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JUDICIAL REVIEW OF RISK ASSESSMENTS: 
THE ROLE OF DECISION THEORY IN 
UNSCRAMBLING THE BENZENE DECISION 

By 
WILLIAM H. RODGERS, JR.*

As any practicing lawyer knows, file cabinets contain two form briefs for cases involving judicial review of administrative action affecting technologies. One, for the losers below, bristles with irate talk about administrative caprice, urges exacting scrutiny, and cites Overton Park.¹ The other, for the winners below, speaks dispassionately of administrative expertise, counsels deference, and cites Vermont Yankee.² Often a party is both winner and loser below, and this calls for deft departmentalization in the brief, simultaneously urging rigorous oversight on one issue while discouraging judicial overreaching on another.

Judges, too, accumulate boilerplate responses, one in defense of a hands-off disposition, another for explaining a decision to lay the hands on. Any conscientious search for guidance on whether to intervene or defer is likely to come up short. The Administrative Procedure Act is positively misleading in some particulars,³ and anyone relying on it for an account of the scope of judicial review of administrative action during the decade of the 1970s would be sorely embarrassed. For a number of years, the Supreme Court and the U.S. Court of Appeals for the District of Columbia Circuit pursued mutually oblivious approaches to the scope of ju-


Appreciation is expressed to my colleagues William R. Andersen and James H. Hardisty, who stimulated my thinking on this subject.


dicial review and the deference due agency procedures and fact finding. The Supreme Court encouraged intervention in its 1971 Overton Park decision, cited hundreds of times by the lower federal courts, but called for deference in its unanimous 1978 Vermont Yankee decision, cited on scores of occasions since. All the while the suspicion has arisen, certainly among practitioners who can say such things, that the grand synthesizing principle that tells us whether the court will dig deeply or bow cursorily depends exclusively on whether the judge agrees with the result of the administrative decision. This harsh descent to legal realism—and a cynical version at that—does not lack empirical ammunition. There are enough administrative agencies today making decisions on enough subjects to rile or please just about anybody with a set of moderately fixed convictions, and most judges qualify on that score. Consistency and neutral principles are not problems until there are many occasions for decision; the reach and complexity of contemporary administrative law have made them problems.

Recently, the issues of regulatory reform, judicial review, and the allocation of decisionmaking authority on technical matters have come together in a spirited national debate over the proper role of cost-benefit analysis in health and environmental decisionmaking. Last term, in Industrial Union Department, AFL-CIO v. American Petroleum Institute, the benzene health standards case, the Supreme Court entered the fray, but in five separate opinions covering 120 pages did little to clarify the issues. This type of judicial anarchy, so typical of the Burger Court, may reflect not so much a lack of leadership or a personal contentiousness among the justices as the fact that we live in a time when values are in disarray. Institutions caught in the flux of technological and social change are in for a rough ride until and unless new grounds for consensus emerge. The Court quickly granted


6. 100 S. Ct. 2844 (1980).
certiorari in a case involving the Occupational Safety and Health Administration's coke oven emission standard, and is obviously aware that more must be said on the subject of institutional responsibilities for health regulation of low-level pollutants.

I.

At issue in the benzene case were OSHA regulations whose chief feature was a reduction in the allowed average airborne benzene exposure level from 10 parts per million (ppm) to 1 ppm. The 10 ppm standard reflected benzene's long known nonmalignant toxic effects. Recent evidence led OSHA to conclude that benzene was a carcinogen, but the leukemogenic risk was documented only at levels higher than the 10 ppm standard already in effect. In establishing the new standard, OSHA sought to rely on a general policy judgment that exposure to known carcinogens should be reduced to the lowest feasible level.

The plurality opinion in the benzene case (Mr. Justice Stevens, joined by Chief Justice Burger, Mr. Justice Stewart, and, in important particulars, by Mr. Justice Powell) came down on the point that the pertinent provisions of the Occupational Safety and Health Act of 1970 must be read as requiring the Secretary of Labor to find, as a precondition to imposing a permanent health and safety standard, "a significant risk of harm and therefore a probability of significant benefits." The plurality's conclusion, that the Act "implies" a requirement that workplaces be

10. Id. at 5918, 5931.
11. Id. at 5925-32.
12. Id. at 5918, 5932.
15. Id. at 2864. Interestingly, the plurality opinion at one point misquotes § 3(8) of the statute, 29 U.S.C. § 652(8) (1976), reading the "reasonably necessary
found unsafe—a finding which was not made—circumvented one problem but created another. The problem avoided was whether, in the event appropriate findings were made and supported, the statute permitted regulations only if their benefits exceeded their costs, or if it called for selection of the most protective standard compatible with the survival of the industries regulated, as the Secretary and several lower courts had held. By focusing on the preliminary finding, the plurality sidestepped the cost-benefit issue, although hinting at several points that it preferred the reading more restrictive of OSHA's authority. But the plurality was obliged to take up the sensitive question of whether a massive record (fifty volumes, ninety-five witnesses) devoted substantially to the issue of the desirability of reducing airborne concentrations of benzene from 10 ppm to 1 ppm was compiled without any administrative perception of whether health benefits would be realized. Because the Administrator believed the regulation would yield benefits and said so, the plurality was forced to consider who had the burden and how much proof was enough, which is perhaps the most difficult single issue

or appropriate” language as “reasonably necessary and appropriate.” 100 S. Ct. at 2862-63 (emphasis added). The disjunctive language tends to support OSHA's argument that § 3(8) is not to be understood as a constraint upon the agency action. See id. at 2883 (Opinion of Rehnquist, J.); Note, American Petroleum Inst. v. OSHA, 10 Env'l L. 664, 667 (1980).

16. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 100 S. Ct. at 2850. The Secretary did find that benefits from the tighter standard were likely to be “appreciable,” see id. at 2870, and it is difficult to resist the conclusion that the whole regulatory exercise was based upon the understanding that reductions in benzene exposure justified the expenditure of hundreds of millions of dollars. See id. at 2876 (Powell, J., concurring).

17. The Court of Appeals for the Fifth Circuit did not expressly require that benefits exceed costs. American Petroleum Inst. v. OSHA, 581 F.2d 483, 502-03 (1978). The opinions of the Supreme Court are qualified on this point. See Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 100 S. Ct. at 2863 (Stevens, J.) (reserving decision on whether “the benefits of the regulation must be commensurate with the costs of its implementation”); id. at 2877 (Powell, J.) (reading the statute as requiring “that the economic effects of its standard bear a reasonable relationship to the expected benefits”).


20. See id. at 2869-72, especially 2870.
presented by the regulation of exposure to low-level pollution.\textsuperscript{21} In what is the most unsatisfactory part of its opinion, and one bearing the stamp of several rewrites, the plurality ruled that substantial evidence did not support the conclusion that the 10 ppm standard then in effect presented a significant risk of health impairment,\textsuperscript{22} perhaps because of failure of explanation, neglect in attempting to construct dose-response correlations from epidemiological data, wooden reliance upon an assumption that the statute required no proof, or unacceptable attempts at quantification.\textsuperscript{23}

Concurring, Chief Justice Burger stressed that the Secretary failed to make the required findings on significant risk.\textsuperscript{24} But, sensitive to the fact that Mr. Justice Stevens’ searching criticism of the record could be understood as judicial overreaching, the Chief Justice pointed out that requiring the Secretary to “retrace his steps with greater care and consideration” should not be understood as interfering with the administrator’s discretion to make “a policy judgment” about a significant risk when exercising, as here, “the prerogatives of the legislature.”\textsuperscript{25} Similarly, in a separate concurrence, Mr. Justice Powell emphasized that an administrative inability to quantify the risk would not necessarily defeat regulation and that properly adopted policy judgments could serve to support the necessary findings.\textsuperscript{26} But Mr. Justice Powell, conceding it to be a “close” question,\textsuperscript{27} concluded that

\begin{itemize}
\item 21. Rodgers, supra note 5, at 219-25; Doniger, Federal Regulation of Vinyl Chloride: A Short Course in the Law and Policy of Toxic Substances Control, 7 Ecology L.Q. 497 (1978); Leape, Quantitative Risk Assessment in Regulation of Environmental Carcinogens, 4 Harv. Env't L. Rev. 86 (1980).
\item 22. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 100 S. Ct. at 2870. The key question for the courts, of course, is whether the agency can support the standard it selects, not refute some other standard. One wonders if the threshold findings requirement of significant risk would be relaxed if, say, the standard was being reduced not to 1 ppm but to 8 ppm. For that matter, if the starting point was one at which admitted damage took place, say at 100 ppm, could administrative judgment sustain reductions to the level of 1 ppm, past the point of diminishing provable returns at 10 ppm?
\item 23. Id. at 2871 n.64. The Secretary's factual finding of “risk” must be “quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way.” Id. at 2866.
\item 24. Id. at 2874.
\item 25. Id. at 2875.
\item 26. Id. at 2875-77.
\item 27. Id. at 2877.
\end{itemize}
there was not substantial evidence to support any administrative findings that risks were unsusceptible to quantification and were significant at current exposure levels. Moreover, Mr. Justice Powell took up the challenge passed over by the plurality and read the statute as allowing a reduction of exposure levels only so long as costs bear a reasonable relationship to expected benefits, rather than a reduction limited solely by industry’s ability to bear the cost. So read, OSHA’s pro forma insistence that the costs were “justified,” influenced in no small part by an interpretation of the statute under which costs were only marginally pertinent, stood without adequate explanation, a ground thoroughly understood as authorizing a remand under contemporary notions of judicial review.

Mr. Justice Powell declined to address the question of whether another reading of the statute (presumably OSHA’s) would offend the delegation doctrine. Mr. Justice Stevens’ plurality opinion plainly viewed the required findings as a way around what was perceived to be a serious issue of excessive delegation of legislative power. Great interest will attend this sudden rediscovery of the delegation doctrine, which was but a joke only a few years ago, particularly since, in a separate concur-

28. Id. at 2876-77.
29. Id. at 2877-78. Note that the Clean Water Act similarly anticipates controls bounded only by the notion that benefits be not wholly disproportionate to the costs of removal. See W. Rodgers, ENVIRONMENTAL LAW § 3.12 (1977).
33. Id. at 2866.
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rence, Mr. Justice Rehnquist became one of the few Supreme Court Justices since the 1930s explicitly to embrace the view that an act of Congress may be invalidated on the ground that the legislature passed on to an administrator too much of its policy-making authority. Focusing upon the statutory direction to the Secretary to protect employees from material impairment of health “to the extent feasible” in standards dealing with toxics, Mr. Justice Rehnquist found the language to be a “legislative mirage,” susceptible to any number of readings, including enforcement to the extent of closing many businesses, or the drawing of distinctions on economic, administrative, or even political grounds. Pointing out that the question of “whether the law of diminishing returns should have any place in the regulation of toxic substances is quintessentially one of legislative policy,” Mr. Justice Rehnquist made the case for Congress facing up to the crucial policy decisions. He invoked familiar separation of powers delegation arguments such as congressional accountability, the need to guide the administrative hand, and the need to identify standards for the courts to enforce. The Rehnquist essay on delegation is certain to spark considerable interest not only because of its novelty but because it raises nontrivial questions of institutional responsibility.

The dissent in the benzene case, written by Mr. Justice Marshall, joined by Justices Brennan, White, and Blackmun, is strong, confident, and biting. Upon the assumption that the record supported a predictive, not a quantified, judgment of benefits, the question for the dissenters was whether the law permitted the Secretary to act immediately or whether further study and documentation were in order. The dissenters, of course, were inclined to cite the complexity of the subject, the need for discretion in policy decisions, and the desirability of deferring to the agency judgment on matters not susceptible to factual proof.

35. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 100 S. Ct. at 2879.
36. Id. at 2883.
37. Id. at 2886.
38. Id. at 2895.
The statute was read, not as requiring that benefits bear a reasonable relationship to costs, but rather that the exposure standard be capable of achievement in an economic and technological sense, thus essentially adopting the Secretary's interpretation. Nor did the dissent find any serious delegation problems, reading "feasible" as meaning capable of achievement, and pointing out that "Congress could rationally decide that it would be better to require industry to bear 'feasible' costs than to subject American workers to an indeterminate risk of cancer and other fatal diseases."

II.

The opinions in the benzene case demonstrate the rich medley of issues raised by attempts to regulate low level exposures to toxic pollutants. Ascertaining the effects tests the limits of scientific capability. Uncertainty abounds. Decisions, if they are to be made, will be constrained guesses, and the outcome will be influenced significantly by who has the burden of producing evidence, how much is enough, and the permissible range of predictive judgment. Who will do the guessing and second-guessing, and under what constraints, are matters of considerable institutional tension. It is hardly surprising that the law of health and environmental regulation has come to rest heavily upon such issues as required administrative findings, the scope of judicial review, and, now, the delegation doctrine.

In attempting to sort out a proper role for the courts in cases such as the benzene case, it might be helpful to step back for the moment to review various theories of administrative decisionmaking. Ideally, acceptance of a descriptive theory of administrative rulemaking would help the courts greatly in their oversight of

39. Id. at 2902 n.30.
40. Id.
42. By decisionmaking, I mean the rulemaking, usually under a variety of hybrid procedures, that represents the prominent form of contemporary administrative action on technological issues. See Pedersen, Formal Records and Informal Rulemaking, 85 Yale L.J. 38 (1975). What we are talking about, then, are theories of administrative legislation. My aim is to give guidance to the courts in their normative judgments of judicial review by focusing upon contrasting descriptive theories of administrative decisionmaking.
agency actions, and allow them to identify the occasions for sharp scrutiny or mild deference. A reasonably complete theory would tell the courts how agencies decide, through whom, and with what interest representation; how they manage, receive, and assess information; and how they view and respond to constraints upon them. Obviously, formal records (often supplemented by extra record submissions) tell the courts some of these things, but they are inevitably incomplete, too complete, or positively misleading. Few practitioners believe that judges read, much less studiously follow, the monstrous records thrust before them. Nor do these records deserve reading, contrived and formless as they are. Not a few appellate judges will admit that a close reading of the record is one of the poorer investments of available decision time. All this means is that there is room to guide judicial intuition by reference to common sense, philosophy, and perhaps a little bit of administrative theory.

There are three prominent contenders for the most suitable descriptive theory of contemporary administrative decision-making, and many lawyers undoubtedly have subscribed to all three at various times. The first is what may be called the classical theory, which views the administrator as a surrogate for the legislative policymaker. Rulemaking, under this view, is a free-wheeling and many-splendored process in which the administrator reaches out for information from any source—hearings, libraries, whispers in the hall. Decisionmaking is perceived to be intuitive, involving as it does horsetrading among the interests and the deft balancing of value choices. Experience, stability, and expertise are valued decisionmaking traits, as lawmakers are expected to know the players, know the industry, and know the history of prior arrangements. Negotiated settlements are the norm, and the multiple member regulatory agencies are expected to achieve decision by compromise, adjustment, and even the log-rolling so familiar to the legislative process. Relationships with Congress are close, usually congenial and informal. The expected product of this process is legislation in the classical sense, and it is thought to embody the characteristics commending that lawmaking mode—generality, avoidance of piecemeal adjudication, prospective guidance, accommodation of a variety of interests, and definitive resolution. This classical perception of adminis-
Administrative rulemaking is the one most lawyers and judges were exposed to in law school, and it is a theory with a substantial following today.

A second model, in many ways the converse of the first, could be called the rational or formal model of administrative decision-making. While we may succumb to classical thought patterns when we reflect nostalgically back upon our days in law school, we are apt to accept the formal model during our overdrive moments when we think idealistically about reform and improvement. Contemporary decision theory, embracing such subjects as systems and cost-benefit analyses, linear programming, and game theory, has experienced its phenomenal growth largely since enactment of the Administrative Procedure Act in 1946. These decision methods to a large degree depend upon the identification of alternatives, the projection of consequences, and the conscious selection of a "best" decision. Decisionmaking is perceived to be less political than under the classical theory and more scientific. Information from any old source will not do; scientific reliability is required and for some reason this often is associated with quantification. There is a heavy reliance upon outside technical consultants. Modeling, decision trees, and risk analyses are much in vogue, and data needs are compelling. Decisionmaking by intuition is scorned; on the contrary, the method must be wholly rational, and it anticipates that there is indeed some "best" decision out there if sufficient attention is paid to finding it.

Under this model, formal proceedings are appropriate, but they are preferably confined to the technically competent. There is little need to cater to the citizen or to other lesser interests who can offer little more than statistically irrelevant expressions of


44. See, e.g., W. GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS (1941); J. LANDIS, THE ADMINISTRATIVE PROCESS (1938). For a reaffirmation of the view that administrative regulations are the equivalent of statutes, see Mr. Justice Brandeis' opinion in Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935), discussed approvingly by the editors in W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 275 n.4 (7th ed. 1979). See also White, Allocating Power Between Agencies and Courts: The Legacy of Justice Brandeis, 1974 DUKE L. J. 195.

pain and pleasure. Administrative expertise, under this theory, means not so much a sophisticated savvy about the business of the agency as it does a knowledge of pertinent technologies, requiring a stable of professionals skilled in a variety of disciplines. A decision is not a negotiated bill of accord, with a little bit here and there for the prominent interests and bearing the stamp of consensus; it is perceived as correct and definitive, carefully developed and imposed. Under this view, relationships with Congress, especially among the technical decisionmakers, are not close, often uncongenial and formal. What emerges from this administrative process is legislative in form, but it rings of snobbishness and may lack the legitimacy and the shopworn staying power often associated with even unpopular congressional enactments. That formal decisionmaking has some role in regulatory lawmaking today is evident from a reading of most administrative and judicial opinions on the subject, including the benzene opinions; today, faith in wholly rational decisionmaking is widespread and is reflected in highly unusual ways.46

A third, and now eminently popular, theory of administrative decisionmaking is the theory of successive limited comparisons, known less elegantly as the science of muddling through.47 This is my own nominee, in essential particulars, for the theory best capturing the realities of how agencies decide. This is a hybrid theory, combining the classical and formal approaches. The central

46. One of my favorite illustrations is a network radio report I heard in June, 1980, on the abortive military attempt to rescue the Iranian hostages. The gist of the report was that if the number of helicopters in the rescue attempt had been increased from eight to ten, the prospects of success would have been increased by only 2.7%. Hearing this, one can only wonder what the response of General Patton or, say, Genghis Khan would have been if presented with comparable insights by a decision analyst. By way of contrast, Luke Skywalker of Star Wars shut down the computers and relied upon "The Force" in the final attack against the Death Star. This is the celebration, I take it, of intuitive judgment over rational decisionmaking in some areas of human endeavor.

tenets reject the idea that decisions represent formally identifiable and discrete "correct" results. Rather, decisionmaking is a process of strategic adaptation over time, incremental advance, and partial resolution. Like the classicists, the muddlers reach out to the interest groups and engage them in negotiation and searches for common criteria, or at least agreed-upon processes. They are similarly familiar, however, with the techniques and methods of formal decisionmaking, although the data which is received is altered and shaped to take into account financial, informational, administrative, and political limits. Cost-benefit analyses within the agencies, for example, bear only an approximate resemblance to the theoretical ideal of welfare economics which serves as the foundation of the practice. Decisionmaking by the muddlers is a process that bends with the breeze, rolls with the punch, runs for daylight. It works by fits and starts, by floating proposals, by reworking them to blunt anguished objections, by amendment over time. It requires successive trips to the Federal Register, referrals to advisory committees, the birth and rebirth of task forces. Decisionmaking is marked by long delays, repeated hearings, erratic shifts as one or another faction gains temporary ascendancy. Decisions reflect combinations of truncated formality (considering alternatives within perceived limits), and intuitive policy and political judgments. The agency houses both technical and political experts, and may call on both during the course of a decision. The legislative judgments that emerge may combine the technical ideal, the negotiated compromise, and the temporary pastiche. That the muddlers are out and about in contemporary administrative agencies is illustrated by ample ammunition citing delay, inconsistency, and error exposed during current regulatory reform debates.

Whatever the theory best describing the rulemaking work of the agencies, it is apparent that agency judgments and behavior are influenced importantly by institutional constraints represented by the courts and the Congress. Since I am attempting to derive an appropriate role for the courts by focusing upon agency

48. See Rodgers, supra note 5, at 199-201.
decisionmaking, my comments at this point will be limited to the constraint represented by the Congress. Here too, I believe that one's theoretical perception of the legislative process offers insight into how the agencies should and do respond, which in turn gives guidance on how courts should behave.

The predominant view of legislation as a means of social control, Austinian in origin, is that an Act of Congress is a command. It retains that quality over time in the face of changing values or disobedience unless and until the social imperative is relieved by further action of the lawmaking body. Under this classical view statutory law is meant to settle disputes, give answers, guide conduct, and reflect some degree of permanence and stability. Several of the countermajoritarian protections in the Constitution (bicameralism, regional representation in the Senate, extraordinary majorities for veto overrides) can be viewed as techniques for contributing to the stability of the legislative product. Fixed rules of action depend upon consensus-building by the legislature, and the Congress, as the sole institution with majoritarian credentials, is viewed as the consensus-builder par excellence. How this social agreement is put together—that is, the process of lawmaking—is the legislature's business. This view of the process of legislation, so far as the courts are concerned, is a kind of metaphysical union of conflicting interests out of which emerges society's marching orders.

Whatever the general merits of this classical view of legislation as a relatively stable set of rules, it does not appear to conform to reality in the volatile legislative-administrative world of

51. This view is implicit in J. BENTHAM, THEORY OF LEGISLATION (1914), and it accounts no doubt for the general opinion that the courts are not empowered to disregard obsolescent legislation. See Davies, Response to Statutory Obsolescence: The Nonprimacy of Statutes Act, 4 VT. L. REV. 203 (1979); Gilmore, Putting Senator Davies in Context, 4 VT. L. REV. 233 (1979); Calabresi, The Nonprimacy of Statutes Act: A Comment, 4 VT. L. REV. 247 (1979).

52. This is evident in a number of the Federalist papers, including No. 58 (J. Madison), No. 62 (J. Madison or A. Hamilton), and No. 63 (J. Madison or A. Hamilton). Number 62 in particular contains a strong attack against "mutable" public policies attributable to temporary shifts in sentiment.

53. This is the view expressed in such cases as Townsend v. Yeomans, 301 U.S. 441 (1937) (hearings not a prerequisite for legislative validity); Field v. Clark, 143 U.S. 649 (1892); United States v. Ballin, 144 U.S. 1 (1892) (compliance with House quorum rules not judicially reviewable).
the regulation of technology.\textsuperscript{54} Today regulatory legislation, at best, represents a short-lived consensus on generalities soon broken down by shifting coalitions that emerge as enforcement takes hold. Legislation is better viewed not as a firm consensus but as a series of shifting accommodations of interest. The constituencies that inspired the basic environmental statutes are quite different from the constituencies that wrought the major amendments within a few short years.\textsuperscript{55} Legislation tends to be experimental, tentative, based on incomplete information, and heavily reliant upon process solutions. Legislative action is a continuous process of oversight, consideration of legislative veto, and committee intervention. A good deal of the legislation requiring consideration of interests in the administrative process—the Freedom of Information\textsuperscript{56} and Advisory Committee Acts,\textsuperscript{57} the Sunshine Law,\textsuperscript{58} the National Environmental Policy Act\textsuperscript{59}—benefits not only private parties but Congress in its oversight role. While under the stricter versions of the classical view, legislation settles all, under the looser versions of muddling through, it settles nothing.


\textsuperscript{55} This is demonstrably evident with respect to successive amendments of the Clean Air Act and Clean Water Act. In many respects also, the evolutionary process has involved a movement away from broad generalities (in the Clean Air Act of 1970) to specific dispositions of ongoing disputes. Much of the commentary on the 1977 amendments has taken note of this phenomenon. See, e.g., Ackerman & Hassler, Beyond the New Deal: Coal and the Clean Air Act, 89 YALE L.J. 1466, 1487-1514 (1980); Currie, Relaxation of Implementation Plans Under the 1977 Clean Air Act Amendments, 78 MICH. L. REV. 155, 201-03 (1979); Domenici, Clean Air Act Amendments of 1977, 19 NAT. RESOURCES J. 475 (1979); Kramer, The 1977 Clean Air Act Amendments: A Tactical Retreat From the Technology-Forcing Strategy?, 15 URB. L. ANN. 103 (1978).

\textsuperscript{58} 5 U.S.C. § 552 (b) (1976).
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III.

The choice of administrative decisionmaking models and their legislative counterparts strongly influences one's normative perceptions of appropriate judicial review. Acceptance of the classical free-wheeling agency model begets a mild regime of review. Administrative know-how, and ergo judicial deference, extends even to the reading of the legislative charter and the interpretation to be accorded legal terms. The agencies, like the legislative body for which they speak, are accorded wide freedom in selecting the procedural techniques used to reach their policy conclusions. They are not held to a record because they do not decide on a record. The interests the agencies hear and heed, and the extent to which they offer explanation of policy choices, are matters of discretion, as they are with the legislative body for which they speak.

By contrast, the assumption that agency decisionmakers are supposed to be rational in the strictest sense of the term encourages a regime of close judicial scrutiny. If the goal is an ideal "best" decision, departures from standards of perfection are viewed with intolerance. Interpretation of the legislative charter should be closely supervised as this charter sets the ultimate bounds of the formal inquiry undertaken. Procedures, too, are in for a close reading, both because Congress has made process an important ingredient of substantive result and because procedural exactitude has long been associated with correct outcomes. Courts will look closely to make sure all interests are heard and their arguments dealt with because, after all, the "best" decision is one with no losers or at least one where losers are accommodated to

60. E.g., Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). This model, however, anticipating rulemakers to be effective legislators, is compatible with the placement of delegation limits on the legislature.


64. See Bazelon, Science, Technology, and the Court, 208 Sci. 661 (1980); Rodgers, supra note 5, at 201-14.
the extent possible. Explanations, supporting studies, and the like may be demanded, as ideal decisions leave no loose ends. There is little judicial tolerance for political balancing or policy guesswork from the agencies, for the results are supposed to be scientifically derived, and whatever the meaning of the scientific method, it is thought to yield results supportable by evidence and to differ sharply from political tradeoff.

Subscribers to the theory of muddling through borrow many suppositions from the formal decisionmaking school. If anything, partial, erratic, and fragmented decisionmaking calls for highly skeptical oversight as pragmatic and ad hoc action proceeds by no set patterns. Muddlers are apt to stray from the paths of legislative guidance as the rational method of the moment collides with a particular statutory imposition. Procedural oversight and interest representation are also important because of the strong process orientation of strategic decisionmaking. Explanations of what was done and why must be demanded by the courts to protect against the dangers of subjectivity associated with incremental decisions under uncertain criteria. The essence of the contemporary hard look doctrine of judicial review is to compel explanations of methodology and identification of the criteria for judgment. An important distinction between review under the formal model and review under the muddling model is that the latter must leave room for the resolution of uncertainty, and for policy and value choice. Problems are not mastered under this view, they are strategically overcome, and strategic thinkers must be allowed intuitive estimates of future events.

It is also probable that the administrator's perception of the nature of legislation, apart from the instructions it contains, will influence implementation behavior. Administrators who perceive themselves as being responsible for carrying out a nonmutable consensus will act like surrogate legislators, relying strongly on their own intuitive sense, not much concerned about repudiation or second-guessing. Administrators who perceive themselves to be the temporary holders of a delicate compromise will be more circumspect procedurally, perhaps less innovative and arbitrary, and attentive to building conclusions that will withstand subsequent

65. See Rodgers, supra note 31, at 701-08.
It is clear that today's hard look doctrine of judicial review and yesterday's delegation doctrine are grounded upon similar insights about the deficiencies of broadly written regulatory legislation—lack of notice to the affected, lack of opportunity to participate in rule formulation, prospects of administrative caprice and discrimination, and legislative cowardice in handing over lawmaking power while retreating to the role of the second-guessing opportunist. Yet, the prescriptions for these maladies differ sharply. Hard look holdings attempt to make sense out of vague delegations, enforce policy declarations discernible there, and do their best to reconcile contradictory and contrived legislative histories. Lack of notice, exclusion of interests from participation, and administrative abuses are exposed and rooted out, not railed against as possibilities to be avoided. By way of contrast, a holding of excessive delegation is a declaration of failure, and a decisive one at that. It sends the legislature back to go, permits ambiguity of means to repeal any purpose demonstrated by adoption of a law, and, most importantly, rewards legislative cowardice with a second chance entirely unpinned by the consequences of the first choice. One wonders whether treating a vague choice as if it were no choice will encourage continued vagueness or more precision. If political decision-avoidance is the compelling legislative motivation, vagueness and likely judicial invalidation offer an attractive way out.

Invalidating vague delegations would appear most appealing to courts subscribing to the classic conception of legislation as a stable expression of consensus. Vague statutes mask disagreements, and hiding differences allows enactment where there are no common criteria and where the lawmakers subscribe to different aims. A strict regard for the separation of powers suggests a judicial insistence upon a clear expression of consensus before the administrators can commence implementation, especially because there are few oversight constraints once they do. Conversely, judges viewing the legislative process as a series of snapshots of shifting interests would be more inclined to find meaning in vague legislation, upon the assumption that legislative reconsider-
ation is perhaps more likely to follow a hard look affirmance than it is a delegation reversal. The view that legislation is an ongoing process of interest accommodation suggests that courts can best assure political responsibility by taking the legislature at its word on each occasion, recognizing it may not be the political last word, but avoiding the conclusion that vague and fragile compromises are so trivial as to be considered void.

IV.

The several decisions in the benzene case point up the need to settle upon a theory of administrative decisionmaking, and apply it consistently. Justice Stevens' plurality opinion comes close to adopting the rational decisionmaking model, and demonstrates the vulnerability of that model to judicial nitpicking over evidentiary gaps in the record supporting the supposedly ideal decision. Mr. Justice Burger's concurring opinion is classicist in tone, prepared to defer broadly to the policy and procedural choices of the agency. That he nonetheless finds evidentiary and explanatory shortcomings suggests that the classical model is vulnerable in that it shuts off judicial inquiry into a wide range of subjects essential to the understanding of contemporary administrative action and thus the essentials of a fair review. Mr. Justice Powell comes down somewhere between the muddling and the rational decisionmaking model, honoring the agency's ability to make predictive judgments but finding insubstantial evidence to support the conclusion that the risk perceived was a significant one. The dissenters are probably believers in muddling, and the analysis adopted is consistent with that theory. Mr. Justice Marshall's opinion, however, together with the Stevens and Powell opinions, makes clear that the choice of theory does not automatically dictate results. Courts overseeing administrative muddlers must distinguish between explanations, which are sharply scrutinized, and predictive judgments to which deference is owed. And courts are obliged also to face up to the questions of who has the burden of predictive judgment and what investigations are necessary to support it, subjects upon which Congress rarely speaks with clarity.

and judges often disagree.

The great debating point of the benzene decisions is the appropriate role of the delegation doctrine, if any, in judicial review of administrative decisions. Apart from the question of whether this was the time to apply it, the utility of the doctrine, as suggested here, depends significantly on one's theory of the legislative process. Believers in muddling are unlikely to accept the assumptions of a sustainable consensus associated with the delegation doctrine. Equally important is the proposition that delegation and close scrutiny are often mutually exclusive means to the same ends; while Congress occasionally may be able to enshrine a consensus, often it must be content with fashioning a truce. Courts insisting before the fact upon what they perceive to be clear marching orders may read too narrowly the legislative options. An insistence after the fact that the journey was by an acceptable route under rules and procedures fairly explained and applied protects the legislative choice, and does so in a way attentive to the policy concerns attending broad delegations. Rejec-

Marshall protested in his benzene dissent the plurality's undertaking of "nearly de novo review . . . on behalf of institutions that are by no means unable to protect themselves in the political process." Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 100 S. Ct. 2844, 2891 n.9 (1980) (citing United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)). The procedural due process now widely accorded wealthy and powerful interests under conventional patterns of hard look review does damage to process theories of the Constitution, which rely upon representational differences as justifying stricter judicial scrutiny for underrepresented minorities. See, e.g., J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). With procedural differences obliterated between weak and strong, substantive distinctions are likely to be taken more seriously.

70. The "feasible" language can be read, fairly I believe, as authorizing controls limited only by the financial viability of the regulated industry. Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 477-78 (D.C. Cir. 1974). So construed, the Secretary has enormous powers and considerable discretion on where to start. But the criteria for choice are quite restrictive, strongly protective of health, and hardly open to the administrative meandering associated with broad delegations.

71. It is recognized that administrative action is necessary to fill in the gaps of broad delegation, whether by rulemaking, see K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 55-57, 59-68 (1969), or adjudication, see Peck, A Critique of The National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making, 117 U. PA. L. Rev. 254 (1968); Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform, 118 U. PA. L. Rev. 485, 513-28 (1970). Effective oversight is an important component of a successful administrative im-
implementation of the plans of the legislative architect. Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev. 1369 (1977); McGowan, Congress, Court, and Control of Delegated Power, 77 Colum. L. Rev. 1119 (1977); Nathanson, Administrative Discretion in the Interpretation of Statutes, 3 Vand. L. Rev. 470 (1950); Rabin, Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement, 44 U. Chi. L. Rev. 60 (1976).