awareness that gave rise to the legislation, and the legislative views expressed in the debates and elsewhere provided sufficient guides to administrators about how to resolve policy choices. When new issues later arose with which the enacting legislature was unfamiliar, however, administrators would lack guides for resolution of policy questions. This lack of policy direction would grow as the administrators were separated increasingly from the enacting legislature by time and the development of new issues unforeseen when the agency was created.

Indeed, during the later years of an administrative agency, an administrator’s principal source of information regarding industry problems and policy arguments on how to resolve these problems might very well come from the regulated industry itself. The regulatory agency would be especially susceptible to industry dependence if it was independent, with no direct supervision by the executive, and if it had a broadly phrased statutory mandate. In such circumstances, it would not be surprising if administrators, lacking other equivalent sources of factual information and policy considerations, developed a sensitivity to the industry view of these matters which skewed regulation toward industry positions. In the vocabulary of the day, the agency then would be “captured” by the industrial interests it was charged with regulating.

Professor Louis Jaffe and others agreed that administration under broadly phrased legislative mandates was likely to be skewed in favor of the regulated industry, but argued that this skewing effect was intended by the legislature that created the agency and provided it with its mandate. Thus, Jaffe ar-

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61. Id. at 74-92.
62. Id. at 94-95. For an extreme application of this view, see Huntington, supra note 57. See also Jaffe, supra note 57, at 1110.
63. See Jaffe, supra note 57, at 1109-10.
64. See M. Bernstein, supra note 42, at 90; Jaffe, supra note 57, at 1112.
65. See Jaffe, supra note 57, at 1112; Huntington, supra note 57. See also M. Edelman, The Symbolic Uses of Politics (1964); G. Kolko, Railroads and Regulation 1877-1916 (1963); Edelman, Governmental Organization and Public Policy, 12 PUB. AD. REV. 276 (1962).
66. Jaffe cites as examples the CAB, which he says was created to promote rather than regulate the airline industry, and the ICC. Jaffe, supra note 57, at 1110. Jaffe reiterated his views 21 years later, using the example of the FCC, which he says Congress created not to regulate the communication industry generally but merely to maintain the “broadcasting status quo” in an orderly
argued that when the legislature intended otherwise, it drafted a precise, narrowly worded standard which provided the agency with little or no discretion. When the legislature wanted the agency to tend toward the industry view, however, it drafted a broadly phrased mandate. By the 1960s, a few critics of administrative agencies had extended Jaffe's analysis to arrive at the essentially cynical view that much regulation was ineffective by design—that it was intended to provide an appearance of public protection although in fact it allowed business interests to seek their own ends without interference from government. Professor Murray Edelman so argued, citing public utility regulation and the antitrust laws as examples. Similarly, Gabriel Kolko, a revisionist historian, made this argument with respect to the ICC.

Insofar as Bernstein's capture theory assumes that a regulating agency's primary source of factual information is the regulated industry, that assumption rests on a further assumption: that comprehensive, unbiased information is not fully available to the agency for the asking—in other words, that information is a scarce commodity. Prior to the mid-1950s, information scarcity justified administrative deference: neither the public nor the courts knew as much about regulatory problems as the regulators. The capture theory, however, helped to undermine this myth of administrative expertise. Bernstein's theory brought into focus the difficulties a regulatory agency might experience in acquiring the information necessary to perform its regulatory task properly.

In 1958, Professors James March and Herbert Simon, in a brilliant summarization of developments in organization theory, used information scarcity as a basis for essentially discarding the "comprehensive rationality" model of decisionmaking. Under the comprehensive rationality model,

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67. Jaffe cites the IRS and the Social Security Administration as examples of narrow delegation. In these circumstances, Jaffe claims, Congress has determined that the matter is "sufficiently important" to preclude industry capture for "the very precision of the law may help to reduce pressures from the regulated." Jaffe, supra note 66, at 1189. In contrast, in cases of broad delegation, Jaffe argues, Congress may simply be "passing the buck," and indeed may want the agency to do nothing to regulate the industry. Id. at 1190.
68. See supra text accompanying note 28.
69. G. Kolko, supra note 65, at 3-6.
70. See supra text accompanying note 28.
rational decisionmakers collect all relevant information and then select the options that best further their goals. March and Simon argued that because information is a scarce commodity, decisionmakers cannot collect all relevant information. Administrators must, therefore, act in a state of partial ignorance and uncertainty. Professor Charles Lindblom followed up on this insight in 1959 by setting forth his “muddling through” theory of administration. According to Lindblom, administrators will not attempt drastic changes if prior results are reasonably satisfactory because the administrators do not possess full information about the consequences of all available courses of action. The administrators know, however, that past administration has not caused dire consequences. On the basis of that information, the administrators are likely to introduce changes only incrementally—to experiment in small steps. Changes that produce undesired results can be withdrawn; changes that advance the goals slightly can be followed by further small changes. By so proceeding, regulatory actions are based substantially on available information and the satisfactory results of prior administration, and decisions based on incomplete information are minimized.

Thus, by 1960, the theoretical underpinnings of administrative expertise had been largely undermined, creating a corresponding erosion in public confidence. Although critics conceded that administrators knew more about their tasks than nonspecialists, there was no longer a sound theoretical basis for believing that administrators in general knew more about the industries under their supervision than industry executives. The activities of the principal regulatory agencies confirmed the inferences from these theories, illustrating that the optimistic view of government regulation prevalent in the 1930s had been in error. For example, the FTC, created to enforce the Clayton Act and to develop policies under which “unfair” methods of competition would be prohibited, had been playing a numbers game throughout the 1950s by bringing inconsequential proceedings against small companies for allegedly violating the Robinson-Patman Act or engaging in misleading advertising. Many of these alleged offenses resulted from re-

72. Id. at 137-42.
74. Id. at 86.
75. See Auerbach, The Federal Trade Commission: Internal Organization and Procedure, 48 MINN. L. REV. 383, 390-93 (1964). This problem was noted
spondents' good-faith attempts to compete with larger rivals. As a result, the Commission was subject to the criticism that it was perverting the spirit of the laws that it was supposed to enforce by imposing, in the guise of regulation, anticompetitive restraints on the economy.\textsuperscript{76} Regardless of the substantive merits of the cases that the Commission brought, however, the public benefits attributable to the Commission's activities were insignificant. Thus, the "expert" Commission was expending vast public resources to bring hundreds of insignificant cases. This administrative mismanagement did not escape public criticism. Numerous critics from the late 1950s onward urged the Commission to develop significant policies designed to further its legislative mandate of fostering marketplace competition and to promote those policies by rulemaking, a course of action that would maximize the regulatory potential of the Commission's necessarily limited resources.\textsuperscript{77}

In 1960, Dean James Landis, in a report to President-elect Kennedy on regulatory agencies, revealed with devastating clarity the morass in which the Federal Power Commission (FPC) had become enmeshed.\textsuperscript{78} In attempting to regulate field prices of natural gas, the FPC had created a backlog of cases which greatly overtaxed its resources. The only way out of the morass was for the Commission to act by rule or by aggregating all of the wells in each field into a single proceeding.\textsuperscript{79} Despite the FPC's purported expertise, it took an outsider to point out the obvious to the Commission.

It was also in the 1960s that Judge Henry Friendly\textsuperscript{80} and Professor Kenneth Culp Davis\textsuperscript{81} focused professional attention on the widespread failure of many agencies to develop standards governing their administration. Both Friendly and Davis believed that although it was necessary for the legislature ini-


\textsuperscript{78} See J. Landis, Report on Regulatory Agencies to the President-Elect 54-58 (1960).

\textsuperscript{79} See id. at 55-56.


tially to confer broad discretion on regulatory agencies, over the course of time agencies should be obliged to develop decisional standards limiting their future discretion. They proposed in essence the common law model of decisionmaking: the agency would learn more about the regulated industry from the decision of each case and eventually would know enough to develop rules or a body of precedents which would progressively guide its decisions. This decisional model is identical to Lindblom’s “muddling through” model in that it assumes that regulatory agencies initially lack information, but incrementally acquire information over the course of their administration.

Thus, by the 1960s, both legal scholars and organizational theorists recognized that administrators operate in a world of incomplete information and began to identify the ramifications of that fact. One significant ramification, empirically demonstrated by the pitiable performances of the FTC and FPC during the 1950s, is that administrative agencies may lack the superior planning abilities claimed by Landis in the 1930s.

The failure of regulatory agencies to engage in long-term planning and thereby to carry out the supervisory role over industry growth and development envisioned by Landis is in part attributable to Landis’s misperceptions concerning agency expertise. It is also attributable to the widespread tendencies of such agencies to mismanage their own resources, as illustrated by the plights of the FPC and the FTC in 1960. March and Simon had furnished an analysis that carried the potential for showing that this mismanagement was intimately connected with the planning failure and was almost structurally required. In addition to their work showing the uselessness of the comprehensive rationality model of decisionmaking for regulatory purposes, March and Simon had set forth “Gresham’s Law of Organizations,” which identified the tendency of decisionmakers to occupy their time with pressing matters of the

82. H. Friendly, supra note 80, at 14; Davis, supra note 81, at 719-22.
83. K. Davis, supra note 81, at 55; H. Friendly, supra note 80, at 14; Davis, supra note 81, at 733.
84. H. Friendly, supra note 80, at 15; Davis, supra note 81, at 733.
85. J. Landis, supra note 78, at 48-52, 54-58. Judge Friendly himself documented the failure of the Civil Aeronautics Board to anticipate and hence to plan regulatory policy for new generations of aircraft and for changing economic conditions. H. Friendly, supra note 80, at 74-105.
86. J. Landis, supra note 78, at 48-52, 54-58.
87. See supra text accompanying notes 71-72.
present moment, thereby depriving them of time for long-term planning.89

Overall, by the early 1960s, the administrative mechanisms and theories developed during the New Deal had been severely criticized and partially discredited.

III. A CHANGE IN FOCUS: 1965 TO PRESENT

A. CHANGES IN THE ADMINISTRATIVE LAW MODEL

Regulation underwent a major change during the period from the mid-1960s to 1980. Congress enacted many new regulatory statutes containing requirements for rulemaking and provisions for judicial review; contrary to the New Deal approach, Congress, in many of these statutes, specified precisely the standards to be employed and the goals that it sought to achieve. This new emphasis on detailed and precisely drawn standards resulted from a widely shared recognition of the dangers of regulatory capture, administrative mismanagement, and the vacillation and timidity of administrators, which created doubt about the ability of regulatory agencies to further public welfare goals. Environmental regulation illustrates the trend toward narrowed administrative discretion. In the Clean Air Amendments of 1970,90 Congress specified precisely the emission limits that were to be imposed on automobile manufacturers.91 Similarly, in the Toxic Substances Control Act,92 Congress required the Environmental Protection Agency (EPA) to specify, within short time limitations, the pollutants most dangerous to human health, and to develop measures for eliminating them.93

89. Id. March and Simon go so far as to say that this is true even in the absence of strong overall time pressure. They argue that the only way to ensure that planning gets done is specifically to require that resources (time and/or personnel) be set aside for the purpose. Id. at 186. Otherwise, planning (or other unprogrammed activity) will occur only when absolutely necessary to carry out some day-to-day activity. Id.


93. See, e.g., 15 U.S.C. § 2603 (1982) (requiring the administrator of the EPA to mandate testing of chemical substances whose health or environmental effects are as yet unknown); id. § 2604 (detailing prerequisites for the manufacture of new chemical substances); id. § 2605 (detailing the procedures to be followed by the EPA in regulating chemical substances found (in any manner) to present "an unreasonable risk of injury to the health or environment"); id.
A second major change apparent in the regulatory statutes of this era was a congressional preference for rulemaking.\textsuperscript{94} Although rulemaking was almost mandated by the subject matter of these statutes, the congressional imposition of rulemaking on agencies as a primary regulatory tool is nonetheless a departure from the paradigmatic regulatory agency of the New Deal and earlier periods, which emphasized case-by-case adjudication.

A third departure of this era’s regulatory statutes consisted of the inclusion in most of the statutes of provisions requiring judicial review under a substantial evidence standard, generally on the record of the administrative proceeding.\textsuperscript{95} Traditionally, courts used the substantial evidence standard for review of adjudications and formal rulemaking.\textsuperscript{96} Rulemaking seldom came under this standard because most rulemaking prior to this time was “informal.”\textsuperscript{97} During the New Deal era an agency would promulgate a rule after collecting such information as it saw fit; after the passage of the APA an agency would promulgate a rule after issuing notice of its intention to do so and accepting comments on its proposal from interested persons.\textsuperscript{98} Rules so issued were characterized as quasi-legislative action and were reviewed by courts in a way analogous to their review of constitutionally challenged statutes. A person attacking the validity of such an administrative rule bore the burden of proving the rule invalid in a declaratory judgment or injunction proceeding. The “minimum rationality” test required that person to prove that under no set of facts could the rule constitute a legitimate means of furthering the statutory purpose.\textsuperscript{99}


\textsuperscript{96} See, e.g., Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1952); Auerbach, supra note 42, at 58; Gifford, Rulemaking and Rulemaking Review: Struggling Toward a New Paradigm, 32 Ad. L. Rev. 577, 578-90 (1980).

\textsuperscript{97} “Explicit statutory requirement that rules be made on the record after opportunity for agency hearing, thus triggering the formal rulemaking requirements of [the APA], is indeed rare.” W. Gellhorn & C. Byse, Administrative Law: Cases and Comments 733 (6th ed. 1974). The authors note as one major exception the fixing of food standards by the FDA. Id. See also Attorney General’s Report, supra note 39, at 108-11.


\textsuperscript{99} See Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935), where Justice Brandeis, writing for the Court, stated that “[w]here the regula-
The restructuring of judicial review of agency rulemaking signified a new era in the relations between courts and agencies. Agency action became subjected to much more intensive scrutiny. During the 1970s, courts developed the “hard look” approach and espoused new and less deferential standards for conducting rationality review. In short, both Congress and the courts acted to reduce agency discretion and to increase the role of judicial oversight.

The regulatory format of this era reflected the demise of the exaggerated confidence in agency planning and expertise which was extolled during the New Deal era by Landis and which continued to affect judicial review well into the post-World War II period. Congress, the courts, and the public became increasingly aware of the susceptibility of agencies to all of the general malfunctions of organizations. As a result, the scope of judicial deference accorded agency decisions was narrowed. Courts increasingly began to probe the logic of agency decisions and the ability of affected interests to participate in the development of rules by furnishing relevant information and by providing critiques for information used by agencies.

Judicial concern that affected interests be heard in the promulgation of rules, combined with the newly developed requirement of on-the-record judicial review of agency rulemaking, produced a series of decisions in which courts increasingly imposed trial-type procedures on agencies engaged in informal rulemaking. Indeed, for most of the 1970s, the courts of appeals, led for the most part by the Court of Appeals for the District of Columbia Circuit, insisted that the procedure is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies.” See also Gifford, supra note 96, at 582-90; Gifford, supra note 53, at 70.

100. For instance, in Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923, reh'g denied, 404 U.S. 877, the court stated:

Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a “hard look” at the salient problems, and has not genuinely engaged in reasoned decision-making.

Id. at 851 (footnote omitted).

dures required of an agency engaged in a rulemaking proceeding be a function of the issues to be resolved in that proceeding. Under this approach, rulemaking procedures would vary from case to case making it difficult for agencies to predict the set of procedures that reviewing courts would retrospectively require. This approach to judicial review increasingly blurred the APA-based distinction between informal and formal rulemaking.

Congress similarly imposed limited trial-type procedures on otherwise informal rulemaking in some of its contemporary regulatory statutes. For example, in the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act Congress explicitly conferred rulemaking power on the FTC but hedged that power with procedural constraints which included the use of “appropriate” cross-examination “required for a full and true disclosure” of “disputed issues of material fact” arising in the rulemaking proceedings. Since a determination of what constituted disputed issues of material fact subject to the cross-examination requirement sometimes could be made only after the fact, statutes of this type pressured agencies to resolve doubts in favor of cross-examination and other judicialized procedures where relevant and created a potential for increased litigation.

As reviewing courts engaged in ad hoc and retrospective determinations about the procedures appropriate to rulemaking, rulemaking procedures stimulated litigation and thus became both increasingly uncertain and time-consuming as cumbersome judicial procedures replaced more efficient notice-and-comment procedures. They also became a major focus for contention, a stimulus to litigation, and a significant drag on industrial activity.

Judicial efforts to restructure informal rulemaking proceedings to comport more closely with a judicial decisionmaking model by imposing confrontation and cross-examination requirements were partially rebuked in Vermont Yankee Nuclear

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Justice Rehnquist, writing for a unanimous Court, told the lower federal courts that in normal cases governed by the APA they were powerless to order agencies to employ more than the congressionally specified notice-and-comment procedures.\textsuperscript{107} In so ruling, however, the Court reiterated the power of the courts of appeals to invalidate agency action not supported by an adequate rationale. Indeed, the Court indicated that the agency action in the case before it might have been vulnerable to invalidation for lack of adequate support in the rulemaking record.\textsuperscript{108} Thus, the Court ordered lower courts to abandon their efforts to impose nonstatutorily required hybrid procedures on agencies and yet sanctioned continued review of informal rulemaking upon the administrative rulemaking record. The Court, by eliminating judicially imposed cross-examination, restored only partially the procedural simplicity of the pre-1965 period. By continuing to approve of, and indeed require, judicial review of informal rulemaking on the rulemaking record, the Court compelled interested parties to force into the rulemaking record all of the data and other material on which they wish to rely in challenging the validity of the rule in subsequent judicial proceedings.

By the late 1970s, therefore, rulemaking had developed into a costly technique.\textsuperscript{109} Although the Court in \textit{Vermont Yankee} reduced significantly the cost of rulemaking to agencies, costs nevertheless remained high. Rules could be issued only after a notice-and-comment proceeding, which had evolved from a simple information-gathering technique in the immediate post-war period into a procedure for assembling all of the data and evidence to be used by every person who contemplated attacking in court the validity of the subsequently issued rule. In addition, since judicial review was on the record, the agency itself had to place in the rulemaking records its entire case in support of its rule.

\textsuperscript{106} 435 U.S. 519 (1978).
\textsuperscript{107} \textit{Id.} at 548.
\textsuperscript{108} \textit{Id.} at 549. The Court remanded the case to the Court of Appeals for the District of Columbia Circuit for consideration of this issue, noting that Judge Tamm, concurring in the result below, had concluded that the NRC's rule lacked sufficient justification even under the relaxed criteria of 5 U.S.C. § 553. \textit{Id.}
\textsuperscript{109} \textit{See} Auerbach, \textit{supra} note 42, at 60-61. For a thoughtful discussion of the practical needs to combine efficiency with fairness in administrative rulemaking, see Currie & Goodman, \textit{Judicial Review of Federal Administrative Action: Quest for the Optimum Forum}, 75 \textit{COLUM. L. REV.} 1, 39-54 (1975).
B. ADJUSTMENTS TO THE REGULATORY PROCESS

In the post-1965 era of regulation, Congress avoided the common-carrier regulatory model,\textsuperscript{110} with its attendant substantive and operational deficiencies, and confined itself to attempts to remedy a number of newly perceived social evils imbedded in the economic system. In legislation including the National Traffic and Motor Vehicle Safety Act of 1966,\textsuperscript{111} the Federal Coal Mine Health and Safety Act of 1969,\textsuperscript{112} the Clean Air Act Amendments of 1970\textsuperscript{113} and 1977,\textsuperscript{114} the National Environmental Policy Act of 1969,\textsuperscript{115} the Occupational Safety and Health Act of 1970,\textsuperscript{116} and the Consumer Product Safety Act\textsuperscript{117} Congress established systems of regulation designed to reduce the number and extent of accidental injuries suffered by drivers, workers, and consumers, and to preserve and improve environmental quality.

Traditionally, these new regulatory schemes would have been explained as remedies for market deficiencies: producers had been selling vehicles that were less than optimally safe; they had tolerated hazards to workers and consumers; and their production processes had polluted the air and water. These were costs borne by persons other than the producers. They were, therefore, "external" costs.\textsuperscript{118} Thus, the proper societal response would have been legislatively to "internalize" these costs to the producers. If producers were required to bear these costs, they would take steps to reduce them which would necessarily entail preventive action.\textsuperscript{119} The newer regu-

\textsuperscript{110} See supra text accompanying note 15.
\textsuperscript{118} External costs are social costs intimately connected with—indeed, caused by—the production processes, but not reflected on the books of producers. See, e.g., A. ALCHIAN & W. ALLEN, EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION, AND CONTROL 114-15 (2d ed. 1977). See also R. POSNER, ECONOMIC ANALYSIS OF LAW 30 (1972).
\textsuperscript{119} The workers' compensation statutes enacted by most states early in the present century, see, e.g., Act of April 24, 1913, ch. 467, 1913 Minn. Laws 675
latory acts, although designed to internalize previously external costs associated with injuries to workers and members of the public and harm to the environment, established regulatory schemes structured to operate preventively. These preventive structures result in less economically efficient mechanisms for internalizing social costs because they do not allow producers to make all of their cost decisions.

The Occupational Safety and Health Act of 1970 (OSHA) presents a prime example of how inefficiencies result from this type of preventative regulation. Under OSHA, worker protection standards are set by governmentally formulated rules which are uniformly imposed on all employers.\textsuperscript{120} This mechanism removes employer discretion to choose to take no preventative action where the perceived risk of injuries is small and the extent of those injuries, should they occur, is slight. The costs that the Act internalizes to industry, therefore, are the prevention costs mandated by OSHA-issued rules, regardless of the relation that these costs bear to the reasonably anticipated risks and costs of worker injuries. Employers are not free to decide to bear compensation costs in lieu of prevention

120. See 29 U.S.C. § 655(b) (1976 & Supp. V 1981). Although the statute does provide for variances, 29 U.S.C. § 655(d) (1976), the Secretary of Labor tends toward the issuance of universally applicable rules. The courts have, at most, required the Secretary to explain why OSHA rules do not take into account a limited number of subcategories. See, e.g., Industrial Union Dep’t, AFL-CIO v. Hodgson, 499 F.2d 467, 480 (D.C. Cir. 1974); Associated Indus., Inc. v. United States Dep’t of Labor, 487 F.2d 342, 351-52 (2d Cir. 1973).
costs when they believe the latter to be disproportionately large in light of market demands for their products. Rather, judgments about the proportionalities of preventative costs are made, if at all, by the OSHA Administrator. Employers may try to influence OSHA judgments in rulemaking proceedings, but they do not make the judgments in a market context modified by legislatively created economic incentives.

This method of limiting occupational safety and health risks has resulted in the imposition of safety and health standards likely to be at nonsocially optimum levels. By vesting the OSHA Administrator with power to impose preventative standards for eliminating workplace hazards, decisions about the extent to which workplace safety should be improved are removed from the very economic contexts that could furnish objective guides for making them. There is little basis for believing that administratively made safety and health standards even approximate socially optimum standards. Indeed, until the United States Supreme Court intervened in the Benzene case, OSHA did not even attempt to assess health risks in some cases. Further, OSHA has successfully fought for the position that it bears no obligation to engage in cost-benefit analysis by weighing the costs imposed on industry in meeting safety and health standards against the benefits resulting from the implementation of those standards.

Even if OSHA did strive to set industry-wide safety and health standards at socially optimum levels and was successful in its attempts, imposing uniform industry-wide prevention measures would fail to provide socially beneficial flexibility for firms in differing economic contexts. Thus, under a workers' compensation regulatory scheme, for example, a firm operating a large plant might find accident prevention measures, entailing a large fixed investment in certain equipment, a cost-effective method for improving worker safety. On the other hand, a firm operating a smaller plant might not find such an investment cost effective. Because OSHA's regulatory options do not take account of such differing circumstances, they tend to confer socially irrational advantages to some firms over others. Moreover, because safety and health standards are set entirely through administrative procedures, OSHA standards are af-

122. See id. at 637-38.
123. See id. at 639-40. See also R. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 48 (1982).
fected by the difficulties of collecting, analyzing, and evaluating information which beset any impartial evaluator, as well as by distortions caused by conflicting interest-group pressures which are brought to bear on OSHA's decisional processes due to OSHA's status as a government agency whose determinations will carry significant economic consequences.

For all of these reasons, OSHA is unlikely to set safety and health standards at socially optimum levels. If the standards are too strict, the costs that industry is forced to internalize are too high. From a traditional perspective, the industrial safety and health standards would be aimed at remedying a perceived failure of the market to internalize worker injuries into the cost calculations of management. OSHA "remedies" this market failure by overinternalizing, thereby unduly increasing production costs and the prices paid by consumers of the industry's products, and unduly decreasing the quantities produced and the number of workers employed.

Other systems of regulation established during the period from 1965 to 1980 resemble, in varying degrees, the OSHA system by establishing agencies (usually within an executive department) that require preventative measures relating to identifiable types of injuries. Because many of these preventative measures are required by rule, they tend to consist of uniform and inflexible requirements imposed throughout the industry to which they apply.

In following the OSHA format of imposing inflexible, uniform, industry-wide preventative measures, other new regulatory agencies produce similar, unintended secondary effects on the economic structure. Under the Clean Air Act Amendments, for example, the EPA imposed uniform industry-wide standards of performance for newly constructed plants, thereby tending to force emission reduction equipment into production processes. As a result, pollution reduction costs to a large extent become fixed costs which, when allocated over production units, decrease as per-unit production increases. As with some OSHA requirements, therefore, the EPA requirements result in a greater increase in unit costs in smaller plants than in larger plants, creating a differential competitive advantage in the latter.

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124. For a discussion of the EPA's attempt to force mandatory dry scrubbers into new power plants, see B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR (1981).
125. This effect was noted, for example, in the initial decision in *In re RSR Corp.*, 88 F.T.C. 800, 850-51 (1976). For an example of how the market responds...
The establishment of preventative measures at socially optimum levels is a problem shared by all of the new regulatory schemes which to date has not been satisfactorily resolved. Some of the new regulatory schemes, however, do take account of this problem. The National Environmental Policy Act of 1969, which requires that an environmental impact statement accompany agency proposals for legislation or other major federal action significantly affecting the quality of the human environment,\(^\text{126}\) was an early attempt to collect information relevant to an assessment of the total costs and benefits of such proposals in order to provide a basis for achieving socially optimum results. The requirement effectively compels inclusion in the decisional calculus of social costs\(^\text{127}\) which otherwise would have been ignored or minimized. The continuing bane of cost-benefit calculations that attempt to include costs external to actual markets, however, is the inherently immeasurable nature of such costs. Subsequently, inflationary impact statements, economic and regulatory impact statements, and small business impact statements have been incorporated in agency rulemaking processes by Executive orders and the provisions of the Regulatory Flexibility Act.\(^\text{128}\) Statements of regulatory impact ultimately are reviewed by an interagency body, chaired by the chairperson of the Council of Economic Advisors, known as the Regulatory Analysis Review Group. These devices are designed to improve bureaucratic decisionmaking by bringing together all relevant cost and benefit data and to focus decisionmaking attention on that data.


127. That is, costs “external” to the enterprise costs. *See supra* note 118 and accompanying text.

These mandated special impact statements and accompanying procedural devices illustrate congressional and presidential disbelief that administrators would otherwise address adequate attention to these matters, and reflect a recognition of the narrow range of vision to be expected from administrators. They are additional manifestations of the substantial decline in the levels of professed esteem attributed to administrative expertise since the 1930s. Even within their own narrowly defined fields of competence, experience has shown that the newer regulatory agencies—like the older ones—suffer from the dysfunctions to which all organizations are subject. William F. Pedersen, an attorney in the EPA's Office of General Counsel whose procedural recommendations were incorporated by Congress in the Clean Air Act Amendments of 1977,129 claimed that strict judicial scrutiny of EPA regulations is a necessary stimulus to careful decisionmaking within the EPA.130 Professor Bruce Ackerman pointed out the EPA's utter failure to assess environmental costs of mandatory dry scrubbers until it was prodded by outside forces acting through the Regulatory Analysis Review Group.131 Both commentators' observations constitute pleas for judicial review of the "hard look" variety, a type of review that deemphasizes deference to agency expertise and scrutinizes agency reasoning.

During this period, Congress evidenced a growing skepticism about the wisdom of many of the regulatory schemes it had previously adopted. With the Consumer Goods Pricing Act of 1975,132 Congress repealed the Miller-Tydings133 and McGuire Acts134 which enabled sellers of branded goods to impose vertical resale price controls where allowed under state law.135

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131. B. ACKERMAN & W. HASSLER, supra note 124, at 91-103.
135. Thus, the Miller-Tydings Act, ch. 690, 50 Stat. 693 (1937) (repealed 1975), stated:

Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter
In the 1930s and 1950s, when these Acts were passed, Congress apparently saw them as aids to small retailers in competition with mass merchandisers. In 1975, Congress saw their repeal as an anti-inflationary measure, and must have viewed the repealed Acts as special interest legislation which subsidized one class of retailers at the expense of consumers in general.

Congressional concern for general consumer welfare was further manifested in 1978 when Congress—after substantial help from the CAB—reexamined airline regulation. Congress discovered that regulation produced an inefficiently run airline system which imposed supracompetitive fares on the traveling public while providing virtually no offsetting benefits. CAB efforts to increase airline profits by holding rates at supracompetitive levels were undermined when the airlines increased flights on remunerative routes. Additionally, the claim that supracompetitive fares on well-traveled routes were subsidizing service on the less-traveled routes was discovered to be false; and even if the well-traveled routes did subsidize the less-traveled routes, the justification for such a subsidy of the minority of air travelers by the majority was not apparent. Congress, believing that the public would be better served by the free market, terminated airline regulation. Airline deregulation appears to mark the decline of the common-carrier regulatory model, which had justified subsidizing less-traveled routes.

Airline deregulation was followed by substantial deregulation of rail transport and of motor transport. Congress has apparently concluded that market forces provide more satisfactory protection of the public interest than government regulation. Indeed, government regulation was in large part an

Id. § 1, 50 Stat. at 693-94.
136. See, e.g., S. BREYER, REGULATION AND ITS REFORM 197-221 (1982); Breyer & Stein, supra note 15.
137. See supra note 15.
138. Id.
official cover for an industry cartel which imposed noncompetitive prices on the public under the guise of protecting it.

Deregulation thus produces several partially overlapping benefits when it replaces economic regulation based on a common-carrier model: (1) society's resources are more efficiently allocated when they respond to the majority of users than to the minority; (2) organizational dysfunctions impeding the regulatory process, such as those resulting from special-interest lobbying and maneuvering before the agency, external political pressures on the agency, possible corruption within the agency, and the phenomenon of regulatory "capture," are no longer relevant; (3) regulators are relieved from the constraints imposed on their decisionmaking by the factor of information scarcity; and (4) the information that is brought to bear on allocation decisions by the market is frequently superior to the information available to regulators.

IV. CONCLUSION

In the mid-1980s, fifty years after the arrival of the New Deal, an array of problems apparently inherent in government regulation are widely recognized. Agencies regulating single industries are susceptible to capture by the interest groups they supposedly regulate, wide grants of administrative discretion create abuses and dysfunctions whereas specific delegations create rigidities, and the institutional structures of the regulatory mechanisms tend to produce a myriad of distortions. The myth of administrative expertise has eroded and has produced a wide consensus about the beneficial effects of strengthened judicial review. Moreover, experience and analyses have shown that some types of regulation are perverse: transportation regulation imposed inefficient and costly transportation services on the nation, enriching some carriers at the expense of the public and wasting others by restraining their abilities to compete with inefficient rivals. Indeed, common-carrier regulation enabled both labor and carriers to share the returns of a monopolistic rate structure and thus replicated the economic performances of the oligopolistic sector of manufacturing in the regulated sector.

Yet, outside of the common-carrier area, regulation is not perverse, but a necessary antidote to otherwise oppressive so-

143. See supra text accompanying note 15.
144. See Hilton, Ending the Ground Transportation Cartel, in Instead of Regulation 50 (R. Poole Jr. ed. 1982). See also supra note 15.
cial problems. The environment will not protect itself, nor will worker health and safety be ensured in the absence of government intervention. Although government intervention remains necessary in many areas, the form that this regulation will take in the future is uncertain. The last fifty years have been a learning experience. As regulatory dysfunctions have been identified, Congress—and often the agencies themselves—has modified regulatory techniques. Today, the techniques of regulation are a focus of intensive scholarly investigation. As a result, the forms that future regulation will take will undoubtedly be more flexible, less costly, and more efficient as greater emphasis is placed on enlisting market mechanisms, where appropriate, to move private behavior patterns in the legislatively ordained directions.