Bureaucracy Democracy and Judicial Review: The Uneasy Coexistence of Legal, Managerial and Political Accountability

by

Jerry L. Mashaw
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Jerry L. Mashaw
Sterling Professor of Law and Management
Yale University

The Puzzle of Judicial Review of Administrative Action

Judicial review of bureaucratic decision making is simultaneously ubiquitous and contestable. The ubiquity of judicial review of the legality of administrative actions has two foundations. First, democratic governance presumes that officials are the servants of the people, and for that normative proposition to be true, “the people” must be able to hold officials accountable for their actions. But, judicial review is not the only accountability mechanism available. Its ubiquity requires, therefore, a second factual predicate – the incapacity of other accountability mechanisms to ensure that officials serve rather than rule. No functioning democracy worthy of the name has found the primary alternative accountability mechanisms, political or managerial control, adequate to the task of sustaining democratic accountability. For this reason “democracy” and the “rule of law” have become inextricably linked, with judicial review as the keystone of the legal accountability system. (See, e.g., Stewart, 1975).

Notwithstanding its prominent place in modern democratic governance, judicial review of administrative action remains continuously contestable. Complaints of the incompetence, impertinence or irrelevance of judicial review are at least as common as praise of judicial review’s efficacy. (See, e.g., Carnegie Commission; Melnick; McGarity, 1992; Pierce, 1996; Shapiro). The reasons for judicial review’s contestability are the mirror image of the reasons for its ubiquity. Judicial review of administrative action simultaneously supports other accountability mechanisms that bolster democratic governance and undermines them. The institution of judicial review of administrative action is, indeed, rife with paradox. It supports democratic governance by making officials accountable to unelected judges. It protects individual rights while simultaneously ensuring state control. It legitimizes expert, bureaucratic administrative judgment by subjecting that judgment to review by bodies who often have limited...
knowledge of either the technical data upon which administrative action is premised or the concrete situations within which particular bureaucracies must function.

The puzzle of judicial review of administrative action, therefore, is just this: how can such a necessary feature of modern democratic governance be accommodated to the demands of both effective administration and democracy itself? My approach to this puzzle is to view judicial review of administrative action as part of a broader question of governmental design in modern democracies, that is, how to make administration simultaneously managerially effective and politically responsive. But, this is a design problem that can only be managed, not solved. For, it entails maintaining an appropriate balance among competing forms of accountability in states committed to democracy, but constrained by the demands of efficacy and by the brute facts of social, political and economic complexity.

The analysis that follows proceeds in parts. I will first survey the major forms of bureaucratic accountability to illustrate how the limitations on managerial and political control of administration yield an almost necessary demand for legal control through judicial review. Attention then shifts to the operation of judicial review in three major domains of administrative action – adjudication, rulemaking and execution. That analysis reveals both the strengths of judicial review as a means for assuring democratic control of administration and respect for the rule of law and its simultaneous competition with political and managerial accountability systems that seek to promote political responsiveness and administrative efficacy. The final section reflects on the institutional design problems produced by these inherent tensions among accountability regimes and speculates about the types of research and analysis that might be most useful to the crafting of appropriate systems of judicial review of bureaucratic action. My
examples will come from the United States, but this is a special case of a more general problem.

**Forms of Official Accountability**

In virtually all modern democracies administrative officials are held accountable through three different, but connected, accountability regimes – the political, the managerial, and the legal. Indeed, in some sense, the emergence of the latter two forms of accountability are responses to the inefficacy of electoral control in the modern administrative state.

Virtually all western democracies labor in the shadow of the (quasi-mystical) model of Athenian democracy. (See generally Jones, Roberts) This was supposedly one of the few times in recorded history that government was in Abraham Lincoln’s ringing phrase “of the people, by the people, and for the people”. Citizens met as a committee of the whole, official positions were allocated by vote or by lot, and officials reported back to the assembly of the citizens. Ten times a year officials charged with carrying out various administrative tasks reported on the conduct of their offices. Their reports were subject to a vote of confidence; and, if confidence was lacking, officials faced a trial by a jury of their fellow citizens. In addition, an official might be impeached by the assembly at any time.

Officialdom was hazardous in Athens, precisely because electoral accountability was efficacious. Any unsuccessful battle or unproductive foreign negotiation might subject the hapless general or ambassador to trial, and, if convicted, to death or exile. According to Demosthenes, Athenian generals were tried for their lives two or three times in an average career, and the danger of a death sentence by trial was greater than the risk of dying in battle.

That this direct and immediate approach to holding officials politically accountable no longer describes modern governance is obvious. What is perhaps less obvious is that the
conditions of modern complex societies make most versions of political control of official action lax, if not incompetent.

This is not to say that periodic elections under conditions of open access to office and majority rule, and the political accountability of administrators to duly elected public officials, are unimportant details of modern democratic governance. They are crucial to the political definition of democratic citizenship. And, they maintain a limited capacity to hold officials accountable for results based on the presumed political preferences of the electorate.

The problem, of course, is that the electorate is no longer reasonably homogenous, and the relationship between citizens’ votes and the output of legislative processes is notoriously weak. (See generally, Mashaw 1997; Rubin) Moreover, for electoral accountability to function effectively presumes that elected officials can control administrative officials. In modern welfare and regulatory states the linkage between elected officials and administrators is not a myth, but it is tenuous. Administrators often possess wide discretion and the quality of their performance is difficult for elected officials to evaluate.

Wide discretion and loose oversight are not difficult to explain. The heterogeneous preferences of a diverse electorate and the uncertainties of appropriate action in a complex world are reflected in the vagueness of the mandates that legislators can provide for administrators. Vagueness begets discretion. (Lowi; Ely) And, when evaluating performance, social outcomes are often complexly and only indirectly related to bureaucratic behavior. To make matters worse much administrative action is non-observable by elected officials who can at best exercise episodic oversight over some administrative decisions. Administrators have quasi-monopolies on the information necessary to evaluate the effects of their actions. (Niskanen) In the modern
administrative state the belief that the citizen-elector exercises democratic control over administrative behavior, even mediately through elected officials, is stretched very thin.

One solution to the deficiencies of political accountability is an attempt to assert managerial control. We live in what has been called an “audit society”. (Power) And the “audit”, broadly understood, is the managerial accountability mechanism of choice in both public and private organizations for ensuring that those who “have the doing in charge”, act both competently and honestly.

Managerialism as a mode of accountability is, of course, not unique to democracies. The monarchical model of accountability involved a simple hierarchical relationship. Officials were accountable to the monarch and the monarch to God. We know little about how God kept his accounts, but monarchs rapidly developed rudimentary systems of auditing. Modern governments are rife with inspectorates of one or another type. (Day and Klein) In some cases the inspectorate is designed to reinforce political control by providing the expertise and continuous observation that politicians lack. In other cases the inspectorate is inside the bureaucracy itself. Indeed, modern managerial techniques emphasize the role of external audits in the creation of internal accountability systems that will produce appropriate controls over official (or private) behavior.

This technocratic regime reinforces accountability, but at a cost. First, it must focus on efficiency and effectiveness and on processes or systems. These are important matters, but they are complexly and sometimes mysteriously related to bureaucratic outputs or social outcomes. More importantly, they have virtually nothing to say about policy choice. They, therefore, strengthen elected officials’ capacity to guard against corruption and inefficiency, but do little to
strengthen political control over what modern bureaucracies do. Put slightly differently, managerial controls tend to assume that administrative implementation can be measured against clear, predetermined policy goals and that processes are tightly linked to outcome. Neither of these assumptions is realistic. (See generally, Dunsire)

Second, the language and dialogue of administrative oversight is internal to the administrative system. The expertise of administrators not only defeats direct political supervision, it defines the terms of evaluation from a managerialist perspective. Managerialism has its virtues, but strong reinforcement of democratic accountability is not one of them. To be sure, centralized bureaucratic control of administrative officials may be a necessary condition for implementing legislatively determined goals, but it is hardly a sufficient condition. For, there is the continuing problem of who audits the auditors.

Here, somewhat ironically is an entryway for judicial review of administrative action. Although we moderns mostly think of judicial review as a means for protecting individual rights against administrative tyranny, judicial review has historically played another role as well. Hauling the king’s officers before the king’s courts to answer for their conduct promotes central administrative control by the sovereign at the same time that it protects private rights. (Shapiro, 1981) Judicial review consolidates state power, and with the shift of power to the people in constitutional democracy, judicial review becomes a device for reinforcing the democratic accountability of administrative officials.

Viewed from this perspective, judicial review of administrative action – the demand for “legal” accountability of officials – is the carrying out of a democratic political project: the reinforcement of democratic control of official behavior. But, like managerial accountability
regimes, it is not obvious that the techniques of accountability available through judicial review are a good fit with the project of democratic political control. Accountability through judicial review is accountability to law. And so it must be. For, to premise accountability in courts on anything other than the law would be to undermine the legitimacy of judicial review. But “the law” is not self-interpreting. When courts find that officials have misunderstood or misapplied their mandates they substitute judicial judgment for the judgment of administrators who have more direct connection to the democratic political process than judges have. Judicial review can undermine the bureaucracy’s political accountability rather than reinforcing it.

We find ourselves, therefore, with a mixed set of accountability regimes: political accountability through electoral processes; managerial accountability through processes of audit and systems design; and legal accountability through judicial review. The project for institutional designers is to make these differing accountability regimes work together to produce accountable governance. And it is in this attempt that we uncover some of the paradoxes and puzzles of judicial review.

For, alas, we do not live in a world in which we can happily assign issues to boxes labeled “political”, “managerial”, or “legal”. Much administrative action can be characterized in all three ways, that is, it makes policy, it is based in part on considerations of administrative efficacy, and it affects citizens’ interests in ways that raise potential legal issues. Much of the legal doctrine and professional argument in any legal system utilizing judicial review of administrative action is precisely about the separation of the “legal” from the “political” or “managerial”. Or, perhaps better put, it is about the accommodation of these three separate means for providing official accountability. The stresses involved in balancing accountability
regimes show up anywhere and everywhere.

**Legal Accountability in Action**

One way to see this delicate balancing act in action is to look at three paradigmatic types of administrative action that might be subjected to judicial review for legality: administrative adjudications, administrative rulemaking (or the adoption of what is sometimes called “delegated legislation”), and “informal” administrative action that neither decides a case nor promulgates a general norm. In a simpler world one might confidently assert that reviewing administrative adjudication would be the principal function of judicial review. As when reviewing the decisions of lower courts, the question for judicial resolution would be straightforward, that is, “was this case decided according to law?” Rulemaking or delegated legislation would, by contrast, be just that: policy choice subject only to available regimes of political accountability (and, perhaps, judicial review for constitutionality). And informal managerial action by administrators would be subject to whatever processes of audit and accountability the relevant bureaucracy and its political overseers had devised. To some substantial degree this simple picture describes the presuppositions of judicial review of administrative action. But, using some American examples, let me illustrate both how these presuppositions operate and the limits of their resolving power.

**Adjudicating Cases**

Administrative adjudicators in the U.S. make millions of decisions annually across a wide range of administrative functions. Often these adjudications involve claims of right which must be determined on a record after opportunity for hearing and argument. Opportunity for appeal of these adjudicatory decisions, either to a specialized tribunal or to a court of general
jurisdiction seems, to the modern legal mind, non-problematic. Reviewing lower tribunals is the work that appellate courts normally do.

Yet review of administrative adjudication raises immediate concerns: What scope of review should reviewing courts exercise, and what remedies should they apply in the case of legal error? To what extent should courts be involved in restructuring the processes of administrative adjudication as against merely ruling on the legality of their outputs? To what extent should the courts rely on standardized administrative routines as guarantors of regularity in high-volume, fact-based adjudications? And, what deference should be paid to the judgments of administrative adjudicators in cases that “make law” as well as apply it. In answering many, if not most, of these questions courts confront tradeoffs between or among legal, political, and managerial accountability.

It seems clear, for example, that much judicial “deference” to administrative adjudicators is based upon the perception that administrative adjudication makes policy as well as applying law. For example, as part of its accommodation to the American administrative state in the New Deal era, the United States Supreme Court, in *NLRB v. Hearst Publications*, famously deferred to the judgment of the National Labor Relations Board (NLRB) concerning whether employees needed the protections afforded by the National Labor Relations Act. It did so through the lawyer’s device of finding that the determination of whether a worker was an “employee” within the meaning of the NLRA was a question of “fact” within the ordinary experience and expertise of the Board. The Court has also made clear that the Labor Board has the choice of making policy through either adjudication or rulemaking and that the Board’s informed choice in this matter will be reviewed only for the most extreme cases of abuse of discretion, that is,
effectively never. In short, these decisions suggest that labor relations policy is for the Board, subject to accountability to the political branches.

If this were the whole story, it would be nicely counterintuitive, that is, political accountability trumps legal accountability even in the review of formal adjudications where one would expect the latter to be most robust. Yet, the story is not so simple. Congress responded to the judiciary’s early self-limitation by new legislation mandating more searching substantive review of Labor Board determinations. More importantly, as Labor Board policies accrete and are judicially approved, they become judicial precedents that bind the Board in future adjudications. Over time the Board loses its discretion to alter policy to accommodate shifts in social, political and economic context. Hence, somewhat ironically, even judicial approval of Labor Board policies can limit its subsequent policy making authority.

These developments almost turn the initial story of deferential judicial review on its head. Well-informed commentators have argued that judicial review has seriously impaired the political responsiveness of Labor Board policymaking, both by granting the Board discretion and by restricting it. (Winter) By giving the Board carte blanche to use adjudication as its principal policymaking device the courts have allowed the Board to bury policy in the factual complexities of individual cases and to, thereby, render political oversight virtually impossible. And, by demanding Board adherence to “precedent”, the courts have deprived the Board of needed flexibility to respond to social, economic or political change. In short, where judicial review should be expected to be most sure-footed and non-controversial, in reviewing administrative adjudication, the judiciary is accused simultaneously of stultifying labor policymaking and of limiting the Board’s political accountability.
To take another prominent example, the Supreme Court has deferred extensively to the judgments of the Social Security Administration concerning the structure of its adjudicatory processes. Here judicial deference is not so much to substantive policy choice, but to managerial judgments about the necessities of bureaucratic administration. The Court has relied explicitly on the circumstantial reliability of internal administrative routines that make individual adjudicators accountable and administrative processes “fair” to claimants. Yet, in its willingness to entertain suits by Administrative Law Judges to protect their “independence” under the federal Administrative Procedure Act, the judiciary substantially undercut the efforts of the Social Security Administration to assure consistent decision making by its hearing officers. And, whether showing deference to managerial judgments or refusing to defer to efforts at ensuring managerial accountability, the judiciary has revealed little understanding of the underlying bureaucratic realities of the system of administrative adjudication it was asked to oversee. (Mashaw, 1983; Mashaw, et al., 1976)

In many ways the Supreme Court’s attempts, both in the Social Security context and elsewhere, to find an accommodation between citizen demands for individualized hearings concerning their rights and the necessities of mass administrative justice are laudable. Citizen’s rights are often held in the fragile currency of state-based concessions: professional licenses, access to education, pension rights, and so on. If the citizen is to be treated as an independent end, not merely a means of effectuating state policy, then surely these rights must be attended with forms of legal security that make them defensible in the face of bureaucratic error or corruption. Individualized hearings, before independent decision makers with demands for proof and judgment on the record are a major bulwark against state oppression.
Yet, individualized hearings are wonderfully anti-bureaucratic. They interrupt regular routines, require the expenditure of disproportionate resources on particular decisions, and risk defeating the goals of programs designed to promote the general welfare. Hence the delicate balancing act between defending individual rights and deference to administrative judgment concerning how hearings might best be structured to maintain administrative capacity.

The point here is that the necessity to balance “legality” against “administrative necessity” puts reviewing courts in an almost impossible position. To defend rights they must insert procedural constraints into bureaucratic regimes with little or no capacity to judge what their ultimate effects might be. (Handler; Simon) And, reliance on administrative necessity may easily turn out to be misplaced where the institution doing the relying – the court – has limited insight into the dynamics of administration.

Thus, for example, in a famous case in which the Court deferred to Social Security Administration’s assurances of the circumstantial reliability of its data, commentators have suggested that the Court failed to appreciate both the nature of the decision that was being made at the administrative level and the degree to which the data relied upon bore on the ultimate determination. (Mashaw, 1976) Indeed, had the court been able to do a managerialist audit of the reliability of the system it was affirming, it might have been alarmed at the apparent inconsistencies across deciders and the astonishingly high rate of victory by petitioners who appealed their decisions to independent administrative law judges.

On the other hand the Court’s willingness to intervene to protect the independence of administrative law judges, who hold formal administrative hearings in the American system, may well have undermined managerial efforts to assure the consistency and accuracy of
administrative determinations. And, where the Court forcefully inserted rights to hearings in welfare administration, this victory for the “common law ideal” of individualized days in court may have dramatically and unpredictably shifted the basic priorities of welfare administration. Assuring “rights” through adjudication may have contributed substantially to the loss of the program’s capacity for client services and have shifted managerial effort from the pursuit of professionalized social services to the defensibility of income eligibility determinations.

(Simon)

All of these critiques of both deference and intervention are, of course, contestable. But they illustrate my basic point: Even in a realm where judicial review seems most appropriate, the review of administrative adjudication, legal and managerial accountability, like legal and political accountability, are strongly competitive. More importantly, because managerial accountability often supports the same values of accurate adjudication that are pursued through the assertion of legal rights to hearings and review, missteps can undermine not just managerialism, but the purposes of judicial review itself.

Rulemaking

Modern bureaucratic administration entails the creation of a host of subsidiary norms, that is, rules, bulletins, memoranda, guidelines, manuals, and other documents that give more concrete meaning to the terms of general statutes. Techniques for generating these norms vary enormously across legal systems. Some treat administrative rulemaking as quintessentially political and subject only to regimes of political accountability. Yet it is difficult to keep the law from creeping in, particularly in “presidential” or “separation of powers” legal systems like the American one. Because administrative jurisdiction and authority flows almost exclusively from
statutes, political control of administrative discretion by presidents is always subject to the question, “Was that (presidentially directed or influenced) administrative act authorized by law?” (See, e.g., Lessig and Sunstein; Shane; Strauss, 1997) And legislative attempts to direct administrative policy free of presidential interference may be viewed as unconstitutional in regimes that treat the President as the Chief Executive Officer. (Elliot) Political accountability also has a legal structure that can be used to mount legal challenges in court, and this is but the tip of the legal iceberg.

Recognition that statutes do not necessarily determine policy choice and that political controls over administrative discretion may be weak have, in the U.S., lead to micro-political controls on administrative policy making. Harking back perhaps to Athenian democratic ideals, American administrative law gives any person a right to participate in agency rulemaking processes. Moreover, Congress has often insisted that judicial review be available to determine whether any administrative action, including a general rule, is “arbitrary”. These process guarantees and provisions for judicial oversight have produced substantial judicial incursions into administrative policy making.

That a Congress that finds itself unable to give administrators crisp statutory instructions might be tempted to rely on judicial review as a means of reigning in rambunctious administrators is understandable. (Scalia; Stewart, 1978) But, the American penchant for providing for immediate review of agency regulatory pronouncements has created a mini-crisis of accountability by thoroughly confusing managerial, political and legal accountability regimes.

A court faced with the question whether an agency rule is “arbitrary” is in reality faced
with a political question: Given the legislative goals expressed in legislation and the information available to the agency, has the agency’s policy judgment been so bad that it should be nullified? That sort of substantive policy issue seems an issue of administration or politics, not law. But, the statutes mandating judicial review demand a “legal” answer. And, the courts have responded by “proceduralizing” arbitrariness to make judicial review of rules legally manageable. The basic technique is to model the rulemaking process on the process of adjudication. Adjudications may be arbitrary in two senses, either substantively, because the facts of record do not justify the agency’s conclusions, or procedurally, because participants have not been given a fair opportunity to participate.

American courts have taken essentially the same approach to rulemaking processes. Attempting to the extent possible to avoid the substantive judgment of whether agency policy makes sense, courts pursue related “procedural” questions of the adequacy of notice, the responsiveness of the agency to relevant comments of participating parties, the adequacy of the agency’s explanation, and the existence of facts in the “record” that would justify the agency’s findings. The result has been to preserve the law-like nature of judicial review, but to impose severe, sometimes insurmountable, burdens on administrative policymaking. (Mashaw, 1994; McGarity, 1991; Pierce) In *Chevron U.S.A. v. Natural Resources Defense Council* the Supreme Court attempted to redress the balance by giving deference to agency interpretations of their own statutes. This deference is premised not just on the epistemological proposition that courts lack the bureaucracy’s subject-matter-specific expertise, but also on the political proposition that agencies are delegates of the legislature who have been authorized to “make law” by their interpretive regulations and who also act under the political supervision of the President. (See
generally, Farina; Merrill and Hickman)

The “Chevron” doctrine’s recognition of the close connection between statutory interpretation and policy choice seems perfectly sensible. But making rules reviewable for “arbitrariness” or “abuse of discretion, while asserting deference to policy choice, including agency statutory interpretation, has produced a peculiar and uncertain jurisprudence. Peculiar because it seems to give judicial deference to agency interpretations of law while immersing courts in the often technical facts in the rulemaking record. Uncertain because courts are not so easily dislodged from legal interpretation. The Chevron opinion withholds judicial deference when the court finds the statute clear, and clarity seems to reside in the eye of the judicial beholder. Moreover, because Chevron’s political preposition is premised on an implicit delegation of interpretive authority courts must decide – on the basis of congressional silence – when the legislature intended to make such a delegation. The result has been rather massive confusion in the lower courts (See Kerr, Miles and Sunstein), and a Supreme Court jurisprudence that often honors Chevron deference by ignoring the doctrine’s relevance to its decisions. (Eskridge and Baer)

Judicial review of rules for arbitrariness also gives important legal armaments to obstructionist elements in the agencies’ regulatory space. Every rule is contestable on a host of possible legal and factual grounds and a reviewing court’s reaction to these complaints is often unpredictable. This provides strong incentives to seek review and strong disincentives for agencies to engage in rulemaking. Although judicial review is hardly the only culprit (Seidenfeld), rulemaking has languished (McGarity, 1991; Pierce) and much administrative policy making has been driven underground. (Asmow; Rakoff) Lack of transparency tends to
undermine both legal and political accountability.

One of the more important American cases on judicial review of administrative action provides some important insights into this uneasy relationship between legal and political accountability. *Motor Vehicle Manufacturers Association of the U.S., Inc. v. State Farm Mutual Automobile Insurance, Co.*, involved the legality of the most important safety rule ever adopted by the National Highway Traffic Safety Administration (NHTSA) – its requirement that all vehicles be equipped with passive restraint systems (either automatic belts or airbags). The regulation had been twenty years in the making, a regulatory history that demonstrates starkly the unpredictable interactions between legal and political control of administration. (See generally Mashaw and Harfst, 1990a)

The rule was first promulgated in the late 1960s, but was immediately derailed by a judicial determination that the agency’s engineering specifications were inadequate. That ruling was both questionable and unnecessary, but sent the agency literally back to the drawing boards. NHTSA then produced a stop-gap measure using a different technology – ignition interlocks to prevent the use of automobiles unless the passengers had attached their seatbelts. This second attempt ran afoul of the political process. Congress received thousands of complaints about the requirement and passed legislation to repeal it.

A change of presidents then put passive restraints on the back burner in an administration that was more interested in promoting automobile sales than regulating their safety. The rule languished until a pro-regulatory administration revived and repromulgated it. But, the effective date for compliance outlasted that administration’s mandate and a less enthusiastic administration decided to require only a “demonstration project” involving a few thousand
vehicles. That administration again passed from the scene and the rule was promulgated again, only to be rescinded by the next deregulation-minded president.

If this sketch tells us anything, it is that the issue of passive restraints was a highly political question, not a mere exercise in technocratic safety engineering. The final rescission set the stage for the State Farm case in which various automobile insurance companies challenged the rescission of the rule as having insufficient basis in the record. On this score, they had a strong case. The agency had spent twenty years compiling a record to support the rule, and the information supporting its rescission was quite thin. The Supreme Court, therefore, invalidated the rescission as being inadequately rationalized.

This much is clear, the political and legal accountability systems were asking quite different questions concerning the legitimacy of the passive restraints rule. Congresses and presidents asked whether the rule, or some specific form of it, was wanted. The courts, whether reviewing its promulgation or its rescission, asked whether agency action was adequately supported by the factual record of the rulemaking proceedings. And, while the Supreme Court in State Farm recognized that the repeal of the rule was almost certainly the result of a change of administration, and therefore, a change of policy, that policy ground was insufficient to sustain the rule. Having “legalized” the review of rulemaking, by translating it into a rational process of weighing evidence compiled in a record, it was simply not possible for the defendant administrator to tell the truth and be upheld. For the truth was something like this: “I represent an administration that was elected campaigning on deregulation and regulatory relief for the automobile industry. There is some question about the safety benefits of the passive restraints rule, and given my administration’s political ideology, we act by a simple motto ‘When in doubt
When told in this way the State Farm story has a straightforward lesson: seen through the lens of judicial review, administration is apolitical. Indeed, administration must be made apolitical in order to subject it to legal accountability. And, to this degree, State Farm is quite consistent with the Supreme Court’s constitutional jurisprudence in which the Court has been prepared to place relatively stringent limits on the powers of both Congress and the President to control administrative policy. Indeed, the Supreme Court’s separation-of-powers jurisprudence so muddies the waters of the reach of presidential and congressional control over administrative policy making that the question of whether administrators are politically accountable to the President or the Congress has no straightforward answer. (See generally Mashaw, et al. 2009, 71-307) In part, and through certain techniques, administrators are answerable to both. But whether this reinforces or destroys political accountability is hard to judge. Many would say that an agent who must satisfy two principals is in a good position to avoid satisfying either.

Judicial review has therefore, to some degree, reinforced the independence of administration from politics and political accountability. But, political institutions that are electorally accountable for government action are unlikely to give up their capacity to control bureaucratic governmental actors without a fight. Deprived of authority to dictate or veto administrative policy choices, both presidents and the congress have attempted to reassert political control over administration by the creation of “managerialist” techniques.

Virtually any major federal, administrative in the United States action must now be attended by a host of analyses that describe in great detail the proposal’s effects on the environment, on the structure of American federalism, on the paperwork burden on American
firms and citizens, and on small entities both public and private, as well as providing an analysis of the costs, benefits and alternatives to the action proposed and the means by which all data used by the agency in its policymaking has been vetted for its scientific quality. (Seidenfeld) These analyses are subjected to review and audit by various “super agencies” in the executive branch and by Congress. Negotiations about the adequacy or soundness of these analyses thus becomes a pathway for reasserting political control by elected officials, particularly the President. (Croley, 2003; Kagan; Olson) As we noted earlier, the membrane that separates “managerial” and “political” accountability may be porous.

Moreover, because all of these analyses become a part of rulemaking records, they are also a part of the factual predicate that is available to a reviewing court when determining whether the agency’s behavior is or is not “arbitrary”. The consequence, once again, has been to reinforce legal accountability through judicial review. Not only may outside parties use judicial review to defeat or delay administrative action that has not satisfied various analytic requirements, courts have held that the Office of Management and Budget, which oversees most of these “impact statement” regimes, may not use its oversight powers to unreasonably delay agency action.9 Political control, in a managerial form, is thus made legally accountable, but at considerable risk of further undermining administrative efficacy.

Execution. Government officers also carry on a huge array of managerial tasks that have little to do with either deciding cases or generating rules of conduct. They manage public lands and state-owned enterprises. They promote the exploration of space and manage the money supply. They build or subsidize infra-structure development, police the borders and attend to the national defense. They set agendas and supervise personnel.
Much of this activity, involving judgments of economic or engineering feasibility, political importance, and administrative capacity, is free from judicial or legal review. Yet, strangely enough, the leading case on the presumption of judicial review of administrative action in the United States (Citizens to Preserve Overton Park, Inc. v. Volpe), is a case involving infrastructure development – the building of highways.\textsuperscript{10} And one finds courts routinely reviewing administrative actions such as Corps of Engineers’ water projects and Department of Interior leasing arrangements on public lands. A closer look reveals that most of these cases are the result of cross-cutting statutes, particularly statutes concerning environmental protection, that attach non-managerial criteria to bureaucratic routines. These requirements have been inserted in the statute books to broaden the vision of mission-oriented administrators. And Congress has relied upon the courts and private litigants as a means for ensuring attention to these broader societal values.

But, the results of “legalizing” management is not always benign. The Overton Park case itself, provides a cautionary tale. (See generally, Strauss, 1992) The plaintiffs were a group of citizens unhappy about the routing of a highway through Memphis, Tennessee. Because the route chosen included the taking of some park property, the plaintiffs seized on the language in the Federal Aid Highways Act that required (1) that highway engineers to avoid the use of park lands unless there were no “feasible or prudent” alternative and (2) demanded that they use “all possible planning” to minimize the damage to park lands ultimately disrupted by highway construction.

The defendant, the Federal Highway Administration, had treated the planning and building of Interstate 40 through Memphis, Tennessee, as an exercise in managerial
administration. It had worked with the Tennessee Highway Department and multiple local and state planning bodies to develop a route that satisfied the need for traffic movement, subject to the constraints of local land use policies and the budget available for highway construction. The project had been ongoing for many years with multiple reanalyses and reassessments of the soundness of the plan from engineering and fiscal perspectives.

The process was also highly political. The routing of the interstate highway had been a major political issue in Memphis for nearly a decade. Local elections had been fought on the basis of that issue and the people of Memphis seemed to have spoken in favor of a city council that was committed to the project. On the basis of all this engineering, fiscal and political information, the Federal Highway authorities had determined that the chosen route through Overton Park was the only feasible and prudent one.

In the crucible of judicial review, the multiple, incremental decisions of highway construction, filtered through both technical and political processes, looked quite different. The plaintiffs urged that the Federal Highway Administration had simply misunderstood the words “feasible and prudent” in the statute. They urged, and the Supreme Court agreed, that the Congress had meant to provide strong protections for park land against the encroachments of road building. In the Court’s view, in order to justify his decision, the administrator needed to find that any other route than the route taking park land would be “uniquely difficult” because of community disruption, or impossible because of engineering criteria. Moreover, the Court refused to accept the administrator’s explanations, offered in litigation affidavits, in response to the plaintiff’s lawsuit. In the Court’s view the administrator had to “make a record” that justified his decision, not simply provide “post-hoc rationalizations” in the context of litigation. The
notion that the lawsuit was misplaced because highway building was not appropriately subjected to judicial review was brushed aside. In the Supreme Court’s view any time there was “law to apply” a court could be called upon to determine whether it had been properly applied.

On remand to the trial court, and after 128 days of testimony, the trial court found that the history of the project, as presented in court, did not satisfy the Supreme Court's “uniquely difficult” standard for choosing a park-land route. The question was remanded to the Federal Highway Administration which declined to continue funding for the project. The federal administrator was then promptly sued by the State of Tennessee which claimed that if there were feasible and prudent alternatives to the park-land route, the administrator was obliged to specify them and fund the project in that location. This put the administrator in a quandary. Federal and state officials had spent a decade devising a plan on the basis of their judgment that there were no feasible or prudent alternatives. There was no administrative record upon which a determination of an alternative route could be premised. Once again the state and local officials went literally back to the drawing boards.

I describe this as a cautionary tale because the judiciary’s intervention has obvious effects on political and managerial accountability for road building. On the political side, the Court’s Overton Park interpretation of the Federal Highway Act shifted authority strongly away from local communities, who are most affected by such endeavors, and toward national elected and bureaucratic officials whose priorities may be quite different. The balance of benefits and costs between park lands and highways is to be decided by federal administrators under national statutory standards that give no obvious weight to local political preferences. The inter-governmental processes of political accommodation that surround joint federal-state-local
projects is subordinated to the hard edges of the law.

The decision also imagines a managerial environment that highway engineers may find quite unrealistic. (Mashaw, 1973) The Court seems to assume that highway building involves ratio-deductive thinking in which facts are gathered, decisions are made based on the application of technical methodologies, and can be rationalized in straightforward logical fashion. The informal and iterative process of professional consultation and craft judgment is not captured by this picture. Moreover, if administrators want to avoid lengthy trials about their engineering decisions, the Overton Park case implicitly instructs them to bureaucratize the process in ways that create records suitable for judicial review. How that effects the real processes of road building is anyone’s guess.

In short, subjecting these sorts of decisions to judicial review implicitly makes real choices about what sorts of accountability regimes are appropriate for ensuring managerial responsibility. The progressive logic of judicial review, if there is law, then there is review, obscures these choices as much as it illuminates them.

One should not, however, take away from the Overton Park case the idea that managerial discretion has been eliminated from American administrative law. American courts clearly recognize that agenda setting is one of the most critical aspects of administrative management. As a consequence, courts have been reluctant, but not entirely unwilling, to invade administrative enforcement discretion or to attempt to set agency regulatory agendas. (Mashaw, et al. 2009, 931-982)

Perhaps the most important thing to notice about these limitations on judicial review of managerial discretion has to do with the way that insulation from legal accountability may create
imbalances in administrative incentives. For while it is presumptively the case that an agency adjudication or agency rulemaking will be subjected to judicial review at some point, precisely the opposite presumption applies to agency failures to act. Agency agenda setting about either policy making or enforcement is an aspect of managerial discretion that in the American legal vernacular is “committed to agency discretion by law”. This means that where political and administrative accountability regimes fail to mobilize administrative energies, judicial review will take up very little of the accountability slack. The modern political world is planted thick with laws, but the beneficiaries of those laws can only occasionally rely on the judiciary to assure that they are enforced. (Sunstein, 1992) In the American administrative state legal accountability thus has a decidedly liberal democratic character. State action that potentially invades individual freedoms, or impairs individual rights or interests, is presumptively subject to judicial review. Administrative inaction that fails to protect the weak from the strong, or diffuse from concentrated interests, is often not reviewable.

Judicial review in the U.S. thus seems to play out a political project of accountability for official action that responds to the peculiarities of the American political culture. It is perhaps not too much to suggest that judicial review in the United States is structured to pursue Thomas Jefferson’s famous aphorism that “that government governs best that governs least.” Public law rights in the United States follow the political culture's preference for insuring “negative” rather than “positive” liberty. But one might question whether the legislative processes that have produced the modern, interventionist administrative state remain wedded to that political ideology.

Reflections on Judicial Review, Institutional Design,
and the Way Forward

Every democracy struggles to keep a workable division between law and politics. If the citizens’ legal rights are subject to the political whims of the rulers, the fundamental presuppositions for democratic governance are erased. The citizen cannot be the pawn of the state and simultaneously the source of its authority. Judicial review of administrative action is a crucial aspect of this democratic project. If officials are not subject to the law, then democracy is a sham. We simply elect our dictators.

Democracy struggles as well to balance the demands of political responsiveness and governmental competence. In the modern world that has often meant separating governance from electoral politics. Indeed, in some significant sense, electoral politics cannot produce responsive government unless it is harnessed to technically competent administration. And incompetence is politically dangerous. As has proved so common in the past, incompetent democracy will give way to authoritarian regimes that promise in the hackneyed phrase “to make the trains run on time”.

Here again judicial review has a role to play. Elected officials cannot monitor the far flung activities of the modern administrative state. But citizens affected by official action can do so in part through the processes of judicial review. For, administrators called to account in court to justify their actions according to law are also being called to account for the technical competence of their actions. Requiring factual predicates for action and reasoned explanations of decisions helps to ensure that administrators, in Weber’s famous phrase, “Exercise power on the basis of knowledge”.

I do not, therefore, deny for a moment the role of judicial review of administrative action
in maintaining politically responsive and technocratically competent governance. This essay has emphasized, however, the potential paradoxes and tradeoffs that accompany making administrators accountable to law. For judicial review both supports political accountability and impairs it, demands administrative competence and undermines bureaucratic capacities. Moreover, the way that judicial review will interact with other accountability mechanisms, the political and the managerial, are often unanticipated and unpredictable. The task of institutional designers is therefore not to get the balance right once and for all. It is instead to understand the project for what it is, a project of democratic experimentalism. Democratic governments would surely be incompletely accountable without effective judicial review. But, if “accountability” is the goal, reinforcing or extending judicial review will not always be the answer.

Designing effective systems of judicial review is a deeply empirical enterprise. But it is not, in my view, an enterprise that is much advanced by the types of empirical studies that have most engaged those scholars in political science and law whose interests lie at the intersection of law and politics. There is now a substantial literature in positive political theory which views legal procedure and judicial review as constructed primarily to further the interests of elected representatives. (See, generally Moe) From this perspective legal institutional design reinforces legislative control and electoral democracy. But, leaving aside the incompleteness and post hoc ergo propter hoc quality of much of this literature (Croley, 2008; Green and Shapiro; Kelman) it has little to tell us about the dynamics of how particular systems work. Similarly, the burgeoning literature investigating the effects of judicial ideology on judicial review of administrative action (Czarneski; Ferguson, Babcock and Shane; Revesz; Miles and Sunstein), provides cautionary tales concerning the idealized, apolitical nature of judicial review of administrative action, but
scarce guidance concerning either the normative significance of these findings, or plausible remedies for the political contamination of legal control of bureaucracy that these studies identify.

Empirical studies of the possible role of judicial review in the decline of bureaucratic efficacy may yield more useful information concerning appropriate empirical design. (Carnegie Commission; Mashaw and Harfst, 1990; Mashaw, 1994; McGarity, 1997; Pierce; Strauss, 1992). But, in the end, designing legal institutional arrangements that effectively balance political, legal and managerial accountability in democratic, but necessarily administrative, states is as much art as science. To my mind the more fruitful avenues for the production of “usable knowledge” (Lindblom and Cohen), are those traversed by careful case studies of bureaucratic administration, both over time and across jurisdictions and subject-matter domains. History, sociology and comparative analysis must inform institutional design. Understanding the modal tendencies of systems can often be pursued through statistical inference using parsimonious theories of human behavior. But issues of appropriate balance are ultimately normative judgments, and specific design decisions must respond to complex and particularized contexts. In that enterprise understanding the modal case is only one part of the designers’ tool kit.
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End Notes


3 See discussion in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

4 See discussion in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).


6 See Nash v. Califano, 613 F.2nd 10 (2nd Cir. 1980).


