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## On Capturing the Possible Significance of Institutional Design and Ethos

Peter L. Strauss<sup>1</sup>

At a recent conference, a new judge from one of the federal courts of appeal – the front line in judicial control of administrative action – made a plea to the lawyers in attendance. Please, he urged, in briefing and arguing cases reviewing agency actions, help us judges to understand their broader contexts. So often, he complained, the briefs and arguments are limited to the particular small issues of the case. We get little sense of the broad context in which it arises – the agency responsibilities in their largest sense, the institutional issues that may be at stake, how these particular issues may fit into the general statutory framework for which the agency is responsible, and so forth.

This paper hopes to open a conversation about what strike me as the largest and least well appreciated of these failures of contextualization. American law students, lawyers and judges seem rarely to think about issues of institutional design and ethos when considering the issues of administrative law. I wonder if this is also true in the legal orders of Europe.

The failure perhaps reflects judicial discomfort in working at the shifting and sometimes troublesome borderland between law and politics, that one can find already expressed in the earliest of our great constitutional cases, *Marbury v. Madison*.<sup>2</sup> Chief Justice Marshall's opinion in that case famously established the place of the courts in the constitutional order. Distinguishing between those acts that a court might control by law, and those that were not subject to legal constraint, he denied any purpose to reach acts the President was entitled to *command* from his subordinates. When an official

“is to conform precisely to the will of the President [h]e is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. ... The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they 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.”

The thing to note is that we would *never* describe the decisions of the Administrator of the EPA about air quality in the way Chief Justice Marshall describes decisions of the Secretary of State about foreign affairs. The Secretary of State is exercising discretion in its largest sense, cases in which there is no law to apply and which “can never be examinable by the courts.” The great Chief Justice Marshall was not addressing the mixed questions of law and politics that are the everyday focus of administrative law and of judicial review for “abuse of discretion” under the APA. For those acts we actually depend on the possibility of effective judicial review to justify their legality; if standards did not exist permitting a court to assess the legality of the Administrator's acts, we

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<sup>1</sup> Betts Professor of Law, Columbia University. Deep thanks to my colleague Gillian Metzger for her thoughtful suggestions – as, for example, the matter immediately following the opening paragraph below.

<sup>2</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166, 170 (1803).

would say an unconstitutional delegation had been made. These are *not* matters to be decided by politics, and they *are* questions examinable by the courts. And that gives the borderline between politics and law particular significance.

It is not hard to point out other settings. Are the constraints of our federalism to be politically or legally enforced? Attention to “the political safeguards of federalism” has significantly discouraged judicial involvement. When those who are supposed to benefit from the enforcement of regulations adopted to protect their interest feel that those laws have been inadequately administered, have they judicial access in the same manner as those against whom regulations are applied? In the late sixties and early seventies American courts and academicians found in recognition of such claims a possible antidote to the apparent capture and subversion of regulators by those whose behavior they were supposed to control.<sup>3</sup> The subsequent conservative turn in our Supreme Court led to emphasis on political remedies for the general failures of government and suspicion of the suitability of the courts for supervising its exercise.<sup>4</sup>

Still, as I insist to my students each year, the fascination of our subject lies in its placement on the difficult and evanescent boundary between politics and law. I am about to embark on a year’s study of one of its aspects. This will be a comparison of how presidential and parliamentary systems handle the interface of politics and expertise in relation to the quasi-legislative form often taken by health and safety regulation – what Americans call rulemaking and others, often, subsidiary legislation – the adoption of regulations at the ministerial level. The problem is captured by a splendid recent book published by Harvard University Press, **Bending Science**,<sup>5</sup> whose theme is probably obvious from its title. Over the past three or four decades, the United States has seen an increasing penetration of power politics into what had previously been rationalized as the playing out of expert judgment; in recent years this has perhaps been most obvious outside the United States in relation to the problem of global warming. My purpose is to study whether the differing political circumstances and arrangements of our governmental structure, and those of various parliamentary systems have produced differing accommodations of the science-politics interface. One real benefit for me of a conference like this one is the possibility it offers of forming research alliances, as it were, that could help me overcome my very real deficits both in understanding the subtleties of your political systems and in speaking or reading languages other than English and, to a much lesser degree, French.

For our purposes today, I am going to limit myself to some examples from the American context of issues for which institutional design and ethos both can be significant, and appear to be underappreciated by American law students, law professors,<sup>6</sup> lawyers, and judges. I will start with

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<sup>3</sup> The classic account is Richard Stewart, *The Reformation of American Administrative Law*, 88 Harv.L.Rev. 1669 (1975).

<sup>4</sup> E.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>5</sup> The authors are Thomas McGarity and Wendy Wagner of the University of Texas Law School.

<sup>6</sup> E.g., Sunstein, Cass R., "Is OSHA Unconstitutional?" (March 2008), *Virginia Law Review*, forthcoming, available at SSRN: <http://ssrn.com/abstract=1113497>, discusses the arguable delegation problem presented by the statute  
(continued...)

a Supreme Court decision that in my judgment dramatically illustrates the point, and then move on to a few perhaps less obvious examples.

## I.

The decision with which I start is *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,<sup>7</sup> known familiarly to American legal scholars (and hereafter referred to) as the *Benzene* case. The case involved a challenge to a regulation issued by our Occupational Safety and Health Administration (OSHA) that imposed a limit of one part per million of benzene in the air of American workplaces. Benzene is a volatile and carcinogenic chemical present in many industrial sites. Its carcinogenicity makes it likely that *any* level of exposure to it will trigger some cancers. Of course benzene is only one such chemical among many possible targets of regulation. The regulatory limit OSHA set was a particularly stringent one, and very expensive for some industries to which it would apply. Particularly given the stringency of the standard, an obvious concern (one captured by later propositions about overregulation causing underregulation) was whether the choice to regulate benzene rather than some other hazardous chemical had been arbitrary. How had the agency chosen benzene, set its priorities? This concern was heightened by the appearance that OSHA had at least temporarily exempted from the standard at least half of the employees it might have reached, attendants at retail facilities selling automotive fuel (“gasoline” in American parlance, “petrol” in British).

Our Supreme Court decided the case, predominantly, by giving the governing statute a strange and strained interpretation.<sup>8</sup> For toxic substances that statute explicitly required OSHA to chose the standard “which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.” This strong command pretty well excludes consideration of issues of cost and of general balance, as the Court would soon explicitly agree.<sup>9</sup> And the benzene standard, as such, met this test. Yet, drawing on language concerned with OSHA’s regulation of *ordinary* workplace hazards, rather than the special risks presented by toxic substances, the prevailing opinion invented a threshold requirement as a precondition to OSHA’s developing any standard at all. As a condition of initiating rulemaking, it said, OSHA must be able to demonstrate that the toxic substance for which it was choosing to develop a regulation would pose a “significant risk” to workers. Otherwise, the Justices worried, the breadth of discretion OSHA would enjoy in choosing its targets would be so broad as to suggest an improper conferral, or delegation, of authority to the agency. In other words, the prevailing opinion supplied a priority setting constraint.

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<sup>6</sup> (...continued)

involved in the Benzene case, next discussed in text, without once mentioning the National Institute of Occupational Safety and Health, or other notable institutional arrangements constraining OSHA’s exercise of the authority given it.

<sup>7</sup> 448 U.S. 607 (1980).

<sup>8</sup> There was no opinion for the Court; Justice Stevens wrote an opinion for four Justices (Chief Justice Burger and Justices Powell and Stewart) that has been taken to govern the questions discussed in text.

<sup>9</sup> *American Textile Mfrs. v. Donovan*, 452 U.S. 490 (1981).

You might be thinking that it would be rational for Congress to be concerned with how OSHA went about setting its priorities, and also that the approach the Court took was a rational one. I thoroughly agree with the first proposition, and am prepared to concede as well that Congress might have expressed its concern by a device such as the prevailing opinion invented. The striking fact, and this is what launches us on our way, is that while the statute does suggest that Congress thought about the prioritization problem, it reflects that it did so by institutional design. The Court's approach was not evident in the statutory language, and certainly was not one that it was clear Congress had chosen. The next few paragraphs suggest how the Justices might have understood certain institutional design elements that Congress *did* choose in relation to its concerns about priority setting. These elements, they might have concluded, had introduced the elements of regularity and constraint they were understandably seeking, but in a manner Congress had directly and explicitly provided for.

OSHA is a constituent element of the federal Department of Labor, one of the American cabinet departments corresponding to a Ministry of Labor in a parliamentary democracy. In the United States, as doubtless elsewhere, the Department of Labor is one of high political moment, whose Secretary and principal administrators are often chosen for political attitudes about labor matters that vary considerably as between Republican and Democratic administrations. Aware of this, and responsive also to industrial concerns,<sup>10</sup> Congress in establishing OSHA created a quite unusual agency structure. Whether it is creating an independent regulatory commission like our Securities and Exchange Commission, an element of a cabinet department like the Animal and Plant Health Inspection Service of the Department of Agriculture, or a freestanding executive branch regulator such as our Environmental Protection Agency, Congress usually endows regulatory bodies with the full range of regulatory authorities. The Commission, Service or Agency has the authority to set its priorities, *and* to create regulations, *and* to take action to enforce those regulations, *and* to hear and decide in the first instance the controversies that arise out of enforcement actions or other disputes about their regulations' meaning or application.

In OSHA's case, Congress strikingly created distinct agencies for these functions. OSHA, for example, is not permitted itself to adjudicate disputes about the enforcement of its regulations. That task is allocated to a separate independent regulatory commission, the Occupational Safety and Health Review Commission, whose administrative law judges and appellate commissioners serve in positions of protected tenure, and have no part in the Department of Labor's political structure. To be sure, it does not mean nearly as much to be an independent regulatory commission (IRC) in the United States as is commonly thought. These days, an IRC is generally conceded to be an element of the executive arm of government – merely an element with somewhat attenuated presidential relationships. The President still has some appointment controls, usually oversees the annual budget submission, and is appropriately in a consultative relationship with IRC rulemakers

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<sup>10</sup> The political circumstances of OSHA's creation, in the wake of dramatic revelations of workplace injury and at a time of generally heightened public enthusiasm for health, safety and environmental legislation, impeded open industrial opposition. Rather, it fought its battles over institutional and procedural arrangements that might tend to keep OSHA's impact in check – as by requiring it to rely on injury data voluntarily supplied to a different arm of the Department rather than data OSHA itself might require be supplied directly to itself, and by specifying unusually elaborate procedures for the making of regulations and heightened standards for judicial review of them. See, e.g., Andrew Szasz, *Industrial Resistance to Occupational Safety and Health Legislation: 1971-81*, 32 *Social Problems* 103 (1984).

if not IRC adjudicators. In other respects too, such as legal representation, office space, etc., the agency is often not much different from other elements of the executive branch. And the IRC's relationship with the American Congress is not at all different from a cabinet department's: its leadership can be called up for oversight hearings, harsh at times; it depends on Congress for legislative support, and for its annual appropriations. Indeed its political vulnerability to the Congress may be greater than a cabinet department's; a Republican chair of the independent Federal Trade Commission once remarked that the principal difference he saw between himself and his cabinet department colleagues in congressional relations was that he had to go before Congress naked, without the presidential shield. To be an IRC, then, is to be somewhat, but not entirely removed from politics. What is striking about the creation of OSHRC, however, is that it moves the resolution of disputes about individual workplace safety violations outside of OSHA and for that matter the Department of Labor into what is arguably a more neutral space. OSHA must share its power with another, perhaps less committed, body.

Another element of institutional design addresses the front end of the regulatory process, the setting of priorities for action. This element, the one with particular relevance for the concerns about OSHA's priority-setting expressed in the *Benzene* case, is not OSHRC, but the National Institute of Occupational Safety and Health (NIOSH). The National Institutes of Health (NIH) are a constituent element of another cabinet department, now the Department of Health and Human Services. That department, generally, lacks quite the political flavor of the Department of Labor and, within its internal structure, the NIH is an arm strongly committed to science and relatively free of politics. Placing NIOSH there, among the National Institutes, was, then, a kind of legislative commitment, a congressional choice for a research and science arm that would be independent of the Department of Labor in identifying those elements of workplace hazard most deserving of regulatory intervention. And that is the job the statute gives it: constant review and development of information about safe exposure levels for toxic materials and harmful physical agents in workplace use, that is to be transmitted to OSHA in recommendations for its action.

The prevailing opinion's recital of the development history of the benzene standard makes clear that NIOSH pressure on OSHA drove the course of that rulemaking.

In a 1974 report recommending a permanent standard for benzene, the National Institute for Occupational Safety and Health (NIOSH), OSHA's research arm,<sup>11</sup> noted that these studies raised the "distinct possibility" that benzene caused leukemia. But, in light of the fact that all known cases had occurred at very high exposure levels, NIOSH declined to recommend a change in the 10 ppm standard, which it considered sufficient to protect against nonmalignant diseases. ... In an August 1976 revision of its earlier recommendation, NIOSH stated that [certain studies it forwarded with its advice] provided "conclusive" proof of a causal connection between benzene and leukemia. Although it acknowledged that none of the intervening studies had provided the dose-response data it had found lacking two years earlier, NIOSH nevertheless recommended that the exposure limit be set as low as possible. As a result of this recommendation, OSHA contracted with a consulting firm to do a study

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<sup>11</sup> Title 29 U. S. C. § 669 (a)(3) requires the Department of Health, Education, and Welfare (HEW) (now in part the Department of Health and Human Services) to develop "criteria" dealing with toxic materials and harmful physical agents that describe "exposure levels that are safe for various periods of employment." HEW's obligations under this section have been delegated to NIOSH, 29 U. S. C. § 671.

on the costs to industry of complying with the 10 ppm standard then in effect or, alternatively, with whatever standard would be the lowest feasible.

In October 1976, NIOSH sent another memorandum to OSHA, seeking acceleration of the rulemaking process and "strongly" recommending the issuance of an emergency temporary standard pursuant to § 6 (c) of the Act, 29 U. S. C. § 655 (c), for benzene and two other chemicals believed to be carcinogens. NIOSH recommended that a 1 ppm exposure limit be imposed for benzene. Apparently because of the NIOSH recommendation, OSHA asked its consultant to determine the cost of complying with a 1 ppm standard instead of with the "minimum feasible" standard. It also issued voluntary guidelines for benzene, recommending that exposure levels be limited to 1 ppm on an 8-hour time-weighted average basis wherever possible.<sup>8</sup>

One unhesitatingly understands from this recital of the history the basis on which OSHA moved forward. As it happened, and as the prevailing opinion demonstrated in other passages, NIOSH's increasingly urgent messages were mistaken in their interpretation of the available science. Yet this hardly obscures the grounding of OSHA's actions in the prioritization scheme that Congress had created and that was working in this case.

Strikingly, the extensive briefs in the case paid no attention whatever to the possible implication of Congress's institutional choices for the priority questions that would so concern the prevailing opinion. Nor was even a moment of oral argument addressed to NIOSH's institutional place – not a question, not a line of argument. The lawyers as well as the Justices, it would seem, were obtuse to the possible implication of the institutional arrangements. It is not as if Congress had been inattentive. It had addressed OSHA's choice of priorities, and addressed it in a way likely to focus attention on available science and away from politics or other sources of possible arbitrariness. Benzene was given priority not on a whim, but because the scientists of NIOSH urgently and repeatedly signaled the need to do so.

Perhaps the lawyers cannot fairly be taxed with having to anticipate the prevailing opinion's focus on priority setting. The existing caselaw did not signal the possibility of treating the stage of priority-setting (rather than the act of standard-setting) as a moment of concern from a delegation perspective. That caselaw was all about whether Congress had adequately supplied standards by which to assess the legality of the eventual regulation itself, *not* the choice of subject on which to regulate. The prevailing opinion's statutory interpretation, strange and strained, could not readily have been anticipated. But even if the lawyers can be excused, it is striking that once the Justices concluded that priority-setting presented an important issue, *they* would pay no heed to NIOSH's role in that respect. If Congress's assignment of priority-setting responsibilities to an outside, relatively impartial and science-centered actor was an inadequate constraint on possible priority-setting abuses, one would at least expect some attention to the question why. And considerations of institutional design and ethos are strikingly absent from the prevailing opinion – and, for that matter, any of the opinions in the case.

There is another, perhaps less troublesome, way in which the Justices revealed their disinterest in institutional factors. The plurality opinion suggests concern that, as noted above, OSHA had

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<sup>8</sup> 448 U.S. 618-21. Save for note "10" just above, footnotes as well as record citations have been omitted.

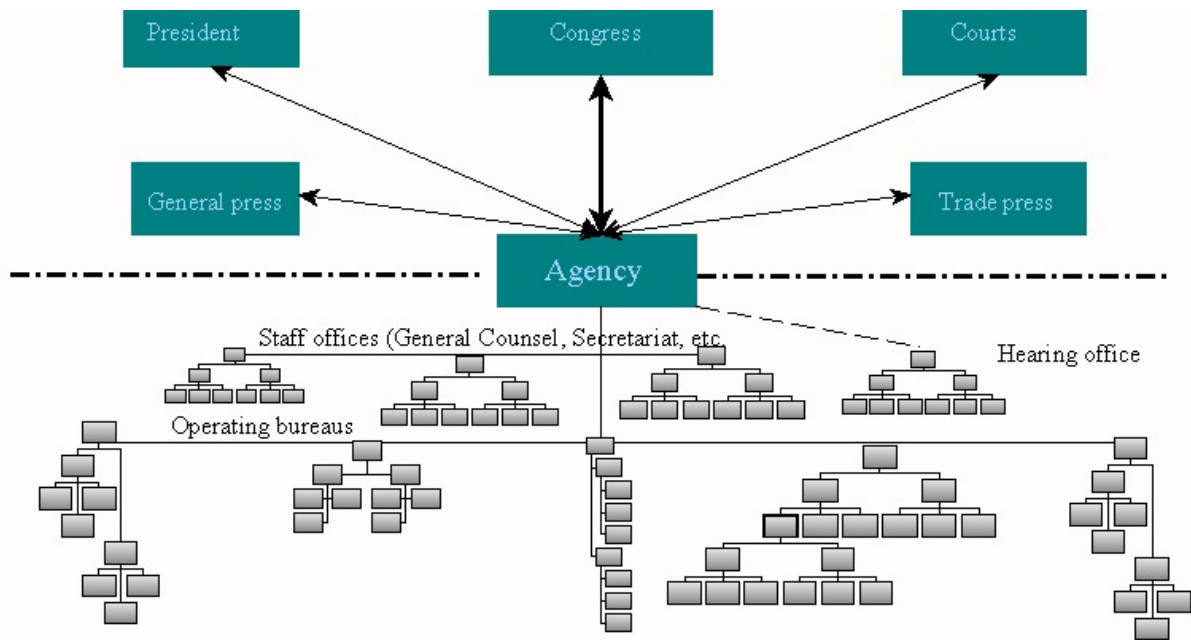
provisionally exempted gas stations from the standards, even though their attendants, when pumping gas into consumers' cars, constituted at least half the number of workers who would inevitably be exposed to atmospheric concentrations of benzene. This too may have seemed arbitrary. Yet further inquiry would have revealed the reason for this action. Not only gas station attendants are present when gas is being delivered into an automobile's fuel tank; indeed, attendants need not be present at all when, as often enough happens, consumers are filling their own tanks. Protection of the public from atmospheric hazards, as distinct from protection of workers, is the responsibility of the Environmental Protection Agency (EPA), an executive branch bureaucracy entirely separate from OSHA and the Department of Labor. EPA had asked OSHA for a chance to coordinate with OSHA's standard for protecting workers the standard it might generate for *consumer* protection from atmospheric benzene at gas stations. Although OSHA could have delayed issuance of its general standard until this matter had been settled, the urgent signals it was getting from NIOSH strongly counseled against a general delay. And so it acted as it did – acknowledging the claim of another agency to coordinate in an area of jurisdictional overlap, but not unnecessarily sacrificing the interest of other workers in prompt protection. Attention to institutional factors here would have drawn the sting of apparent arbitrariness. And this understanding, too, was undeveloped. By ignoring the appropriate demands of internal government coordination, the plurality could, and did, make OSHA seem more arbitrary than it had been in the use of its power.

Once again it is possible that greater attentiveness by the government's lawyers, their anticipation of a judicial response possible if not inevitable in the context of this dispute, could have influenced the Court's response. The shape of opinions is never wholly the responsibility of the Court. The government's briefs emerge from a specialized bureaucracy exquisitely trained in and capable of doctrinal argument, but far less appreciative of and attuned to institutional issues. Judicial review of administrative action is front and center; how a given agency is integrated into government as a whole, and what constraints or controls might emerge from those relationships, is much less central a concern.

Early in my career I was a part of that bureaucracy, the Office of the Solicitor General in the Department of Justice. It controls government litigation in the Supreme Court, polishing the briefs and most often also making the oral argument. A small office, its attorneys are intimates of the Court and its doctrines, but far removed from appreciation of the shaping contexts of agency action. The problems entailed by these characteristics of the office's functioning were not revealed to me until four years later, when I returned to Washington to be general counsel of an independent regulatory commission, the Nuclear Regulatory Commission. It was a general education in the bearing of institutional relationships and realities, and perhaps two anecdotes will be suggestive.

First, at a certain point, the Commission permitted me to spend a week at a seminar regularly offered by the Brookings Institution to upper-level government civil servants. Early on, one of the lecturers used a diagram like this one:





It was a revelation – not that the manifold relationships or their importance were surprising to me (I had been living with them for over a year now), but rather that my prior law school teaching of administrative law had been so completely obtuse to any relationship beyond that between agency and court. Such a diagram became a central orienting part of my teaching from the moment I returned to the classroom. In today’s law school world, though, it may still remain eccentric.

1. Second, not long after I returned from this seminar it was necessary to help the Commission deal with an opinion of the United States Court of Appeals for the District of Columbia Circuit that threatened substantial disruption of its work and would become a major Supreme Court decision in the field, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*.<sup>9</sup> Could we win the support of the Solicitor General’s Office for review of this decision? The conversations that ensued were only about doctrine. The potential for review lay in the possibility that the DC Circuit had required excessively formalized procedures of the Commission, a question about which its opinion was perhaps deliberately obscure.<sup>10</sup> Agreeing that if it *had* required excessively formalized procedures of the Commission, we would have a strong case for Supreme Court correction of this error, the Solicitor General counseled us to try again. If the court was clearer the second time around, he promised, then he would gladly seek Supreme Court review on our behalf. While the Solicitor General was interested in the shapeliness of doctrine, of course, the Commission’s interest was in effectively performing its work. From that perspective, it was incredible that he should suggest such an experiment. Fortunately from our point of view, the private corporation with its license at stake did not require his approval and successfully sought Supreme Court review. This brought the decision immediately before the Court.

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<sup>9</sup> 435 U.S. 519 (1978).

<sup>10</sup> It is not unknown for an intermediate court, aware of the thinness of the doctrinal ice on which it is constructing an opinion, to write in ways that may tend to shield it from Supreme Court review.

## II

Underappreciation for congressional institutional design is also evident in more recent litigation about the delegation question, *Whitman v. American Trucking Association*.<sup>11</sup> Here Congress had created a scientific body within the Environmental Protection Agency, a Clean Air Scientific Advisory Council (“CASAC”) charged with advising the agency about science issues relevant to its regulatory responsibilities. Unlike NIOSH, CASAC is located within bureaucratic hierarchy of the EPA itself, the agency it is charged to advise. Yet CASAC is structured in a way that makes its responsibilities for objective judgment evident. As one of several science advisory boards Congress has chartered within the agency, it is constituted of scientists employed full-time elsewhere – generally in university settings – who serve EPA as special governmental employees, not civil servants *or* political appointees.<sup>12</sup> Its responsibility, reflected on its website,<sup>13</sup> is to provide “independent advice to the EPA Administrator on the technical bases for EPA's national ambient air quality standards.” It had pursued that responsibility in the case at hand, which concerned Clean Air Act standards for particulates and ozone, reporting the ranges of exposure level that in its judgment raised significant public health concerns and were within reasonable possibility of control by the industrial sources contributing to them. As in *Benzene*, the agency’s subsequent action fell within the parameters that this independent, science-oriented body had identified.

When the resulting rule was challenged in the D.C. Circuit,<sup>14</sup> the majority found it offensive to the constraints of the delegation doctrine. EPA, the court reasoned, “lacks any determinate criteria for drawing lines. It has failed to state intelligibly how much is too much. ... EPA's formulation of its policy judgment leaves it free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog.” Yet this characterization is credible *only* if one ignores the institutional constraints Congress had created by its creation of CASAC, and CASAC’s advice in the particular case. For the dissent in the case, its institutional characteristics and contributions were key:

CASAC must consist of at least one member of the National Academy of Sciences, one physician, and one person representing state air pollution control agencies. In this case, CASAC also included medical doctors, epidemiologists, toxicologists and environmental scientists from leading research universities and institutions throughout the country. EPA

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<sup>11</sup> 531 US 457 (2001).

<sup>12</sup> This is a not uncommon statutory arrangement for regulatory areas with high science and/or engineering content; similar bodies can be found, for example, at the Federal Aviation Administration, the Food and Drug Administration and the Nuclear Regulatory Commission. The latter’s Advisory Committee on Reactor Safeguards had not only a statutory role; I often witnessed the practical ways in which its scientific judgments, identifying areas of consensus and of necessary safety concern, influenced NRC outcomes.

<sup>13</sup> <http://yosemite.epa.gov/sab/sabpeople.nsf/WebCommittees/CASAC>.

<sup>14</sup> *American Trucking Ass’n v. EPA*, 175 F3d 1027 (1999).

must explain any departures from CASAC's recommendations. Bringing scientific methods to their evaluation of the Agency's Criteria Document and Staff Paper, CASAC provides an objective justification for the pollution standards the Agency selects. Other federal agencies with rulemaking responsibilities in technical fields also rely heavily on the recommendations, policy advice, and critical review that scientific advisory committees provide.

But for the majority, the “question whether EPA acted pursuant to lawfully delegated authority is not a scientific one. Nothing in what CASAC says helps us discern an intelligible principle derived by EPA from the Clean Air Act.”

In the Supreme Court, the Justices readily found the “intelligible principles” that our Constitution requires for a delegation of rulemaking authority to withstand constitutional challenge.<sup>15</sup> But CASAC’s role drew no attention from the Court; nor does it appear that the parties argued, as the court of appeals dissent had, that the institutional choices Congress had made, in themselves, had any significance for the delegation issue.

### III

I have written at length in other places<sup>16</sup> about a 1971 decision of our Supreme Court, *Citizens to Preserve Overton Park v. Volpe*<sup>17</sup> whose present large influence on American administrative law comes from its explication of the standards for judicial review of informal agency action. In the course of getting to that discussion, the Court was required to interpret a statute that in somewhat ambiguous terms instructed the Department of Transportation, when making decisions about the routing of limited-access federal highways (our Autobahns), to protect parklands from unnecessary intrusions. At issue was the possible intrusion of Interstate 40 on a unique central park in Memphis, Tennessee.

One with the leisure to explore the political history of I-40 in Memphis and the development of federal law about location of these roads, such as I later had as an academic,<sup>18</sup> could find that there had been well over a decade of political dispute in Memphis about the location of the roadway, involving state and federal as well as local officials, and producing numerous ameliorative changes in the plan for its routing and design. One could notice, as well, a steady stream of congressional statutes – of which the ones at issue in the case seemed only the latest expression – creating ever-increasing opportunities for political expression about these issues and standards to guide their

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<sup>15</sup> Whitman, n. 11 above.

<sup>16</sup> Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community, 39 UCLA L Rev 1251 (1992); *Citizens to Preserve Overton Park v. Volpe* – Of Politics and Law, Young Lawyers and the Highway Goliath, in Peter L. Strauss, ed., **Administrative Law Stories** 258 (2006).

<sup>17</sup> 401 U.S. 402 (1971).

<sup>18</sup> Drawn to the case from memories of my puzzlement about it when a member of the Solicitor General’s office at the time it was litigated; the case was not, however, my responsibility.

decision. Had the Court been persuaded to accept a political understanding of the statutes at issue, which is how the responsible administrators had understood them – had it been aware *inter alia* of the unusually high levels of political engagement on precisely the question of I-40's route through Memphis, including several appearances before Congress addressing the matter – it could easily have decided to leave the matter at rest. After all, the moving parties before the Court were a small volunteer group of citizens of varying motivations. Hardly representative of the local populace, they had seized every opportunity politics afforded them over the preceding fifteen years and had in fact secured much change, albeit not the total rerouting they wished. But for the Court, politics was self-evidently unreliable:

It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible. Although it may be necessary to transfer funds from one jurisdiction to another, there will always be a smaller outlay required from the public purse when parkland is used since the public already owns the land and there will be no need to pay for right-of-way. And since people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business. Such factors are common to substantially all highway construction. Thus, if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes.

Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary. But the very existence of the statutes indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.

Again, the Court's obliviousness to the possible success of alternative institutional controls – in this instance, of Congress's increasingly stringent arrangements to assure local voice in such matters, and of the changes that the petitioners and others had in fact won over time – can be traced as readily to the attorneys and the circumstances of litigation in the Court as to the Justices. The case was briefed on a schedule that did not permit deep learning about its background,<sup>19</sup> and it was briefed by the Solicitor General's office, that was unlikely to be sensitive to either the political history or the broad statutory context. Nonetheless, the opinion's strong skepticism about the utility of institutional arrangements, in my judgment, fits well with my general theme here. As I wrote when I did have that academic leisure,

"The statute the Overton Park Court had to interpret was open to readings both of text and of legislative history that would either credit or discredit the workability of political controls. The Court chose a reading that maximized the possibilities of judicial control of agency decision through litigation, reasoning in part that only this reading could vindicate the

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<sup>19</sup> Because the bulldozers were already at Overton Park's gates, the case came to the Supreme Court in a rush. Certiorari was granted December 7, 1970, with petitioner's brief due on December 21 and the Government's on January 4; usually petitioners have 90 days, with a further 60 days permitted for the response, and the response need not be written during a holiday period. On such a schedule, inevitably, only the surface could be reached.

policies that underlay the statute in question. The alternative reading would have credited the possibility of effective political controls, and the Court concluded that in the context before it these controls would inevitably fail. Overton Park thus presents us not only with the use of the courts as a surrogate for political action, but also with a declaration by the Court that only the surrogate can work. ...

"... [I]f the inquiry whether politics *could* work to control the decisions in question was an appropriate one, the negative answer the Court gave – that politics could not have worked to control those decisions – was in error. Political controls, so far as one can tell, were the only controls Congress had considered; and in the instance, they were working well. A fuller appreciation for the Overton Park controversy, whether viewed from Washington, D.C. or Memphis, Tennessee shows wide and effective engagement of a variety of political actors in the controversy. The effect of the Court's action in surrogate politics was to empower one of those actors to an extent that had not been contemplated, and that is not sustainable on any general political view. ...

"Both the temptations and the justifications for judges to imagine their role in political terms may seem greater when they are overseeing administrative action. Electoral controls over administrators are at best indirect. Although those controls exist in forms judges emphatically do not experience - viz., the legislative oversight hearing, or the possibility of policy-based dismissal - their very inappropriateness for judges may in itself contribute to judicial underestimation of their legitimacy and/or effectiveness and may make judges think judicial control all the more important."<sup>20</sup>

And, I might have added, neither the Justices nor those who present litigations to them, are likely to be deeply versed in appreciating the possibilities and virtues of institutional controls.

#### IV

One can identify contexts in which institutional considerations do appear to have contributed to the Court's understanding – albeit even in these cases with a possibly distorting effect. Take, for example, the running debates on the Court about the uses and abuses of legislative history in statutory interpretation. These have been sharply influenced by the Court's understanding of the kind of institution Congress is, and the consequent (un)reliability – indeed, susceptibility to manipulation – of the public records of its work. The concerns Justices have expressed are well grounded in the possible abuses of congressional process. What is perhaps remarkable is that they are taken to reflect the *norm* of congressional behavior, that no credit is given to institutional controls instinct in Congress's functioning as a continuous body or to the arguable differences between settings of high and low political moment. Justice Breyer, the one current Justice with considerable experience working in Congress and a consequent appreciation for the ways in which its institutional controls function, is much more prone to accept legislative history as indicative in contexts he finds reliable, than Justices who have never had that experience and seem disposed to

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<sup>20</sup> 39 UCLA L. Rev. passim.

accept “public choice” accounts of congressional behaviors as the norm.

The influential American scholar Jerry Mashaw, writing about the problem of assessing the fairness and reliability of administrative procedures, once identified three competing models that he found in considerable tension with one another.

"There is a substantial critical literature on the administration of disability benefits under Titles II and XVI of the Social Security Act. One strand of the commentary is concerned that the disability program fails to provide adequate service to claimants and beneficiaries. ... The failure of the bureaucratic decision process to emphasize the role of professional judgment and to adopt a service orientation is seen as the program's major deficiency.

"A second, more 'legalistic' perspective is concerned primarily with the capacity of individual claimants to assert and defend their rights to disability benefits. ... In sum, the concern is with the failure of the disability decision process to provide the essential ingredients of judicial trials.

"A third strand of the critical literature chides SSA for failing to manage the adjudication of claims in ways that produce predictable and consistent outcomes. The concern is that the system may be out of control, and the suggestions for reform are essentially managerial ... . In short, the system is viewed in bureaucratic terms and criticized for its inadequate management controls. . . .

"... [T]hese criticisms reflect distinct conceptual models of administrative justice. Second, each of the models is coherent and attractive. But, third, the models, while not mutually exclusive, are highly competitive: the internal logic of any one of them tends to drive the characteristics of the others from the field as it works itself out in concrete situations.

"If these hypotheses are correct, then it may also follow that the best system of administrative adjudication may be the one most open to criticism. A compromise that seeks to preserve the values and to respond at once to the insights of all of these conceptions of justice will, from the perspective of each separate conception, appear incoherent and unjust. The best system of administrative adjudication that can be devised may fall tragically short of our inconsistent ideals."<sup>21</sup>

In a number of its opinions assessing issues of procedural fairness, the Court appears to have been influenced, in particular, by its assessment of the possible contribution of the first of these models, “professional treatment,” and of the possible impact of its judgment on professional values. Confronted with a challenge to a statute effectively excluding lawyers from the claims processes of the Veterans’ Administration, the Court appeared to take solace from its staffing (largely by persons themselves veterans) and by the consistent successes of veterans’ organizations appearing on veterans’ behalf.<sup>22</sup> In cases concerned with the fairness of public schools’ procedures in disciplining students, Justices have expressed confidence in the professional values of teachers and concern for

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<sup>21</sup> Jerry Mashaw, *Bureaucratic Justice* 21-23 (1983).

<sup>22</sup> *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305 (1985).

the impact of proceduralizing judgments on those values.<sup>23</sup> Initially oblivious to the impact of its procedural judgments on the professional qualities of welfare administration,<sup>24</sup> the Court subsequently reached judgments appearing to rely on those qualities in contexts where that reliance might reasonably have been questioned.<sup>25</sup> The defining decision in the due process context, *Mathews v. Eldridge*,<sup>26</sup> is similarly motivated.

And finally in this respect, for these purposes, one may mention *Withrow v. Larkin*,<sup>27</sup> a case in which the Court was called on to assess the possible bias of a part-time state board of physicians responsible for disciplining doctors for ethical violations, who had been involved in decisions about bringing administrative charges against a doctor, and the possible criminal prosecution of him, as well as decision of the merits of his case. Here the institutional understanding and values the Court drew on were its own: judges *also* do this, passing on arrest warrants and preliminary hearings, and rehearing cases that may have been reversed on appeal; their professional training is such as to permit it without creating disqualifying bias. Given the “presumption of honesty and integrity in those serving as administrators ... a realistic appraisal of psychological tendencies and human weakness” does not establish that “conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden.” There was, of course, no evidence to the point; this was simply the Court expressing its own institutional understandings and instincts.

## V

One way of rationalizing these judgments about fair procedures, certainly those most recently discussed, is to reason that they are arrangements legislatively chosen, and presumptively chosen with an eye to their fairness as well as considerations of accuracy and efficiency. The legislature, too, will have been aware of the contributions of Mashaw’s three models, and made choices with a view to their tensions and inevitable trade-offs. Given the difficulties courts would encounter in

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<sup>23</sup> *Goss v. Lopez*, 419 U.S. 565 (1975)(Powell, J., dissenting); *Ingraham v. Wright*, 430 U.S. 651 (1977); see Robert Burt, *The Constitution of the Family*, 1979 Sup.Ct.Rev. 329, 341-42.

<sup>24</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970); see Jerry Mashaw, *Due Process in the Administrative State* 33-34 (1985).

<sup>25</sup> *Wyman v. James*, 400 U.S. 309 (1971)(recipient must permit home visit by caseworker “of some training whose primary objective is, or should be, the welfare, not the prosecution, of the aid recipient”; an amicus brief filed by the union of caseworkers had emphatically denied training for these qualities); *Richardson v. Perales*, 402 U.S. 389 (1971) (in a case involving a Mexican-American’s claim for disability payments, with evident overtones of malingering, majority reliance on the medical discipline of reports by doctors who had briefly examined the claimant – a “stable of defense doctors” never subjected to cross-examination in the dissent’s eyes; “the professional curiosity a dedicated medical man possesses,” in the majority’s view – over the claimant’s Spanish surnamed treating physician).

<sup>26</sup> 424 U.S. 319 (1976).

<sup>27</sup> 421 U.S. 35 (1975).

accurately determining such issues as “a realistic appraisal of psychological tendencies and human weakness,” there is simply an insufficient basis for courts to displace legislative judgments.

Well, one wonders, why the same modesty does not commend itself when confronting institutional judgments like those evidently behind the creation of bodies like NIOSH and CASAC, or the political frameworks for decisions about road location.

Let me end, as I began. This paper hopes to open a conversation about what strike me as the largest and least well appreciated of our failures to think through the intersection of law and politics. American law students, lawyers and judges seem rarely to think about issues of institutional design and ethos when considering the issues of administrative law. I wonder if this is also true in the legal orders of Europe.