

LAW, EXPERTISE AND RULEMAKING LEGITIMACY

BY

SIDNEY A. SHAPIRO*

**Request Abstract.*

I. INTRODUCTION

In the 1960s and 1970s, Congress passed nearly all of the health, safety and environmental laws that govern us today. Not to be outdone in the reform department, the courts fashioned a slew of new administrative procedures resulting in a “reformation” of American administrative law as Richard Stewart’s iconic article characterized these developments.¹ Stewart understood the procedures as creating a type of political pluralism that would hold agencies accountable for fulfilling their legislative missions to protect people and the environment.² But, as the same time, environmental and other public interest advocates were lawyers who used the law to contest the legality of agency action.

Administrative law scholarship continues to debate the relative roles of political and legal accountability in legitimating public administration.³ Like Charlotte Johansson and Bill Murray in *Lost in Transition*, however, public administration finds itself in an alien culture when we shift to the political process to legitimize agency policy-making. Once the focus shifts to political process, public interest advocates become just another interest group seeking to use political power to serve their own political preferences. Although these “interests” concern such public goals as clean water, clean air, and the preservation of endangered species, these legislatively

* Frank U. Fletcher Professor of Law, Wake Forest University. I am indebted to Elizabeth Fisher, Professor of Environmental Law, Corpus Christi College, Oxford, as a co-author of articles and a forthcoming book that provided the foundation for the central ideas in this essay. *See infra* notes 8-9 (listing articles and the forthcoming book coauthored by Professor Fisher).

¹ Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975).

² *Id.* at 1670.

³ See Sidney A. Shapiro & Richard M. Murphy, *Eight Things Americans Cannot Figure Out About Controlling Administrative Power*, 61 Admin. L. Rev. 5, 28-29 (2009) (noting continuing debates about accountability).

mandated goals become the personal preferences of a group's members and nothing more regarding what policy an agency should choose among its regulatory options.

This understanding of public administration is misplaced. The laws implemented by agencies are not neutral between protecting people and the environment, and not doing so. When public interest advocates sue an agency claiming that it has not met its statutory obligations, they are seeking to vindicate the public interest as defined by an agency's legislative mandate. The same is true for regulated entities. While Congress has committed the country to protecting people and the environment in the ways indicated in a legislative mandate, the mandate has limitations that an agency cannot exceed. Holding the agency accountable by arguing it has exceeded those limitations likewise vindicates the public interest because it upholds the law establishing the agency's authority to act.

The essay explains why it is worthwhile to untangle the threads of political and legal accountability that run through administrative law. My argument proceeds in five steps.

The first section describes the political process narrative identified in Stewart's *Reformation* article and describes why this narrative considers political accountability as necessary to legitimize rulemaking. From this perspective, legal mandates leave an agency with discretionary and ultimate political choices about which rule to adopt. Stewart characterized the procedural reforms adopted in the 1960s and 1970s as constraining that discretion by using a type of political pluralism. Relatedly, proponents of regulatory negotiation argued it was a more efficient and effective means of achieving the political pluralism discussed by Stewart. The viewpoint that the law largely does not constrain rulemaking has had a lasting and broad impact on administrative law scholarship, as this section will explain.

The second section considers how a legal narrative legitimizes rulemaking in light of Stewart's claim that rulemaking is a discretionary and ultimately political process. It begins with two articles written by Professor Bill Funk that criticized regulatory negotiation as standing

administrative law “on its head.”⁴ Because regulatory negotiation relies on a political deal to legitimize a rule, he argued, it ignores the reason why Congress has established an administrative agency in the first place, which is in the expectation it will use its policy experience and expertise to make a reasoned policy choice.⁵

I then expand on Professor Funk’s analysis using a legal narrative captured by Frank Newman’s christening of administrative law as “legal civics” many years ago.⁶ In this narrative, judicial review verifies that an agency has chosen a policy option within its delegated authority that reflects its policy and technical expertise. Litigants serve the public interest by assisting the courts in determining whether an agency has done so. Moreover, although agencies operate in a political environment, including intervention by Presidents seeking to further their policy preferences, agencies must independently defend their policy choice according to the evidence and policy arguments before it regardless of how political influence motivated their actions.

This narrative, like the political process narrative, is about constraint. The role of administrative law is to ensure that agencies do not exceed their legislative mandate and to protect agency decision-making from political influence that might subvert that mandate. But, as Section Four develops, the previous narrative is incomplete. When Professor Funk objected to regulatory negotiation, he did so on the basis it displaces law and “expertise” in the choice of a regulatory policy.⁷ An ongoing project of the author, separately and with others, has been to establish the “legal civics” narrative suffers from the failure to understand the nature and context of expert public administration.⁸ More specifically, we have overlooked the robust contribution

⁴ William Funk, When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA’s Woodstove Standards, 18 *Env’tl. L.* 55, 92 (1987); William Funk, Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest, 46 *Duke L.J.* 1351, 1376 (1997). For a discussion of these articles, *See infra* notes ___ & accompanying text.

⁵ Funk, Woodstove Standards, *supra* note 4, at

⁶ Walter Gellhorn & Clark Byse, *Administrative Law: Cases and Comments*, at xvii (6th ed. 1974) (quoting Frank C. Newman).

⁷ Funk, Woodstove Standards, *supra* note 4 **Error! Bookmark not defined.**, at 90.

⁸ Sidney A. Shapiro, The Failure to Understand Expertise in Administrative Law: The Problem and Its Consequences, 50 *Wake Forest L. Rev.* 1097 (2015); Sidney Shapiro & Elizabeth Fisher, *Chevron* and the Legitimacy of Expert Public Administration, 22 *Wm. & Mary Bill of Rts. J.* 465, 478-79 (2013); Sidney A. Shapiro, Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis, 53

that expertise can make towards identifying the public interest, as defined in an agency's legislative mandate. Once we no longer treat what goes on inside of an agency as a "black box,"⁹ it is apparent expertise does the heavy lifting when it comes to making is possible for an agency to implement its statutory mission.

The last section considers the implications of the failure of fully acknowledge the essentiality of expertise to the regulatory enterprise. The recognition of this contribution is important for two reasons.

Accounting for expertise gives us a more accurate picture of the degree to which, as is perceived by many, rulemaking at bottom is an inherently discretionary, political process. This perception underlies the interest of scholars to consider ways to bring more political accountability to this "political" process. But, before we take this step, which is challenged by its own accountability issues, we need to have a more accurate understanding of how expertise legitimizes agency action on the basis of reason-giving and policy evidence.

In addition, once we recognize the essentiality of expertise to an agency's mission, we need to consider how administrative law and expertise interact with each other. Administrative law has the potential to support the contribution of expertise to good administration or it can constrain and limit it. We must therefore make administrative law more than a search for constraining agency power. It needs to be about ensuring the capacity of public administration to act on behalf of regulatory beneficiaries. An agency's capacity includes both its legal authority to act and having the expertise it needs to do the job.

Ye administrative law is "legal civics," but if administrative law is to legitimate administrative government, we need have a different conception of what we are doing. To be legitimate, an agency must do more than stay within its legal authority. It must also deliver the goods of protecting people and the environment, just as Congress has required it to do.

Washburn L.J. 1 (2013); Sidney A. Shapiro & Ronald F. Wright, The Future of the Administrative Presidency: Turning Administrative Law Inside Out, 65 U. Miami L. Rev. 577 (2011).

⁹ Sidney A. Shapiro, Rulemaking Inaction and the Failure of Administrative Law, __ Duke L.J. __ (forthcoming 2019).

II. POLITICS AND ACCOUNTABILITY

Stewart's *Reformation* article attributes the concept of administrative law as political process to the fact that when agencies engage in rulemaking the law runs out. Because of the generally ambiguous and vague nature of legislative mandates, an agency's choice of a rule is inherently a discretionary, political act. It is for this reason that the court sought to legitimize the process through the participation of affected parties—a type of political pluralism. As noted, negotiated rulemaking drew on this concept and claimed, "We can do this better." Although the use of regulatory negotiation has tailed off, the understanding that agencies are essentially unconstrained by law in rulemaking continues to be influential. This perception chimes with public choice analyses of agency decision-making, supports the use of presidential administration, and fuels arguments that the administrative state is illegitimate.

A. Political Pluralism to the Rescue

The transformation of administrative law in the 1960s and 1970s, Stewart observed, called "into question its appropriate role in our legal system."¹⁰ Up to that point in time, administrative law had been focused on reconciling "competing claims to government authority and private autonomy by prohibiting official intrusions on private liberty or property unless authorized by legislative directives."¹¹ For this purpose administrative law used the "transmission belt thesis," which treated "the agency as a mere transmission belt for implementing legislative mandates in a particular case."¹² According to this concept, the "imposition of administratively determined sanctions on private individuals must be authorized by the legislature through rules which control agency action," and the role of administrative procedures, including judicial review, is "to ensure the agency's compliance" with the previous

¹⁰ Stewart, *supra* note 1, at 1669.

¹¹ Id. at 1669-70.

¹² Stewart, *supra* note 1, at 1675.

requirement.”¹³ If so, the intrusion was legitimate because it was “commanded by a legitimate source of authority – the legislature.”¹⁴

The transmission belt thesis fell apart in the New Deal because the “broad and novel character of agency discretion could no longer be concealed” once Congress created new agencies with sweeping powers.¹⁵ The conventional understanding is that the New Dealers proposed that expertise could provide the missing legitimacy. According to New Deal proponents, Congress would delegate substantial authority to agencies to address social and economic problems, experts in an agency would identify the best solution to one of those problems according to social, scientific and economic evidence, and their decision-making process would be politically insulated to promote more objective decision-making.¹⁶

By the 1970s, it was widely accepted by the 1970s that expertise could not provide objective solutions to regulatory problems.¹⁷ Nevertheless, Congress continued to delegate significant decision-making authority to agencies.¹⁸ In Stewart’s account, the existence of this discretionary decision-making created a legitimacy gap that was addressed by the courts in the 1960s and 1970s.

The nub of the problem, according to Stewart, was that these new laws, like the New Deal legislation, established a substantial policy space in which agencies operated. Since agencies lacked detailed legal instructions about what action to take within the policy space, they have to “reweigh and reconcile the often nebulous or conflicting policies behind the directives in the context of a particular factual situation with a particular constellation of affected

¹³ Id. at 1672-73.

¹⁴ Id. at 1675.

¹⁵ Id. at 1677.

¹⁶ See Bruce A. Ackerman & William, H. Hassler, *Clear Coal, Dirty Air* 4-6 (1981) (identifying the New Deal model as based on the affirmation of expertise, agency insulation from central political control, and insulation from judicial review).

¹⁷ See Alan Weinberg, *Science and Trans-Science*, 10 *Minerva* 209, 209 (1972) (pointing out the Alvin Weinberg pointed out the gap between pure science and pure policy).

¹⁸ See Stewart, *supra* note 1, at 1684 (noting the substantial discretion delegated to agencies in the 1960s and 1970s).

interests.”¹⁹ This “required balancing of policies,” Stewart concluded, “is an inherently discretionary, ultimately political procedure.”²⁰

Following the adage “if you only have lemons, make lemonade,” the courts engineered a reformation of administrative law that established a “surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision.”²¹ The courts expected agencies to accommodate the “range of affected interests” by adopting three familiar reforms. Rulemaking became a paper hearing process that permitted rulemaking participants to challenge an agency’s information and data in the rulemaking process.²² The liberalization of standing doctrine enabled public interest groups to represent regulatory beneficiaries who suffered an aesthetic, recreational or health or safety risk because of an agency’s failure to regulate sufficiently,²³ which enabled these groups to contest agency rules that were inconsistent with the evidence and arguments presented in their comments. Finally, “hard look” review made it easier for public interest advocates to challenge rules that they thought were not sufficiently protective of people and the environment.”²⁴

Because of the previous innovations an agency had an incentive to pay attention to rulemaking comments, public interest commentators gained political leverage to negotiate with an agency over the outcome. Despite the lack of guidance in the agency’s mandate, the

¹⁹ *Id.* at 1684.

²⁰ *Id.*

²¹ *Id.* at 1670.

²² Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Procedural Reform of the “Hard Look,”* 92 Notre Dame L. Rev. 331, 338 (2016). Although the language of the APA did not so require, the courts interpreted it to require agencies reveal all of the scientific and technical data and methodologies underlying a proposed rule,²² *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977), and to respond to all significant arguments and evidence presented during the comment process in its final justification for the rule.

²² *Portland Cement Ass’n v. Ruckelhaus*, 486 F.2d 375, 394 (D.C. Cir. 1973).

²³ *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Village of Elk Grove Village v. Evans*, 997 F.2d 328 (7th Cir. 1983).

²⁴ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970). In Judge Harold Leventhal’s formulation, a court must ensure that an agency has given “reasoned consideration to all the material facts and issues,” and if a judge became “aware ... that the agency has not really taken a ‘hard look’ at the salient problems,” the court should remand the action back to the agency for a more satisfactory explanation. *Id.* Soon, however, hard look review became associated with the idea that a court should take a ‘hard look’ at an agency’s explanation. Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the ‘Hard Look’*, 92 Notre Dame L. Rev. 331, 346-47 (2016).

rulemaking process therefore legitimated a rule by inviting public involvement and ensuring that input could not be ignored. Or so the narrative claimed.

The idea that rulemaking was a form of political pluralism encompassed a normative theory of democracy popular with political scientists in the 1950s.²⁵ In light of the fact that many citizens fail to vote, then and now, the pluralists were concerned about whether legislative decisions were actually democratic. They argued there were so despite low turnouts in elections because officials responded to interest group competition in determining public policies.²⁶ The pluralists characterized those officials as “referees of group conflict, registers of group demands, or ratifiers of the outcomes of intergroup contests.”²⁷ Their “sole function is to register the opposing strengths of the competing interest groups and to record the result in the form of government policy.”²⁸ Nevertheless, pluralists expected continual bargaining would produce a fair and equitable division of the benefits and burdens of government.²⁹ Because multiple interest groups pressured government, pluralism prevented the government from favoring some interests over others.³⁰ In short, the contest over government policy was a “fair fight.”³¹

It did not take long for other political scientists to doubt the accuracy of this theory.⁸¹ As E. E. Schattschneider deftly explained, “The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent.”⁸² Stewart, likewise, was skeptical that the reforms being undertaken would “ensure all relevant interests will be represented before agencies.”⁸³ He therefore doubted administrative law would produce an interest group process that produced “outcomes that better serve society as a whole.”⁸⁴

²⁵ See, e.g., Robert Dahl, *Who Governs* (1961); David Truman, *The Governmental Process: Political Interests and Public Opinion* (1st ed. 1951).

²⁶ Truman, *supra* n. , at 106.

²⁷ David Truman, *The Governmental Process* xxv (2nd ed. 1964)

²⁸ Daniel Hays Lowenstein, Political Bribery and the Intermediate Theory of Politics, 32 *UCLA L. Rev.* 785, 838 (1985).

²⁹ Steven P. Croley, Theories of Regulation: Incorporating the Administrative Process, 98 *Colum. L. Rev.* 1, 31-34 (1998)

³⁰ Robert Dahl, *Who Governs?: Democracy & Power in an American City* (1961).

³¹ Jud Mathews, Minimally Democratic Administrative Law, 68 *Ad. L. Rev.* 605, 614 (2016).

Stewart's prediction turned out to be accurate. We know regulated entities are far better represented in the rulemaking process than environmental and other public interest groups.⁸⁵ Thus, as Stewart predicted, political pluralism is wanting as a method of legitimacy even if one subscribes to administrative law as political process. But, in the meantime, regulatory negotiation became the flavor of the day in administrative law, by expanding on Stewart's idea of rulemaking pluralism.

B. "Reg-Neg" As "Better" Political Pluralism

Proponents of regulatory negotiation saw the process as a way of avoiding, or at least reducing, the time, expense, and the lack of legitimacy associated with agency rulemaking.³² Whether regulatory negotiation achieves the first two purposes is not apparent,³³ but my interest here is with the last claim that regulatory negotiation is a way of addressing the lack of legitimacy of the rulemaking process.

In a regulatory negotiation, an agency forms an advisory committee of persons who can adequately represent all of the various interest groups who have a stake in the outcome of a rule.³⁴ The agency also agrees to propose any rule that is the consensus of the negotiating committee.³⁵ If the committee members reach a consensus, all of the members except the agency agree ahead of time that they will support the proposed rule and not challenge any final rule in court consistent with the proposed rule.³⁶

Phillip Harter, a leading (probably the leading) proponent of regulatory negotiation explained, picked up on the idea that rulemaking is an inherently discretionary process. He explained that agencies lacked a concrete legal basis for making decisions because of vague and

³² See, e.g., Phillip Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L.J. 1, 6 (1982).

³³ See David Wendel, *Negotiated Rulemaking: An Analysis of Administrative Issues and Concerns*, 41 Admin. L.J. 227, 230, 247-48 (1990) (describing the evidence why regulatory negotiation may not decrease the time and expense of rulemaking); Peter H. Schuck & Steven Kochevar, *Reg Neg Redux: The Career of a Procedural Reform*, 15 Theoretical Inquiries in Law 417, 433-440 (2014) (citing and explaining the literature debating the effectiveness of regulatory negotiation).

³⁴ See *Id.* at 239 (describing the regulatory negotiation process).

³⁵ *Id.* at 230.

³⁶ Funk, *Woodstove Standards*, *supra* note 4, at 79.

ambiguous mandates. Necessarily, this meant that the decisions agencies made were “political” because there was “no purely rational or right answer.”³⁷ But the

current regulatory procedures do not permit the parties to participate directly—to share in reaching the ultimate judgment, which is what provides the legitimacy to political decisions. Although the agency, like an umpire, makes the decision alone, a multitude of political forces influence the decision. Because there is no overriding or generally accepted reasons to have faith in the choices made by the agencies, rules issued after even the most ardent hybrid [rulemaking] process lacked legitimacy.³⁸

The upshot, Harter concluded, was that the adversarial system adopted by rulemaking in the reformation failed “to provide a mechanism for deciding the inherently political issues in a politically legitimate way.”³⁹ By comparison, the rule in regulatory negotiation was based on the consensus of persons representing all of the interests at stake in a rulemaking, “which is, after all, the nature of political decision-making.”⁴⁰

C. Irreducible Discretion

The claim that agency rulemaking involves discretionary political choice has resonated with many scholars and lawyers. Academics,⁴¹ the Administrative Conference of the United States,⁴² and the Clinton administration⁴³ all had good things to say about regulatory negotiation. In fact, there was hardly a negative voice present at the conception of the idea except Professor Funk.⁴⁴ These endorsers shared the understanding of regulatory negotiation as constraining agency discretion by making it more politically accountable.

The perception that rulemaking involves irreducible discretion has fueled three additional trends. For one thing, it chimes with a considerable literature that models administrative

³⁷ Harter, *supra* note 32, at 17.

³⁸ *Id.* at 17-18.

³⁹ *Id.* at 18.

⁴⁰ *Id.*

⁴¹ See Funk, *Bargaining*, *supra* note 4, **Error! Bookmark not defined.**, at 1353 (discussing the supportive academic literature).

⁴² See *id.* at 1353-54 (explains the support of ACUS).

⁴³ Office of the Vice President, *Accompanying Report of the National Performance Review: Improving Regulatory Systems* 3 (1993).

⁴⁴ Funk, *Bargaining*, *supra* note 4, **Error! Bookmark not defined.**, at 1353-54, 1365-66.

outcomes as the product of political considerations. Positive political theory treats agency choice of policies as the product of political power, strategic behavior, and political negotiation.⁴⁵ Similarly, “[p]ublic choice theory posits that legislators, executive branch officials, and agency administrators are in business for themselves; that is, they are motivated by the same types of incentives that motivate their counterparts in the private sector.”⁴⁶

In addition, the White House has inserted itself into the rulemaking process through the Office of Regulatory and Information Affairs (OIRA) and by increasing the number of presidential appointees in agencies.⁴⁷ Presidential administration has been defended as necessary to address unaccountable agency decision-making. For some, presidential control is constitutionally mandated⁴⁸ or statutorily implied absent a contrary legislative indication.⁴⁹ Whether so mandated or not,⁵⁰ presidential administration, at least in theory, legitimizes rulemaking by subjecting discretionary political choices by agencies to the oversight, if not direction, of the only federal officer elected by the entire country. As Professor Criddle has pointed out, “the underlying normative vision of presidential administration as a formula for strengthening popular representation in agency rulemaking has gained widespread acceptance and continues to attract adherents today.”⁵¹ The claim that the president is accountable to the electorate for the decisions made in presidential administration is contestable, however, as I will discuss in the final section.⁵²

⁴⁵ Jerry Mashaw, *Greed, Chaos and Governance: Using Public Choice to Improve Public Law* (1997).

⁴⁶ Steven J. Eagle, *Economic Salvation in a Restive Age: The Demand for Secular Salvation Has Not Abated*, 56 Case W. Res. L. Rev. 569, 574 (2006)

⁴⁷ Shapiro & Wright, *supra* note 8, at 583.

⁴⁸ See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 549 (1994) (defending a “unitary president” in which the Constitution gives the President final word over the agency’s exercise of discretion regarding the timing or substance of rulemaking).

⁴⁹ Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2251 (2001) (arguing Congress signals that the President has directive authority over agency rulemaking where it fails to designate an agency as “independent”).

⁵⁰ See, e.g., Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 Duke L.J. 963 (2001) (opposing the unitary president argument)

⁵¹ Even J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Rulemaking*, 88 Texas L. Rev. 441, 447 (2010)

⁵² See *infra* notes __ & accompanying text.

Finally, the perceived lack of accountability of agency rulemaking has led some to doubt the democratic legitimacy of the entire enterprise. According to these commentators the “bureaucracy has sprawled,”⁵³ public administration is a “monstrosity,”⁵⁴ administrative law is illegal⁵⁵ and illiberal,⁵⁶ and the Constitution that protected liberty has been lost.⁵⁷ For Phillip Hamburger, echoing the description of rulemaking as a discretionary political action, “administrative law has been the means by which a powerful class has enthroned its own authority within the form of republican government.”⁵⁸

There has been vigorous pushback to these three developments,⁵⁹ and I join in this dissent. As I begin to develop next, administrative law does not leave agencies with unconstrained direction contrary to the depiction of rulemaking by Stewart and Harter.

III. LAW AND ACCOUNTABILITY

As noted, Professor Funk objected that regulatory negotiation “stands administrative law ‘on its head.’”⁶⁰ This section begins with Professor Funk’s objections to regulatory negotiation, and then enlarges on his analysis to describe the legal narrative of legitimacy employed by Professor Funk.

A. Finding Regulatory Negotiation Objectionable

Professor Funk mounted two objections to regulatory negotiation. As he detailed in a case study of a regulatory negotiation conducted by EPA, the process can result in the adoption of an illegal rule that no one challenges in court. More broadly, because an agency’s responsibility to

⁵³ Christopher J. Walker, Restoring Congress's Role in the Modern Administrative State, 116 Michigan L. Rev. 1102 (2018).

⁵⁴ Senator Orrin Hatch, A Constitutional Conservatism For Our Time, 19 Tex. Rev. L & Pol. 206 (2015).

⁵⁵ Philip Hamburger, Is Administrative Law Unlawful?, (2014).

⁵⁶ Douglas Ginsburg and Steve Menashi, Our Illiberal Administrative Law, 10 NYU J. L & Liberty 477 (2016).

⁵⁷ Randy Barnett, Restoring the Lost Constitution: The Presumption of Liberty (rev. ed. 2014); Richard Epstein, The Classic Liberal Constitution: The Uncertain Quest for Limited Government (2014).

⁵⁸ Hamburger, *supra* note 55, at 11.

⁵⁹ See, e.g., Adrian Vermeule, 'No': Review of Philip Hamburger, “Is Administrative Law Unlawful?,” 93 Tex. L. Rev. 1547 (2015).

⁶⁰ Funk, Woodstove Standards, *supra* note 4, at 92. See also Funk, Bargaining, *supra* n note 4, at 1376 (finding “regulatory negotiation reduces the agency to the level of mere participant in the formulation of the rule and essentially denies the agency any responsibility beyond effectuating the consensus achieved by the group”).

achieve a consensus among interest groups, it abandons its obligation, assigned to it by Congress, to use its policy expertise to choose an appropriate regulatory policy, a duty that administrative law has traditionally enforced.

1. Illegal Rules

The Woodstove Standards rule adopted by EPA based on a regulatory negotiation illustrates the potential of regulatory negotiation to lead to an illegal rule.⁶¹ The purpose of the rule was to reduce the health risk associated with the smoke in the atmosphere from wood burning stoves.⁶² The rule required woodstove manufacturers to install equipment on a stove that would abate the chemical in the smoke causing the health risk and to label stoves as in compliance with this requirement.⁶³ Although the rule also forbade individuals from using a stove that was not in compliance, the rule was only enforceable against the manufacturers and not those persons who bought and used the stoves.⁶⁴

EPA grounded the rule in the Clean Air Act, but it regulates those who use the stove, and there is no legal authority to establish manufacturing requirements for a product and ban the sale of products that do not meet those requirements.⁶⁵ Moreover, since the rule is not enforceable against stove owners,⁶⁶ EPA in effect is not regulating the source of the smoke at all as it is required to do.

2. Deal-Maker, Not Decision-Maker

As a second objection, Professor Funk explained how regulatory negotiation changes the role of an agency from being an independent decision-maker to brokering a deal among interest

⁶¹ See Funk, Woodstove Standards, *supra* note 4, at 66-67 (finding the legal section relied on by EPA as authorizing the rule did not do so, and the requirements imposed by the rule were not legally authorized).

⁶² *Id.* at 57-60 (describing the health risks associated with woodstove emissions).

⁶³ *Id.* at 65-66.

⁶⁴ *Id.* at 66.

⁶⁵ See *id.* at 67-78 (detailing the reasons why the woodstove standards rule was illegal).

⁶⁶ *Id.* at 66.

groups. As a result of this switch, the “theory and principles of regulatory negotiation are at war with the theory and principles of American administrative law applicable to rulemaking.”⁶⁷

Whether an agency’s “statutory directions may be specific or general,” it’s “actions are justified and legitimized by their service to those directions.”⁶⁸ This means the “statute is not just a brake or anchor on agency autonomy; it is the source and reason for an agency’s actions.”⁶⁹ By comparison, when regulatory negotiation looks to the political compromise of the committee members to legitimize a rule,” the action” diminishes the sanctity of the law as both the source of agency authority and its limits.”⁷⁰

Professor Funk acknowledges that we have lost faith long ago in the idea that “politically neutral administrators could determine finite and correct answers to the problems of modern industrial society.”⁷¹ Thus, “[w]hile the [Administrative Procedure Act] perhaps reflects a loss of the naïve faith in the natural ability of expert bureaucrats to scientifically discover solutions to society’s problems, it does not indicate a lessened determination to use agencies and rulemaking to solve politically perceived problems.”⁷² As he appreciates, “What is meant by the public interest is not always clear.... Whatever it is, it is to be distinguished from the public choice or interest representation models of the administrative state.”⁷³

Regulatory negotiation, in other words, is not the “reasoned decision-making” which is the “fundamental concept” of administrative law.⁷⁴ As the oft-quoted words of *Scenic Hudson Preservation Conference v. FPC* indicate, “an agency’s role as representative of the public interest ‘does not permit it to act an umpire calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the

⁶⁷ *Id.* at 89.

⁶⁸ Funk, Bargaining, *supra* note 4, at 1374.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1375.

⁷¹ Funk, Woodstove Standards, *supra* note 4, at 90.

⁷² *Id.* at 90.

⁷³ Funk, Bargaining, *supra* note 4, at 1383.

⁷⁴ *Id.* at 1380.

[agency].”⁷⁵ Thus, in conclusion, regulatory negotiation “stands this role on its head, first, by reducing the agency to the level of a mere participant in the formulation of a rule, and second, by essentially denying that the agency has any responsibility beyond giving effect to the consensus achieved by the group.”⁷⁶

Others have joined Professor Funk’s criticism,⁷⁷ but other scholars have defended the process.⁷⁸ In particular, Professors Schuck and Kochevar find Funk’s criticisms “wide of the mark” because “rules must still pass through notice and comment, and must be subject to the normal review.”⁷⁹ If, therefore, “a negotiated rule really did flout the public interest or meaningfully depart from norms of reasoned decision-making, we should expect notice and comment procedures and judicial review to detect and reject it.”⁸⁰

Whether or not this happens, however, is contestable. After all, the agency and some key major players have agreed on the proposed rule, which likely makes the ultimate outcomes subject to path dependency.⁸¹ In any case, Professor Funk’s objection was that the proposed rule is not necessarily the one that an agency would have chosen on the basis of its technocratic and other expertise. Schuck and Kochevar object, however, that Funk’s “technocratic account is wishful thinking; claims of rational justifications for rules are often smokescreens for interest group horse-trading with the agency playing mediator, orchestrator, or auctioneer.”⁸²

⁷⁵ Funk, Woodstove Standards, *supra* note 4, at 92.

⁷⁶ *Id.* at 92. See also Funk, Bargaining, *supra* note 4, at 1376 (finding “regulatory negotiation reduces the agency to the level of mere participant in the formulation of the rule and essentially denies the agency any responsibility beyond effectuating the consensus achieved by the group”).

⁷⁷ See, e.g., Susan Rose-Akerman, Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation, 43 Duke L.J. 1206, 1211-12; 1216-17 (1994).

⁷⁸ See, e.g., Schuck & Kochevar, *supra* note 33; Jody Freeman & Laura I. Langbein, Regulatory Negotiation and the Legitimacy Benefit, 49 N.Y.U. Env’tl L.J. 60 (2000).

⁷⁹ Shuck & Kochevar, *supra* note 33, at 429.

⁸⁰ *Id.* at 429-430.

⁸¹ See S.J. Liebowitz & Stephen E. Margolis, Path Dependence, Lock-In, and History, 11 J. Law, Econ. & Org. 205, 206-207 (1995) (explaining how new decisions are a function of previously made decisions).

⁸² Shuck & Kochevar, *supra* note 33, at 431.

This argument takes us back to Stewart’s claim that rulemaking “is an inherently discretionary, ultimately political procedure.”⁸³ But, as the next subsection discusses, legal expectations deeply penetrate the rulemaking process. In addition, Section IV explains because expertise makes a more robust contribution to identifying useful policy solutions than Schuck and Kochevar acknowledge, it serves as a check on political influence.

B. Using Law for Legitimacy

Professor Funk’s criticism reflects a legal process narrative that legitimates rulemaking as a reasoned search for the public interest. In this narrative, administrative law aligns the outcome with Congress’ intent in two ways. First, judicial review verifies an agency has chosen a policy that is it the policy space created by its legislative delegation. Second, judicial review confirms the agency’s choice of policies is based on reasoned decision-making. The decision, in other words, is the product of the agency’s expertise and judgment.

Two familiar cases—*Chevron*⁸⁴ and *State Farm*⁸⁵—provide the foundation of this narrative. Both establish an expectation that an agency has chosen a policy option within its delegated authority using its policy expertise and judgment.

1. Chevron

The two-step test of legislative authority adopted in *Chevron* has been indelibly imprinted onto administrative law,⁸⁶ although its future has been called into question by some of the Justices.⁸⁷ Bypassing this possibility for a moment, I turn to how *Chevron* can be read as supporting the legal narrative just described.

⁸³ Stewart, *supra* note 1 at 1684.

⁸⁴ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

⁸⁵ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

⁸⁶ See Michael Pappas, No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the *Chevron* Doctrine, 39 *McGeorge L. Rev.* 977, 978 n. 5 (2008) (acknowledging the enormous number of scholarly articles written on *Chevron* and finding 6,173 such articles).

⁸⁷ See Valerie C. Brannon & Jared P. Cole, Deference and its Discontents: Will the Supreme Court Overrule *Chevron*?, Congressional Research Service, Oct. 11, 2018 (describing judicial opposition to *Chevron*), <https://fas.org/sgp/crs/misc/LSB10204.pdf>.

To restate the familiar, a court at step asks whether “Congress has directly spoken to the precise question at issue.”⁸⁸ Put another way, a court is asking whether Congress authorized or precluded the agency’s policy choice. At step two, therefore, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”⁸⁹

The Court, as most readers are aware, was willing to defer to the agency’s interpretation at step two because the choice of a definition implicated policy considerations for which the agency was better suited. As it noted, “The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”⁹⁰ Regarding the resolution of policy issues, the Court pointed out, “Judges are not experts in the field, and are not part of either political branch of the Government.”⁹¹

If the Supreme Court were to overrule *Chevron*, a court would choose the definition of a vague or ambiguous term without deferring to an agency’s interpretation. It seems more likely, however, that the Court will continue its current approaches to avoiding step two of resolving cases at step one or avoiding *Chevron* altogether.⁹² Regarding either change, the elimination of deference to an agency’s statutory interpretation is likely to limit the contribution that expertise can make in deciding whether a rule is within the agency’s policy space, as the last section of this essay discusses.⁹³

2. *State Farm*

The second step of *Chevron* requires verification that an agency’s has chosen a reasonable interpretation of an ambiguous or vague statutory term or terms, which means it is within the policy space that Congress created. By comparison, *State Farm* inquires into whether

⁸⁸ 467 U.S. at 842.

⁸⁹ *Id.* at 843.

⁹⁰ *Id.* at 843

⁹¹ *Id.* at 865–66

⁹² See, e.g., *King v.*

⁹³ See *infra* notes __ & accompanying text.

the policy is consistent with the evidence and arguments present in a rulemaking.⁹⁴ In words that are now familiar, the Court obligated an agency to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”⁹⁵ The examples the Court then offered are connected with the policy rationality of its choice. *State Farm* notes that an agency would fail the “rational connection” expectation if it “has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”⁹⁶

Some scholars have suggested the second step of *Chevron* and *State Farm* engage in the same inquiry or at least overlap.⁹⁷ Regardless, it is clear that administrative law attempts to furnish a set of legal expectations that filter or constrain agency policy choices based on political influence. The suggestion that the choice of a rule is a discretionary political act is therefore wide of the mark. It may be true that an agency is free to choose more than one policy that is authorized by its statutory mandate. This is the concept that Congress creates a policy space, explicitly by giving an agency that choice or implicitly by using statutory language that is vague or ambiguous. But an agency is not entirely free to choose any such policy. It must support that policy choice as consistent with the policy evidence and arguments before it. While a policy choice can be the result of political influence, the agency must still reconcile it with the expectations established by *Chevron* and *State Farm*.

⁹⁴ 463 U.S. at 42.

⁹⁵ *Id.* at 43.

⁹⁶ *Id.* at 44.

⁹⁷ See, e.g., RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.4, at 604 (5th ed. 2010) (“[T]he question whether an agency engaged in reasoned decision-making within the meaning of *State Farm* often is identical to the question a court must answer under step two of the test announced in *Chevron* ...--is an agency's construction of an ambiguous provision in an agency-administered statute reasonable?”); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 Chi. K. L. Rev. 1253, 1263 (1997) (explain step two of *Chevron* as arbitrariness review).

Stewart perceived correctly that legal process does not identify one policy that must be adopted. Modern rulemaking is hardly the “transmission belt” concept of legitimacy of old. But it is an overstatement to equate the agency’s policy flexibility with the idea that rulemaking is therefore “a inherently discretionary, ultimately political procedure.”⁹⁸ It may be a political process, but it is deeply infused with legal expectations and requirements that constrain and channel political input. It is, in a phrase, “legal civics.”

IV. EXPERTISE

The insistence that rulemaking is an inherently discretionary and ultimately political act fails to credit how administrative law insists on a reasoned judgment in the choice of a rule. It is misleading in another significant way. It disregards the role of expertise in an agency. The idea that agency expertise might somehow discipline the agency’s policy process is dismissed as fanciful since, as all concede, expertise cannot identify which policy choice is the best one.⁹⁹ As a result, administrative law scholarship for the most part ignores the relationship between expertise and decision-making in rulemaking.¹⁰⁰ As I written about in some detail,¹⁰¹ studying expertise reveals that it is complex and multifaceted, and therefore it makes a more robust contribution to public administration than is acknowledged in administrative law. Despite this complexity, two general insights convey how expertise discipline an agency to identify, as best it can, which policy options best implement its statutory responsibilities.

First, experts are trained to evaluate policy evidence and assess its reliability and significance according to the professional standards that are part of their education and professional socialization. This orientation requires them to assess policy evidence and arguments as objectively as possible including without regard to self-interest or their own

⁹⁸ Stewart, *supra* note 1 at 1684.

⁹⁹ See *supra* notes ___ & accompanying text; see also Sidney A. Shapiro, “Political” Science: Regulatory Science After the Bush Administration, 4 Duke J. Const. L. & Pub. Pol’y. 31, 34-35 (2009) (explaining why Progressive’s faith that expertise could provide objective answers to regulatory issues was mistaken).

¹⁰⁰ See Shapiro, Failure to Understand, *supra* note 8, at 1098 (reporting a Westlaw search focused on expertise and administrative law produced only brief references to expertise, which recognized its significance, but did not discuss in any detail what it is or the precise role that it plays in public administration).

¹⁰¹ See *supra* note 8

political preferences.¹⁰² Lawyers, for example, are trained to identify an agency’s legal options in an impartial manner, and then to implement the option chosen by administrators. Likewise, scientists and social scientists are trained to interpret available evidence in an impartial manner.

Experts are therefore able to offer agency administrators professionally formed advice about agency options. There is a policy development process in well-managed agencies, which employs agency experts to assess evidence and arguments in an ongoing process.¹⁰³ As policy proposals bubble up from the staff to top administrators, the output reflects this professional input. In short, unless administrators chose not to employ this process or ignore it somehow, agency professionals will speak “truth to power.”¹⁰⁴ In fact, the efficacy of this expertise and professionalism is evident from the steps various administrations hostile to regulation have taken to sidestep staff advice, alter it in ways that are more politically palatable, or avoid the input in other similar tactics.¹⁰⁵

Second, professionals in the agency engage in discursive decision-making process in which persons trained in various disciplines interact with each other inside and outside of the agency to debate and dispute arguments and information put forward in the rulemaking process.¹⁰⁶ This process, which is based on reasons and evidence, engages in reconciling and

¹⁰² See Shapiro, Failure to Understand, *supra* note 8, at 1131-33 (finding professionalism, establishes an environment in which scientists, lawyers, and other professionals are expected to act according to their professional training); Shapiro, Missing Institutional Analysis, *supra* note 8 **Error! Bookmark not defined.**, at 7 (same).

¹⁰³ Shapiro, Failure to Understand, *supra* note 8, at 1105-1116 (describing the expert policy development process).

¹⁰⁴ See Shapiro, Fisher & Wagner, *supra* note **Error! Bookmark not defined.**, at 490 (pointing out the bureaucracy speaks truth to power when professionals challenge political appointees by indicating that how the policies that they favor are inconsistent with scientific and policy evidence).

¹⁰⁵ See Thomas O. McGarity & Wendy E. Wagner, Deregulation Using Stealth “Science” Strategies, __ Duke L.J. __ (forthcoming 2019) (detailing the extensive lengths that administrations hostile to regulation have used to stop scientists from influencing policy choices inside of agencies).

¹⁰⁶ See Shapiro, Missing Institutional Analysis, *supra* note 8, 9-12 (explaining how discursive institutionalism constrains self-interest and legitimizes administrative action); Shapiro, Fisher & Wagner, *supra* note 8, at 498 (describing how EPA’s interactions with experts, the public, and other technical staff throughout the NAAQS process are iterative and discursive).

accounting for conflicting evidence and arguments, disciplinary perspectives, political demands, and legal commands.¹⁰⁷

This is not a claim that agency policy development is untainted by political considerations by administrators and policy professionals in the agency. These are part of the mix in decision-making, and agency experts can help administrators assess and react to these pressures.¹⁰⁸ But this description of what happens inside of an agency is a far cry from the discretionary and inherently political process that is the assumption of the political process narrative.

Still, not all agencies operate in the manner just described. Some agencies are internally dysfunctional, and it is possible that politics may have a greater influence in those agencies.¹⁰⁹ As mentioned earlier, administrations seeking to avoid regulation or to weaken it have adopted various political tactics to stop scientists and others from speaking truth to power. As well, the failure of the Mineral Mining Service (MMS) to prevent the BP oil spill, which resulted in the deaths of eleven workers and the worst environmental disaster in the United States,¹¹⁰ comes to mind because it is clear that the oil industry largely controlled the policy process in the agency.¹¹¹

The possibility that an agency may go off the rails in one of these or other ways, however, does not deny the potential to create a well-managed agency in which there is a robust

¹⁰⁷ See Shapiro, Failure to Understand, *supra* note 8, at 1100 (noting that discursive practices deter self-interested behavior by expecting that experts will offer reasons for their conclusions and will contest the claims of other experts).

¹⁰⁸ See *supra* notes ___ & accompanying text.

¹⁰⁹ See Shapiro, Missing Institutional Analysis, *supra* note 44, at 27 (explaining that the creation and maintenance of professionalism and a discursive process of policy evaluation depends on good management)

¹¹⁰ Rebecca M. Bratspies, A Regulatory Wake-Up Call: Lessons from BP's Deepwater Horizon Disaster, 5 Golden Gate U. Env'tl. L.J. 7, 8 (2011).

¹¹¹ See Alyson Flournoy, et. al., Ctr. For Progressive Reform, Regulatory Blowout: How Regulatory Failures Made the BP Disaster Possible and How the System Can Be Fixed to Avoid a Recurrence 3 (2010) "Over the course of several administrations, the MMS was 'captured' by the oil industry, and came to see industry, rather than public, as its constituency," and that this "made regulators particularly subject to pressure and influences from industry," producing "an appalling lack of energy in its efforts to protect against industry excesses"), available at http://www.progressivereform.org/articles/BP_Reg_Blowout_1007.pdf.

internal system of professionalism and a discursive reason-giving. When that happens, as is taken up next, law and expertise work hand in hand to establish the legitimacy of rulemaking.

V. CONCLUSION: RETHINKING LAW AND EXPERTISE

The abiding question for administrative law scholarship is how to fit “the ‘round peg’ of administrative government into the ‘square hole’ of the nation’s constitutional culture.”¹¹² There is general agreement about the contribution of legal procedures and judicial review to this enterprise, but scholars split over the extent to which the political process can and should also play a legitimating role.

The debate about regulatory negotiation illustrates this disagreement. Supporters see it as a useful approach in appropriate circumstances because it brings political pluralism to the table, but as Bill Funk pointed out, the process in effect displaced, or least circumvented, how administrative law normally screens political input. While administrative law opens the doors of agencies to political interests and elected officials, it also requires that agencies justify a rule as reasonable in light of the evidence and arguments regardless of the political influence that might have occurred.

Although I have come down on the side of retaining that approach, this essay is about the failure to acknowledge the contribution that expertise makes to legitimize rulemaking. Recognizing this contribution is crucial for two reasons.

First, bringing expertise into the frame gives us a more accurate picture of the degree to which, as is perceived by many, rulemaking at bottom is an inherently discretionary, political process. This claim leads scholars to look for ways to bring more political accountability to this “political” process. But, before we take this step, which is fraught with its own accountability challenges, we need to have a more accurate understanding of how both law and expertise legitimize agency action on the basis of reason-giving and policy evidence.

¹¹² Sidney A. Shapiro, to Administrative Law, 2005 Issues in Legal Scholarship, 1, 3.

Second, once we recognize the essentiality of expertise to an agency's mission, we need to consider how administrative law and expertise interact with each other. Administrative law has the potential to support the contribution of expertise to good administration or it can constrain and limit it.

Given this interaction, Professor Liz Fisher and I argue in a forthcoming book administrative law should be about ensuring the capacity of public administration to act on behalf of regulatory beneficiaries.¹¹³ Capacity means an agency has both the necessary legal authority and the expertise it needs to do the job. For us, capacity is about legitimacy. Rulemaking is legitimate when Congress has authorized it and when an agency has relied on its expertise and expert judgment to choose a regulatory policy. When this happens, the agency has done what it was instructed to do, and it is this connection to Congress' intent that makes it democratically legitimate.

As an example, consider the possibility, discussed earlier, that the Supreme Court will overrule *Chevron* and no longer defer to an agency's construction of an ambiguous or vague statutory term or terms.¹¹⁴ The abandonment of *Chevron* necessarily will limit the contribution that expertise can make in choosing an appropriate rule. Once judges take it upon themselves to resolve statutory ambiguities or define vague terms, we lose the contribution that expertise makes towards resolving the policy issue or issues that underlie the definition of the term or terms.

This is only one illustration of how administrative law impacts the use and contribution of expertise,¹¹⁵ and this is not the opportunity to pursue further ramifications. Instead, I end where I started. Bill Funk's objection to regulatory negotiation points the way to how law and expertise can create the capacity of government to choose reasonably policies to protect people

¹¹³ Fisher & Shapiro, supra note **Error! Bookmark not defined.**

¹¹⁴ See *supra* notes ___ & accompanying text.

¹¹⁵ For discussion of additional interactions, see, e.g., Shapiro & Fisher, Legitimacy of Expert Public Administration, supra note 8 (discussing how judicial approaches to step one of *Chevron* impact the contribution of expertise to effective governance).

and the environment, and because of this potential, we must be careful not to allow political input to overwhelm this system or displace it.