

# ARTICLES

## LAW, EXPERTISE AND RULEMAKING LEGITIMACY: REVISITING THE REFORMATION

BY

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*In the 1960s and 1970s, 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. Once we expect administrative procedures to legitimize rulemaking by promoting interest group political pluralism, however, we lose sight of public administration as a political-legal system. There is, an even deeper problem, however. By focusing exclusively on constraint, both proponents and opponents of regulation ignore the contribution that expertise makes to the legitimation of administrative law. 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 be able to protect people and the environment as Congress has required it to do. Administrative law, therefore, must facilitate that mission as well as constrain it.*

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## 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.<sup>1</sup> Stewart understood the procedures as creating a type of interest representation political pluralism that would hold agencies accountable for fulfilling their legislative missions to protect people and the environment.<sup>2</sup> But, at 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 legitimizing public administration.<sup>3</sup> Like Scarlett Johansson and Bill Murray in *Lost in Translation*, however, administrative law finds itself in an alien culture when we expect administrative procedures to legitimize rulemaking by promoting political pluralism. 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 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. While agencies obviously operate in a political system and are influenced by it, the fact remains that 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 ensure the pursuit of the public interest as defined by an agency’s legislative

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<sup>1</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1669 (1975).

<sup>2</sup> *Id.* at 1670.

<sup>3</sup> See Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can’t Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 28 (2009) (noting continuing debates about accountability).

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. In short, we have a political-legal system, not just a political system.

The Article 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.

Part II 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.<sup>4</sup> Stewart characterized the procedural reforms adopted in the 1960s and 1970s as constraining that discretion by using a type of interest representation political pluralism.<sup>5</sup> Relatedly, proponents of regulatory negotiation argued in the late 1980s and early 1990s that it was a more efficient and effective means of achieving the political pluralism discussed by Stewart.<sup>6</sup> The viewpoint that the law largely does not constrain rulemaking has had a lasting and broad impact on administrative law scholarship, as this Part will explain.

Part III 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 William (Bill) Funk that criticized regulatory negotiation as standing administrative law "on its head."<sup>7</sup> 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 reasoned choices.<sup>8</sup>

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.<sup>9</sup> 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

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<sup>4</sup> Stewart, *supra* note 1, at 1682.

<sup>5</sup> *Id.* at 1683.

<sup>6</sup> Jody Freeman, *The Private Role in the Public Governance*, 75 N.Y.U. L. REV. 543, 654–55 (2000).

<sup>7</sup> William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55, 92 (1987) [hereinafter Funk, *Woodstove Standards*]; William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1376 (1997) [hereinafter Funk, *Bargaining Toward the New Millennium*]. For a discussion of these articles, see *infra* notes 78–97 and accompanying text.

<sup>8</sup> Funk, *Woodstove Standards*, *supra* note 7, at 94.

<sup>9</sup> WALTER GELLHORN & CLARK BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS*, at xvii (6th ed. 1974) (quoting Frank C. Newman).

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 Part IV develops, this narrative is incomplete. When Professor Funk objected to regulatory negotiation, he did so on the basis that it displaces law and “expertise” in the choice of a regulatory policy.<sup>10</sup> An ongoing project of the author, separately and with others, has been to establish that the “legal civics” narrative suffers from the failure to understand the nature and context of expert public administration.<sup>11</sup> More specifically, we have overlooked the robust contribution that expertise can make towards delivering 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,”<sup>12</sup> it is apparent expertise does the heavy lifting when it comes to making it possible for an agency to implement its statutory mission.

Part IV considers the implications of the failure to 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 and it can constrain and limit it. We must therefore make administrative law more than the black box version of 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. If administrative law is to facilitate both of these objectives, legal doctrines must be based on an understanding of expertise.

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<sup>10</sup> Funk, *Bargaining Toward the New Millennium*, *supra* note 7, at 1386.

<sup>11</sup> Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1097–98 (2015) [hereinafter Shapiro, *Failure to Understand*]; Sidney Shapiro & Elizabeth Fisher, *Chevron and the Legitimacy of “Expert” Public Administration*, 22 WM. & MARY BILL RTS. J. 465, 478–79 (2013); Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L.J. 1, 2 (2013) [hereinafter Shapiro, *Missing Institutional Analysis*]; *see also* Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 578 (2011).

<sup>12</sup> Shapiro, *Failure to Understand*, *supra* note 11, at 1098.

Yes, administrative law is “legal civics,” but if administrative law is to legitimize 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 be enabled to deliver the goods of protecting people and the environment, just as Congress has required it to do.

## II. POLITICS AND ACCOUNTABILITY

Stewart’s *Reformation* article attributes the concept of administrative law as political process to the fact that the law runs out when agencies engage in rulemaking.<sup>13</sup> Because of the generally ambiguous and vague nature of legislative mandates, Stewart characterized an agency’s choice of a rule, although loosely bounded by law, as an inherently discretionary, political act.<sup>14</sup> In this narrative, the courts sought to legitimize the process through the participation of affected parties—a type of interest representation political pluralism. As noted, negotiated rulemaking drew on this concept and claimed, “We can do this better.”<sup>15</sup> 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 it fuels arguments that the administrative state is illegitimate.

### A. Political Pluralism to the Rescue

Up to the New Deal, administrative law had been focused on reconciling “competing claims of governmental authority and private autonomy by prohibiting official intrusions on private liberty or property unless authorized by legislative directives.”<sup>16</sup> According to a “transmission belt thesis,” “the agency [was] a mere transmission belt for implementing legislative directives in particular cases.”<sup>17</sup> Since the “imposition of administratively determined sanctions on private individuals must be authorized by the legislature through rules which control agency action,” the role of administrative procedures, including judicial review, was “to ensure the agency’s compliance” with the previous requirement.<sup>18</sup> In this manner, the intrusion was legitimate because it was “commanded by a legitimate source of authority—the legislature.”<sup>19</sup>

Stewart explains 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.<sup>20</sup> He suggests that the New Dealers proposed that expertise could provide the missing

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<sup>13</sup> Stewart, *supra* note 1, at 1671.

<sup>14</sup> *Id.* at 1684.

<sup>15</sup> *Id.* at 1774–75.

<sup>16</sup> *Id.* at 1669–70.

<sup>17</sup> *Id.* at 1675.

<sup>18</sup> *Id.* at 1672–73.

<sup>19</sup> *Id.* at 1675.

<sup>20</sup> *Id.* at 1677.

legitimacy. According to this understanding, which is an incomplete account of these events,<sup>21</sup> 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.<sup>22</sup>

By the 1970s, if not before, it was widely accepted that expertise could not provide objective solutions to regulatory problems.<sup>23</sup> Although expertise informs decision makers, regulatory decisions at the end of the day are policy issues because the resolution of the issues requires normative judgments. Nevertheless, Congress continued to delegate significant decision-making authority to agencies.<sup>24</sup> As readers are aware, Congress passed a flurry of regulatory legislation in the 1960s and 1970s, commonly referred to as “social regulation,” in response to a series of events that demonstrated the lack of effective regulation of the business community.<sup>25</sup> This legislation, as Stewart relates, presented an unprecedented challenge for administrative law, calling “into question its appropriate role in our legal system.”<sup>26</sup>

The nub of the problem, according to Stewart, was that these new laws, like the New Deal legislation, left a substantial policy space in which agencies operated.<sup>27</sup> Since agencies lacked detailed legal instructions about what action to take within the policy space, they had 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 interests.”<sup>28</sup> This “required balancing of policies,” Stewart concluded, “is an inherently discretionary, ultimately political procedure.”<sup>29</sup>

Efforts by the courts to address this legitimacy gap created a “reformation” of administrative law in the 1960s and 1970s.<sup>30</sup> In the reformation, the courts engineered a “surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision.”<sup>31</sup> The reformation consisted of three familiar reforms. Rulemaking became a paper hearing process that permitted rulemaking participants to challenge an agency’s

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<sup>21</sup> Progressives did understand that there could not be an objective science of administration, see Shapiro & Fisher, *supra* note 11, at 486–87, and they therefore looked for ways to keep expertise “articulate with the democracy.” *Id.* (citing HERBERT CROLY, *PROGRESSIVE DEMOCRACY* 373 (1914)).

<sup>22</sup> See BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN 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).

<sup>23</sup> See Alvin M. Weinberg, *A Useful Institution of the Republic of Science*, 10 *MINERVA* 439, 439–40 (1972) (pointing out the gap between pure science and pure policy).

<sup>24</sup> See Stewart, *supra* note 1, at 1684 (noting the substantial discretion delegated to agencies in the 1960s and 1970s).

<sup>25</sup> See Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 *U. KAN. L. REV.* 689, 692–96 (2000) (describing these events).

<sup>26</sup> Stewart, *supra* note 1, at 1669.

<sup>27</sup> *Id.* at 1677.

<sup>28</sup> *Id.* at 1684.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1676, 1681, 1683.

<sup>31</sup> *Id.* at 1670.

information and data in the rulemaking process.<sup>32</sup> 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,<sup>33</sup> 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.<sup>34</sup>

Because of the previous innovations, agencies had an incentive to pay attention to rulemaking comments, and 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 rulemaking process therefore legitimated a rule by inviting public involvement and ensuring that input could not be ignored. Or so the narrative claimed.<sup>35</sup>

The idea that rulemaking was a form of political pluralism encompassed a normative theory of democracy popular with political scientists in the 1950s.<sup>36</sup> 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.<sup>37</sup> They argued that they were so, despite low turnouts in elections because officials responded to interest group competition in determining public policies.<sup>38</sup> The pluralists characterized those officials as "referees of group conflict, registers of group demands, or ratifiers of the outcomes of intergroup contests."<sup>39</sup> Their "sole function is to register the opposing strengths of the competing interest groups and

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<sup>32</sup> Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look,"* 92 NOTRE DAME L. REV. 331, 338 (2016). Although the language of the Administrative Procedure Act (APA) did not so require, the courts interpreted it to require agencies to reveal all of the scientific and technical data and methodologies underlying a proposed rule, and to respond to all significant arguments and evidence presented during the comment process in its final justification for the rule. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973); *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 243, 245 (2nd Cir. 1977).

<sup>33</sup> *Sierra Club v. Morton*, 405 U.S. 727, 737–38 (1972); *Vill. of Elk Grove Village v. Evans*, 997 F.2d 328, 329–30 (7th Cir. 1993).

<sup>34</sup> *Greater Bos. 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. Shapiro & Murphy, *supra* note 32, at 346–47.

<sup>35</sup> See Shapiro & Murphy, *supra* note 32, at 338–40.

<sup>36</sup> See DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 43–44 (1951) (discussing how the "overlapping" of various interest groups creates an equilibrium in our political society). See generally ROBERT DAHL, *WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY* (2nd ed. 2005).

<sup>37</sup> TRUMAN, *supra* note 36, at 314 (discussing the troublesome effect that group voting has on the democratic process).

<sup>38</sup> *Id.* at 319.

<sup>39</sup> DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION*, at xxv (2nd ed. 1964).

to record the result in the form of government policy.”<sup>40</sup> Nevertheless, pluralists expected continual bargaining would produce a fair and equitable division of the benefits and burdens of government.<sup>41</sup> Because multiple interest groups pressured government, pluralism prevented the government from favoring some interests over others.<sup>42</sup> In short, the contest over government policy was a “fair fight.”<sup>43</sup>

It did not take long for other political scientists to doubt the accuracy of this claim. As E.E. Schattschneider deftly explained, “The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent.”<sup>44</sup> Stewart, likewise, was skeptical that the reforms being undertaken would “ensure that all relevant interests will be represented before the agencies.”<sup>45</sup> He therefore doubted administrative law would produce an interest group process that produced “outcomes that better serve society as a whole.”<sup>46</sup>

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.<sup>47</sup> Thus, as Stewart predicted, political pluralism is wanting as a method of legitimacy even if one subscribes to administrative law as political process.

There is a deeper problem. The idea that the purpose of administrative law is to foster political interest pluralism hollows out public administration. Since decisions are legitimated based on the clash of interest groups, there is no consideration given to the role of agency expertise in legitimizing rulemaking even though an agency’s performance of its legislative mission depends on such expertise. Ironically, at the very time that Congress assigned ambitious missions to agencies like the EPA, with the expectation that the agency would develop the expertise to accomplish those missions, administrative law turned away from expertise and towards the political process to legitimize rulemaking outcomes.

### B. “Reg-Neg” as “Better” Political Pluralism

Despite these substantial flaws in using political pluralism to develop rulemaking legitimacy, regulatory negotiation became the flavor of the day in administrative law by expanding on Stewart’s idea of rulemaking pluralism. Proponents of regulatory negotiation saw the process as a way of avoiding, or at

<sup>40</sup> Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 838 (1985).

<sup>41</sup> Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 31–34 (1998).

<sup>42</sup> DAHL, *supra* note 36, at 137–38.

<sup>43</sup> Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 614 (2016).

<sup>44</sup> E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 35 (1960).

<sup>45</sup> Stewart, *supra* note 1, at 1763.

<sup>46</sup> *Id.* at 1760.

<sup>47</sup> See, e.g., Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 119, 125, 128–29 (2011) (finding that business interests filed 81% of the rulemaking comments in ninety EPA hazardous air pollutant rulemakings and 170 times more communications with EPA than public interest groups); see also Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 226 n.16–17 (2012) (describing studies of industry dominance).



least reducing, the time, expense, and the lack of legitimacy associated with agency rulemaking.<sup>48</sup> Whether regulatory negotiation achieves the first two purposes is not apparent,<sup>49</sup> 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.<sup>50</sup> The agency also agrees to propose any rule that is the consensus of the negotiating committee.<sup>51</sup> 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.<sup>52</sup>

Phillip Harter, a leading (probably the leading) proponent of regulatory negotiation, picked up on the idea that rulemaking is an inherently discretionary process.<sup>53</sup> He explained that agencies lacked a concrete legal basis for making decisions because of vague and ambiguous mandates.<sup>54</sup> Necessarily, this meant that the decisions agencies made were “political” because there was “no purely rational or ‘right’ answer.”<sup>55</sup> 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 the umpire, makes the decision alone, a multitude of political forces influence the decision. Because there is no overriding or generally accepted reason to have faith in the choices made by the agencies, rules issued after even the most ardent hybrid [rulemaking] process lack[ed] legitimacy.<sup>56</sup>

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.”<sup>57</sup> 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 decisionmaking.”<sup>58</sup>

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<sup>48</sup> See, e.g., Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 6 (1982).

<sup>49</sup> See David Wendel, *Negotiated Rulemaking: An Analysis of Administrative Issues and Concerns Associated with Congressional Attempts to Codify a Negotiated Rulemaking Statute*, 41 ADMIN. L.J. 227, 230, 247–48 (1990) (describing the evidence for 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 LAW 417, 433–40 (2014) (citing and explaining the literature debating the effectiveness of regulatory negotiation).

<sup>50</sup> See Wendel, *supra* note 49, at 239–41 (describing the regulatory negotiation process).

<sup>51</sup> *Id.* at 230.

<sup>52</sup> Funk, *Woodstove Standards*, *supra* note 7, at 79.

<sup>53</sup> Harter, *supra* note 48, at 16–17.

<sup>54</sup> *Id.* at 16.

<sup>55</sup> *Id.* at 17.

<sup>56</sup> *Id.* at 17–18.

<sup>57</sup> *Id.* at 18.

<sup>58</sup> *Id.*

### C. Irreducible Discretion

Regulatory negotiation was promoted as a better way to address the discretionary political choices inherent in rulemaking. More broadly, the claim that agency rulemaking involves *discretionary political choices* has resonated with many scholars and lawyers. Despite the disappearance of public administration in regulatory negotiation, academics,<sup>59</sup> the Administrative Conference of the United States,<sup>60</sup> and the Clinton Administration<sup>61</sup> all had good things to say about it. In fact, there was hardly a negative voice present at the conception of the idea except Professor Funk.<sup>62</sup> 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 among administrative scholars. The first trend is a considerable literature that models administrative outcomes as the product of political considerations rather than the result of a legal process. Positive political theory, for example, treats agency choice of policies as the product of political power, strategic behavior, and political negotiation.<sup>63</sup> 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.”<sup>64</sup> In other words, the possibility that regulatory outcomes reflect policy evidence and legal mandates falls by the wayside in this approach to analyzing administrative law.

As a second trend, the White House has inserted itself into the rulemaking process through the Office of Regulatory and Information Affairs and by increasing the number of presidential appointees in agencies.<sup>65</sup> Presidential administration has been defended as necessary to address unaccountable agency decision-making. For some, presidential control is constitutionally mandated<sup>66</sup> or statutorily implied absent a contrary legislative indication.<sup>67</sup> Whether so mandated or not,<sup>68</sup>

<sup>59</sup> See, e.g., Funk, *Bargaining Toward the New Millennium*, *supra* note 7, at 1353 (discussing the supportive academic literature).

<sup>60</sup> See *id.* at 1353–54 (explaining the support of the Administrative Conference of the United States).

<sup>61</sup> AL GORE, OFFICE OF THE VICE PRESIDENT, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW: IMPROVING REGULATORY SYSTEMS 3 (1993).

<sup>62</sup> Funk, *Bargaining Toward the New Millennium*, *supra* note 7, at 1353–57, 1365–66.

<sup>63</sup> JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 10, 118 (1997).

<sup>64</sup> 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).

<sup>65</sup> Shapiro & Wright, *supra* note 11, at 583.

<sup>66</sup> 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).

<sup>67</sup> Justice 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”).

<sup>68</sup> See, e.g., Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 966 (2001) (opposing the unitary president argument).

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.”<sup>69</sup> The claim that the president is accountable to the electorate for the decisions made in presidential administration is contestable, however, as I have discussed elsewhere.<sup>70</sup>

In a third trend, 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,”<sup>71</sup> public administration is a “monstrosity,”<sup>72</sup> administrative law is illegal<sup>73</sup> and illiberal,<sup>74</sup> and the Constitution that protected liberty has been lost.<sup>75</sup> For Philip 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.”<sup>76</sup>

There has been vigorous pushback to these three developments,<sup>77</sup> and I join in this dissent. But public administration is invisible in these responses. 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. To understand why, however, it is necessary to bring public administration expertise back into the picture.

### III. LAW AND ACCOUNTABILITY

As noted, Professor Funk objected that regulatory negotiation stands administrative law “on its head.”<sup>78</sup> This Part begins with Professor Funk’s

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<sup>69</sup> Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 447 (2010).

<sup>70</sup> See Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805, 1830–37 (2019) (discussing why the President is not accountable to the electorate concerning rulemaking interventions).

<sup>71</sup> Christopher J. Walker, *Restoring Congress’s Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1102 (2018).

<sup>72</sup> Senator Orrin Hatch, *A Constitutional Conservatism For Our Time*, 19 TEX. REV. L. & POL. 199, 206 (2015).

<sup>73</sup> PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 1, 2, 7 (2014).

<sup>74</sup> Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 477 (2016) (arguing that administrative law has “drifted so far from the liberal tradition”).

<sup>75</sup> See RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 1* (rev. ed. 2014) (discussing the negative impact that courts have had on the Constitution); RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 6 (2014) (discussing the politicization of the original Constitution).

<sup>76</sup> HAMBURGER, *supra* note 73, at 11.

<sup>77</sup> See, e.g., Adrian Vermeule, *No: reviewing Philip Hamburger’s “Is Administrative Law Unlawful?”* 93 TEX. L. REV. 1547–48 (2015).

<sup>78</sup> Funk, *Woodstove Standards*, *supra* note 7, at 92; see also Funk, *Bargaining Toward the New Millennium*, *supra* note 7, at 1376 (finding “negotiated rulemaking 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.”).

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 the U.S. Environmental Protection Agency (EPA), the process can result in the adoption of an illegal rule that no one challenges in court.<sup>79</sup> More broadly, because an agency's responsibility is to achieve a consensus among interest groups, it abandons its obligation, assigned to it by Congress, to use its expertise to choose an appropriate regulatory option, a duty that administrative law has traditionally enforced.

#### *1. Illegal Rules*

The Woodstove Standards rule adopted by EPA illustrates the potential of regulatory negotiation to lead to an illegal rule.<sup>80</sup> The purpose of the rule was to reduce the health risk associated with the smoke in the atmosphere from wood burning stoves.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup>

EPA grounded the rule in the Clean Air Act,<sup>84</sup> 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.<sup>85</sup> Moreover, since the rule is not enforceable against stove owners,<sup>86</sup> 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 groups. As a result of this switch, the "theory and

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<sup>79</sup> See Funk, *Woodstove Standards*, *supra* note 7, at 66–74 (finding the authority relied on by the EPA did not legally authorize the Woodstove rules or associated requirements).

<sup>80</sup> See *id.* (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).

<sup>81</sup> *Id.* at 57–60 (describing the health risks associated with woodstove emissions).

<sup>82</sup> *Id.* at 65–66.

<sup>83</sup> *Id.* at 66.

<sup>84</sup> 42 U.S.C. §§ 7401–7671q.

<sup>85</sup> See Funk, *Woodstove Standards*, *supra* note 7, at 66–78 (detailing the reasons why the Woodstove Standards rule was illegal).

<sup>86</sup> *Id.* at 66.

principles of regulatory negotiation are at war with the theory and principles of American administrative law applicable to rulemaking.”<sup>87</sup>

As he explained, whether an agency’s “statutory directions may be specific or general,” its power and its “actions are justified and legitimized by their service to those directions.”<sup>88</sup> This means the “statute is not just a brake or anchor on agency autonomy; it is the source and reason for the agency’s actions.”<sup>89</sup> By comparison, Professor Funk continues, 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 limit.”<sup>90</sup> In other words, Professor Funk is making the point that law is intimately related to an agency’s legitimacy. Law performs this function by ensuring that a decision is not only a political deal but that a decision is grounded in expert evidence and analysis.

Professor Funk acknowledges that we long ago lost faith in the idea that “politically neutral administrators could determine finite and correct answers to the problems of modern industrial society.”<sup>91</sup> He explains, “While the [Administrative Procedure Act] perhaps reflects a loss of the naïve faith in the natural ability of expert bureaucrats to scientifically discover objectively correct solutions to society’s problems, it does not indicate a lessened determination to use agencies and rulemaking to solve politically perceived problems.”<sup>92</sup> But, Professor Funk continues, “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.”<sup>93</sup>

Regulatory negotiation, in other words, is not the “reasoned decision-making” which is the “fundamental concept” of administrative law.<sup>94</sup> As the oft-quoted words of *Scenic Hudson Preservation Conference v. Federal Power Commissioner*<sup>95</sup> indicate, “an agency’s role as representative of the public interest ‘does not permit it to act as an umpire blandly 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 [agency].’”<sup>96</sup> Regulatory negotiation therefore “stands this role on its head, first, by reducing the agency to the level of a mere participant in the formulation of the rule, and second, by essentially denying that the agency has any responsibility beyond giving effect to the consensus achieved by the group.”<sup>97</sup>

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<sup>87</sup> *Id.* at 89.

<sup>88</sup> Funk, *Bargaining Toward the New Millennium*, *supra* note 7, at 1374.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1375.

<sup>91</sup> Funk, *Woodstove Standards*, *supra* note 7, at 90.

<sup>92</sup> *Id.*

<sup>93</sup> Funk, *Bargaining Toward the New Millennium*, *supra* note 7, at 1383.

<sup>94</sup> *Id.* at 1380.

<sup>95</sup> 354 F.2d 608 (2nd Cir. 1965).

<sup>96</sup> Funk, *Woodstove Standards*, *supra* note 7, at 92.

<sup>97</sup> *Id.* at 92; *see also* Funk, *Bargaining Toward the New Millennium*, *supra* note 7, at 1376 (finding “negotiated rulemaking 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.”).

Some have joined Professor Funk's criticism,<sup>98</sup> but other scholars have defended regulatory negotiation.<sup>99</sup> In particular, Professors Schuck and Kochevar find Funk's criticisms "wide of the mark" because "rules must still proceed through notice and comment and must be subject to the normal judicial review."<sup>100</sup> 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."<sup>101</sup>

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.<sup>102</sup> Moreover, the rulemaking committee members agree not to sue the agency if it adopts a final rule that is consistent with the rule that they proposed.<sup>103</sup> 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 expertise.<sup>104</sup> Schuck and Kochevar respond that this objection "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."<sup>105</sup>

This response takes us back to Stewart's claim that rulemaking, while loosely bounded by law, nevertheless "is an inherently discretionary, ultimately political procedure."<sup>106</sup> But, as the next subsection discusses, legal expectations deeply penetrate the rulemaking process. In addition, Part IV explains that 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. As a search for the public interest, administrative law aligns the outcome with Congress's intent in two ways. First, judicial review verifies an agency has chosen a policy that is in 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. When this happens, the agency has done what it was instructed to do, and it is this connection to Congress's intent that makes it democratically legitimate.

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<sup>98</sup> See, e.g., Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1211–12, 1216–17 (1994).

<sup>99</sup> See, e.g., Schuck & Kochevar, *supra* note 49, at 418; Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 61–62 (2000).

<sup>100</sup> Schuck & Kochevar, *supra* note 49, at 429.

<sup>101</sup> *Id.* at 430.

<sup>102</sup> See S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J.L. ECON. & ORG. 205, 206–07 (1995) (explaining how new decisions are a function of previously made decisions).

<sup>103</sup> See *supra* note 55 & accompanying text.

<sup>104</sup> See Schuck & Kochevar, *supra* note 49, at 431.

<sup>105</sup> *Id.*

<sup>106</sup> Stewart, *supra* note 1, at 1684.

Two familiar cases—*Chevron U.S.A. Inc. v. Natural Resources. Defense. Council, Inc.*<sup>107</sup> (*Chevron*) and *Motor Vehicle Manufacturers Ass'n of the U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*<sup>108</sup> (*State Farm*)—provide the foundation of an expectation that an agency has chosen an outcome within its delegated authority using its expertise and judgment.<sup>109</sup>

### I. Chevron

The two-step test of legislative authority adopted in *Chevron* has been indelibly imprinted onto administrative law,<sup>110</sup> although its future has been called into question by some of the Justices.<sup>111</sup> Bypassing this possibility for a moment, I turn to how *Chevron* can be read as supporting the legal narrative just described.

To restate the familiar, a court at step one asks whether “Congress has directly spoken to the precise question at issue.”<sup>112</sup> 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.”<sup>113</sup>

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, “[t]he 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.”<sup>114</sup> Regarding the resolution of policy issues, the Court pointed out, “[j]udges are not experts in the field, and are not part of either political branch of the Government.”<sup>115</sup>

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 by resolving cases at step one or avoiding *Chevron* altogether.<sup>116</sup> 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 Part IV of this Article discusses.<sup>117</sup>

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<sup>107</sup> 467 U.S. 837 (1984).

<sup>108</sup> 463 U.S. 29 (1983).

<sup>109</sup> *Chevron*, 467 U.S. at 865; *State Farm*, 463 U.S. at 43.

<sup>110</sup> 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).

<sup>111</sup> See VALERIE C. BRANNON & JARED P. COLE, DEFERENCE AND ITS DISCONTENTS: WILL THE SUPREME COURT OVERRULE *CHEVRON*? 1 (2018), <https://perma.cc/HD77-DHPS> (describing how the Supreme Court may reverse or alter the *Chevron* doctrine).

<sup>112</sup> *Chevron*, 467 U.S. at 842.

<sup>113</sup> *Id.* at 843.

<sup>114</sup> *Id.* (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

<sup>115</sup> *Id.* at 865–66.

<sup>116</sup> See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2483 (2015).

<sup>117</sup> See discussion *infra* Part V.

## 2. State Farm

The second step of *Chevron* requires verification that an agency 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.<sup>118</sup> By comparison, *State Farm* inquires into whether the policy is consistent with the evidence and arguments present in a rulemaking.<sup>119</sup> 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.’”<sup>120</sup> 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.<sup>121</sup>

Some scholars have suggested the second step of *Chevron* and *State Farm* engage in the same inquiry or at least overlap.<sup>122</sup> 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 regulatory option that is authorized by its statutory mandate. This is the concept that Congress leaves 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 option even if it is arguable authorized by its statutory mandate. It must support its rule as consistent with the 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*.

Stewart perceived correctly that legal process does not identify one outcome 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 flexibility with the idea that rulemaking is therefore “an inherently discretionary, ultimately political procedure.”<sup>123</sup> It may be a political process, but it is deeply infused with

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<sup>118</sup> *Chevron*, 467 U.S. at 842–44.

<sup>119</sup> *State Farm*, 463 U.S. 29, 43–44 (1983).

<sup>120</sup> *Id.* at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

<sup>121</sup> *Id.*

<sup>122</sup> See, e.g., RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 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.-KENT L. REV.* 1253, 1263 (1997) (explaining step two of *Chevron* as arbitrariness review).

<sup>123</sup> Stewart, *supra* note 1, at 1684.



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.<sup>124</sup> As a result, administrative law scholarship for the most part ignores the relationship between expertise and decision making in rulemaking.<sup>125</sup> Administrative lawyers fail to acknowledge that the *competence* of public administration—an agency’s entwined capacity to implement its legislative mandate and its authority to do so—are both integral to administrative law. In other words, sense cannot be made of administrative law without making sense of public administration.

Consider, for example, the “waters of the US” rule, known as the “WOTUS” rule. The rule adopted a definition of the term “waters of the United States” that determined the jurisdiction of the Army Corps of Engineers (Corps) and the EPA under the Clean Water Act<sup>126</sup> (CWA). Congress passed the CWA in 1972 with an explicit objective to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”<sup>127</sup> The Act applies to discharges into “navigable waters” which are the “waters of the United States, including the territorial seas.”<sup>128</sup>

This mandate is both legally ambiguous and geographically ambiguous. Neither streams nor rivers come with an identification label stating that they are “waters of the United States.” As a unanimous U.S. Supreme Court noted in 1985, “the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land.”<sup>129</sup>

Nevertheless, the definition of “waters of the United States” is crucial to legislation aimed at environmental protection. In devising a definition of “waters,” it is therefore necessary to incorporate into the definition scientific understandings

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<sup>124</sup> See *supra* notes 137–147 and 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).

<sup>125</sup> See Shapiro, *Failure to Understand*, *supra* note 11, at 1098 n.7 (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).

<sup>126</sup> Department of Defense: Department of the Army: Corps of Engineers and Environmental Protection Agency, Clean Water Rule: Definition of “Waters of the United States”, 80 Fed. Reg. 37,054 (June 29, 2015) [hereinafter WOTUS Rule]; Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

<sup>127</sup> 33 U.S.C. § 1251(a).

<sup>128</sup> 33 U.S.C. § 1362(7).

<sup>129</sup> *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

about the contribution that watercourses, including wetlands and small streams, make to ecological health.<sup>130</sup>

The Corps and EPA, the location of the needed experts, have both developed their expertise relating to water quality over time.<sup>131</sup> They have carried out research, passed rules and guidance, and been subject to judicial review that has forced them to reflect on their own competence.<sup>132</sup> The 2015 Rule, designed to clarify and simplify the definition and delineate bright line distinctions where possible, was not a matter of pure political discretion. As the preamble explained, “[t]his interpretation is based not only on legal precedent and the best available peer-reviewed science, but also on the agencies’ technical expertise and extensive experience in implementing the CWA over the past four decades.”<sup>133</sup> The rule was accompanied by extensive analysis including a review of 1200 peer reviewed publications.<sup>134</sup>

Given all of this, resolving the question of what are “waters of the United States” is not “an inherently discretionary, ultimately political procedure.”<sup>135</sup> The definition is one of expert analysis utilizing the competence of public administration—its evolving legal mandate, its scientific capacity, its experience, and its history.

As this example suggests, and as I have written about in some detail,<sup>136</sup> 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 disciplines an agency to identify, as best it can, which policy options best implement its statutory responsibilities.

First, experts are trained to evaluate scientific and social science 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 political preferences.<sup>137</sup> Scientists and social scientists, for example, are trained to interpret available evidence in an impartial manner. Lawyers, likewise, are trained to identify an agency’s legal

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<sup>130</sup> Dave Owen, *Little Streams and Legal Transformations*, 2017 UTAH L. REV. 1 (2017).

<sup>131</sup> TODD SHALLAT, *STRUCTURES IN THE STREAM: WATER, SCIENCE AND THE RISE OF THE US ARMY CORPS OF ENGINEERS* (1994). See generally THEODORE PORTER, *TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY AND SCIENCE IN PUBLIC LIFE* (1995).

<sup>132</sup> *Riverside Bayview Homes*, 474 U.S. 121; *Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng’rs*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006).

<sup>133</sup> WOTUS Rule, *supra* note 126, at 37,055.

<sup>134</sup> U.S. ENVTL. PROT. AGENCY, *CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE (EXTERNAL REVIEW DRAFT)* (EPA/600/R11/098B, 2013).

<sup>135</sup> Stewart, *supra* note 1, at 1684.

<sup>136</sup> See *id.* at 1098.

<sup>137</sup> See Shapiro, *Failure to Understand*, *supra* note 11, at 1133 (finding professionalism establishes an environment in which scientists, lawyers, and other professionals are expected to act according to their professional training); see also Shapiro, *Missing Institutional Analysis*, *supra* note 11, at 7 (also finding professionalism establishes an environment in which scientists, lawyers, and other professionals are expected to act according to their professional training).

options in an impartial manner, and then to implement the option chosen by administrators. As Cass Sunstein has pointed out:

There are numerous experts within any cabinet level department. They have been working on the relevant issues for many years and through multiple administrations. They do not care at all about elections, politics, or interest groups.<sup>138</sup>

“They work for political appointees,” he continues, “but they themselves are not political.”<sup>139</sup>

Experts are therefore able to offer agency administrators professionally formed advice about agency options. In well-managed agencies, there is a policy development process that employs agency experts to assess evidence and arguments.<sup>140</sup> As policy proposals bubble up from the staff to top administrators, the output reflects this professional input. In short, agency professionals speak “truth to power” by indicating when political influencers favor regulatory outcomes that are inconsistent with the available scientific and social science evidence.<sup>141</sup> The impact 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.<sup>142</sup>

Second, professionals in the agency engage in a 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.<sup>143</sup> When experts of different disciplines work together, they develop an expertise that allows them to evaluate the credibility and usefulness of information and data outside of their field.<sup>144</sup> Agencies can rely on this interaction expertise to create a discursive process for the evaluation of information and data.<sup>145</sup> This process, which is based on reasons and evidence, engages in reconciling and accounting for conflicting evidence and arguments, disciplinary perspectives, political demands, and legal commands.<sup>146</sup>

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<sup>138</sup> Cass Sunstein, *The Most Knowledgeable Branch*, 164 U. PENN. L. REV. 1607, 1620 (2016).

<sup>139</sup> *Id.* at 1609.

<sup>140</sup> Shapiro, *Failure to Understand*, *supra* note 11, at 1105–16 (describing the expert policy development process).

<sup>141</sup> Shapiro & Wright, *supra* note 11, at 616.

<sup>142</sup> See Thomas O. McGarity & Wendy E. Wagner, *Deregulation Using Stealth “Science” Strategies*, 68 DUKE L.J. 1719 (2019) (detailing the extensive lengths that administrations hostile to regulation have used to stop scientists from influencing policy choices inside of agencies).

<sup>143</sup> See Shapiro, *Missing Institutional Analysis*, *supra* note 11, at 9–12 (explaining how discursive institutionalism constrains self-interest and legitimizes administrative action); Shapiro et al., *supra* note 11, at 498 (describing how EPA’s interactions with experts, the public, and other technical staff throughout the NAAQS process are iterative and discursive).

<sup>144</sup> Shapiro, *Missing Institutional Analysis*, *supra* note 11, at 1108.

<sup>145</sup> *Id.* at 1109; see, e.g., Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 L. & CONTEMP. PROBS., Autumn 1991, at 57, 80 & n.66 (describing the multidisciplinary rulemaking teams at EPA).

<sup>146</sup> See Shapiro, *Failure to Understand*, *supra* note 11, 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).

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.<sup>147</sup> 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 because expert input is not present or is ignored.<sup>148</sup> 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. Administrators can choose not to employ a process of expert evaluation or they can just ignore expert advice. 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,<sup>149</sup> comes to mind because it is clear that the agency did not expect its experts to interpret what technological protections were appropriate or it ignored their advice.<sup>150</sup>

The possibility that an agency may fail to develop its experience or administrators will ignore that expertise does not deny the potential to create a well-managed agency in which there is a robust 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.”<sup>151</sup> 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 displaces, or least circumvents, how administrative law normally screens

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<sup>147</sup> *Id.* at 1102.

<sup>148</sup> See Shapiro, *Missing Institutional Analysis*, *supra* note 11, at 25 (explaining that the creation and maintenance of professionalism and a discursive process of policy evaluation depends on good management).

<sup>149</sup> Rebecca M. Bratspies, *A Regulatory Wake-Up Call: Lessons from BP’s Deepwater Horizon Disaster*, 5 GOLDEN GATE U. ENVTL. L.J. 7, 8 (2011).

<sup>150</sup> See Alyson Flournoy et al., *Regulatory Blowout: How Regulatory Failures Made the BP Disaster Possible, and How the System Can Be Fixed to Avoid a Recurrence*, CTR. FOR PROGRESSIVE REFORM 3 (2010), <https://perma.cc/FM6U-PQX2> (noting that “[o]ver 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”).

<sup>151</sup> Sidney Shapiro, *Pragmatic Administrative Law*, 5 ISSUES LEGAL SCHOLARSHIP, 2005 at 1, 3.

political input.<sup>152</sup> 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 Article 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.

Presidential administration is a good example. As noted earlier, efforts by the White House to influence, if not control, agency rulemaking can be seen as a response to the claim that because rulemaking involves discretionary political choices, more political oversight is necessary.<sup>153</sup> Yet, based on this erroneous assumption, presidential administration has deteriorated agency expertise in a number of ways, as I have previous described.<sup>154</sup> Understanding the contribution of expertise to rulemaking and not treating agency expertise as a black box indicates we need to adjust the role of presidential administration.<sup>155</sup> There is a strong potential to reduce the disadvantages of presidential administration without a loss of accountability or legitimacy. While this is a topic for another article, the mismatch between presidential administration and agency capacity to implement its mission indicates why an accurate understanding of expertise is a prerequisite for designing a system of accountability.<sup>156</sup>

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.

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.<sup>157</sup> 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

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<sup>152</sup> Funk, *Bargaining Toward the New Millennium*, *supra*, note 7, at 1356.

<sup>153</sup> See *supra* notes 66–67 and accompanying text.

<sup>154</sup> See Shapiro & Wright, *supra* note 11, at 608–17 (describing the ways in which presidential administration has deteriorated agency rulemaking).

<sup>155</sup> *Id.* at 617–18.

<sup>156</sup> My argument presumes a well-managed agency that uses expertise to develop its capacity to implement its statutory mission, which as noted earlier, is not always the case. See *supra* notes 148–150 and accompanying text. But the solution to this issue may not be more presidential administration, but maybe to ensure that the agency becomes better managed and uses expertise in an appropriate manner.

<sup>157</sup> See Shapiro & Fisher, *supra* note 11, at 467.

or terms. This is only one illustration of how administrative law impacts the use and contribution of expertise, which I have covered in more detail elsewhere.<sup>158</sup>

Given this interaction, Professor Liz Fisher and I argue in a forthcoming book administrative law should be about ensuring agencies have the capacity to accomplish the legislative missions that they have been given.<sup>159</sup> 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's intent that makes it democratically legitimate. The task of the courts is to ensure that this has occurred. Thus, judicial review is not so much a matter of deference, but instead is the duty to ensure the type of reasoned judgment that Congress required actually occurred. 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 reasonable policies to protect people and the environment, and because of this potential, we must be careful not to allow political input to overwhelm this system or displace it.

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<sup>158</sup> For discussion of additional interactions, see, for example, *id.* at 494 (discussing how judicial approaches to step one of *Chevron* impact the contribution of expertise to effective governance).

<sup>159</sup> *Id.* at 478–79.