Este artigo está licenciado sob a licença Creative Commons Atribuição-NãoComercial-SemDerivação 4.0 Internacional (CC BY-NC-ND 4.0).



Revista de Direito Administrativo
ISSN: 0034-8007
eISSN: 2238-5177

Allocating Power Within Agencies*

Alocação de poder nas agências

*Elizabeth Magill***
*Adrian Vermeule****

ABSTRACT

Standard questions in the theory of administrative law involve the allocation of power among legislatures, courts, the President, and various types of agencies. These questions are often heavily informed by normative commitments to particular allocations of governmental authority among the three branches of the national government. These discussions, however, are incomplete because agencies are typically treated as unitary entities. In this Article, we examine a different question: how does administrative law allocate power within agencies? Although scholars have sometimes cracked open the black box of agencies to peer inside, their insights are localized and confined to particular contexts. We will

* Article received on July 6, 2021 and approved on June 10, 2024. Originally published by The Yale Law Journal Company in *The Yale Law Journal*, March 2011, Vol. 120, No. 5 (March 2011), p. 1.032-1.083 Available at: https://www.jstor.org/stable/41060409. DOI: https://doi.org/10.12660/rda.v284.2025.93025.

** Elizabeth Magill is Vice Dean, Joseph Weintraub Bank of America Distinguihed Professor of Law, University of Virginia School of Law. E-mail: mem2a@virginia.edu.

*** Adrian Vermeule is John H. Watson Professor of Law, Harvard Law School. E-mail: adrian.vermeule@icloud.com.

Thanks to Jake Gersen, Michael Gilbert, Jill Hasday, Michael Herz, Kristin Hickman, Dick Merrill, Anne Joseph O'Connell, Dan Ortiz, Fred Schauer, Glen Robinson, Peter Strauss, and George Yin. We would also like to thank participants in the winter faculty retreat at Virginia Law School, as well as workshops at Chicago, Emory, Minnesota, and Wisconsin law schools. Thanks to Chris Brown, Janet Kim, Dan Sullivan, and Sergei Zaslavsky for first-rate research assistance.

generalize the idea, attempting to show that administrative law allocates power both horizontally and vertically within agencies and offering some hypotheses about the nature of the resulting effects. Horizontally, administrative law directly or indirectly determines the relative influence within agencies of various types of professionals—lawyers, scientists, civil servants, politicians, and others. Vertically, administrative law directly or indirectly determines the relative influence within agencies of appointed agency heads, mid-level bureaucrats, and line personnel. This perspective illuminates several of the most puzzling judicially developed principles and doctrines of administrative law, including the doctrines surrounding *Chenery*, *Chevron*, *Mead*, and *Accardi*, as well as agency structures and procedures established by statute or executive order. The internal allocation perspective offered here both improves upon and critiques existing justifications for the these developments and in that sense points the way toward a superior understanding of administrative law.

KEYWORDS

administrative law — business and the law — environmental law — courts — government authority

RESUMO

Questões fundamentais na teoria do direito administrativo envolvem a distribuição de poder entre legislativos, tribunais, o presidente e diversos tipos de agências. Essas questões são frequentemente influenciadas por compromissos normativos com determinadas alocações de autoridade governamental entre os três poderes do governo nacional. No entanto, essas discussões são incompletas, pois as agências são geralmente tratadas como entidades unitárias. Neste artigo, examinamos uma questão diferente: como o direito administrativo distribui o poder dentro das agências? Embora estudiosos ocasionalmente tenham aberto a "caixa-preta" das agências para analisá-las internamente, suas observações são localizadas e limitadas a contextos específicos. Nossa abordagem generaliza essa ideia, buscando demonstrar que o direito administrativo distribui poder tanto horizontal quanto verticalmente dentro das agências e oferecendo algumas hipóteses sobre os efeitos resultantes. Horizontalmente, o direito administrativo determina, direta ou indiretamente, a influência relativa de diferentes profissionais dentro das agências — advogados, cientistas, servidores

públicos, políticos e outros. Verticalmente, o direito administrativo determina, direta ou indiretamente, a influência relativa de dirigentes nomeados, burocratas intermediários e funcionários de base dentro das agências. Essa perspectiva esclarece vários dos princípios e doutrinas mais enigmáticos desenvolvidos pelo Judiciário no direito administrativo, incluindo as doutrinas associadas a *Chenery*, *Chevron*, *Mead* e *Accardi*, bem como as estruturas e procedimentos das agências estabelecidos por lei ou ordem executiva. A perspectiva da alocação interna apresentada aqui aprimora e critica as justificativas existentes para esses desenvolvimentos e, nesse sentido, aponta o caminho para uma compreensão superior do direito administrativo.

PALAVRAS-CHAVE

direito administrativo — negócios e o direito — direito ambiental — tribunais — autoridade governamental

Introduction

Perhaps the main topic in administrative law is the allocation of power among legislatures, courts, the President, and various types of agencies. Theorists usually justify their preferred allocations by reference to some conception of expertise, politics, or legalism. Promoters of independent agencies appeal to expertise; promoters of presidential supervision of the bureaucracy appeal to political accountability; promoters of expansive judicial review of agency action appeal to legalism. In all of these standard debates, the main issue is the allocation of power *across* institutions; agencies are typically treated as unitary entities.

In this Article, we will examine how administrative law allocates power *within* agencies and how arguments from expertise, legalism, and politics apply inside agencies rather than across institutions. Although commentators have sometimes cracked open the black box of agencies to peer inside, their insights are localized and confined to particular contexts.[1] We will generalize

[1] We cite the local arguments in the appropriate places below. There is a more general literature in political science that addresses "agency design" or agency "structure and process". For an overview, see Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333-62 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

the idea, attempting to show that administrative law allocates power both horizontally and vertically within agencies and offering some hypotheses about the nature of the resulting effects. Horizontally, administrative law directly and indirectly determines the relative influence within agencies of various professionals—lawyers, scientists, civil servants, politicians, and others. Vertically, administrative law directly and indirectly determines the relative influence within agencies of appointed agency heads, lower-level bureaucrats, and line personnel.

This perspective illuminates several of the most puzzling principles and doctrines of administrative law. Among them are the *Chenery* principle that agency action cannot be upheld in court on the basis of *post hoc* rationalizations; the *Chevron* doctrine, which gives deference to reasonable agency interpretations; the *Mead* doctrine, which amends *Chevron* by giving agencies more deference if they use more procedural formality; and the *Accardi* (or *Arizona Grocery*) principle, which requires agencies to follow their own rules until duly changed. In each of these cases, we will suggest, one of the main effects of the relevant doctrine is to allocate power within agencies—not just among agencies, courts, and other actors. That perspective helps to improve upon, and to critique, existing justifications for the doctrines. Administrative law involves not only doctrines of judicial review, but also agency structures and procedures, which are usually established by statute or executive order. Structure and process, we will claim, also have important direct and indirect effects on the allocation of power within agencies.

In offering these claims, our aims are twofold: first, we outline a theoretical framework for understanding how legal rules might affect the allocation of power within agencies; second, we propose a series of hypotheses about the actual allocation effects of administrative law rules. Although we provide anecdotal evidence and insider testimony Where it is available, there is very little in the way of systematic empirical work about the questions we discuss. This state of empirical uncertainty cuts neither for nor Against our claims. The current regime of administrative law itself rests on unarticulated and unproven suppositions about the internal design of agencies and the effects of law inside agencies. The only implication of this state of uncertainty

---

Yet this literature for the most part treats "the agency" as a unit and asks how and why institutions such as Congress and the President impose various structural and procedural requirements on agencies. In other words, this literature (for the most part) asks how the black box should be shaped, not what lies inside it. We cite some of the exceptions to this generalization in the body of the paper.

is that it demands a new research agenda for empirical administrative law—one that should take account of the internal allocation effects of legal rules, among others matters.

Part I identifies the various stakeholders within agencies and the constraints that constitutional law places on the allocation of power among those stakeholders. Part II examines rules, principles, and doctrines of administrative law that affect horizontal allocation within agencies. Part III does the same for vertical allocation. Finally, Part IV generalizes the examples to state some general tradeoffs; the largest tradeoff is between the Twin goals of allocating power in desirable ways across institutions and allocating power in desirable ways within agencies. A brief conclusion follows.

I. Inside the agency

A. Agencies Are a "They", Not an "It"[2]

Even casual observers of the administrative state recognize that agencies, like nearly all large organizations, are not unitary actors. They are fractured internally. At a minimum, many agencies have the following stakeholders: political appointees, civil servants, front-line decisionmakers, and policy professionals (including attorneys, economists, public policy analysts, or scientists).[3] These are not mutually exclusive categories: one can be a policy professional and a civil servant or a political appointee. One can think of these stakeholders along at least three dimensions: (1) the nature of their selection and tenure (political appointees, civil servants); (2) their professional training and orientation (lawyers, economists, scientists, budget specialists); and (3) their place in the hierarchy of the agency (front-line decisionmakers, top-of-the-heap policymakers).

---

[2] Apologies to Ken Shepsle. *See* Kenneth A. Shepsle, Congress Is a *"They", Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

[3] In an ongoing project, Anne Joseph O'Connell and her coauthors are acquiring and analyzing a mass of information about the characteristics of these stakeholders. Some of the results to date can be found in George A. Krause & Anne Joseph O'Connell, Measuring Loyalty and Competence of Presidential Appointees in U.S. Federal Government Agencies, 1977-2005: A Generalized Latent Trait Analysis (Apr. 19, 2010) (unpublished manuscript) (on file with authors); and Anne Joseph O'Connell, Qualifications of Agency Leaders (Mar. 24, 2010) (unpublished manuscript) (on file with authors).

Several types of stakeholders often will have decisive or crucial authority when the agency acts. "Decisive" and "crucial" are intended to capture a broad range of contributions to agency decisionmaking, including cases where the relevant actor is, formally, the ultimate decisionmaker (such as the political top appointees), cases where the actor has a right to have her views considered or deferred to by others by operation of law, agency rule, or custom, or cases where an actor's input into the decision is inevitably part of the process of agency decisionmaking. There are important differences here, and those differences translate into different levels of influence over given decisions, but only the general (and simple) point is relevant for present purposes. The views and actions of different types of stakeholders shape the agency's performance of its duties.

To illustrate, imagine that the Food and Drug Administration seizes an adulterated drug. Each of the following types of actors is likely to have a significant hand in shaping the overall course of the agency's enforcement action: a front-line enforcement agent who develops the facts and executes the seizure; her supervisors in the regional office and perhaps central agency (who may even have authored a manual instructing enforcement agents on how to conduct seizures); the agency attorney who advises on the enforcement action and defends the agency if the action is challenged in court; and the attorneys, civil servants, and political appointees who help decide whether to seek to appeal if there is an adverse ruling against the government. Enforcement actions in many agencies are routine and initiated at the lower levels of the agency. Even with respect to these types of decisions, a variety of different types of stakeholders will have an influence over the course of the agency's action. The point is even more obvious with less routine decisions. An agency's high-stakes rulemaking or adjudication is likely to involve significant input from civil servants, lawyers, scientists, economists, and political appointees.

These differing stakeholders are likely to disagree, at least sometimes, about the right course for the agency.[4] The conflicts between political appointees and the "bureaucracy"—usually taken to refer to the well-insulated-from-termination members of the professional civil service—are legion. Those at the lower rungs of the agency hierarchy are likely to have

[4] *See generally* ANTHONY DOWNS, INSIDE BUREAUCRACY (1967) JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM (1978); THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989).

different views about proper enforcement strategy than those at the higher rungs, for example.[5] And policy professionals regularly disagree, not Only (and predictably) with political appointees, but with Other policy professionals as well. Robert Katzmann's well-known study of the Federal Trade Commission describes the varying worldviews of the lawyers and the economists at that agency and the way in which their conflicts worked out.[6]

There is much more to be said about the dynamics of the relationships among these agency stakeholders and (more importantly) about their consequences, but the basic points are simple: agencies contain identifiable constituencies that affect policymaking, and these constituencies can, and do, come into conflict over the proper functioning of the agency.

B. Allocating Power Within Agencies: Constitutional Constraints

Our aim is to offer some hypotheses about the ways in which factors external to the agency shape the relationships among the agency's internal stakeholders. We will explore three such factors: constitutional law, judicial review of administrative action, and the structure and process of agencies. As the next two Parts detail, these outside forces allocated power within an agency both horizontally (to different types of decisionmakers at roughly the same level at the agency) and vertically (to decisionmakers at varying levels within the agency hierarchy).

By way of introduction to the idea, however, we will start with a few constitutional rules that constrain agency structure and that can be profitably understood to allocate power within agencies. These rules are a good starting point because they are constraints on agency design and structure that are costly to change. They change only through altered Supreme Court interpretation of the constraints, a constitutional amendment, or some other large change in constitutional understanding.

We begin with the complicated constitutional rules governing the appointment and removal of personnel at the top of the agency Pyramid.

---

[5] *See generally* HERBERT KAUFMAN, THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR (1960) (providing a classic case study of fragmentation and efforts to overcome fragmentation in the U.S. Forest Service).

[6] ROBERT A. KATZMANN, REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY (1980).

Under those rules, the President has the power to appoint, and the Senate, the power to confirm, principal officers; Congress cannot be directly involved in appointment or removal of such officers.[7] At the same time, however, Congress may insulate some (though not all) of those principal officers from the President in a variety of ways. Congress may create agencies where the principal officers have staggered terms so that a single President is less likely to appoint all such officers (and in any event not all at once); Congress may require that the officers be balanced politically, requiring, for instance, that no more than three of five be from a single political party; and Congress may require that the President have "good cause" to terminate some principal officers, as opposed to leaving the President free to fire those officers for any reason at all.[8]

There are conventional explanations for the broader implications of these constitutional rules. On one account, the rules are best understood as the product of a power struggle between Congress and the President for control of policymaking. Another story would tell us that these rules reflect a tradeoff between "politics" and "expertise". That is a controversial characterization, however, because insulation from the President is not the same as expertise; insulation from the President may simply increase the political influence of congressional committees and other third parties on the agency. Rather, these rules navigate a tradeoff between the costs and benefits of proximity to the President—and hence the political consequences associated with that proximity.

We focus instead on the effect that these rules have on the way authority is allocated *within* the agency. Those at the top of some agencies are closer to the President, while those at the top of others are more independent of the executive. This organizational structure influences the internal allocation of power any time agency stakeholders are in conflict over the right course for the agency, and proximity to the President suggests one course while (some) independence from the President suggests another. Based on what we know about intra-agency and intra-executive branch conflicts, those circumstances

---

7 *See* Buckley v. Valeo, 424 U.S. 1, 125-26 (1976); Myers v. United States, 272 U.S. 52, 164 (1924).

8 *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935). The Supreme Court has recently held that "dual for-cause" arrangements are unconstitutional. In such an arrangement, a principal officer whom the President can remove only for cause is authorized to appoint officers whom the principal officer can remove only for cause. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151-61 (2010).

occur with sufficient regularity (and on sufficiently important issues) that they are worth our attention. One hypothesis is that Where the top personnel in the agency are closer to the President, they are more likely to have the power to override competing stakeholders within the agency; given the President's position at the top of the government's organizational chart, political types who have the President's ear are more likely to prevail over the technocrat or the lawyers. Tracing out the consequences of such differences across agencies will no doubt be difficult, and of course other factors will help explain any particular agency action (the salience of the particular issue before the agency, the costs and benefits of the options on the table). It is not hard to hypothesize however, that the proximity of the agency's top leadership to the President is important in explaining which of the competing forces within the agency will prevail.

Consider now a quite different constitutional rule that affects the allocation of authority within an agency, albeit at a level well below the top of the hierarchy: the requirements of procedural due process. In certain circumstances, an agency will be required to provide individualized process—some sort of face-to-face hearing—in the course of making a decision adverse to an individual. To take the most well-known example in the modern era, in *Goldberg v. Kelly* the Supreme Court held that the government was required to hold a hearing prior to terminating welfare benefits.[9] *Goldberg*, of course, is something of a cause *célèbre*, but it is embedded within a larger body of law with a long pedigree about the dictates of procedural due process even where "new property" is not at stake.[10] That body of law sometimes requires the government to hold a hearing before, during, or after taking an adverse action against an individual.

Like the rules about top agency personnel, there is a longstanding scholarly conversation about the values that underlie the Supreme Court's interpretation of procedural due process as a constraint on government decisionmaking. Perhaps they promote dignitary values? Perhaps they promote accurate decisionmaking? Perhaps they protect against the

---

[9] 397 U.S. 254 (1970).

[10] See Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (holding that due process does not require a hearing when an increase in property valuation applies equally to all property owners); Londoner v. City & Cnty. of Denver, 210 U.S. 373 (1908) (holding that due process requires an opportunity for a hearing when a tax assessment sets individual property owners' shares of costs for road improvements); Ann Woolhandler, *Delegation and Due Process: The Historical Connection*, 2008 SUP. CT. REV. 223.

government singling out politically unpopular individuals? We suggest that the debate should focus not only on what values these rules promote but also on the way in which these constitutional constraints (and whatever values they promote) allocate decisionmaking authority within the agency. As we elaborate in Part III, procedural due process sometimes requires that the agency use a particular kind of process (face-to-face hearing) and a particular kind of decisionmaker (some sort of adjudicator). This means that, by operation of constitutional law, a hearing (and an adjudicator who presides over that hearing) must play a key role in the government's decision. This has a variety of implications for the allocation of authority inside the agency. When the Constitution requires a hearing, agency leaders are forced to use an often costly and inconsistent process for initial decisionmaking that is generally presided over by adjudicators who enjoy a guarantee of decisional Independence.

II. Horizontal Allocation

Beneath the level of constitutional law, how might legal rules affect the allocation of power within agencies? We begin with rules, principles, and doctrines of administrative law that allocate power horizontally, across different professions at any given level within the agency's decisionmaking structure. We first explain how judicial review doctrines have such effects and then show how the rules that determine the structure of the agency and the procedures that it must use can also have these effects. These power allocation effects can be the direct or indirect result of the doctrines and rules we examine; likewise, these effects can arise because of conscious efforts by agency personnel to reallocate power within an agency, or instead as the unintended by product of actions taken in pursuit of other aims. We will sometimes observe that a reallocation of authority is an indirect result of a doctrine or, alternatively, the result of action by the agency. For present purposes, however, it is not essential to pin down exactly how these reallocations of authority come about. The main point is that these doctrines and rules can usefully be understood to allocate authority within the agency.

A. Judicial Review

We hypothesize that doctrines of judicial review of agency action affect how decisionmaking power is allocated within agencies. Although those effects are typically indirect, that does not mean they are of secondary importance. As we will see, several pillars of the American law of judicial review can fruitfully be understood in this way.

1. Chenery

In its first decision in *SEC v. Chenery Corp.*,[11] the Supreme Court announced a fundamental principle of administrative law: agency action can be upheld, if at all, only on the rationale the agency itself articulated when taking action.[12] The corollary of *Chenery* is that agencies may not employ "post hoc rationalizations"[13] offered during litigation to save an action whose original rationale is untenable.

Despite its intuitive appeal, the foundations of *Chenery* are far from clear. What exactly is bad about post hoc rationalization, at least if the new rationale in fact justifies the agency's action? Outside the courtroom, actors often make good decisions for bad reasons, and if they later realize that there was a good reason for the good decision, so much the better. So long as the rationale the agency offers during litigation is sound, it is not obvious why the court should set aside the agency's action.

On one view, the foundation of the *Chenery* principle—requiring agencies to state the legal grounds for their actions when they act—lies in an aspect of the nondelegation doctrine, which constrains the grant of lawmaking power to agencies.[14] This account holds that nondelegation requires not only that legislation state an "intelligible principle" to guide agency decisionmaking,[15] but also that agencies must state the grounds for their exercise of delegated authority. On this account, *Chenery* is best understood as derived from the general values behind the nondelegation doctrine, which attempts to allocate

---

11 318 U.S. 80 (1943).
12 *Id*. at 94.
13 Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971).
14 *See* Kevin M. Stack, The Constitutional Foundations of Chenery, 116 Yale L J. 952 (2007).
15 *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

lawmaking power to politically accountable actors and to ensure a reasoned exercise of that power.

This analysis is unsatisfactory on several grounds. For one thing, it is not helpful to say that the *Chenery* principle derives from a constitutional principle requiring agencies to state the legal grounds for their actions when they act. That account constitutionalizes *Chenery* but otherwise leaves the principle unexplained. Second, the account fits poorly with the actual scope and effect of the *Chenery* principle. Conventionally understood, the point of the nondelegation doctrine is to allocate lawmaking authority between the legislature and the executive. The ban on *post hoc* rationalizations, however, does not involve that sort of allocation across institutions. Rather, the primary effect of the *Chenery* principle is to affect the *timing* of reason-giving by the agency itself. Under *Chenery*, the issue is not which institution may act; the issue is *when* the agency—whose legal authority is conceded—must state its reasons. The answer *Chenery* gives is that the agency must speak before, rather than during, litigation. The agency's rationales must not be *post hoc*; are, if they are, they amount to mere "rationalizations". But this rule does not allocate lawmaking power between the legislature and the executive.

So understood, *Chenery's* crucial effect is to reallocate power horizontally *within* agencies.[16] Under a rule that allows *post hoc* rationalizations, lawyers[17] have a crucial role while other policy professionals do not. It is lawyers who formulate *ex post* reasons that are presented to a court, and those reasons need not be tied to the reasons why the agency acted in the first place. *Chenery*, on

---

[16] Stack attempts to tie the horizontal allocation effect of *Chenery* to the nondelegation idea by saying that *Chenery* reallocates power to politically accountable decisionmakers within the agency, as opposed to lawyers. Stack, *supra* note 14, at 993-96. But, as understood by the Supreme Court, the nondelegation doctrine requires some minimum, not of political accountability *simpliciter*, but of political accountability on the part of legislators, as opposed to other types of officials. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (holding that nondelegation requires that Congress itself, not agency officials, must adopt an intelligible principle to constrain the agency's lawmaking power). The political accountability of agency officials is neither here nor there, as far as the nondelegation doctrine is concerned. Moreover, the decisionmakers who, under *Chenery*, formulate agency policy before the fact need not be politically accountable appointees in any event; they may also be and usually will be scientists or other professionals or civil servants enjoying insulation from political oversight. Thus, *Chenery* is best understood to constrain the role of lawyers, rather than as an attempt to enforce principles of political accountability; *Chenery* is not necessarily or even systematically tied to political accountability in any form.

[17] In most cases these will be appellate lawyers because relevant statutes direct petitions for review of agency action to federal courts of appeals. However, in some cases the first hearing the will occur before a district court, and in that sense trial lawyers are also covered by the *Chenery* principle.

the other hand, requires that the *ex ante* reasons be the basis for judicial review of the action and thereby gives authority to the personnel who help formulate policy before the fact. That group may well include lawyers providing counsel, but it will invariably include other types of professionals as well—scientists, technical experts, political appointees within agencies, and civil servants. Lawyers will retain a role even under *Chenery* because agencies that will be held to their initial rationales during later litigation will have an incentive to consult lawyers *ex ante*. Yet *Chenery* in effect ensures that nonlawyers will always have an *ex ante* role in shaping the agency's official position. Further, it prevents lawyers from speaking officially for the agency by advancing new policy rationales during litigation. *Chenery* is thus best understood not through the prism of nondelegation principles but as a doctrine that constrains the role of lawyers in formulating agency policies.

On this account, *Chenery's* foundations involve a commitment to (nonlegal) technical expertise at least as much as a commitment to political accountability, yet the nondelegation account *Chenery* focuses on the latter.[18] For our purposes, however, the foundations of *Chenery* are not the major problem. The key point, rather, is just that temporal allocation of reason-supplying authority under *Chenery* has powerful horizontal allocation effects across professions; this effect fits the doctrine's scope more closely than does a nondelegation account.

2. Chevron

The most famous doctrine in all of administrative law is, arguably, the *Chevron* doctrine.[19] In rough terms, *Chevron* requires judges to defer to reasonable agency interpretations of statutes.[20] In recent years, decisions beginning with *United States v. Mead Corp*.[21] have modified the *Chevron* framework in important ways, in part by attempting to cabin the conditions under which *Chevron* applies in the first place. We turn to *Mead* shortly; first we will try to understand the indirect, horizontal allocation effects of the classic *Chevron* framework itself.

---

[18] See Stack, supra note 14, at 958-59.
[19] See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
[20] See Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1505 (2009).
[21] 533 U.S. 218 (2001).

Before *Chevron*, the law bearing on agencies' interpretive authority was unclear, with competing lines of cases. One view suggested that questions of law were, by their nature, for courts to decide.[22] Another view, stemming from *Skidmore v. Swifi & Co.*,[23] was more supportive of deference.[24] This second line of cases agreed in principle that legal questions were for courts. But it also emphasized that courts would afford agencies a type of epistemic deference when their pronouncements were highly expert, were based on accumulated experience, or were especially likely to track legislative intentions. In general, an agency was given deference on the basis of "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[25]

Importantly, under both lines of case law, statutory interpretation was conceived as a search for the single best reading of the statute. Courts might defer to agencies epistemically as experts who are especially likely to find the best meaning, just as a patient might defer to a doctor's diagnostic skills. Yet, in principle, the factors relevant under *Skidmore* and its successors were just pointers to the correct interpretation of the statute.

As E. Donald Elliott has emphasized, however, *Chevron*'s major conceptual innovation was to sweep away the classical notion that all statutes, even in hard cases, have a single best interpretation—a "point estimate" of statutory meaning.[26] Rather, he argues, the *Chevron* framework conceives interpretation as typically involving agency choice within a "policy space", defined by the range of the statute's reasonable interpretations.[27] To be sure, even under *Chevron* there will be some cases in which the statute has only one reasonable reading, in which case there will be a single best point estimate of the statute's meaning.[28] Yet *Chevron*, in contrast to the older framework,

---

22 *See* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 551-52 (1985).

23 323 U.S. 134 (1944).

24 Yet another approach can be seen as a precursor to *Chevron*. In *NLRB v. Hearst Pub'ns, Inc.*, 322 U.S. 111 (1944), the Court emphasized that Congress had delegated to the agency the primary task of interpreting a key statutory term. *See* id. at 130 ("It is not necessary in this case to make a completely definitive limitation around the term 'employee'. That task has been assigned primarily to the agency created by Congress to administer the Act.").

25 *Skidmore*, 323 U.S. at 140.

26 E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1,11 (2005)

27 *Id*. at 12.

28 See Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598-600 (2009).

does not presuppose that all cases are like that. In the hard cases that tend to provoke litigation and reach appellate courts, agencies will usually have some discretion to choose among policies that fall within the range of reasonable interpretations.

Chevron's recasting of agency interpretation as a choice within a policy space may also have important indirect effects on the roles and importance of various professions within the agency. According to Elliot's account, under a point-estimate model of statutory interpretation, lawyers have a dominant voice within the agency. At a minimum, lawyers have broad power, during internal agency deliberations, to veto policy positions that are otherwise desirable, and indeed legally supportable, on the ground that they are legally incorrect. Under the *Chevron* framework, by contrast, the lawyer's role is relatively constrained. Lawyers identify the range of reasonable interpretations, but policymaking officials, including scientists and political appointees, choose within the range. Again, in some cases the range collapses to a point, but not always or even often. As compared to the predecessor regime, a major effect of *Chevron* is to disempower lawyers within agencies.

3. Mead

The *Mead* decision modifies the *Chevron* framework, attempting to delineate the scope of its application. Like its predecessor, *Mead* plausibly has important horizontal and vertical effects on the allocation of power within agencies. We examine the horizontal effects in this Subsection and the vertical effects in Part III.

In principle, *Mead* lays out legal preconditions for the *Chevron* framework to apply at all and has thus been dubbed "*Chevron* Step Zero.[29]" There are many controversies and uncertainties about the details of the *Mead* analysis—and these uncertainties in themselves tend to make lawyers more important than they would be if *Chevron* simply applied to all agency action—but the main outlines of the *Mead* framework are clear enough. Under *Mead*, *Chevron* applies if and only if Congress has demonstrated an intention to delegate law-interpreting power to the agency. Whether courts will find such an

[29] Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006); *see also* Thomas W. Merril & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 836 (2001) (coining the term "*Chevron* Step Zero" before *Mead* was decided).

intention to exist depends, in part, upon procedural proxies: if the agency used formal rulemaking or adjudication or notice-and-comment rulemaking, a court is likely to find that the agency holds law-interpreting authority (although some opinions have suggested that procedural formality is neither necessary nor sufficient to find intent to delegate[30]). Outside these categories of relatively formal procedure, intent to delegate depends on a totality-of-the-circumstances inquiry based upon a laundry list of factors. One of the main factors, emphasized in *Mead* itself, is whether the agency's decisions were made in a centralized way or instead by Branch offices or line officials; we return to this point below.

If the *Mead* analysis indicates that the *Chevron* framework does not apply, then agencies are remitted to the preexisting *Skidmore* framework, under which the court assumes that there must be a point estimate of statutory meaning, rather than identifying a range of reasonable readings (although agencies' views will be given epistemic deference). *Mead*, then, is the toggle switch, not only between alternate doctrinal frameworks, but also between two different conceptions of statutory interpretation: the classical one that assumes there are best readings ("point estimates") in all cases, and a modern one that accepts irreducible ambiguity ("range estimates").

Most importantly, *Mead* also toggles between a relatively lawyer-centered approach to statutory interpretation, under the classical framework, and an approach that emphasizes the role of nonlawyer professionals, who choose policies based on technocratic and political factors under the Chevron framework. If, as Elliott suggests, *Chevron* has important horizontal allocation effects within agencies, then the *Mead* analysis is what determines whether and when those effects will occur.

The consequence is that the stakes of judicial debates over *Mead* are higher than, and somewhat different from, what has been recognized to date. When the *Mead* analysis is restrictive, so that agencies' decisions are frequently remitted to *Skidmore*, lawyers will come to the fore in the agencies' internal deliberations. If, on the other hand, the *Mead* analysis is capacious, so that *Chevron* usually applies, then scientists and political appointees will have a larger role. In general, the Court has witnessed sharp debates among

---

[30] *See, e.g.*, Barnhart v. Walton, 535 U.S. 212, 221(2002) ("[T]he fact that the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due". (citation omitted)).

the Justices about the law of *Chevron* Step Zero. Justices Stevens and Breyer generally say that *Chevron* will apply only under relatively narrow conditions, judged in case-by-case fashion. Justice Scalia, by contrast, has mounted a rearguard action against *Mead*, arguing that *Chevron* should be the standard analysis whenever the agency offers an "authoritative" statement of its views, and that the *Skidmore* framework is an anachronism. On the usual analysis, the stakes in this debate involve comparative institutional competence—the allocation of law-interpreting authority between courts and agencies. From the perspective we offer here, however, the stakes involve which professionals within agencies will have a dominant role in formulating the agency's position—which the courts will frequently accept, under either the Chevron or *Skidmore* frameworks. By promoting or constraining various types of professionals within agencies, *Mead*, no less than *Chevron*, indirectly determines the relative weights and roles of legalism, political accountability and technocratic expertise in the administrative state.

4. Mead: The Intersection of *Chevron* and *Chenery*

There is another relevant aspect to *Mead* that can be understood most easily by examining Justice Scalia's position in more detail. Scalia's view is not the law and is not likely to become the law any time soon. Yet the very divergence between his view and the Court's illuminates the institutional effects of *Mead*, *Chevron*, and *Chenery*.

On his view, the law of agency deference and *Chevron* Step Zero is easy to state: agencies either receive no deference at all, as when they interpret a statute like the Administrative Procedure Act (APA) whose analysis is committed to the courts, or else the framework of *Chevron* deference applies, in which case agencies offer an "authoritative" pronouncement on the meaning of their own organic statutes. On this approach, there would be no intermediate category of *Skidmore* deference, and the law of *Chevron* Step Zero would be much simpler, and apparently more rule-like, than under the Court's approach.

It should be immediately apparent, however, that in Justice Scalia's framework a great deal turns on what counts as an "authoritative" agency pronouncement. In particular, does an agency's statement during litigation suffice? Or must the agency offer its authoritative view at the decisional stage, during agency rulemaking or adjudication? In short, what is the status of the *Chenery* principle under Justice Scalia's view of *Mead* and under the Court's

view as well?

It is clear that on Justice Scalia's view, *Chevron* principles operate to override *Chenery*. In *Christensen v. Harris County*,[31] a precursor to *Mead*, the question was whether, and on what basis, to defer to a legal interpretation contained in an opinion letter signed by the Acting Administrator of the Wage and Hour Division of the Department of Labor. The Court said that *Skidmore* deference, rather than *Chevron* deference, supplied the right framework and that, on the merits, the opinion letter was unpersuasive.[32] Justice Scalia, however, found the agency's view authoritative. The letter standing alone might not have sufficed, Justice Scalia noted, presumably because the Acting Administrator of a single division was too low-level an official to bind the agency; this is the vertical allocation issue that we will examine later. What made the agency's view authoritative, Justice Scalia continued, was that

> the Solicitor General of the United States … has filed a brief, cosigned by the Solicitor of Labor, which represents the position set forth in the opinion letter to be the position of the Secretary of Labor. That alone, even without the existence of the opinion letter, would in my view entitle the position to *Chevron* deference.[33]

On this view, there is a partial override to the *Chenery* principle, due to the operation of *Chevron* Step Zero.

The remarkable implication of this approach is that the statement of the Solicitor of Labor, taken all by itself, can constitute the official position of the whole Department and the cabinet secretary who heads it. Consistent with our discussion of *Chenery* above, the indirect override of *Chenery* principles in the *Chevron* context advocated by Justice Scalia would have the effect of transferring law-interpreting and policymaking power from political appointees and labor experts within the Department to the lawyers who protect its interests in litigation. Clearly, this issue is intertwined with the issue of vertical allocation; Justice Scalia seems to assume that the Secretary of Labor has sufficient control of the Department's Solicitor. Whatever the validity of that assumption, however, the horizontal allocation issue is distinct. A world in which the authoritative determination of the agency's position is

---

31 529 U.S. 576, 586-87 (2000).
32 *Id*. at 587.
33 *Id*. at 591 (Scalia, J., concurring).

made, in the first instance, by the Solicitor is very different from a world in which that determination is made in the first instance by nonlegal personnel within the agency.

5. Cost-Benefit Default Rules

As a matter of statutory interpretation, when do agencies have the authority—or obligation—to engage in cost-benefit analysis? If agencies may not engage in cost-benefit analysis, how should they make decisions? Congress has given no general, explicit instruction on these issues. Accordingly, courts usually fall back upon highly contextual, statute-specific interpretive methods. Some statutes naturally lend themselves to cost-benefit readings, some statutes seemingly require agencies to regulate to the point of maximum "feasibility,"[34] and some provide a variety of other decision rules. Yet in most of these statutes, there is sufficient open texture to make the choice of default rules a high-stakes issue.

Recently, then, commentators have applied the theory of statutory default rules to the role of cost-benefit analysis. One view articulated by cost-benefit proponents holds that, where statutes are silent or ambiguous, courts should presume that agencies have the authority to engage in cost-benefit analysis.[35] Unless Congress speaks very clearly, cost-benefit analysis will become the universal default norm in the administrative state. Indeed, this view may push even further: if agencies have the authority to conduct cost-benefit analysis, it is unclear on what grounds they could refuse to exercise it. For one Thing, as we will see, internal executive branch regulations administered by the Office of Information and Regulatory Affairs (OIRA) require them to do so. For another, courts who read unclear statutes to permit cost-benefit analysis would be likely to stamp a refusal to use cost-benefit analysis as unreasoned and arbitrary decisionmaking, equivalent to announcing that the agency will choose a policy with net costs.

The Supreme Court has not, as yet, made any general pronouncement on cost-benefit default rules. However, an important recent case, *Entergy Corp*

---

[34] For an introduction to and critique of feasibility analysis, see Jonathan S. Masur & Eric A. Posner, *Against Feasibility Analysis*, 77 U. CHI. L. REV. 657 (2010).

[35] Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1680-81 (2001).

vs. Riverkeeper, Inc.,[36] suggests that a majority of the Roberts Court would be hospitable to cost-benefit analysis under debatable statutory directives. *Entergy* involved a provision of the Clean Water Act mandating that certain regulatory clean-water standards shall "'reflect the best technology available for minimizing adverse environmental impact.'"[37] In many cases, lower courts have read similar "best available technology" directives to mean that the agency must ignore the costs of compliance where compliance is feasible unless those costs would become so large as to bankrupt firms, cause large job or revenue losses, or otherwise produce widespread damage to industry. On those grounds, the Second Circuit had declared the EPA's reliance on cost-benefit analysis impermissible.[38]

Writing for a majority of five,[39] Justice Scalia upheld the agency interpretation under *Chevron*. The "best technology available", the Court held, could reasonably be read to mean whatever technology has the greatest net of benefits over costs and thus produces an average unit of the relevant good most efficiently, even if it produces less of the good than would some other decision rule.[40] The *Entergy* opinion does not clearly say that agencies may use cost-benefit analysis whenever statutes refer to "best available technology", even with the aid of *Chevron*; collateral points in the Court's analysis involve specific features of the Clean Water Act and the agency's longstanding use cost-benefit analysis, neither of which necessarily generalize to other statutes.[41] However, *Entergy* is a blow to proponents of feasibility analysis and of others alternatives to cost-benefit analysis. Most generally, *Entergy* could easily become a stepping stone to holding, in the not-so-distant future, that ambiguous statutes should presumptively be read to authorize cost-benefit analysis.

For present purposes, the significance of *Entergy*, and of the (possible) adoption of cost-benefit default principles by the Court, is that a judicial shift to cost-benefit analysis would reinforce the horizontal selection effects of *Chevron*. Cost-benefit analysis expands the range within which economists, scientists, and other nonlegal professionals effectively choose agency policy. Of the many policies that might generate benefits greater than costs, the agency

---

36 129 S. Ct. 1498 (2009).
37 *Id.* at 1503 (quoting Clean Water Act, 33 U.S.C. § 1326(b) (2006)).
38 Id. at 1502-05, 1507.
39 Justice Breyer wrote an Opinion concurring in part and dissenting in part.
40 Entergy, 129 S. Ct. at 1505-06.
41 Id. at 1506-09.

will attempt (or should attempt) to pick the one that generates the greatest net benefits, and lawyers will have little to contribute to this quintessentially technocratic problem. Under feasibility analysis, by contrast, lawyers read sweeping statutory instructions and inform other agency personnel that regulation is mandated unless some threshold of economic disaster is met.[42] The difference is between a decision procedure that puts technocrats on center stage and one that makes technocratic analysis a mere side-constraint on the implementation of a legal mandate that, in the usual case, must simply be obeyed. Cost-benefit analysis generally shifts power away from lawyers and toward scientists, economists, and other policy professionals.

6. "Hard Look" Review

So far, in our examples, doctrines of judicial review that affect the horizontal allocation of power within agencies have mostly worked to the detriment of lawyers. *Chenery*, *Chevron*, and certain positions about *Chevron*'s scope that Justices have adopted in the *Mead* debate all have this effect. However, there is no necessary connection between horizontal allocation and the disempowering of lawyers. The allocation effects of administrative law rules can cut in many different directions, increasing or decreasing the role of any group of agency stakeholders, including professionals of any kind.

Under "hard look" review, agencies have an obligation to provide a reasoned policy analysis for their regulatory choices. Decisions such as *Overton Park*[43] and *State Farm*[44] are pillars of the current law of judicial review; they require agencies to provide a reasoned connection between the facts they find and the choices they make. Under hard look review, although courts are not to impose their own policy choices, courts will apply searching scrutiny to ensure that agencies have acted rationally. This concept yields many controversies over what, exactly, such scrutiny should be taken to entail,[45]

---

[42] See Masur & Posner, *supra* note 34, at 662.

[43] Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

[44] Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[45] *Compare* Ethyl Corp. v. EPA, 541 F.2d 1, 68-69 (D.C. Cir. 1976) (Leventhal, J., concurring) (advocating "modest" substantive review of administrative action on the assumption that "judges will acquire whatever technical knowledge is necessary as background for decision of the legal questions"), *and* Portland Cement Ass'n v. Ruckelshaus, 486 F. 2d 375, 402 (D.C. Cir. 1973) (Leventhal, J.) ("[T]he necessity to review agency decisions, if it is to be more than a meaningless exercise, requires enough steeping in technical matters to determine whether the

but we need not engage those controversies. An important point, however, is that agencies' "rationality" is not judged in the abstract but by reference to factors made relevant by the statute. An agency's consideration of statutorily irrelevant factors, or its failure to consider relevant ones, render its decision procedurally flawed.[46]

What are the alternatives to hard look review? An alternative prominent in the 1930s and 1940s would require that agency decisions merely survive rational basis review in the very forgiving sense in which that term is used in constitutional law.[47] Under rational basis review, agencies would be upheld so long as the reviewing court could posit any imaginable rationale for the agency's decision. The modern Court, however, has been explicit that hard look review is not to be equated with rational basis review.[48] Although the Court's formulations do not make the difference pellucid, hard look review is supposed to be more searching than rational basis.

The Court's move from rational basis to hard look review, beginning in the 1960s, has had important horizontal allocation effects. In a rational basis world, agency heads, who are usually political appointees, can choose policy within a very broad range. Although such appointees may choose to be advised by scientists, economists, lawyers, or other professionals, they need not rely on these actors. The main constraints on agency action, in a world of rational basis review, arise not from expertise or from law but from politics—from the reactions of congressional committees, the President, and the general public.

In a world of hard look review, those political constraints are still present, yet legal and technocratic considerations constrain the agency as well. A major and quite explicit point of hard look review, especially as stated in *State Farm*, is that courts will not accept political considerations as rational justifications for agency action.[49] Agencies must now run the gauntlet of serious judicial

---

agency 'has exercised a reasoned discretion'". (quoting Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1970))), *with Ethyl Corp*., 541 F. 2d at 67 (Bazelon, C.J., concurring) (warning that "substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable").

46 *See* Massachusetts v. EPA, 549 U.S. 497, 532-35 (2007).

47 *See* Pac. States Box & Basket Co. v. White, 296 U.S. 176, 185-86 (1935); Miss. Valley Barge Line Co. v. United States, 292 U.S. 282, 286-87 (1934).

48 *See State Farm*, 463 U.S. at 43 n. 9.

49 Compare *id*. at 52 (stating that rescinding a regulation that was based on a policy conclusion requires "a 'rational connection between the facts found and the choice made'" (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962))), *with id*. at 59 (Rehnquist,

review, and this prospect forces agencies to ensure both that their decisions are scientifically and technocratically defensible and that those decisions rest on a plausible legal account of which factors are statutorily relevant. Power within the agency can shift in two directions simultaneously, both downwards and sideways, from political appointees at the top level of the agency to technocrats and lawyers at lower levels of the agency. However, political appointees can also benefit by using legalisms or appeals to scientific expertise to conceal their controversial tradeoffs and policy choices. Thus, the possible effects and connections are complex. Let us thus examine several different possibilities.

Commentators have identified two horizontal effects of hard look review. In the first, agencies react by emphasizing the scientific character of their analysis, even to the point of engaging in a "science charade" in which policy choices are disguised as technocratic determinations of fact and causation.[50] The result is to allow scientists "to control access to the resolution of all questions that include even the slightest component of science, and to do so generally with minimal interference from lawyers and governmental officials."[51] High-level political appointees themselves "mechanically assign the standard-setting task to agency scientists and associated techocrats."[52] The result is that hard look review allows scientists to elbow aside lawyers and to dominate the formulation of policy choices by agencies, although scientists have no legal expertise and no political warrant to strike tradeoffs or choose between competing values. Alternatively, political appointees may use the science charade to evade political accountability for their own policy choices, cloaking them in scientific objectivity.[53] In this variant, scientists are not aggrandizing themselves at the expense of accountable politicians but instead serve as ventriloquists' dummies for politicians and the bureaucracy.

In a second account of the horizontal effect, by contrast, the result of hard look review is to empower lawyers at the expense of scientists and Other policy experts.[54] On this view, hard look review "justifies the [general

---

J., concurring in part and dissenting in part) (positing that a new administration's shift in policymaking priorities is a "perfectly reasonable basis" for an agency to rescind a regulation).

50 Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1617 (1995).

51 *Id*. at 1672.

52 *Id*. at 1632.

53 *See id*. at 1653-54.

54 *See* MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 154 (1988) (arguing that agencies respond to the prospect of hard look

counsel's office] in taking positions on the substantive merits of proposals and on the technical and economic validity of the support documents."[55] Hard look review is often supposed to be a basically procedural device, focusing on whether the agency has engaged in a rational process of decisionmaking; but the doctrine is sometimes given a substantive cast, as when the Supreme Court suggested that reviewing courts should ensure not only that agencies consider the relevant factors, but also that agencies have made no "clear error of judgment."[56] Under either prong of hard look review, lawyers are crucial, either to identify what the relevant factors are or to ensure that the agency's conclusions will not strike other lawyers—namely the judges—as wildly implausible.

These two accounts are not necessarily inconsistent. Each may apply to different agencies or to the same agency at different times. We may understand the "science charade", on the one hand, and lawyering-up, on the Other, as alternative strategies that agencies follow. Moreover, the strategies need not be mutually exclusive; from the standpoint of political appointees who wish to ensure that courts uphold their controversial policy choices, both Science and law provide useful cover. Another fator is how the courts treat different agencies, which may differ based on general judicial assessments of a given agency's quality, on the ideological character of the agency's subject area, or on the ideological proclivities of judges, among others. Here, too, different agencies may anticipate different types or levels of oversight from reviewing courts and may adopt different strategies for that reason. Whether technocrats or lawyers will assume a larger role in guiding agency decisions under hard look review is in part a function of whether reviewing courts place more emphasis on legal considerations (such as ascertaining the relevant factors under complex regulatory statutes) or instead on the agency's documentation of unassailable scientific theories and scientific evidence.

The most general point is simply that hard look review involves much more than the allocation of competence between courts and agencies. Hard look review is usually defended on the ground that the prospect of meaningful

---

review by "hir[ing] more lawyers and giv[ing] them more of a role in producing decisions that will withstand court scrutiny").

55 Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, LAW & CONTEMP. PROBS., Autumn 1991, at 57, 67.

56 Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974); Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).

judicial oversight will improve "the agency's" decisionmaking and its policy choices. In light of its internal allocation effects, however, we can see that the composition of agency decisionmakers is itself at stake in the choice between hard look review and the alternatives. The Court's consistent approval of hard look review has affected not only what agencies may do but who within agencies may do it.

7. The Administrative Law of Emergencies

Although in nominal terms the Court has consistently required hard look review of agency action, judicial scrutiny sometimes weakens; the *de facto* intensity of review varies with circumstances. In practice, courts apply hard look review more or less strictly, depending upon context. This variation can have collateral allocation effects within agencies as well. In the extreme case, "hard look" review can become "soft look" review or even a rubber stamp for agency decisionmaking.

We will consider only one example: the administrative law of emergencies, especially emergencies arising from threats to national security. After 9/11, federal courts applied hard look review in highly deferential ways where agencies made a decision with national security implications.[57] In *Jifry v. Federal Aviation Administration*,[58] for example, the D.C. Circuit considered a challenge to agency rules promulgated on an emergency basis without notice and comment, under which the Federal Aviation Administration, acting in conjunction with the Transportation Security Agency, had revoked the commercial piloting licenses of a group of aliens on the ground that they posed an unacceptable risk of terrorism. The court upheld the agencies' action Against both procedural challenges and on hard look review, noting that "[t]he TSA and FAA deemed such regulations necessary in order to minimize security threats and potential security vulnerabilities to the fullest extent possible."[59] This is, needless to say, hardly the sort of "probing" and "in-depth" scrutiny that the Court demanded in *Overton Park*.[60] Cases like

---

[57] For an overview and a collection of cases and examples, see Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).

[58] 370 F.3d 1174 (D.C. Cir. 2004).

[59] *Id*. at 1179 (internal quotation marks omitted).

[60] *Overton Park*, 401 U.S. at 415.

Jifry embody what the political theorist David Dyzenhaus describes as a legal "grey hole"—a judicial stance that provides the form, but not the substance, of judicial oversight.[61]

Just as the shift to hard look review tends to empower technocrats and lawyers at the expense of political appointees within agencies, so too the shift toward soft look review and legal grey holes tends empower politics at the expense of expertise and, especially, law. In times of perceived emergency, the opportunity costs of agency inaction are specially high, and courts will be reluctant to block agencies from taking action while ponderous legal proceedings and scientific studies go forward. Ossification, a major objection to hard look review, becomes especially worrisome, however much of a problem it may or may not be in normal times.[62] Courts are inclined to defer to executive officials, especially the President, and afford the barest rational basis scrutiny to administrative and presidential action. The result is that the relatively more cumbersome processes of technocratic and legalistic governance are temporarily shunted aside.

B. Structure and Process

Judicial review is but one corner of administrative law, which also involves statutes, executive orders, and other legal instruments that structure the agencies and the procedures they use. These rules also have important horizontal allocation effects, both direct and indirect. A few examples follow.

1. Agency Design

Agency design, broadly speaking, affects the allocation of authority within the agency. Part II, for example, discusses the consequences of rules about the appointment and removal of top agency officials on the allocation of authority within the agency. Another example comes from a line of work in political science that focuses on the systematic differences between agencies created by

---

[61] *See* Vermeule, *supra* note 57, at 1096 n.2 (citing DAVID DYZENHAUS, THE CONSTITUITION OF LAW: LEGALITY IN A TIME OF EMERGENCY 3 (2006)).

[62] For some recent findings suggesting that ossification is not an enormous problem, see Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. REV. 1111, 1125-31.

statute and agencies created by the President. While it is commonly though that all agencies are created by statute, many have actually been created by the President or one of his subordinates. The Office of Homeland Security, created in the immediate aftermath of 9/11, is just one recent example.[63] That Office, of course, was eventually transformed by the statute establishing the Department of Homeland Security, but many executive-created agencies never receive legislative blessing. Some examples include the Federal Security Agency (created by President Roosevelt in 1939),[64] the National Security Agency, the Federal Emergency Management Agency, and the Domestic Policy Council.[65]

David Lewis, in his study of executive-created agencies, has identified common features of such agencies that distinguish them from agencies created by statute. Lewis identifies five features of agencies that suggest insulation from the President—location outside the Cabinet, independence, commission structure, fixed terms for leaders, and qualifications for leaders.[66] After studying the creation of all agencies between 1946 and 1977, Lewis concludes (perhaps not surprisingly) that the data "overwhelmingly indicates that presidents rarely create agencies that are insulated from their control."[67] One important contribution of Lewis's work is to bring the President back into the story of bureaucracy.

Another implication of this work, however, is the one emphasized here: executive-initiated agencies are closer to the President because different types of agency design allocate authority *within* the agency. That is, Presidents have more influence over these agencies and their activities *not* because all who work at those agencies are blindly loyal to the President, saluting whenever he passes. That is simply not how complex organizations work. Executive-created agencies, like other agencies, are complex institutions. They have stakeholders within them who will, on occasion, disagree on the right course of the agency. Our hypothesis is that the President has more influence over

---

63 *See* DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997, at 77-78 (2003); Dara Kay Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 684 (2006) (describing the President's creation of the Office of Homeland Security).

64 *See* Mariano-Florentino Cuéllar, *"Securing" the Nation: Law, Politics, and Organization at the Federal Security Agency*, 1939-1953, 76 U. CHI. L. REV. 587 (2009).

65 See Lewis, *supra* note 63, at 79.

66 *Id*. at 44-48, 58-59.

67 *Id*. at 91.

these agencies because those who are closest to the President within these agencies are better equipped to overcome their intra-agency opponents. Their access to the superior authority of the President will operate as something of a Trump card in intra-agency disputes.

2. OIRA Review

Executive orders initiated by President Reagan[68]—and continued with modifications by Presidents Clinton[69] and George W. Bush[70]—mandated internal executive branch review of regulatory initiatives by agencies. The details differ somewhat across administrations, but there is a common core that mandates that executive branch agencies conduct cost-benefit analyses of major regulations or refusals to regulate and that OIRA would then review the agencies' findings. President Obama issued a new executive order on OIRA review[71] that repealed the earlier order by George W. Bush, thus reverting to the Clinton-era regime, which approved of cost-benefit analysis in qualified form. Obama's choice to head OIRA, Cass Sunstein, is a leading proponent of cost-benefit analysis;[72] in broad outline, the Obama Administration has maintained the core presidential commitment to cost-benefit analysis.

Just as cost-benefit default principles for statutory interpretation shift power to technocrats within agencies, OIRA review plausibly does so as well. Indeed, the effect may be stronger in the latter case. Cost-benefit default principles—at least to date at the Supreme Court level—merely permit agencies to use cost-benefit analysis. There is de facto pressure, but no legal obligation, to use such analysis when it is available. Under a regime of OIRA review, by contrast, there is an external enforcer with legal authority (via executive order) to force agencies to reconsider policy choices that do not plausibly survive cost-benefit scrutiny. (It is unclear, under the extant framework, whether OIRA may finally override an obdurate agency in case

---

[68] Exec. Order No. 12,291, 3 C.F.R. 127 (1982). President George H.W. Bush left President Reagan's executive order in place.
[69] Exec. Order No. 12,866, 3 C.F.R. 638 (1993).
[70] Exec. Order No. 13,422, 3 C.F.R. 191 (2007).
[71] Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009).
[72] See, *e.g.*, Cass R. SUNSTEIN, THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION (2002).

of disagreement. The reason this issue remains unclear is that no agency has an incentive to test the ultimate legal limits. Executive agencies, at least, are sensitive to signals from the upper reaches of the administration, and OIRA has usually had White House backing for its cost-benefit mission).[73] The looming presence of OIRA review gives technocrats within agencies a powerful argument that vigorous cost-benefit analysis is the price of accomplishing the agency's goals at all.

3. Separation of Functions

We have emphasized that "agencies" are unitary actors and can be internally fractured in a de facto sense. In a number of situations, however, agencies are explicitly fractured by law. Examples include the National Labor Relations Board (NLRB), whose General Counsel is a separate office with statutory powers, including the power to issue complaints,[74] and the division of authority over customs-related matters among the U.S. Customs Protection agency, the U.S. Immigration and Customs Enforcement agency, the Court of International Trade, and the Federal Circuit Court of Appeals. The two customs agencies are divisions within the Department of Homeland Security, while the two courts that hear customs matters are Article III courts of limited jurisdiction.[75]

As these examples suggest, the sheer bewildering heterogeneity of the administrative state makes it impossible to generalize about the allocation effects of agency structure. However, some structural features cut across particular areas, such as the separation of adjudicative functions from that agency functions at the lower levels of agencies. The APA requires that administrative law judges (ALJs), who must be lawyers, hear cases in the first

---

[73] *See supra* notes 68-71.

[74] *See* National Labor Relations Act § 3(d), 29 U.S.C. § 153 (2006); Vaca v. Sipes, 386 U.S. 171, 182 (1967); Jonathan B. Rosenblum, *A New Look at the General Counsel's Unreviewable Discretion Not To Issue a Complaint Under the NLRA*, 86 YALE L.J. 1349 (1977).

[75] For the place of the customs agencies within the Department of Homeland Security, see *Border Security*, DEP'T HOMELAND SECURITY, http://www.dhs.gov/files/bordersecurity.shtm (last visited Oct. 14, 2010). For the Article III status of the Court of International Trade, see *About the Court*, U.S. CT. INT'L TRADE, http://www.cit.uscourts.gov/informational/about.htm (last visited Oct. 14, 2010). For the Article III status of the Federal Circuit, see *Court Jurisdiction*, U.S. Ct. APPEALS FOR FED. CIRCUIT, http://www.cafc.uscourts.gov/index.php?option=com_content&view=article&id=i44&Itemid=27 (last visited Oct. 14, 2010).

instance, although appeals can usually go to the top level of the agency. Even where structural features are not universal but are instead particular to a given agency, allocation effects can be more or less apparent and important. There is little doubt, for example, that the first-order effect of the creation of a separate General Counsel's office at the NLRB, with substantial statutory powers, has the effect of legalizing the overall tenor of the agency's work. Perhaps in part for this reason, the NLRB is well known for proceeding predominantly through case-specific adjudication initiated by complaint from the General Counsel's office, rather than through rulemaking, which has a more policy-oriented tenor.[76] An implication is that allocation effects may, in turn, affect the agency's choice between rulemaking and adjudication; we return to this point in Part IV.

4. Litigating Authority

Most agencies are represented in court by the Department of Justice (DOJ), but Congress has sometimes granted independent litigating authority to agencies.[77] Where Congress has done so, agency lawyers, rather than DOJ lawyers, represent the agency in court. Observers of these arrangements have analyzed the effect of DOJ control of litigation on an agency's capacity to implement its programs.[78] They have also explained the occasional allocation of independent litigating authority to agencies as part of a larger tussle between the President and the Congress for control of the bureaucracy, the idea being that independent litigating authority "enlarges department and agency responsibility, thereby providing oversight committees greater opportunities to influence agency business."[79]

These considerations are certainly part of the story, but statutes that grant independent litigating authority to an agency will also affect the allocation of authority among professionals within it. When a DOJ attorney represents

---

[76] *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 565-70 (2002).

[77] *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 264-70 (outlining the differing statutory arrangements for controlo f agency litigation).

[78] Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 Admin. L. REV. 1345 (2000).

[79] Devins, *supra* note 77, at 166.

the agency in court, the agency (and its general counsel) loses sole control over the arguments it will make and the tactics it will pursue in defending or pursuing agency action. Agency officials will instead need to persuade the DOJ lawyer that the agency's views on substantive matters or litigation tactics are correct.

The agency's general counsel will no doubt be the key player in this effort, but decisionmaking authority will not rest with her.

When the agency has independent litigating authority, by contrast, the general counsel is the one who makes the final decisions about the agency's legal arguments and tactics, subject of course to those senior to her within the agency itself. Our hypothesis is that this latter arrangement changes the dynamics between general counsels and other professionals within the agency. There are two reasons for this. When the general counsel makes predictions about how a court will react to an argument or whether a tactic is wise, those in the agency who disagree with her will know that it is ultimately her call to make, and this may dampen the vigor with which opposing arguments are made. A second reason the dynamics might change rests on the fact that a general counsel in an agency with independent litigating authority is alone responsible for an aspect of the agency's interaction with the outside world that those in the agency care deeply about. Sole responsibility, of course, can lead to either credit or blame. To the extent that the general counsel is perceived to be an astute reader of the courts, the general counsel will get sole credit—and the resulting stature and influence within the agency—for success in this important agency activity. But if the general counsel is perceived to be unsuccessful in court, she (and not the DOJ) bears all of the blame.

III. Vertical Allocation

Many of these features of judicial review, and of agency structure and process, have vertical as well as horizontal allocation effects. Those rules allocate power among senior policymakers close to or at the top of the agency—political appointees, lawyers, technocrats—but in doing so, they also allocate power away from those decisionmakers at the lower level of the agencies, such as enforcement agents and adjudicators. In this Part, we will explore in more detail rules and structures that vertically allocate power within the agency. Here too, we structure our discussion around the distinction between judicial review on the one hand and agency structure and procedure on the other.

We note, where relevant, differences between direct and indirect allocation effects and between intended and unintended allocation effects.

A. Judicial Review

1. Mead Redux

Mead establishes the conditions under which an agency will be eligible for *Chevron* deference. As already discussed, this approach creates two regimes, one where *Chevron* does not apply and one where it does (which agencies prefer, all else equal). Lawyers are more dominant in the former regime, and nonlawyer professionals are more dominant in the latter regime. But this rule does not just allocate authority among these professionals; both the majority and dissent in *Mead* can also be understood to embrace approaches that vertically allocate power as well. The same can be said of a Leading treatment of *Mead*, written by Professor David Barron and then-Professor Elena Kagan.[80]

For the majority in *Mead*, the fact that lower-level agency personnel made the agency decision at issue in the case mattered to the outcome. Recall that *Mead* held that agencies would be entitled to the more deferencial *Chevron* standard only when the agency was acting with the force of law. While the Court did not comprehensively identify when the agency would be "acting with the force of law", it stated that an agency would be doing so if it relied on the more elaborate processes of notice-and-comment rulemaking or adjudication when it made its decision. A conventional defense of this holding, one developed by Professor Thomas Merrill, is grounded in ideas about the proper functioning of the branches of government.[81] The argument goes that it is legitimate for Article III courts to defer to agency interpretations of ambiguous federal statutes *only* when Congress has delegated lawmaking authority to the agency and the agency has adopted its interpretation in the

[80] Barron and Kagan argue for an internal "nondelegation" principle that would reward na agency with *Chevron* deference only when top-level officials take responsability for the agency's statutory interpretation. David J. Barron & Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 SUP. CT. REV. 201.

[81] Brief Amicus Curiae of Professor Thomas W. Merrill in Support of Petitioner at 14-26 United States v. Mead Corp., 533 U.S. 218 (2001) (No. 99-1434); Merrill & Hickman, *supra* note 29, at 837.

course of exercising that lawmaking authority—acting, that is, with "the force of law".

This separation-of-powers perspective is blind to the internal effects of the *Mead* rule. After *Mead*, the determination of whether *Chevron* or the less deferential *Skidmore* applies, at least in cases where the agency has discretion about how to proceed, is left to the agency has discrition about how to proceed, is left to the agency officials who determine what type of process the agency will use to make a decision.[82] This allocates authority upward within the agency as officials with that sort of authority will be at the higher levels of the agency. At least on the facts of *Mead*, the Court seems to suggest that the agency was not acting with the force of law because the decisions were made at the lower rungs of the agency hierarchy. As the Court put it, claiming that the Customs classifications had legal force "is to ignore the reality that 46 different Customs offices issue 10,000 to 15,000 of them each year."[83] Such decisions were, the Court noted, being "churned out" at that high rate in "46 scattered offices" and, given this, it was "self-refuting" to claim that the rulings had the force of law.[84]

Just as the majority can be understood to allocate power to higher-level officials who possess the authority to decide whether the agency will act with the force of law, Justice Scalia's dissenting position in *Mead* would do the same, albeit in a different way and with a different result on the facts of *Mead* itself. In Justice Scalia's view, as observed earlier, *Chevron* applies any time there is a gap to fill and the agency's position is "authoritative."[85] High-level officials would be put in the driver's seat. If an agency wants *Chevron* deference, such officials must have embraced the challenged agency policy. To Justice Scalia, it matters not that the policy was originally formulated at the lower levels of the agency organizational chart. For him, the Customs ruling was "authoritative" because the General Counsel of the Department of the Treasury and the Solicitor General of the United States filed a brief that treated the Customs ruling as the "official position of the Customs Service."[86]

---

82 *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386-90 (2004).
83 Mead, 533 U.S. at 233.
84 *Id.*
85 *Id*. at 240-41 (Scalia, J., dissenting).
86 *Id*. at 258.

As noted earlier, if Justice Scalia had his way, this approach would horizontally allocate authority to high-level lawyers (including those outside of the agency), but it would allocate vertically as well. Only those who have the power to make an agency position authoritative—in other words, senior officials—can make a policy eligible for *Chevron* deference.

Professor Barron and then-Professor Kagan, in one of the few academic treatments to emphasize that judicial review doctrines allocate authority within agencies, argue for an approach to *Mead* that would allocate authority along the vertical axis within the agency. They suggest that courts should only reward agencies with *Chevron* deference when the official who is delegated authority under the statute (usually, though not always, the top official in the agency) makes the actual decision.[87] Barron and Kagan defend this rule, which would obviously allocate authority to higher-level officials, as promoting accountable and disciplined agency action. The main point for present purposes, however, is that their approach explicitly rests on an understanding that judicial review of agency action can operate to allocate authority vertically within the agency.

2. The Accardi Principle

A second feature of judicial review of administrative action that allocates power within agencies is the *Accardi* principle,[88] also known as the *Arizona Grocery* principle.[89] That principle, stated simply, obliges an agency to follow its own rules; a court will invalidate agency action that fails to do so. That may seem like an uncontroversial principle, but it is not,[90] and it is, in fact, most interesting in those cases where the agency's rule that constrains its exercise of discretion is not required by any source of authority such as a statute or court order. In such cases, the agency has voluntarily adopted

---

87 *See* Barron & Kagan, *supra* note 80, at 236.

88 *See* United States *ex rel*. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569 (2006).

89 *See* Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry., 284 U.S. 370 (1932).

90 *See, e.g.*, Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own "Laws"*, 64 TEX. L. REV. 1 (1985); Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 ADMIN. L. REV. 653 (1992); Note, *Violations by Agencies of their Own Regulations*, 87 HARV. L. REV. 629 (1974).

a rule that constrains its own discretion. Agencies can and do voluntarily adopt rules that (for example) establish procedures that structure decisionmaking (in centralized or decentralized ways) or identify how they will exercise their enforcement discretion. If the agency adopts the rule in the proper way, then under the *Accardi* principle a court will enforce the rule against the agency in the future.

The key point is that a court—a third party outside the agency—will enforce the rules that are subject to the *Accardi* principle. Conventional justifications for the *Accardi* principle emphasize reliance interests and rule-of-law concerns.[91] Recent work by one of us emphasizes that the *Accardi* principle gives agencies a mechanism to make limited credible commitments about the stability of their policies; this can allow agencies to entrench policy across time and protect themselves from political interference by the President or Congress.[92] These arguments focus on the external allocation of powers and duties between and among agencies, other lawmaking institutions, and regulated parties.

These are incomplete understandings, though, because the *Accardi* principle also allocates authority within the agency. It gives top-level agency officials a more effective mechanism than they would otherwise have to monitor and control the actions of their subordinates.[93] It helps them, in other words, to control delegations of power within the agency. A senior official, through a discretion-limiting rule that a court will enforce against the agency, can control her subordinates' exercise of discretion, thereby allowing her to advance particular policy goals, consistency across like cases, or whatever the senior officials' objectives may be. Given that a central risk associated with delegation of authority is that the principal loses some control over the actual decision, the *Accardi* principle helps facilitate delegation within the agency in the first instance.[94] By giving top-level principals an additional instrument with which to control subordinate agents, *Accardi* encourages principals to transfer more power to those agents.

---

91 *See* Merrill, *supra* note 88, at 570, 604.
92 Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV 859, 873-88 (2009).
93 *See id*. at 884-86.
94 *See id*.

3. Massachusetts v. EPA

In *Massachusetts v. EPA*,[95] the Supreme Court set aside the EPA's denial of a petition filed by states and private parties that asked the agency to regulate greenhouse gas emissions from vehicles. The EPA had denied the petition on two grounds. First, it stated that greenhouse gas emissions did not meet the definition of "pollutant" under the Clean Air Act. Second, even if greenhouse gases were pollutants, the EPA stated that, for a variety of reasons (discussed below), it would still not regulate them as vehicle emissions under the Clean Air Act. The Court handed the EPA a thoroughgoing defeat, holding that greenhouse gas emissions were—plainly—pollutants under the Act. It also held that the EPA's explanations for its failure to regulate were legally invalid and, in the course of doing so, identified the types of reasons that could justify the agency's failure to act.[96]

According to one account,[97] the Court accomplished something quite specific in *Massachusetts v. EPA*: its holdings forced the agency to exercise expert, technocratic (as opposed to political) judgment. The Court did this against a backdrop of allegations that the administration had "politicized" scientific judgments made by health and safety agencies generally and had done so specifically with respect to scientific judgments that the EPA was charged with making under the statute. *Massachusetts v. EPA* can be seen as a response to that charge because the Court's holding guards against such politicization.

On this account, the key move for the Court was to narrow the grounds upon which the agency could refuse to act. In order to regulate vehicle emissions under the statute, the agency had to make a threshold finding that the pollutant cause dor contributed to "'air pollution which my reasonably be anticipated to endanger public health or welfare.'"[98] The agency offered a laundry list of reasons for why, even if greenhouse gas emissions fell within the definition of "pollutant" under the Act, the EPA would decline to regulate vehicle emissions: "the complex and highly uncertain nature of the

---

95 549 U.S. 497 (2007).

96 *Id*. at 532-35 (suggesting that inaction could be justified only "[i]f the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming").

97 Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: *From Politics to Expertise*, 2007 SUP. CT. REV. 51.

98 549 U.S. at 528 (quoting 42 U.S.C. § 7521(a)(1) (2006)).

scientific record, the agency's desire to have the benefit of ongoing research, and the inadvisability of piecemeal regulation to adress an issue of global magnitude at a time when the President and Congress are seeking to develop a comprehensive approach."[99] The agency's denial of the petition left the status quo in place (no regulation of greenhouse gas vehicle emissions), but it did not definitively make a finding that vehicle emissions did not threaten health and welfare. In effect, the agency decided not to decide whether vehicle emissions threatened human health or welfare.

Not a single one of the EPA's reasons, according to the Court, provided a valid basis for refusing to act.[100] In denying the petition, the only reasons that the agency could rely on were reasons grounded in the relevant statutory provisions. In other words, When the agency was deciding whether it would exercise its regulatory authority, the only reasons that the agency could consider were those that the statute made relevant to the exercise of regulatory autority. Thus, the agency could fail to act if it decided that the emissions did not endanger the health or welfare of the public or if it decided that the scientific uncertainty on that matter was so "profound" (the Court's word) that the agency could not make a reasoned judgment on the matter.[101] But it could not fail to regulate because of short-of-profound uncertainty in the science, inconsistency with presidential priorities, or negative international consequences. The statute simply did not make any of those matters relevant.

Requiring "the agency" to exercise expertise, as *Massachussets v. EPA* does, gives certain types of decisionmakers within the agency a leg up if and when there is conflict among agency stakeholders. *Massachussets v. EPA* allocates authority within the agency because it puts those with special access to expert judgment in a more powerful position than they would occupy if the agency could rely, in declining to exercise its authority, on the sorts of reasons the EPA offered and the Court rejected: for example, some (less than profund) uncertainty in the science, consistency with the President's overall priorities, or foreign policy concerns. Political appointees at the top of the agency could and would fashion those latter sorts of reasons, while technocrats would be in a superior position when it came time to formulate reasons related to threats to human health and welfare. This allocation of agency authority pushes power not only toward technocrats but also *down* the agency hierarchy as technocrats

[99] Brief for Federal Respondent at 35, Massachusetts v. EPA, 549 U.S. 497 (No. 05-1120).
[100] 549 U.S. at 533-34.
[101] *Id*. at 534.

sit on the lower ladders of the agency. The professionals who possess the knowledge, expertise, and know-how to master the science are hierarchically inferior to the political appointees at the top of the agency. This is not to say that the technocrats will always win over the political appointees when they are in conflict. Rather, by demanding to see just what the technocrats bring to the table, *Massachusetts v. EPA* gives them some weapons that they can use to attempt to prevail in an intra-agency conflict.

4. Substantial Evidence: Universal Camera and the Morgan Cases

Part II discussed the way in which hard look review of agency policy choices allocates authority among different types of professionals at the agency. Judicial review of factual findings does something similar, although here a primary effect is to distribute authority along the agency's vertical axis. Factual findings are, of course, often central to agency action. What is the level of vertical integration in a particular industry? Has a drug been shown to be both safe and effective? Is a particular trade practice deceptive to consumers? Is a food additive carcinogenic?

The processes that agencies rely on to determine such facts can involve different types of decisionmakers at different levels within the agency hierarchy. Such findings are often made, at least initially, in adjudicatory proceedings that are presided over by decisionmakers who in some respects resemble trial judges: they take evidence (including documentary evidence and witness testimony), entertain arguments from both sides, and render written decisions based exclusively on the record of the proceeding. In the most formal of these adjudications, which are presided over by ALJs, the APA requires (1) a separation of adjudicatory personnel from investigators and enforcement personnel; (2) prohibits the ALJ from privately consulting with anyone, including other agency personnel, on any "fact in issue" in the proceeding; and (3) prohibits ex parte contacts with anyone outside the yhe agency.[102] ALJs enjoy other features of independence. Their pay is set by Office of Personnel Management,[103] not their own agency, and they can be removed only after a full-blown adjudicatory hearing.[104] As any senior

[102] Administrative Procedure Act, 5 U.S.C. §§ 554(d), 556, 557(d)91) (2006).
[103] *Id*. § 5372.
[104] *Id*. § 7521.

administrator at an agency with a great deal of adjudication will attest (perhaps with some frustation), ALJs, and to a lesser extent hearing officers, are fairly independent of the agencies in which they sit. But adjudicators adjudications are often finalized at a higher level within the agency. They are often reviewed internally by an appellate body or other superior decisionmaker, and sometimes by the decisionmakers at the very top of the agency hierarchy, such as the EPA Administrator or Federal Communications Commission (FCC) or SEC Commissioners.

The reviewing court must determine whether the original findings made at the hearing are owed special protection or deference. When agency factual findings are challenged in court, they will be upheld if they are supported by "substantial evidence" or (if that test does not apply) if they are not arbitrary and capricious. These tests are empty formulations—they do not tell us much, and their meaning has changed over time in any event. What is somewhat more instructive is that the agency's factual finding will be assessed based on the record before the agency.

Whatever the court decides about how to evaluate factual findings will affect the allocation of power among the agency's internal decisionmakers. Depending on the nature of judicial review of factual findings, authority can be allocated up or down in the agency hierarchy. It might allocate authority toward the initial factfinders, who sit at the middle to lower levels of the agency pyramid, conduct proceedings somewhat insulated from the rest of the agency, and often are (relatively speaking) independent of the agency, or it might allocate authority away from those initial adjudicators and to reviewing officials and political appointees at the higher levels of the agency.

Consider two possible approaches to judicial review of agency factual findings. On the one hand, that review might favor the initial adjudicator and be (like judicial review of trial court findings) highly deferential to the factual determinations made in the initial adjudication. Reviewers might uphold agency factual findings as long as the agency's final factual finding is consistent with the finding of the initial adjudicator and be skeptical whenever the initial determination is reversed. Under such a regime, agency higher-ups would reverse the initial adjudicator at their peril; they could only do so if they could convince the reviewing court that they too have closely reviewed the evidence; they may even have to show that they have reviewed the same documentary evidence and heard the same testimony and argument themselves.

At the other end of the spectrum, judicial review of factual findings might favor the agency higher-ups. It could treat the initial adjudicator's decision as not particularly important. On review, the agency could depart from those factual findings without any special demonstration that the agency closely reviewed the evidence and testimony presented at the initial hearing.

The history of judicial review of agency factfinding contains decisions supporting a variety of different standards of review located at different points along the spectrum just identified. Some approaches have favored initial decisionmakers, thus allocating authority down the ladder of the agency hierarchy. There is, to start, a basic point about the "substantial evidence" test and the requirement that the evidence be found in the record before the agency. That record is most likely to be compiled at the initial stage of proceeding by the initial adjudicator. It is true that initial determinations can be reviewed within the agency and that on review an agency has all powers that the initial adjudicator had, including the power to reopen the record.[105] Reopening the record, however, does not operate to erase the initial record and in any event is costly. As a practical matter, then, the initial decisionmaker is likely to have been decisive in the creation of the record upon which the agency's determination will rise or fall if it is challenged in court.

Beyond this general point about the natural consequences of the judicial examination of an agency record for substantial evidence, reviewing courts have developed more specific doctrines that are best understood as allocating power among internal agency decisionmakers and, like the substantial evidence test itself, empowering initial decisionmakers, at least when compared to an approach that would allocate most authority to senior agency decisionmakers.

Two well-known lines of cases illustrate this. In *Universal Camera*, the Supreme Court evaluated a final NLRB decision that rejected the earlier findings of an NLRB hearing examiner.[106] The Second Circuit held that is was required to accept the Board's decision to reject the examiner's findings, because those findings were "not 'as unassailable as a master's."[107] The Supreme Court rejected this line of reasoning and held that a reviewing court's assessment

---

[105] *Id*. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule").

[106] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[107] *Id*. at 492 (quoting NLRB v. Universal Camera Corp., 179 F.2d 749, 752 (2d Cir. 1950)).

of whether an agency's finding was supported by substantial evidence should include consideration of the initial decisionmaker's findings.[108] As the Court put it, "Nothing suggests that the reviewing courts should not give to examiner's report such probative force as it intrinsically commands."[109] The *Universal Camera* Court declined to adopt a general standard that should apply in this situation, but the Court did indicated that failure to follow the initial finding might raise some questions about whether the agency's final decision was supported by substantial evidence: "We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion."[110] Thus, under *Universal Camera*, initial agency findings are not protected by something like a "clearly erroneous" standard, but rather an agency that reverses those findings without a good explanation is likely to face a skeptical reviewing court.

Another example of rules that, at least initially, favored the original decisionmaker can be found in the twists and turns of the *Morgan* saga, which produced four *United States v. Morgan* cases.[111] At issue was a decision by the Secretary of Agriculture, which he admitted that he had made only after consultation with agency staff and without having heard oral arguments or having considered the briefs submitted by the challengers. In *Morgan I*,[112] the Court held that, if true, these allegations meant that the Department had denied the parties the full hearing they were entitled to under the law. In a phrase that was widely used to capture the idea, the Court wrote that "[t]he one who decides must hear."[113] This principle of personal decisionmaking, if fully enforced, would mean that higher-ups in the agency could make findings only after conducting a very full review, including perhaps hearing testimony themselves. The *Morgan I* principle substantially raises the cost to higher-level decisionmakers who want to reverse findings made in initial adjudicatory proceedings and thereby allocates authority down within the agency.

---

[108] *Id*. at 493-94.
[109] *Id*. at 495.
[110] *Id*. at 496.
[111] United States v. Morgan (*Morgan IV*), 313 U.S. 409 (1941); United States v. Morgan (*Morgan III*), 307 U.S. 183 (1939); Morgan v. United States (*Morgan II*), 304 U.S. 1 (1938); Morgan v. United States (*Morgan I*), 298 U.S. 468 (1936).
[112] *Morgan I*, 298 U.S. at 477-78.
[113] *Id*. at 481.

There also have been a variety of approaches to judicial review of agency factfinding that allocated authority up and toward reviewing officials and political appointees. One example is the "mere scintilla" rule. At one point prior to the passage of the APA, Congress believed that courts were upholding agency factual findings if there was a "mere scintilla" of evidence to support it, even if the weight of the evidence in the record undermined that little bit of evidence. The Court perceived congressional debate over the APA of the "substantial evidence" test as sending a signal that such review was too deferential to agency factual findings.[114] The debate proceeded on the usual grounds of the relative institutional competence of agencies and courts but also concerned the allocation of authority within the agency. A "mere scintilla" approach protects agency findings, regardless of the internal review process that led to them, and thus provides greater freedom for higher-level officials to reach their own view of the facts—constrained only by the limited requirement that there be a bit of evidence in the record to support the finding.

Another example in this same vein comes from the subsequent *Morgan* cases. While *Morgan* I put forward a strong "personal decision" requirement, that requirement did not last. By *Morgan IV*, the requirement was relaxed, although not abandoned. The agency decisionmaker still must become familiar with the issues in the case prior to making a decision, but she can satisfy the requirement without hearing the evidence herself.[115] And as the *Morgan I* principle is relaxed, higher-level officials face fewer costs when reversing initial adjudicatory determinations.

5. State Secrets Privilege

A final example involves the doctrine of judicial review requiring those at the top of the agency to take responsibility for the assertion of governmental secrecy. In *United States v. Reynolds*,[116] the Supreme Court identified formalities that must be satisfied in order for the United States to assert the "state secrets" privilege. In order to assert the privilege, the Court wrote, "[t]here must be

---

[114] The *Universal Camera* Court discussed this matter as it discussed the then-new APA provisions regarding judicial review of agency factfinding. *See Universal Camera*, 340 U.S. at 481-91.

[115] *Morgan IV*, 313 U.S. at 415-16.

[116] 345 U.S. 1 (1953).

a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer".[117]

The effect of *Reynolds* on internal allocations of power will be familiar. The formalities associated with the assertion of the privilege operate to shift authority to the top official and away from other lower-level officials. This squarely places the authority with the agency official who is closest to the President and away from the civil service, lawyers, and program officers who otherwise populate the relevant agencies.

B. Structure and Process

As noted earlier, judicial review is not the only means by which authority is the allocated within an agency. Agency structure and required process also allocate authority within the agency. The examples discussed in Section II.B as having horizontal allocation effects have vertical allocation effects as well. For example, an agency design that puts the agency close to the president, as some executive-initiated agencies do, consequently allocates authority away from those who are lower down in the agency hierachy. OIRA review of agency rules plausibly shifts power to technocrats, as Section II.B suggests, and at the same time shifts authority to experts in the "middle" of agency—that is, away from political appointees at the top agency but also away from personnel at the bottom of the agency. This Section discusses three other examples of agency structure and process that internally allocate power along this vertical dimension.

1. Delegations of Authority to Particular Officials

Just as the Supreme Court in *United States v. Reynolds* required the head of a department to formally invoke executive privilege, thus assuring that decision would be made by the top official at the agency, Congress sometimes chooses to vest particular agency officials with discrete authority. There are no doubt many examples of this in the U.S. Code, but here we discuss two.

---

[117] *Id*. at 7-8 (footnote omitted).

Among the most well-known examples of this is the General Counsel of the NLRB, discussed earlier. The General Counsel is intended to be separate and independent from the Board. By statute, the General Counsel, and the General Counsel alone, has the authority to make certain decisions.[118] The General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints … and in respect of the prosecution of such complaints before the Board."[119] This discretion not only allocates authority away from the Board but also shifts authority over legal matters away from the regional directors, who are otherwise vested with significant authority under the Act.[120]

The Federal Food, Drug, and Cosmetic Act[121] ("Act") similarly specifies high-level officials to make certain decisions. Under the Act, the FDA has the authority to seize food on an emergency basis (without any judicial process) if it believes that the food "presents a threat of serious adverse consequences".[122] This authority, however, can be exercised "only if the Secretary or an official designated by the Secretary approves" the detention order.[123] The statute goes on to limit which officials can serve as designees of the Secretary: "An official may not be so designated unless the official is the director of the district under this chapter in which the" food involved is located, "or is an official senior to such diretor."[124]

The President likewise occasionally identifies specific officials who must exercise some function or make some decision. One example is drawn from President Bush's January 2007 amendments to Executive Order 12,866. Those amendments, among other things, required agencies to designate one of the agency's presidential appointees to be its "Regulatory Policy Officer."[125] "Presidential appointees" are just what they sound like; they are appointed by the President and confirmed (or not) by the Senate. Under Executive Order 12,866, Regulatory Policy Officers are to report to the agency head, who is also generally a presidential appointee, and they are to be "involved at each stage

---

[118] For a discussion of the legislative debates leading to this structure, see Seymour Scher, *The Politics of Agency Organization*, 15 W. POL. Q. 328 (1962).
[119] 29 U.S.C. § 153(d) (2006).
[120] *Id*.
[121] 21 U.S.C. §§ 301-399ª (2006).
[122] *Id*. § 334(h)(1)(A) (2006).
[123] *Id*. § 334(h)(1)(B)
[124] *Id*.
[125] Exec. Order No. 13,422 § 5(b), 72 Fed. Reg. 2763, 2764 (Jan. 18, 2007).

of the regulatory process."[126] The amended executive order is a transparent effort to reach into agencies and make certain that political appointees have a seat at the table during the development of regulatory policy. This has both horizontal and vertical allocation effects. It empowers political appointees at the expense of technocrats, and it also places authority in an official at the top of the agency of hierarchy.

2. Freedom of Information Act, Deliberative Privilege Exception

Under FOIA,[127] parties may request that agencies make available "identifiable records" and, unless those records are subject to an exemption, the agency must make those records public.[128] The relevant exemption here is the "deliberative privilege" exemption.[129] In order to be exempt from disclosure under this exemption, the document must be both predecisional and deliberative.[130] The exemption does not apply to factual materials[131] or to statements of agency policy or interpretation of law,[132] even if those statements or interpretations contain deliberative materials.

According to the Supreme Court, the exemption is aimed at protecting "frank discussion of legal or policy matters" that "might be inhibited if the discussion were made public."[133] The debate over deliberative privilege tends to focus on the "public's right to know", which FOIA broadly endorses. Thus, the debate centers around which government documents should be revealed to the public and which documents can be kept from the public. That is no doubt one important dimension of the question of the scope of the deliberative privilege exemption. Another way to understand the contours of the doctrine, however, is to notice which sorts of agency personnel are even in a position to assert deliberative privilege. To the extent that keeping documents shielded from the public is a benefit to agency personnel because it allows them to

---

126 Exec. Order No. 12,866 § 6 (a) (2), 58 Fed. Reg. 51,735, 51,741 (Oct. 4, 1993).
127 5 U.S.C. § 552 (2006).
128 *Id*. § 552(a) (3).
129 "Deliberative privilege" is a subset of a wider FOIA exemption: Exemption 5, which covers privileges. *See id*. § 552(b)(5) (providing exemption from disclosure for materials "which would not be available by law to a party other than an agency in litigation with the agency").
130 *See* Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).
131 *See* EPA v. Mink, 410 U.S. 73 (1973).
132 *See* Am. Mail Line, Ltd. v. Gulick, 411 F.2d 696 (D.C. Cir. 1969).
133 NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975).

engage in robust and frank exchange, that benefit will flow only to those who are at the middle level of the agency. Those at the very top of the agency are policymakers; they don't deliberate, they decide. Thus, their documents will usually be either statements of agency policy or interpretation of law, or both; neither type of document is covered by the exemption.[134] And those lower down in the hierarchy are unlikely to have the benefit of deliberative privilege to shield their documents, either because they are not authorized to provide deliberative input into important decisions or because they are primarily charged with determining facts.

3. Managing and Controlling Adjudication

There are several disputes about agency adjudication and agency adjudicators that are best understood to be disputes about allocating up to agency policymakers or allocating down toward agency adjudicators. We will consider them briefly because, unlike several of the other examples discussed in this Article, these disputes are conventionally understood to be intra-agency tugs-of-war between varying decisionmakers whose interests conflict.

One set of controversies involves the independence of adjudicators. As a result of the APA, ALJs enjoy statutory "decisional independence."[135] many non-ALJ adjudicators who are not covered by the APA, but under the Due Process Clause, such adjudicators must, at a minimum, be unbiased,[136] which implies some level of independence. Policymakers at the top of agencies have sometimes found adjudicators frustrating precisely because of this independence. They have also worried about adjudication's inefficiency and inconsistency as a policymaking instrument. As a result of these features, some agencies attempt to manage and supervise these decisions. This raises the question of what sorts of "supervisory" techniques an agency can pursue that are consistent with an adjudicator's decisional independence. To take a very well-known example, the Social Security Administration created reform programs aimed at promoting more consistency across agency ALJs. The programs included a peer review program, monthly production goals,

---

[134] *See Coastal States*, 617 F.2d at 869 (finding that the Department of Energy regional counsel's memoranda were not deliberative privilege materials but were instead agency policy).

[135] Nash v. Califano, 613 F.2d 10, 15 (2d Cir. 1980).

[136] *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927).

and a quality assurance system that zeroed in on certain ALJs who had what the agency viewed to be skewed reversal rates. When the programs were challenged, the first two were deemed consistent with ALJ independence, but the reviewing court thought that the last measure potentially infringed ALJs' decisional independence.[137] The bottom line is that senior agency officials can "manage" adjudication only to the extent that supervision does not relate to the resolution of particular cases.

Other than supervising adjudications and adjudicators, top agency policymakers also sometimes wish to limit the issues subject to individualized adjudication or even eliminate the need for adjudication altogether. Here, the agency policymakers have been markedly more successful than they have been in their supervisory efforts. In general, if a matter can be resolved by general rule under the governing statute, an agency can adopt a rule that obviates the need for individualized adjudication or limits the matters open to individualized adjudication even if individualized adjudication would otherwise be required. Thus, the Supreme Court endorsed the FCC's "Multiple Ownership Rules", which operated to eliminate the need for a hearing that would otherwise be required under the statute.[138] The rule limited the number of stations that a license holder could own; if a license holder applied for a station and ownership of that station would put the license holder over the threshold, the FCC would deny approval without holding the hearing that would otherwise be required in that circumstance.[139] Likewise, the Supreme Court allowed policymakers at the Department of Health and Human Services to adopt "medical-vocational guidelines" that removed a particular matter from the realm of individual adjudication. The guidelines determined whether, given certain facts, there was a job available in the national economy for a person seeking disability benefits. The Supreme Court sustained these "grid" regulations as an appropriate exercise of agency authority, which meant that the matters covered by the guidelines were resolved, not by individual proceedings as they had been before the guidelines, but by reference to the rule.[140]

In the end, the structure of adjudication allows adjudicators to operate fairly independently on matters that are within their purview, thus allocating

---

[137] Nash v. Bowen, 869 F.2d 675 (2d Cir. 1989).
[138] United States v. Storer Broad. Co., 351 U.S. 192, 203 (1956).
[139] *Storer*, 351 U.S. at 203.
[140] Heckler v. Campbell, 461 U.S. 458 (1983).

authority down within the agency. But senior agency policymakers retain a fair amount of freedom to craft rules that remove matters from the purview of case-by-case adjudication.

IV. Tradeoffs and Implications

The rules that structure agencies and determine their decisionmaking processes and the legal doctrine of judicial review have important effects in determining how power is allocated within agencies, both horizontally and vertically. What are the implications of this point, for administrative law and policy?

Analytically, the main implication is that *considerations of institutional choice are inadequate, by themselves, to evaluate rules of administrative law*. Institutional choice involves the allocation of power across institutions, taking those institutions as fixed. By contrast, institutional design takes the allocation of tasks as fixed and asks how institutions should be designed so as best to execute the tasks entrusted to them. In principle, the legal system should equilibrate institutional choice and institutional design, considering the allocation of tasks in light of the capacities and behavior of institutions while simultaneously adjusting the capacities and behavior of institutions in light of the allocation of tasks. However, under real-world constraints, not everything can be adjusted simultaneously; the analyst must usually take some institutional margins as fixed while considering the effects of interventions on other margins, while the actors who actually design institutions face still greater constraints. Sensibly enough, then, a great deal of administrative law theory treats the design and operation of agencies as fixed or exogenous, while asking how legal powers should be allocated between agencies and other institutions.

In this framework, our major claim is that it is equally illuminating to reverse the usual procedure. In other words, we hold constant the allocation of power across institutions while considering the variable effects of legal rules on the allocation of power within agencies. Every rule of administrative law can, and often does, have simultaneous effects on both the margin of institutional choice and the margin of institutional design. *Chevron*, for example, is frequently viewed solely through the lens of institutional choice—should courts or agencies say what the law is?—yet, as we have seen, one of its main effects is to allocate power within agencies and thus to affect the

design and operation of agencies themselves. When horizontal and vertical allocation effects operate, the internal design of institutions is just as important as institutional choice in evaluating and reforming rules of administrative law.

This is general, but we can go further by identifying some of the implications of the examples given in Parts II and III and explaining some systematic tradeoffs that arise when the allocation of power within agencies is brought to the surface. We hypothesize that the allocation of authority within agencies, either horizontally or vertically, has a series of effects. Some of these have been mentioned earlier as we discussed the consequences of single examples, and others have not. We start with a general statement of those effects and then move to particulars.

A. Horizontal Allocation Decisions

In the most general terms, horizontal allocation determines which professions—or which mix of professions—will have the upper hand within the agency, shaping its culture and inner workings. The ongoing contest over the roles of expertise, legalism, and politics in administrative law can thus be viewed in sociological terms as a contest among different types of professionals, with different types of training and priorities. Legal rules and institutional structures that empower scientists or engineers will conduce to a technocratic agency culture, while rules and structures that empower lawyers will carry in their wake the distinctive culture of lawyers. There is a large and underexplored set of questions about how, exactly, a legalistic orientation differs from a technocratic one[141] and how both of those differ from the politician's orientation; a burgeoning research program at the intersection of law, psychology, and sociology attempts to get traction on these questions.[142] What administrative lawyers can learn is that arguments and hypotheses about the roles of expertise, legalism, and politics in the administrative state

[141] For the hypothesis that lawyers, by training, are mare tolerant of institutional rules and procedures that yield decisions perceived to be wrong or mistaken in specific cases but yield superior outcomes in general, see FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 8-10 (2009); and Frederick Schauer, *Is There a Psychology of Judging?*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION-MAKING 103 (David Klein & Gregory Mitchell eds., 2010).

[142] *See, e.g.*, Barbara A. Spellman, *Judges, Expertise, and Analogy*, in THE PSYCHOLOGY OF JUDICIAL DECISION-MAKING, *supra* note 141, at 149.

can be addressed in a more concrete—and perhaps even testable—form by framing them sociologically, rather than conceptually.

B. Vertical Allocation Decisions

Moving authority up or down within the agency hierarchy will, in the usual case, have predictable effects. When authority is allocated down within an agency, there are two consequences. The most obvious effect is an increase in the number of decisionmakers, which thereby decentralizes agency decisionmaking. This will make the development of coordinated and consistent agency action more difficult. The second effect is to give decisionmaking authority to civil servants and thus to increase the independence or reduce the political responsiveness of agency decisionmaking. Allocating up has converse consequences: it increases the chances of coordinated and consistent policy and the political responsiveness of agency decisionmaking. In Part II we emphasized the differences among senior policymakers, such as political appointees, lawyers, and technocrats, and how which of them holds more cards in the game will be important. But it seems a fair statement that all of them will be more sensitive to political concerns than civil servants and line bureaucrats at the lower levels of the agency.

None of this is to take a normative position on which consequences are best. Resolving that depends on the normative goals of the enterprise. One could argue that administrative decisionmaking should be politically responsive or welfare-maximizing or reflect some notion of justice. We take to position on that, and it may very well differ depending on the policy objectives that the agency has in mind. The point here is instead to offer hypotheses about the tradeoffs associated with different choices.

C. Empowering Courts Empowers Agency Lawyers

We now move to more specific implications of these general points. It is sometimes assumed that empowering courts to decide legal questions leaves agencies free to focus on questions of policy and even encourages them to do so. On a view of this sort, one of the main benefits of a sharp division of functions between agencies and courts is a form of institutional specialization. In light of intra-agency allocation effects, however, this view is illusory. The more

robust the power of courts to override agency choices on legal grounds, the larger the role within agencies of lawyers, who must attempt to divine which "point estimate" or single best reading of statutes the courts will announce (under *Chevron*) or which factors that the courts will understand statutes to have made relevant (under hard look review). Lawyers within agencies may squeeze out politicians and technocrats; this is the flip side of Elliott's observation that *Chevron* empowers the latter professional at the expense of the former. These effects might be good or bad; different normative perspectives will judge them differently. But all normative perspectives would profit from understanding what the internal allocation effects of possible rules might be.

Attention to the relationship between empowering courts and empowering lawyers within the agency also suggests a new perspective on reviewability doctrine, one of the most contested issues in administrative law. The questions are whether and when courts should refrain from evaluating agency action. Because the statutory standards are open-ended, courts are the primary architects of the doctrine. Although reviewability is a contested corner of administrative law, the debate is not attentive to the consequences identified here. Debates over decisions like *Heckler v. Chaney*—which created a presumption that agency nonenforcement decisions are immune to judicial review[143]—pit advocates of legal controls on administration against those who are skeptical of such controls because they prefer agency expertise, executive branch accountability, or legislative controls as instruments of agency control. Pitching the debate that way is too simple because it ignores the internal effects of these decisions within the agency. If there is littles threat of judicial review, then lawyers lose their place at the table over the agency debates and deliberates over the action.

Disempowering courts, then, does disable legal constraints but does so in a different way than the conventional debate suggests. It mutes the influence of lawyers within agencies; that means other professionals come to the fore. Again, this is not to say that empowering lawyers within agencies need be good or bad. Much depends upon context; in some settings, legalization of agency decisionmaking might help to ensure that agencies do not violate rights or commit serious policy blunders, while in other contexts the result might be ossification and poor policy. It is to say, however, that the arguments over how law-interpreting power should be allocated among courts and

[143] 470 U.S. 821, 831-32 (1985).

agencies cannot proceed without considering the effects of legalization on the personnel, internal culture, and decisionmaking processes within agencies themselves.

D. Spillovers

Empowering particular decisionmakers within agencies can have spillover effects. Once lawyers, scientists, or economists—or any other professionals—are employed to cope with a particular issue, they become major stakeholders within agencies, and their influence can seep out laterally to encompass issues other than the one for which they were originally conscripted. When hard look review empowers lawyers at the expense of scientists, an effect we mentioned above, a spillover effect can result.

A study of EPA decisionmaking observed spillover effects "in the wild", as lawyers from the EPA's Office of General Counsel (OGC) encroached upon the work of other professionals:

> In addition to its role as statutory interpreter, OGC plays a quality control role. To ensure that rules survive substantive judicial review, the agency's attorneys often delve into the technical, economic, and legal underpinnings of the rules, and the attorneys seldom feel confined to pristine questions of statutory interpretation. Since many of the important and controversial science and policy disputes that arise in EPA rulemaking are ultimately resolvable only by reference to policies that originate in the agency's statutes, the attorney's role may range broadly into areas that other members consider to be within their own professional bailiwicks. This bifurcated role for OGC can thus lead to friction with the other offices and to the aggrandizement of institutional power of lawyers with their own ideas about appropriate regulatory policy.[144]

Spillovers are significant because allocation effects within agencies cannot always be confined to particular issues. The personnel selected to cope with any given issue will have a seat at the table that can be used to affect agency decisionmaking on other issues. Arguments about the rules of administrative law must take into account not only the immediate allocation effects of rules but their remote effects as well—and the latter may be at least as important as the former.

---

[144] McGarity, *supra* note 55, at 82.

E. Agency Choice Between Rulemaking and Adjudication

We suggest one further hypothesis: that allocation effects can influence agency choice between rulemaking and adjudication.[145] According to this hypothesis, which is an application of the spillover point, agencies whose culture is more lawyer-dominated will tend to engage in *ex post* enforcement and case-specific policy elaboration. Agencies whose culture is more dominated by scientists, economists, or other nonlawyer professionals will tend to favor *ex ante* rulemaking.

This hypothesis is fragile because it depends upon the proposition that lawyers, qua lawyers, are more likely to favor case-specific modes of agency policymaking.[146] The idea would be that technocrats favor rules based upon legislative-type facts—the type of statistical and general facts toward which their professional training is geared—whereas lawyers, educated and primarily trained (until very recently) in a case-based system oriented toward the common law, are prone to favor modes of procedure that emphasize adjudicative-type facts. We are not aware of any systematic evidence for or against this idea; but here is an extended anecdote, solely to motivate the hypothesis and make it minimally plausible.

Jerry Mashaw and David Harfst provide an in-depth account of the struggle between different types of professionals—engineers on the one hand and lawyers and economists on the other—to influence the choice of policymaking form at the National Highway Transportation Safety Administration (NHTSA) in the 1970s and 1980s.[147] In the early 1970s, safety engineers dominated NHTSA's culture and the agency proceeded through *ex ante* regulatory standards, an approach that "simply reflected 'the task [That engineers] do best.'"[148] The courts rejected these standards in a series of decisions in 1972; the immediate result was to "embarrass[], and ultimately delegitimate[] the

---

[145] *See generally* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004) (analyzing the significance and the judicial treatment of agency choices about how to implement policy goals).

[146] This hypothesis is especially fragile because it is in some tension with Fred Schauer's hypothesis that lawyers are more tolerant of rules that override what would otherwise be the best policy decision in particular cases. *See* SCHAUER, *supra* note 141, at 8-10. Needless to say, the issues here are ultimately empirical.

[147] Jerry L. Mashaw & David L. Harfst, Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance, 57 U. CHI. L. REV. 443 (1990).

[148] *Id.* at 445.

efforts of the principal proponents of aggressive rulemaking", namely the engineers.[149] The medium-term result was an "increased use of complex internal procedures [within NHTSA] that emphasized the cautionary propensity of lawyers and economists."[150] In contrast to the engineers' preferred approach of *ex ante* standard-setting, the agency's chief counsel preferred a strategy of *ex post* recalls on a large scale, and that approach was warmly received by the courts. "The legal successes of the enforcement personnel, particularly [the lawyers], lifted them to successively higher plateaus of power within the agency,"[151] and "the engineering-rulemaking dominance … dominance gave way to a lawer/economist-recall dominance."[152]

The episode may illustrate either or both of two causal patterns. On one hand, the dominance of a certain profession within the agency may influence the agency's choice of regulatory form (rulemaking versus adjudication). On the other, where external institutions, such as courts, mandate that the agency use a certain regulatory form, a spillover effect of the mandate can be to change the relative dominance of professions within the agency. In particular agencies, both effects could be observed at different times.

As a corollary, the episode suggests that the judges' 1972 decisions rejecting NHTSA's *ex ante* standards had far broader effects than the judges themselves are likely to have envisioned. Beyond the particular outcomes of cases, or even the administrative law principles announced in those cases, the decisions shaped the agency's decisionmaking going forward and did so by promoting the power and intra-agency cultural influence of one type of professional over another. One major result was to bias systematically the agency's choice of policymaking away from rulemaking and toward adjudication. In particular contexts, this effect may be good or bad—we have said nothing to indicate a view either way, generally or in the NHTSA setting—but judges, legislators, and other designers of the rules of administrative law should be aware of these crucial secondary effects.

---

[149] *Id.* at 478.
[150] *Id.*
[151] *Id.*
[152] *Id.* at 447.

Conclusion

We conclude by underscoring both the promise and the limits of our claims. Legal rules and institutional structures affect the allocation of power within agencies, with important secondary effects on agency decisionmaking. Administrative law theory tends to focus on the allocation of power between agencies and other institutions, rather than the internal composition of agencies. To the extent that administrative law theory cracks open the black box of agencies, it either speaks in abstract terms about the relative roles of expertise, law, and politics or else offers isolated anecdotes about horizontal and vertical allocation effects. We have attempted both to generalize these anedoctes into a systematic theoretical framework and to recast the tensions among law, politics, and expertise in more concrete sociological terms. This yields a range of testable hypotheses about the allocation effects oh the rules and structures of administrative law. We do not claim to have proven the truth of any of our hypotheses. But there is no burden of proof on these matters; allocation effects within agencies are inevitable, and current law itself rests upon unproven suppositions about the same matters. The research agenda of empirical administrative law, then, should include the allocation of power within agencies as a central topic.