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Peter L. Strauss

Columbia University School of Law, strauss@law.columbia.edu

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Legislation That Isn't – Attending To Rulemaking's "Democracy Deficit"

*In the end this may seem merely a fiat,
but that is always true, whatever the disguise.¹*

Peter L. Strauss²

Philip Frickey's commitment to practical legal studies won my admiration early on in his career. In this welcome celebration of his extraordinary career, it seemed fitting to essay something "practical" – an effort at a constructive approach to an enduring problem – that has some bearing on his life-long attention to the problem of "interpretation." If it will not make the problem go away, perhaps it will provide a basis for understanding its inevitable tensions, and in that way help us step past theoretical exegeses suggesting the possibility of simple answers.

The enduring problem for a democracy that I want to address here is the legitimacy of permitting unelected officials to create binding legal texts. This is a problem for judges (at least the unelected ones) as well as regulators, a problem heightened for us by the American invention of constitutionality review.³ For judges, at least in the statutory context, we deal with this problem by pretending that they are only involved in interpretation, not law-making. While the judges themselves frequently write under the apparent illusion that they have in fact "made law" by their statutory "interpretation,"⁴ one can at least say that the text of those decisions, unlike the text of a statute or regulation, is not seen as having, in and of itself, legally binding force for any but the parties to the case decided. For regulations however, as for

¹ *Sinram v. Pennsylvania R. Co.*, 61 F.2d 767, 771 (2d Cir. N.Y. 1932) (L. Hand, J., concluding a lengthy opinion explaining a determination about the unseaworthiness of a coal barge).

² Betts Professor of Law, Columbia University. Thanks are due to my fellow panelists and the attendees at the Frickey Festschrift for reactions helpful in shaping this paper, as to Keith Bradley, Cynthia Farina, Nina Mendelson, Todd Rakoff and Kathryn Watts for their readings. Thanks also to Andrew Amend, CLS '08, for invaluable research and editorial assistance. Any errors are just my own.

³ E.g., Jeremy Waldron, *The Dignity of Legislation* (1999); John Hart Ely, *Democracy and Distrust* (1980); Alexander Bickel, *The Least Dangerous Branch* (1962).

⁴ Compare the super-strong presumption that once an interpretation has been rendered, courts must "adhere to [that] ruling under the doctrine of stare decisis, and ... assess an agency's later interpretation of the statute against that settled law. ... Congress, not this Court, has the responsibility for revising its statutes." *Neal v. United States*, 516 U.S. 284 (1996), with

"To the French, ... to universalize the Anglo-American presupposition that "cases" make "law" is to fall into two crass assumptions. First, it assumes that just because judges exercise significant normative control, this control must qualify as lawmaking ... [which is] to fail to acknowledge that while a few legal systems have decided to exalt the judge by treating his work product as Law, most have not, preferring to reserve this special status to legislative enactments. Secondly ... [o]ne need hardly call judicial decisionmaking "law" in order to stress that judges must make normative choices To do so ... produces ... potentially negative side-effects, such as the glorification of the judiciary and a concomitant tendency to compromise popular control through legislative, administrative, grass-roots and other processes. ... Thus Gény explains that 'it is important to note: it is not that the jurisprudence constitutes an independent source of law, any more than it constitutes a custom sui generis'. It is only an 'authority', a 'propulsion device', or 'initiator of custom'."

statutes, the situation is different. Violation of the Secretary of Agriculture's valid rules governing the grazing of sheep in national forests, unlike violation of the rule in Shelley's case, is in and of itself a basis for sending someone to jail.⁵ This paper is about the latter problem; the former is well-enough plowed.

In the literature about the European Union, the resulting "democracy deficit" is often invoked in discussing the regulation-like "implementing measures" that emerge as tertiary legislative instruments, two levels below the Union's constitutive treaties and one below its "secondary"⁶ measures – that is, regulations and directives adopted by its Parliament and Council.⁷ The involvement of the European Parliament (and to a lesser extent a Council composed of persons who are politically responsible on a national level), as well as the public nature of secondary measures' consideration, are thought to supply legitimacy to the regulations and directives enacted through that process.⁸ But "implementing measures" emerge from the shadowy process of "comitology," hidden and bureaucratic, a process whose very name suggests arcane mysteries and possible intrigue. Hence the "democracy deficit."⁹

In parliamentary democracies like England's, the problem may be papered over through arrangements by which "statutory instruments" (i.e., regulations) are actually or at least constructively laid before Parliament, available for question or debate although that may rarely happen. The election of the responsible minister, controlling the work of his department; the vulnerability of the government as a whole to having to go to a new election at any moment should confidence in it be lost; the possibility if not actuality of a vote on the measure in question – all these tend to settle concerns about possible democracy deficits, even if the realities revealed by thoughtful inquiry suggest that, on the whole, the bureaucrats and not the minister – certainly not the Parliament – are effectively in charge of most statutory instruments that become law.¹⁰

Even in parliamentary democracies, the problems inherent in devolving the *political* authority people have given their elected representatives upon unelected persons were early and forcefully stated.

⁵ United States v. Grimaud, 220 U.S. 506 (1911).

⁶ Americans do not think of legislation as secondary, but if one takes the Constitution as the primary source of governing law – as, in the European Union, the constitutive treaties are – then that becomes an understandable usage. It is the usage Europeans deploy. Consequently, the administrative agency rules we are prone to characterize as secondary legislation are, for them, tertiary.

⁷ E.g., Paul Craig and Grainne De Burca, EU Law – Text, Cases and Materials 134 (4th ed. 2007); Giandomenico Majone, "Europe's 'Democracy Deficit': The Question of Standards," 4 Eur. L.J. 5 (1998).

⁸ David Beetham and Christopher Lord, Legitimacy and the EU (1998). An American reader should perhaps be warned of the confusing (to Americans) European usage, in which acts of the European Parliament and Council, that we would characterize as statutes, are denominated either "directives" or "regulations," depending whether they themselves operate with the force of law on individuals, or rather require further action by member states to create legally binding obligations on citizens that are to be enforced as a matter of (EU-required) national law. See generally Paul Craig and Grainne DeBurca, n. 7 above.

⁹ On these processes generally, see Peter L. Strauss, Turner Smith, and Lucas Bergkamp, Rulemaking, in George Bermann, ed., European Union Administrative Law (2008).

¹⁰ The English scholar Edward C. Page has published widely on this subject, basing his work on wide-ranging interviews concerning an understudied subject. Edward C. Page and Bill Jenkins, Policy Bureaucracy: Government with a Cast of Thousands (Oxford 2005); Edward C. Page, Governing by Numbers (Hart 2001); Edward C. Page, "How Policy is Really Made," Public Management and Policy Association, London (August 2006) <http://personal.lse.ac.uk/Pagee/>, visited March 27, 2009.

The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making laws, and place it in other hands.¹¹

The difficulty, of course, as Ed Rubin persuasively characterized for us two decades ago,¹² is that in the complexities of contemporary society and its understanding of the resulting needs for social order, placing the power to make law in other hands is inevitable. There is simply too much to do for an elected body of generalists to accomplish; and besides, while we might think elected politicians should decide whether and under what procedures we ought to have a legal regime to encourage the provision of safe drinking water (inter alia), in general we would not think assessment of just what levels of arsenic made drinking water acceptably safe¹³ a matter for determination as a matter of political will. That *requires* an act of judgment informed by good science. And, consequently, much legislation, like the Safe Drinking Water Act, is intransitive – creating a body with the authority to set binding legal standards as an act of judgment, applying legislatively framed standards indicating limited factors to be considered in reaching that judgment.

A legislature may be entitled to have the general sufficiency of its work-product assessed, if it is assessed at all, as the product of political will. Outside the framework of protected individual right or fundamental issues of governmental structure, American courts essentially acknowledge as much, limiting constitutional review of economic measures to the barest notions of rationality.¹⁴ But would we say the same about rulemaking? The very circumstances that so often effectively require intransitivity in legislation carry with them the implication that political will alone cannot suffice, that acts of reasoned judgment along legislatively prescribed lines are required.

One begins to sense the difficulties with the strong “unitary” view of presidential authority. From the earliest days of the Republic, “politics” has been the only effective measure of presidential as well as congressional decision. As an element of his iconic opinion in *Marbury v. Madison*, Chief Justice Marshall early asserted the sufficiency of political will, rather than assessed judgment, for those matters committed to the President’s discretion:

[The Secretary of State, in administering foreign affairs] is to conform precisely to the will of the President: he is the mere organ by whom that will is communicated. The act of such an officer, as an officer, can *never* be examinable by the courts. ... [W]here the heads of departments are ... to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are *only* politically examinable. ...

The province of the courts is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they

¹¹ John Locke, *Second Treatise of Civil Government* (1690).

¹² Edward Rubin, *Law and Legislation in the Administrative State*, 89 *Colum. L. Rev.* 369 (1989).

¹³ Arsenic, a colorless, tasteless poison, is an inevitable pollutant of some water supplies, as a result both of natural deposits and of human interventions. Setting a threshold level, however minute, has been found adequate to protect the public from the effects of long-term, chronic exposure to it. See <http://www.epa.gov/safewater/arsenic/index.html>, visited April 9, 2009.

¹⁴ *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can *never* be made in this court.¹⁵

While it regularly reviews agency decisions, the Supreme Court has found in commitment of authority to the President a reason to decline review.¹⁶ The President is not an APA “agency”; the **DISCRETION!!!** Chief Justice Marshall is describing would be found to fit APA Sec. 701’s exclusion of matters committed to “agency discretion”¹⁷ from any review at all if he were.

But this is hardly the case when it comes to the exercise of “discretion”¹⁸ in the form of executive agency rulemaking. While the APA in Sec. 701 excludes any matter from judicial review to the extent it is committed to agency discretion, Section 706 (that could not be reached if the “plain meaning” of previous sentence were followed,) explicitly provides for review for “abuse of discretion.”¹⁹ The Court has squared this circle by characterizing as the realm of unreviewable **DISCRETION!!!** those settings in which there is “no law to apply”; where the law does set standards – as it must where agencies are authorized to act with the force of law – one finds, rather, discretion, a setting in which the courts must abjure substituting their judgment for the agency’s, yet nonetheless are to engage in “searching but narrow” review.²⁰ Indeed, for agency judgments, unlike presidential ones, the empowering statutes generally *require* review – sometimes paradoxically in the “substantial evidence” terms reserved for the most formal of administrative procedures, which notice and comment rulemaking is not.²¹ The courts effectively echo this requirement that the creation of binding legal texts by unelected officials be the demonstrable product of “judgment,” not “will,”²² and assess the adequacy of those judgments by inquiries quite severe in their demands for rationality.²³ And for three decades some have celebrated this development as a means for giving “those who care about well-documented and well-reasoned decision-making a lever with which to move those who do not.”²⁴

¹⁵ Marbury v. Madison, 5 U.S. 137, 165-66 (1803)[emphasis added].

¹⁶ See, e.g., Dalton v. Spector, 511 U.S. 462 (1994).

¹⁷ 5 U.S.C. §701(a): “This chapter applies, according to the provisions thereof, except to the extent that ... (2) agency action is committed to agency discretion by law.”

¹⁸ For this paper, the term discretion is presented as binary, as if it had either law-less or law-full meanings. As my casebook colleague Cythia Farina points out, discretion that is constrained by law comes in many shades influencing the degree of judicial review available – the discretion involved in denying a petition for rulemaking, the discretion of a hearer about credibility issues, the discretion made tolerable by the reassurance of professional role (cf. Walters v. Nat’l Ass’n of Radiation Survivors, 473 U.S. 305 (1985)), as well as that which is deployed by the EPA in deciding just what level of SO₂ is tolerable in power plants emissions. I deal here only with that kind of **DISCRETION!!!** which Chief Justice Marshall insisted could “never” be challenged in court and as to which the obligation of a federal officer was to serve as the President’s faithful messenger.

¹⁹ 5 U.S.C. §706: “... The reviewing court shall – ... (2) hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, *an abuse of discretion*, or otherwise not in accordance with law”

²⁰ Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

²¹ Automotive Parts & Accessories Ass’n v. Boyd, 407 F.2d 330 (DC Cir. 1968).

²² Cf. The Federalist Papers 91 (A. Hamilton).

²³ Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

²⁴ William F. Pedersen, Jr., Formal Records and Informal Rulemaking, 85 Yale L.J. 38, 59-60 (1975).

It may be worth a brief excursion explicitly to connect the dots among the questions of discretion-type, reviewability and delegation. In practice, the delegation doctrine has had decisive force only in contexts in which the authority being exercised appeared to involve **DISCRETION!!!** and not discretion. That was the apparent characteristic of the two notable delegation cases of the Supreme Court in the 1930's.²⁵ More recently, the Eighth Circuit reacted to a government lawyer's claim that (because the Secretary of the Interior had "discretion" in relation to certain decisions respecting Native American affairs) a cabinet officer's decision was unreviewable (Sec. 701) by finding the statute conferring that discretion an unlawful delegation.²⁶ Subsequently, and I have always imagined this happened after he had horse-shedded the Secretary, the Solicitor General informed the Supreme Court that the Secretary on mature reconsideration had realized that review *was* possible – that there *was* "law to apply" in assessing the correctness of his judgment – and the Court, as he requested, vacated the judgment below and remanded the matter for the merits review the Secretary was now seeking.²⁷ A particularly forceful statement of the position can be found in Judge Harold Leventhal's opinion in *Ethyl Corp. v. EPA*:

In the case of agency decision-making the courts have an additional responsibility set by Congress. Congress has been willing to delegate its legislative powers broadly - and courts have upheld such delegation - because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory. Nor is that envisioned judicial role ephemeral, as *Overton Park* makes clear.²⁸

The legitimacy of delegated discretionary authority, that is, is directly tied to the possibility of judicial review for the rationality of its exercise. For delegated discretion, the judicial review issue is at 180 degrees from **DISCRETION!!!**. Power may exercised if and only if the actor is prepared to demonstrate its legality to a reviewing court.

At least one court has gone so far as to question whether delegation of authority to make openly political decisions could *ever* be permitted an administrative agency. In *Boreali v. Axelrod*,²⁹ the NY Public Health Service had adopted a rule about second-hand smoke that contained exemptions for small establishments, explained essentially in political trade-off/economic terms, not in terms of public health. This, the court ruled, was improper. The New York legislature could empower the PHS to resolve issues of public health, even ones that required considerable exercise of judgment in the face of spongy facts. What it could not do was to empower the PHS to make political decisions, to exercise will rather than judgment. Legislatures can do

²⁵ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935); see Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 11 *Tel Aviv U. Studies in Law* 9, 21-24.

²⁶ *South Dakota v. U.S. Department of the Interior*, 69 F.3d 878 (1995).

²⁷ *Department of the Interior v. South Dakota*, 519 U.S. 919 (1996). The Court did not say just what the standards were, but subsequent courts, including the Eighth Circuit on remand, have proceeded as if they could be found. *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999); *Carcieri v. Norton*, 398 F.3d 22, 29 (1st Cir. 2005); *South Dakota v. United States DOI*, 423 F.3d 790, 795-96 (8th Cir. 2005); *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30-33 (D.C. Cir. 2008). Judge Brown of the D.C. Circuit, in the last of these cases, strongly stated the opposing view, *id.* at 34 ff.

²⁸ *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (DC Cir 1976; Leventhal, J.)

²⁹ 71 NY 2d 1 (1988).

that; our votes empower them to. But not agencies. One might think a similar concern implicit in the Supreme Court's repudiation of "cost" as an element permitted the EPA in Clean Air Act administration in *Whitman v. American Trucking Ass'n*.³⁰ Permitting so wide-ranging a set of decisional factors would have underscored the enormity of the power thus conferred, a consideration that seems often to have moved the Court in its ostensible rejections of delegation arguments that nonetheless serve to cabin granted authority.³¹ In *Massachusetts v. EPA*,³² the majority rejected the EPA's explanation of its refusal to engage in rulemaking respecting carbon dioxide as a greenhouse pollutant grounded in foreign relations concerns:

[This] alternative basis for EPA's decision--that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time--rests on reasoning divorced from the statutory text. ... [T]he use of the word "judgment" is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits. ... [O]nce EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.³³

In its decision in *Entergy Corp. v. Riverkeeper*,³⁴ just four weeks before this conference, the Court majority – while finding "cost" permissible as a consideration in Clean Water Act administration, insisted that this was because Congress had so permitted. Phil would find the three opinions addressing this issue fascinating for their tension among the usually textualist and more-willing-to-look-at-the-entrails Justices; Prof. Rick Hills immediately questioned, with apparent reason, whether Justice Scalia, looking neither left nor right at what had happened in Congress, had not abandoned textualism for the *Chevron*³⁵ deference he has previously asserted textualists are much less likely to find called for.³⁶ But the important thing to note for our purposes is that this is how all nine Justices addressed it, as a question of what Congress had provided. And respecting *Chevron*, all carefully framed the decision

³⁰ 531 U.S. 457 (2001).

³¹ Thus, Justice Scalia, who in other contexts has inveighed against finding elephants in mouseholes, *MCI Telcoms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994), wrote for the *Whitman* majority that "While Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators' [exempted from ordinarily applicable grain elevator standards] ... it must provide substantial guidance on setting air standards that affect the entire national economy," 513 U.S. at 475.

³² 549 U.S. 497 (2007)

³³ At 533-34.

³⁴ 129 S. Ct. 1498 (2009).

³⁵ *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

³⁶ "Does Scalia Abandon Textualism In *Entergy Corp v. Riverkeeper*?" <http://prawfsblawg-blogs.com/prawfsblawg/2009/04/does-scalia-abandon-textualism-in-entergy-corp-v-riverkeeper.html>, visited April 14, 2009 ("I think so. If I am right, then *Entergy Corp*, handed down today, is a significant defeat for textualism at the hands of its most zealous proponent."); compare Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *Duke L.J.* 511, 521 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists." (emphasis in original)).

processes involved as, in the first instance, EPA's decision processes (i.e., not White House decision processes) and, second, as processes that had involved the exercise of reviewable judgment, not will.

Of course the tension between technocratic and political views of agency action is not new, and any thought of rationalizing administration as *simply* the exercise of expertise – as if the necessary judgments could be reached by calculation and without the intrusion of values – has long since vanished. But is it, then, *just* politics?³⁷ And if it is, rather, *necessarily* an admixture – if we refuse to accept the arbitrariness of “just politics” but it is impossible to achieve “a government of laws and not of men” *strictu sensu* – how do we keep the law side in significant operation?

The development of aggressively centralized presidential oversight, even control, of executive agency rulemaking has given this question new prominence. A quarter century ago, as these oversight mechanisms were gathering momentum, the Supreme Court delivered two judgments within months of each other that mark its poles. In *State Farm*,³⁸ it reiterated and expanded the formulae for judicial review of the exercise of executive discretion under law that it had voiced in *Citizens to Preserve Overton Park v. Volpe*,³⁹ and did so in a manner commonly taken as an explicit embrace of the DC Circuit's development of “hard look review” in important rulemakings. And then in *Chevron*⁴⁰ it celebrated what many have criticized as an inappropriate limitation of the judicial role on review, accepting the possibility that Congress would often confer effective lawmaking (interpretive) roles on agencies within the ambiguous interstices of the statutes they were responsible to administer – and, in the course of doing so, forcefully noting the President's political influence over matters of an essentially policy-making character, that could not be a proper element of judicial judgment.

Succeeding years have witnessed ever-increasing presidential command of the agency rulemaking apparatus, and increasing politicization of the executive agency bureaucracy.⁴¹ Adherents of the strong view of the “unitary executive” celebrate the trend, finding in the Constitution an essential right of the President to command all executive action – in effect, extending to EPA rulemaking Chief Justice Marshall's characterization of the Secretary of State's foreign affairs function as a realm in which the officer “is to conform precisely to the will of the President: he is the mere organ by whom that will is communicated.” They do not seem to notice what Marshall said

³⁷ “Politics,” like “discretion,” is a word of contrasting meanings, as Robert Post so thoughtfully shows in his contribution to this symposium. People may operate from the friend/enemy perspective, with loyalty as the central measure, or understand politics to embrace a collective reaching toward an acceptable judgment with celebration of open disagreement as the means of getting there. Presidents will vary how they understand it, as is so dramatically illustrated by the stances of our present and next-previous Presidents, see *infra* note 73 and accompanying text. The problem of “will” is that it must accept the friend/enemy view as possibly driving the judgment that can “never” be made in court.

³⁸ Note 23 above.

³⁹ Note 20 above.

⁴⁰ Note 35 above.

⁴¹ On April 14, 2009, the Library of Congress's Thomas website reported 127 presidential nominations as having been received for Senate consideration, for civilian positions (i.e., excluding Military, Foreign Service, NOAA, Public Health), and a number of these positions were nominations to judgeships in the federal or District of Columbia courts. The number of “political” positions in administration controlled by the White House, outside the Civil Service (including its politically somewhat vulnerable Senior Executive Service), exceeds 2500. Persons living in parliamentary systems built over permanent civil service bodies find this level of politicality astounding.

would follow from this proposition, or its tension with the ideas of Section 706, *Overton Park*, and *State Farm*. Their point, I suppose, is that the President is elected and in this way any “democracy deficit” is cured.

Berkeley’s Dean, Christopher Edley, after working with President Carter’s domestic policy staff, was among the first to note for us how inevitable *and appropriate* some intrusion of politics into rulemaking is.⁴² Notice, though, how much more problematic dependency on the President’s election is for us, than the practice of parliamentary responsibility is in parliamentary democracies. There, many or all ministers may be elected (that is, have an independent electoral responsibility) and all must answer directly to the Parliament. The government may fail at any moment, and if it does everyone will be on the hustings. It will be the cabinet, not the Prime Minister alone, who collegially reject (or accept) a minister’s proposal for what we call rulemaking.⁴³ If a statutory instrument seems mistaken, the government can force its consideration by the Parliament and, at least in the lower House (thus raising visibility even if the upper House is “independent”), effectively control the enactment of a corrective measure.

Our Cabinet Secretaries, in contrast, answer only to the President and White House staff; while Congress can require presence at hearings and refuse desired boons, statutory or budgetary, its resources are slim.⁴⁴ Our governments never “fail” in the parliamentary sense; our election dates are firmly fixed into the next millennium and (except as the presidential election might be characterized that way) we never, as such, elect the government. And then there are the influences of what Phil and his casebook colleagues have so persuasively pointed to as “vetogates.” Should the President block a rule and that somehow become public, Congress could correct his mistake only by overcoming all those hurdles – most importantly, only by mustering the super-majority that would be necessary to overcome his expectable veto. Should a simple majority of Congress conclude that a rule the President favored politically was undesirable, that too would fail. Simple majorities in both houses and presidential assent *are* required to enact or alter statutes – usually to be tested in court, as earlier remarked, merely as acts of “will” – but for rules to which the President assents, super-majorities would have to be mustered to overcome the expectable veto of congressional acts of disapproval. And because instant governmental failure is not in the cards, because – whatever the President does – any thought of political “retribution” must await a subsequent election in which he will be the candidate no more often than once in every two, and no one expects that election to turn on some administrator’s ostensible decision he may have coerced, the idea that politics will control his actions is remarkably remote.

⁴² *Administrative Law: Rethinking Judicial Control of Bureaucracy*, Yale University Press, 1990.

⁴³ Consider these thoughts, put to me by Keith Bradley:

I propose that we think of the difference between political and administrative discretion not in terms of how politics influences the making of a decision, but rather in terms of how one reverses a decision. ... British politics [is] more democratic, in this sense, because so many decisions are made by ministers, and because the life of governments is undetermined. Even though ministers are appointed without confirmation by a powerful prime minister, a motivated citizen who wants to reverse a ministerial decision knows exactly what he has to do, and it entirely involves working to change the political personnel.

Email of July 8, 2009.

⁴⁴ Cf. Thomas Mann and Norman Ornstein, *The Broken Branch* (2006)

My casebook colleague Todd Rakoff, reading an early draft of these remarks suggested noting that our parties - or those that have a chance of coming to power - are based on very broad coalitions, such that each represents (albeit to differing degrees) most of the views to be found on public policy. Over the years American political parties have enforced much less rigorous discipline, particularly in the Congress, than the parties of parliamentary democracies often deploy. Absent much party discipline or feeling that it ought to prevail, the result is to make even executive administration quite diverse. As President Harry Truman famously remarked when President Eisenhower, a former general, had been elected to succeed him, "He'll sit here ... and he'll say, 'Do this! Do that!' And nothing will happen. Poor Ike-it won't be a bit like the Army. He'll find it very frustrating."⁴⁵ If presidential power is understood as the power to *persuade* – if those with whom he interacts understand that duties lie with them, that loyalty is not the *primum bonum* of holding executive office, and that the diversity of political view within their party creates wiggle room for them in performing their duties – then one might argue that the 2500 or so presidential administrative appointments made without the benefit of Senate confirmation will still predictably represent, in some crude but real sense, the disparate views of a majority of the population. Introduce the emphasis on loyalty and effective party discipline that has characterized the Republican party in recent years, in Congress as well as in the White House, and this reassurance disappears. The governing ethic of those taking the “strong unitary executive” view is that the first duties of civilian heads of departments, like generals of the Army, are loyalty and obedience. Truman again: “Whenever you have an efficient government you have a dictatorship.”⁴⁶

Presidential control over rulemaking, then, is no simple answer to the problem of the “democracy deficit.” Indeed, given both the privacy screen⁴⁷ behind which it is, understandably enough, exercised and the extraordinary range of measures that might be subject to it, one could conclude that presidential control makes the democracy deficit not better but worse. It invites political “will” to be exercised in a manner that may be undisclosed and essentially uncorrectable. One begins to understand here another of those tensions that pervade American ideas about government and the separation of powers. On the one hand, the President’s executive authority precludes the possibility that he is to be a lawmaker;⁴⁸ on the other, we unhesitatingly embrace agency rulemaking – as, indeed, as a practical matter, we must. Professor Rakoff, in a published analysis, sought to contrast these propositions as grounded, for the President, in reluctance to accept an office both omni-powered and omni-competent;⁴⁹ agencies entrusted with focused authority, and subordinate to Congress and Court as well as to the President, are a different story. But this works, of course, *only* if we accept that the President’s role is one of oversight and persuasion, not control.

I have discussed at some length elsewhere⁵⁰ how considerations such as these lead me to find in the President’s obligation that the laws be “faithfully executed” a

⁴⁵ Richard Neustadt, *Presidential Power and the Modern President*.

⁴⁶ Harry S Truman, *Lecture at Columbia University, 28 Apr. 1959*, <http://www.quotations-page.com/quote/27058.html>, visited April 21, 2009.

⁴⁷ See *infra* text accompanying notes 58-60, 66-68.

⁴⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (opinion of Black, J.)

⁴⁹ Todd Rakoff, *op. cit.* n. 25 above.

⁵⁰ Peter L. Strauss, *Overseer or “The Decider”?* *The President in Administrative Law*, 75 G.W.U. L. Rev. 615 (2007).

responsibility to accept that Congress has conferred on *others* duties that *they* are to exercise, and to exercise not as a matter of will, but as acts of judgment. The courts, that is, must have a role in relation to rulemaking, and that role cannot be an empty one. In the opinions that have, to date, most openly accepted the intrusion of political considerations, this proposition has been instinct. The 5-4 decision this Term in *Entergy*, as already noted, divided over whether “cost” was an acceptable element of EPA decisions under the Clean Water Act. The disagreement was perhaps a reflection of the secondary impact of “delegation” concerns – made ironic, as the dissent noted, by the majority author’s usual and apparently delegation-motivated indisposition to find “elephants in mouseholes.”⁵¹ But the opinions were unanimous in their presumption that the decision was the EPA’s, proper if (as the majority reasoned) cost was a permissible factor for the EPA to consider, and to be assessed by the usual standards of judicial review of agency action. And Judge Patricia Wald’s canonical decision in *Sierra Club v. Costle*, spends 103 pages in Fed Second closely attending to the EPA’s reasoning supporting its early rule requiring scrubbing and other measures to control sulphur dioxide emissions by electric power plants before reaching (and deciding to put aside) the possibility that unrecorded presidential and congressional counselling might have influenced the EPA Administrator in choosing among the several possibilities the record he had would support.⁵² Very clearly she is reviewing the EPA Administrator’s decision, and doing so with intensity:

We reach our decision after interminable record searching (and considerable soul searching). We have read the record with as hard a look as mortal judges can probably give its thousands of pages.⁵⁴⁰ We have adopted a simple and straightforward standard of review, probed the agency’s rationale, studied its references (and those of appellants), endeavored to understand them where they were intelligible (parts were simply impenetrable), and on close questions given the agency the benefit of the doubt out of deference for the terrible complexity of its job. We are not engineers, computer modelers, economists or statisticians, although many of the documents in this record require such expertise and more.

Cases like this highlight the critical responsibilities Congress has entrusted to the courts in proceedings of such length, complexity and disorder. Conflicting interests play fiercely for enormous stakes, advocates are prolific and agile, obfuscation runs high, common sense correspondingly low, the public interest is often obscured.

We cannot redo the agency’s job; Congress has told us, at least in proceedings under this Act, that it will not brook reversal for small procedural errors; Vermont Yankee reinforces the admonition. So in the end we can only make our best effort to understand, to see if the result makes sense, and to assure that nothing unlawful or irrational has taken place. In this case, we have taken a long while to come to a short conclusion: the rule is reasonable. Whatever the conversation with the President may have been, the decision was the administrator’s and one to be closely reviewed following the administrator’s reasons.⁵³

⁵¹ 129 S. Ct. at 1517 (Stevens, J., dissenting) (internal quotation marks omitted).

⁵² The opinion begins at 657 F.2d 298, and discussion of the *ex parte* issue begins on p. 400; excluding its appendices, the opinion ends on p. 410.

⁵³ 657 F.2d at 410; footnote 540 is omitted, but do note its number, in itself a signal of the intensity of the exercise.

To be sure, as Bruce Ackerman and William Hassler plangently argued in their book, **Clean Coal, Dirty Air**,⁵⁴ the rule Judge Wald upheld has the markers of a political compromise, and there was ample circumstantial evidence that one had occurred. If persuaded that the decision had been reached on the basis of factors the statute did not make relevant – as alleged, getting votes to support an important (and unconnected) treaty, and protecting the economic livelihood of West Virginia coal miners – she acknowledged that she would have had to vacate the EPA rule. But the issue was its persuasive rationalization in terms of the factors made relevant by statute and the record the agency had built. Kevin Stack has persuasively explained this outcome in the most fundamental of separation of powers terms, grounded in the long-standing administrative law proposition, established by *SEC v. Chenery* and predating the APA, that agency decisions must be justified in the terms used by the agency.⁵⁵ While some have tended to criticize the Court’s decision in *State Farm* in the terms suggested by Justice Rehnquist’s partial dissent, for having ignored the political factors suggested by the recent election of a new President, the *Chenery* proposition amply explains it. The agency attempted no such explanation (and might have had to reach outside the factors permitted by its statute if it had, inviting judicial censure).⁵⁶ The court, then, could not be criticized, even implicitly, for finding the challenged rule deficient in the terms the agency had used to explain it and failing to reach an explanation the agency had not given; and Justice Rehnquist *can* be criticized for having done so.

What if the agency gave an explanation of its reasoning that included political considerations, perhaps ones impressed upon it by the President? If they were not factors Congress had authorized the agency to consider – that is, if they interjected them simply on the President’s authority – *Massachusetts v. EPA* holds that that reasoning would be unavailing. Permission to use it would take us straight into the quagmire suggested by *Youngstown Sheet & Tube, Chenery, Marbury*, and the stated dependency of valid delegations on demonstrable legality. In an influential article published some years ago, Elena Kagan suggested one possible means of dealing with the authority question: just as courts presume that congressional delegations of the authority to act with legal force to an agency entails the agency’s primary responsibility to resolve interstitial questions of statutory meaning and application fairly left open by statutory language, those delegations should also be presumed to permit presidential guidance grounded in factors not explicitly precluded the agency yet understandable in rational policy terms.⁵⁷ The Court’s recent *Entergy* decision might be thought to take one as far as suggesting such an assumption about *agency* authority; for the majority, silence did not suffice to defeat the proposition that an authority that might have been thought one of those “elephants in a mousehole” (both distant from the agency’s focal expertise and redolent of political will) had been conferred.

Might the judicial role on review include any attention to *presidential* political reasons that might be expressed as elements of the reasoning underlying rulemaking? If Professor, now Solicitor General, Kagan’s argument about implicit delegation – parallel to *Chevron*—offers us a way past the non-delegation/*Youngstown/Marbury* problem, mustn’t that be on a basis that can be fit with *Overton Park/State*

⁵⁴ Yale University Press 1981.

⁵⁵ Stack, Kevin M., *The Constitutional Foundations of Chenery*. 116 Yale L.J. 952 (2007).

⁵⁶ Stephen Williams, *The Roots of Deference*, 100 YALE L. J. 1103, 1108 (1991).

⁵⁷ Elena Kagan, *Presidential Administration*, 114 Harv.L.Rev. 2245 (2001).

Farm/Sierra Club and the like, a basis that excludes raw politics, requires public explanation, acknowledges formal agency responsibility for decision, and permits judicial review? Two very recent contributions to the literature not yet in the law reviews but already posted on SSRN point interestingly in just this direction.

The first I found was Professor Nina Mendelson of Michigan's "Disclosing 'Political' Oversight of Agency Decision Making,"⁵⁸ which is to appear in a forthcoming issue of the Michigan Law Review. Professor Mendelson finds it striking – wouldn't we all agree? – that after more than three decades of formal presidential oversight of agency rulemaking⁵⁹ openly stressing the importance of analyses and factors that make eminent political sense but are rarely explicit elements of agency mandates, her diligent research could unearth virtually no trace of its influence in agency rulemaking. Statements of basis and purpose just don't mention, much less explain, changes that review by the Office of Information and Regulatory Affairs (OIRA) may have induced.⁶⁰ Of course this fits with *State Farm* – that is, the agency explains the rule in terms supportable on its record and the factors it is directly charged to consider – but at a cost in candor that may make "hard look review" seem no better than a shell game. One is reminded of what I understand was once said about the writing of Civil Aeronautics Board decisions allocating airline service; its opinion-writing staff would be told what the Board had decided, that Delta would get the route from Atlanta to Chicago, say, but no more. It was for them to figure out why giving the service to Delta and not to United or American best served the public convenience and necessity. Like doing the Sunday crossword puzzle, this could be challenging mental gymnastics, but was entirely artificial. And so, Professor Mendelson asks, would we not be better served by statements that acknowledge the White House input and resulting changes, in ways that permit the continuing, rationalizing constraints of judicial review?

Not two weeks later, barely three weeks before our conference, I found on SSRN the abstract of Professor Kathryn Watts' "Proposing A Place For Politics In Arbitrary-And-Capricious Review,"⁶¹ set to appear in the Yale Law Journal. This piece differs from Professor Mendelson's by focusing on the lack of transparency at the judicial review stage rather than earlier points in the rulemaking process.⁶² But as the title tells you, it is cut from the same cloth.⁶³

⁵⁸ 108 Mich. L. Rev. (forthcoming 2010), available at <http://ssrn.com/abstract=1470850>.

⁵⁹ See generally Kagan, supra note 57, at 2272-2319.

⁶⁰ Professor Mendelson also notes opacity with respect to information *required* to be put in the rulemaking record. Under Executive Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), which governs White House oversight of rulemaking via OIRA, agencies must identify OIRA-induced changes and make available documents exchanged between OIRA and the agency. However, Professor Mendelson reports great difficulty in locating these items in agency dockets, see Mendelson, supra note 58, manuscript at 32 & n.50; see also id. at 40 ("[T]he disclosure requirements of Executive Order 12,866 have been honored in the breach.").

⁶¹ 119 Yale L.J. (forthcoming 2009), available at <http://ssrn.com/abstract=1353519>.

⁶² The two authors accordingly offer different solutions: Professor Watts proposes allowing agencies to defend actions against judicial challenge by identifying political influences consistent with relevant public values or policy choices, whereas Professor Mendelson advocates requiring agencies to include in rulemaking documents summaries of interactions with political actors.

⁶³ Indeed, this is what one might expect of pieces scrutinizing justifications given by agencies in, respectively, the Federal Register and the courts; under *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), the rationales supplied in each forum must be the same.

The *Marbury-Youngstown*-non-delegation side of the tension I have been trying to sketch for you is reflected in the attention both pieces give to where it is that decision must be made, and to the problem of injecting factors that cannot be attributed, even presumptively, to congressional authorization.⁶⁴ What is most important about them is not just their realism about the inevitable, indeed appropriate place of politics in agency decisionmaking, but also their insistence – echoing Dean Edley’s earlier writings – that this must be visible and rationalized; that, rather than reflecting obedience to political instructions from one whose “will” could never be questioned in court, the use of “politics,” perhaps better “policy,” must be in a form that permits explanation and invites review. As Professor Watts puts it, arbitrary and capriciousness review should encompass “political influences *that an agency openly and transparently discloses and relies upon in its rulemaking record.*”⁶⁵ Professor Mendelson, too, makes “transparency” key to the regime she urges; both (properly) assume we are talking about discretion, so that the problem of standards and factors proper for the agency to consider then becomes quite key.

To return to President Truman’s wisdom for a moment, the difficulty with this argument (as with transparency arguments generally) is that it gets caught up with the frequent dependency of candor on confidentiality: “The President cannot function without advisers or without advice, written or oral. But just as soon as he is required to show what kind of advice he has had, who said what to him, or what kind of records he has, the advice received will be worthless.”⁶⁶ It is, on my understanding, no accident that improving transparency has been so constant and difficult a theme in the administration of Executive Order 12,866⁶⁷ and its predecessors, that “executive privilege” is so often invoked in defense against congressional oversight.⁶⁸

Both of these young scholars acknowledge, as well, that revealing and reviewing the results of White House inputs will prove easier for courts – and perhaps also for Presidents – in some settings than in others. Although repudiated by the majority in *Massachusetts v. EPA*,⁶⁹ one could think an important distinction might be drawn between presidential communications directing (even controlling) what in general are to be an agency’s priorities, and communications telling it exactly what to do; Justice Scalia’s dissent in that case strongly so argued.⁷⁰ A directive “It is more important, in my judgment, for you to work on X than Y, and I instruct you to tackle that problem first,” might be distinguishable from “In relation to your project X, where you could find in a range between .5 and .75, choose .75.” The second, much more obviously than the first, is purporting to exercise a “duty” that Congress has assigned to the agency, and every Justice in the case endorsed Justice Scalia’s concession that “[w]hen the Administrator *makes* a judgment whether to regulate greenhouse gases, that judgment must relate to whether they are air pollutants that ‘cause, or contribute

⁶⁴ Thus, both acknowledge that an agency should not be allowed to support its action by advertising to, say, the President’s desire to help an industry that contributes substantial campaign funds.

⁶⁵ *Id.*

⁶⁶ II Harry Truman, *Memoirs: Years of Trial and Hope* 454 (1956).

⁶⁷ See *supra* note 60.

⁶⁸ See generally *Costle*, 657 F.2d at 405 & n.522. For examples of reliance on executive privilege by, respectively, the Reagan and first Bush administrations, see Steven T. Kargman, Note, OMB Intervention in Agency Rulemaking: The Case for Broadened Record Review, 95 *Yale L.J.* 1789, 1800-01 (1986) and Sidney A. Shapiro, Political Oversight and the Deterioration of Regulatory Policy, 46 *Admin. L. Rev.* 1, 21-23 (1994).

⁶⁹ N. 32 above.

⁷⁰ 549 U.S. at 552-53.

to, air pollution which may reasonably be anticipated to endanger public health or welfare.”⁷¹

A presidential directive for a particular result is getting into the details, where political authority holds less persuasiveness. It is violating all the norms of efficiency that cause us generally to prefer standards over rules when we are addressing the regulation of private behavior. It has long seemed to me that the potentially most valuable contribution of EO 12866 both to political responsibility and to good government lies in Section 4, the section requiring coordination with the White House of an agency’s annual regulatory plan. Yet Presidents have preferred to develop Section 6 cost-benefit analysis of particular rulemaking efforts – retrospective nit-picking that is extremely vulnerable to the kinds of political uses more readily identified as illegitimate. In talking with high level bureaucrats from parliamentary systems, I find them quite credibly accepting of political direction on general policy issues, but dismissive, to the point of regarding as illegitimate, political efforts to tell them how to decide particulars.

As we speak, these issues appear to be significantly in play. In early directives concerned with EO 12866 and restoring integrity to science, President Obama has promised respect for agency responsibility, significant advances in transparency, and a thorough revision of EO 12866, the formal mechanism⁷² by which the White House interacts with rulemaking.⁷³ Yet his critics have already noticed significant reservations in these documents (and other behaviors) looking the other way.⁷⁴ In my judgment, a great deal hangs in the balance.

As remarked at the outset, my effort has been not to solve a problem, but to suggest to you tensions that are likely to endure, and that it is in our best interests to *have* endure. Our continuing challenge is to maintain circumstances recognizing the importance of politics, the imperatives if you like of the democracy deficit in rulemaking, while at the same time keeping excessive power for covert action, for the concretization of simple “will,” out of any single pair of hands. In today’s world, our risk of failure in that balancing effort lies principally with the presidency.⁷⁵ We must so construct the President’s relation to government as to permit the enduring belief that we live in a rule-of-law culture of constrained reasonable judgment, even as we recognize the contributions that political will can make. It is not easy. It is not hard

⁷¹ *Id.* (emphasis in original).

⁷² But hardly the only such mechanism; see, e.g., Kagan, n. 57 above; Lisa Bressman & Michael Vandenberg, *Inside The Administrative State: A Critical Look At The Practice Of Presidential Control*, 105 Mich.L.Rev. 47 (2006).

⁷³ See *Regulatory Review: Memorandum for the Heads of Executive Departments and Agencies*, 74 Fed. Reg. 5977 (Feb. 3, 2009); *Scientific Integrity: Memorandum for the Heads of Executive Departments and Agencies*, 74 Fed. Reg. 10,671 (March 11, 2009).

⁷⁴ For instance, President Obama asked for public input on how to reform E.O. 12,866, see Office of Management and Budget, *Federal Regulatory Review*, 74 Fed. Reg. 8819 (Feb. 26, 2009), but of the 183 submissions received, not one came from a public agency, see <http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp>. This silence, striking in any event, might be taken to suggest a policy of clamping down on executive branch communications at the expense of transparency. Similarly, while President Obama has trimmed OIRA’s role back to what it was in the Clinton years, see Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009), even then, White House review of rulemaking did not lack critics of its politicizing and delay-promoting possibilities.

⁷⁵ See Peter M. Shane, *Madison’s Nightmare -- How Executive Power Threatens American Democracy* (Chicago 2009)

to find oneself peering into the abyss. “In the end this may seem merely a fiat, but that is always true, whatever the disguise.”⁷⁶ Adrian Vermeule in another recent article has reminded us of the bleak assessment of the German philosopher Carl Schmitt, that the rule of law must inevitably fail.⁷⁷ Schmitt wrote about, and Vermeule is principally concerned with, the problems of emergency powers – so much with us in the wake of 9-11 and the Iraq War. But the black holes and grey holes he describes, as indeed he remarks, pervade administrative law’s efforts to constrain the irrational exercise of power. We cannot ignore them, but neither must we succumb to their gravitational force.

Let me end as I began, by invoking Phil’s lifelong commitment to *practical* legal studies. In this most real of all possible worlds, as my friend Roy Schotland put it to me long ago, accommodating reality is the best we can hope for. And Phil has given us a treasure-house of such efforts.

⁷⁶ See *supra* n.1.

⁷⁷ Our Schmittian Administrative Law, 122 Harv. L. Rev. 1095 (2009).