

# ARTICLES

## JUDICIAL REVIEW OF EXECUTIVE POLICYMAKING IN ADVANCED DEMOCRACIES: BEYOND RIGHTS REVIEW

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*The legitimacy of modern states depends on the ability of democratic institutions to reflect citizens' preferences and values and on the state's ability to use technical expertise competently. Legitimacy has a three-fold character based on rights, democratic responsiveness, and competence. We argue that courts can help reconcile these competing aspects of executive legitimacy. Our premise may seem implausible because courts are the archetypal "counter-majoritarian" institution, and judges typically have little knowledge of*

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*technical subjects. However, based on a critical review of the law in the United States, Canada, Italy, and France, we argue that courts can balance respect for democratic choice and deference to experts with limited oversight that enhances legitimacy across all three dimensions. We discuss the hazards of substantive review by technically illiterate courts and argue that procedural review can be a partial substitute. If courts review rulemaking, they need to acknowledge its role in upholding policymaking values, and if they review adjudications, they need to understand that court-like procedures are inadequate to capture the broad policy issues often at stake. Based on our review of the four case studies, we conclude that to further both democracy and competence, courts: (i) should review the substance of the agencies' decisions under a weak reasonableness test and (ii) should concentrate on the administrative process, notably by enforcing a widespread duty to give reasons and by assuring generous rights of participation.*

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## INTRODUCTION

An independent judiciary can be a check on democratic and bureaucratic institutions. It can help enhance the legitimacy of the state by constraining the behavior of politicians and officials in the interest of fundamental values. Courts in modern democracies generally act as bastions for the protection of individual rights. This is an important role, but the legitimacy of modern states depends on more than the protection of rights. It also depends on the ability of democratic institutions to reflect citizens' preferences and values and on the state's ability to use technical expertise competently. Legitimacy has a three-fold character based on rights, democratic responsiveness, and competence.<sup>1</sup> Courts tend to gravitate toward the protection of rights, and in some countries, the

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1. SUSAN ROSE-ACKERMAN, FROM ELECTIONS TO DEMOCRACY: BUILDING ACCOUNTABLE GOVERNMENT IN HUNGARY AND POLAND [hereinafter, FROM ELECTIONS TO DEMOCRACY], 5–7 (2005); see also, Susan Rose-Ackerman, *Regulation and Public Law in Comparative Perspective*, 60 UNIV. OF TORONTO L.J. 519 (2010). For a slightly different trichotomy see Jerry L. Mashaw, *Judicial Review of Administrative Action: Reflections on Balancing Political, Managerial and Legal Accountability*, 1 REVISTA DIREITO GV 153, 168 (2005) (referencing political, managerial, and legal accountability). See also, Eduardo Jordão, *supra* note \* (especially noting chapter 1.2).

jurisdiction of constitutional courts is restricted to such cases. We argue that courts can also play a constructive role in furthering both democracy and competence. Our goal is to show how this can be done with reference to four jurisdictions with different legal traditions and political regimes: the United States, Canada, France, and Italy.

If modern states regulate complex technical areas, such as public utilities and antitrust, it is unrealistic and unwise to require statutory texts to resolve all the policy issues that will arise in practice. Statutes need to allow agencies considerable discretion to set policy and to resolve individual cases in line with their technical assessments.<sup>2</sup> For this reason, concern for democratic legitimacy does not end with the passage of regulatory statutes. Rather, the agencies themselves need to operate under checks that assure their transparency and accountability to the public.

There is no single way to balance democracy against expertise and the protection of rights, but we argue that the courts can help reconcile the competing aspects of executive legitimacy as a supplement to direct intervention by the legislature or the cabinet. Our premise may seem implausible because courts are the archetypal “counter-majoritarian” institution, and judges typically have little knowledge of technical subjects such as engineering or economics. However, we argue that courts can balance respect for democratic choice and deference to experts with limited oversight that enhances legitimacy on all three dimensions.

In some situations, courts do recognize that they can play a role beyond the protection of rights. However, because that role is not always precisely defined and constrained by statute or by constitution, courts may be at sea in asserting authority. Without a framework, it is hardly surprising that some courts are very deferential to the policy choices of the executive and hold back. These courts look to their own lack of strong democratic credentials to limit review. In contrast, other courts have become increasingly strict in their review of agency actions in complex technical areas, but they have done this, not by reference to democratic legitimacy, but rather by invoking traditional administrative law norms based on rights. These norms, we argue, although perfectly appropriate in many cases, are not adequate to the review of many actions of regulatory agencies and antitrust authorities. Even if the cases nominally involve conventional rights-based challenges, their implications for policy and for state–society

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2. We use the term “agency” as it is used in the United States to refer both to executive departments under the President or a Cabinet Secretary, such as the Environmental Protection Agency or the Occupational Health and Safety Administration in the Department of Labor, and to independent agencies, such as the Federal Communications Commission. In Europe, the term “agency” is usually reserved for independent regulatory authorities.

relations often go beyond claims that government actions violate individual rights.

Managing the tension between deferring to technical expertise and avoiding agency capture by narrow interests raises a different dilemma for courts. Agencies that regulate a market must be able to take account of the economic interests of the firms in the market. However, they also need to hear from consumers, workers, competitors, policy analysts, and advocates with no direct personal stake in the outcome. The agency is supposed to be apolitical and well informed about the regulated industry. However, especially for independent agencies insulated from the rest of government, decisionmakers risk capture by the very interests they are supposed to be regulating. Courts, then, can help prevent the worst instances of capture, but if they are too aggressive, they risk substituting their own uninformed and non-expert judgment for that of the agency. Judges need to be sure that they do not invoke the protection of individual rights as an excuse for imposing their policy preferences.

Courts need to strike a balance between deference to the expert choices of specialized administrative bodies and review of those decisions to assure that they are taken in a transparent and responsive way. Plaintiffs may ground their arguments on rights violations; however, the courts also can seek to assure that democratic values and competent expert advice infuse administrative choices. Courts that take on this role can enhance, not undermine, government legitimacy.

The law regulates the market in many different ways. Some statutes depend entirely upon private individuals to bring lawsuits to defend their rights; others delegate enforcement to a private entity whose members police its behavior. We leave these options to one side and concentrate on regulatory programs that require active government involvement. Within that category, some statutes contain sufficient guidance to the administration so that no executive policymaking is necessary. The agency simply implements the law on a case-by-case basis in light of clear statutory guidance. In such cases the only role for the courts is to police the agency to be sure that it does not violate rights and to control for fraud and maladministration. We ignore such cases on the ground that they seldom describe the complex, fast-changing technical areas central to the modern regulatory state that require policymaking delegation.<sup>3</sup>

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3. The justification for delegation in technically complex areas is usually based on the claim that agencies have a comparative advantage over the legislature in: (i) *expertise*, meaning not only specialized knowledge, but also *experience*—acquired through repeated action—in the relevant area; and (ii) *time*, which the legislature lacks if decisions must be made expeditiously.

We focus on regulatory initiatives where both statutes and agency actions determine policy. In the cases we discuss, regulatory policymaking is legally permitted by delegation in a statute or through constitutional provisions. Some agencies issue general norms—both rules with the force of law and guidelines—to govern their actions in individual cases. Other agencies make case-by-case enforcement decisions that over time produce de facto policies in much the same way as the common law generates legal principles.<sup>4</sup>

Agency policymaking is not merely “legal” in a narrow formal sense. Agencies combine technical expertise with democratic accountability to produce policy.<sup>5</sup> For example, most rules that govern air and water pollution combine expert technical knowledge with a concern for citizens’ interest in a clean environment and take into account business objections to high costs. Likewise, the vagueness of antitrust statutes often gives the relevant authority considerable leeway to foster different types of social goals, such as consumer welfare or economic freedom. Agencies may have a choice of whether to implement a statute through rulemaking or adjudication, and many do both—setting general policy through rules and enforcing it in adjudications that themselves are exercises in judgment, not just mechanical applications of the rules.

We discuss the hazards of substantive review by technically illiterate courts and argue that procedural review can be a partial substitute that is consistent with democratic legitimacy and regulatory competence. In making this claim we, of course, recognize that the distinction between substance and procedure is not always clear-cut. Nevertheless, review can tilt in one or another direction, and we argue for a particular sort of procedural oversight.

Our basic general point is that quasi-judicial processes that uphold the rights of individuals in adjudications are not adequate to further competent and democratically legitimate policymaking. If courts review rulemaking, they need to acknowledge its role in upholding policymaking values, and if they review adjudications, they need to understand that court-like procedures are inadequate to capture the broad policy issues at stake in

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4. See *Paul v. B.C. (Atty Gen.) (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 606 (Can.); France Houle & Lorne Sossin, *Tribunals and Policy-Making: From Legitimacy to Fairness*, in *DIALOGUE BETWEEN COURTS AND TRIBUNALS: ESSAYS IN ADMINISTRATIVE LAW AND JUSTICE* 123 (Laverne A. Jacobs & Anne L. Mactavish eds., 2008).

5. We use the term “rulemaking” in the American sense to mean secondary legislation issued by agencies (both cabinet departments and independent agencies) under authority delegated to them by statute, or, as in France, by the French Constitution itself. It is equivalent to the terms “secondary legislation,” “decree,” and, with some caveats, “ordinance.”

major adjudications involving regulated industries or antitrust violations. Beyond any claimed rights violations, courts need to ask if agency actions are consistent with democratic values and are competent, not as a legal matter, but with respect to scientific and social-scientific expertise. However, courts need to accept the reality that agencies are both more technically competent than courts and more democratically accountable. This is true even for so-called independent agencies; in every jurisdiction studied they are less independent of the political branches than the courts.<sup>6</sup>

Stringent judicial review of agency actions could lead the courts to usurp the policymaking competence of the agencies. One response to this concern is to deny jurisdiction to the courts to review policymaking in the executive and to limit them to resolving rights violations arising in individual cases. That would leave agency policymaking free of judicial oversight and hence not subject to judicial policy biases. However, given the weakness of legislative oversight, especially in technical, low-profile areas, the risk of agency capture and bias is high. Judicial review can help counter those tendencies, but it needs to be circumscribed to avoid the countervailing problem of judicial policymaking.

Based on our review of the four case studies, we show how judicial review can further both democracy and competence, while preserving the protection of rights. Courts: (i) should only subject the substance of the agencies' decisions to a weak reasonableness test; and (ii) should concentrate on the administrative process, notably by enforcing a widespread duty to give reasons and by assuring generous rights of participation. To make that case, we discuss both substantive and procedural review through a critical review of the law in Canada, the United States, Italy, and France.

We begin with substantive review in Part I. For decisions involving

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6. Some French commentators argue against judicial deference to independent administrative agencies on the ground that they lack political accountability. *See* MARTIN COLLET, *LE CONTROLE JURIDICTIONNEL DES ACTES DES AUTORITES ADMINISTRATIVES INDEPENDANTES* 171–72 (2003). However, members of French regulatory agencies are usually appointed through politically accountable processes for limited time periods. For example, the nine members of the French Broadcasting Authority are appointed: one-third by the President, one-third by the Parliament, and one-third by the Senate. Agency members are under some pressure to satisfy the politicians who appointed them (or their voters) in order to assure their appointment to the same or to other functions. Furthermore, unlike U.S. agencies, French agencies have limited rulemaking power and may be subject to rules promulgated by a politically responsible minister. Hence, even though independent administrative agencies are less accountable to the government than the central administration, they remain more accountable than courts, many of whose members are career officials. They may also be more accountable to the legislature. Thus, there remains an argument for judicial deference on grounds of political accountability.

policy or technical aspects, we argue in favor of reasonableness review as an appropriate way to balance and enhance the competing aspects of state legitimacy. In addition to allowing oversight that protects rights, this standard of review gives some leeway to agencies to accomplish their disparate missions. As has been shown in the U.S. context, this approach limits the courts' ability to impose their own policy preferences.<sup>7</sup> Moreover, by deferring to agency policy judgments, the courts enhance the political responsibility of the agencies for the decisions they make. An agency cannot excuse itself by arguing that it adopted a given policy because it was the "only possible" legal solution. It is responsible to political actors for its own decisions and options. In this sense, limited review based on a reasonableness test not only allocates policy decisions to the most competent actors, but it also sheds light on those actors' choices and enhances their responsibility.

Our approach is comparative. We start with Canada, which, we argue, has settled on a workable and deferential review for reasonableness in technically complex areas. However, Canadian courts apply substantive review mostly in the context of individual adjudications, and only rarely in rulemakings. This leaves a gap in coverage that is filled in the United States with review of substantive policy decisions made through general rules under the provisions of the U.S. Administrative Procedure Act (APA). Nevertheless, U.S. courts also struggle to determine the line between law and policy because of their greater review authority compared with Canada.

Italy and France are similar to Canada in that policy made through rules is not routinely reviewed in either country, although the substance of rules occasionally figures in individual decisions. However, unlike Canada, their legal standards lack a realistic appreciation of the role of non-legal experts in agency decisionmaking. Courts in Canada are quite deferential; the Italian and French courts provide more stringent oversight. In Italy, the current orientation toward strong review arose after a long and complex hesitation; in France it is the result of a long tradition.

Arguing for deference with respect to technocratic regulatory substance, however, does not imply deference overall. Judicial review of administrative policymaking processes can serve democratic values. We

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7. Judicial bias is a concern of U.S. administrative law scholars, but even the most critical recognize that the federal courts' limited review responsibilities reduce the degree of bias. See generally Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).



argue in Part II that courts are capable of such review, even if they are not able to judge the substance of complex policy choices. We concentrate on two important procedural aspects: reason-giving requirements—a mixture of substance and procedure—and public participation in policymaking. In both cases there may be tensions between rights-based jurisprudence, on the one hand, and efforts to uphold democratic legitimacy and technical competence in the executive, on the other.

To see how tensions can arise, consider three motivations for a reason-giving requirement. First, judges might use the agency's reasons to help them decide if rights have been violated. Second, reasons might help the courts figure out if the administration has followed the legislative will. Third, public reason-giving might improve direct democratic accountability to citizens. In the first two cases, the reasons could be provided as late as the time the case comes before the court. In the third case, the agency would need to publish its reasoning in an open document along with the administrative agency decision. The public is the addressee of the reasons; they are designed to convince the citizens, not just the courts. Reason-giving can complement public participation. The government both is open to citizen input and must explain its decisions to the public. The courts would require openness rather than leaving it to the political judgment of public officials.

Similar issues arise in the context of public participation in agency actions. From a rights-based perspective, participation refers to the rights of the individual or firm subject to a government action—denial of a benefit, imposition of a cost. The person directly affected has a right to be heard before a decision is made. However, the democratic legitimacy of executive action has a different focus. Participation includes hearings and comment periods open to anyone with an interest in the decision, even if only as a citizen with policy preferences. Participation in that sense goes beyond “the parties” and even beyond those “stakeholders” with a material stake in the outcome. Courts are commonly asked to protect the individual against state overreaching, but in the context of administrative policymaking, executive branch accountability to the general public and the competent use of expertise are also central. We ask whether and how courts might monitor that aspect of government performance.

Notice-and-comment rulemaking procedures under U.S. administrative law suggest one way for courts to balance deference to agencies' substantive policy choices against checks on the openness and transparency of procedures. Procedural requirements for rulemaking are not as widespread in our other cases. In Canada, France, and Italy, procedural requirements are common in individual adjudications. We consider this difference and ask whether procedural review of executive rulemaking might be adapted

to fit the circumstances of our other cases. In all of our cases, regulators face similar pressures for more accountable executive policymaking. If one accepts our skepticism about substantive review, then review of procedures comes to the fore as a response to these concerns.

## I. JUDICIAL REVIEW OF SUBSTANTIVE POLICY<sup>8</sup>

We begin with Canada, where the judicial approach to agency expertise has shifted markedly from very intrusive to very deferential. We then discuss the United States, where courts are more deeply engaged in the review of rules before they go into effect. We next move to the civil law cases. Italy has followed a variable route—moving from intensive review to deference and back again without taking the modern policymaking environment into account. We end with France, which has special features that make it a more problematic case, but one that raises a number of important issues about the role of the courts. We conclude that in technically complex cases review of substance should be deferential. Courts can review the “reasonableness” of administrative choices but ought not to become deeply involved in substantive controversies that they are ill-prepared to judge.

### A. Canada

In Canada, there is very limited judicial review of the substance of administrative rulemaking. Review is only possible on constitutional grounds, including breaches of the Charter of Rights and Freedoms. Judicial review of administrative adjudication has evolved from very intrusive to quite deferential and nuanced. In recent decades, the Supreme Court of Canada has demonstrated a subtle understanding of the way courts can monitor the executive without exceeding their competence or their position in the democratic structure.

#### 1. Limited Substantive Review of Rulemaking

Substantial review of administrative rulemaking in Canada is possible but very limited. Courts can strike down regulations on the grounds of constitutional violations<sup>9</sup> and for breaches to the Canadian Charter of Rights and Freedoms. They will also review the substance of rules to assess

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8. For a more complete account of the intensity of substantive judicial review in our four countries, see Jordão, *supra* note \*.

9. See *Beauchemin v. Blainville* (2003), 231 D.L.R. 4th 706 (Can.); *Canadian Civil Liberties Ass'n v. Ontario (Minister of Education)* (1990), 71 O.R. 2d 341 (Can.); *Rocket v. Royal Coll. of Dental Surgeons*, [1990] 2 S.C.R. 232, 232 (Can.).

if they were promulgated within the grant of power to the executive or to agencies (jurisdictional grounds).<sup>10</sup> In all those cases, review is usually based on the non-deferential standard of correctness.

Administrative rules are not subject to attack on other grounds. Judicial review is not available on the basis of bad faith<sup>11</sup> or unreasonableness,<sup>12</sup> for example. In *Thorne's Hardware Ltd.*, applicants challenged for “bad faith” an Order in Council extending the limits of a port in New Brunswick.<sup>13</sup> With the extension, the port would include the applicants’ private berth and harbor facilities. According to them, the order was passed for the sole purpose of increasing the National Harbours Board’s revenues. The Supreme Court refused to review the Order:

We were invited to undertake such an examination but I think that with all due respect, we must decline. It is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council . . . . [T]he government’s reasons for expanding the harbour are in the end unknown. Governments do not publish reasons for their decisions; governments may be moved by any number of political, economic, social or partisan considerations . . . . The Governor in Council quite obviously believed that he had reasonable grounds for passing [the order] extending the boundaries of Saint John Harbour and we cannot enquire into the validity of those beliefs in order to determine the validity of the Order in Council.<sup>14</sup>

## 2. *The Evolution of Judicial Review of Administrative Adjudications*

Until 1979, Canadian courts reviewed administrative adjudications very aggressively. This approach led to serious conflicts with the government. Parliament reacted by adding “privative clauses” to statutes that explicitly exempted certain government decisions from judicial review.<sup>15</sup> The courts initially responded by circumventing these clauses through the use of the “preliminary question doctrine.”<sup>16</sup> A preliminary or jurisdictional question

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10. See *Enbridge Gas Distrib. Inc. v. Ontario Energy Bd.* (2005) 74 O.R. 3d 147 (Can.).

11. See *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, 111, 112 (Can.); see also SARA BLAKE, *ADMINISTRATIVE LAW IN CANADA* 148 (4th ed. 2006).

12. *UL Canada Inc. v. Procureur Général du Québec* (2003), 234 D.L.R. 4th 398, para. 25, 32 (Can.), *aff'd*, [2005] S.C.R. 143 (Can.); *Aerlinte Eireann Teoranta v. Canada (Minister of Transport)*, [1987] 3 F.C. 383, *aff'd*, (1990) 68 D.L.R. 4th 220, 220 (Can.).

13. *Thorne's Hardware Ltd.*, 1 S.C.R. 106.

14. *Id.* at 112–15.

15. Privative clauses are statutory provisions that impose limits on the judicial review of administrative decisions.

16. The “preliminary question doctrine” was extremely important and dominant before 1979. In a 1988 decision the Supreme Court stated that: “The principle itself presents

is one that concerns the jurisdiction of the administrative agency to decide a given matter. Accordingly, the judiciary subjected agency decisions to very exacting review, under the standard of “correctness.” Courts interpreted this doctrine broadly to justify intrusive oversight.<sup>17</sup>

Eventually, the Supreme Court of Canada ended the era of intrusive review in a landmark 1979 decision, *Canadian Union of Public Employees*, a case challenging a decision of the Labour Board with respect to a particular strike, not a general rule.<sup>18</sup> The individual case did, however, articulate a broader policy. The Court criticized excessive judicial intervention and created a standard of review called “patent unreasonableness.”<sup>19</sup> Under this standard, agencies had “the right to be wrong,” and the Court annulled their decisions only when they were “so patently unreasonable that [their] construction [could not] be rationally supported by the relevant legislation,”<sup>20</sup> or when they were “so flawed that no amount of curial deference [could] justify letting [them] stand.”<sup>21</sup>

Judicial deference persists to the present. In many cases courts defer even in the absence of a privative clause. They seldom apply the correctness standard to strike down administrative actions, and the few cases where they do involve general questions of law, human rights, constitutional issues, or jurisdictional concerns. Of particular interest to our inquiry is the Court’s contextual approach to determining the standard of review.

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no difficulty, but its application is another matter.” *Union des Employés de Service, Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 1086 (Can.).

17. See, e.g., *Metro. Life Ins. Co. v. Int’l Union of Operating Eng’rs*, [1970] 1 S.C.R. 425, 435–36 (Can.); *Bell v. Ontario Human Rights Comm’n*, [1971] 1 S.C.R. 756, 772, 775 (Can.). Those decisions followed the House of Lords precedent in *Anisimic v. Foreign Compensation Comm’n*, [1969] 2 A.C. 147 (Can.). Many years later, the Canadian Supreme Court noticed that such a precedent had “set forth a definition of jurisdictional error that was so broad as to include any question involving the interpretation of a statute.” *Canada (Attorney Gen.) v. Pub. Serv. Alliance of Can.*, [1991] 1 S.C.R. 614, 644 (Can.).

18. *Canadian Union of Pub. Emps., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (Can.).

19. Canadian courts have historically applied three standards of review: (i) correctness; (ii) reasonableness (*simpliciter*); and (iii) patent unreasonableness. “Correctness” is a very intrusive standard, currently applied mostly to questions of law. The “reasonableness *simpliciter*” standard was situated somewhere between those two extreme positions. The Supreme Court first applied it in *Canada (Director of Investigation and Research) v. Southam Inc.* [1997] 1 S.C.R. 748, 765, 779 (Can.). However, the vagueness of the standard made it very difficult to apply and to distinguish from “patent unreasonableness” standards. Hence, the Supreme Court decided to combine them into a single *reasonableness* standard. See *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 195 (Can.).

20. *Canadian Union of Pub. Emps.*, 2 S.C.R. 227, 237 (Can.).

21. *Law Soc’y of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 269–70 (Can.).

### 3. *The Contextualized Standard of Review*

Canadian administrative law has developed a workable two-stage structure. First, the Court determines the standard of review that it will apply.<sup>22</sup> Second, it decides the case using that standard. The analytical framework used for the first stage was first called the “pragmatic and functional” approach.<sup>23</sup> Since the Supreme Court decision in *Dunsmuir*, the reformed test is called “standard of review analysis.”<sup>24</sup> Applied to issues of both statutory construction and administrative discretion,<sup>25</sup> this analysis is a four-pronged test that weighs different factors of the decision under review: (i) the presence of a privative clause or a statutory right of appeal;<sup>26</sup> (ii) the purpose of the administrative agency within its enabling legislation; (iii) the expertise of the agency relative to the reviewing court on the issue in question; (iv) the nature of the question—law, fact, or mixed law and fact. Courts verify how the administrative decision scores on each of the four factors, and the appropriate standard of review emerges from this scoring exercise.

This analytical framework is relevant for two reasons. First, the decision of what standard of review to apply is transparent, enhancing the accountability of the courts and legitimizing their decisions to intervene or limit their oversight. Second, under the prongs of the test, courts weigh substantial and institutional aspects of the agency’s decision. The framework goes against the formalistic approach followed by most civil law countries (that use formal concepts such as discretionary or nondiscretionary competence to determine the standard of review), and it requires the courts to assess which institution is better constituted to decide the issue under review.

For our purposes, three prongs are particularly relevant. Under the second prong, courts assess the role of the agency. If the agency acts as a

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22. The pragmatic and functional approach was first mentioned in *Union des Employés de Service, Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 1081 (Can.), but its classic four prongs were only established and explained ten years later in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*. [1998] 1 S.C.R. 982, 1005–12 (Can.).

23. See *Dunsmuir*, 1 S.C.R. 190, 248 (“Generally speaking courts have the last word on . . . legal matters[,] . . . while administrators should generally have the last word . . . to decide administrative matters.”).

24. *Id.* at 192 (merging patent unreasonableness and reasonableness into a single reasonableness standard).

25. The “pragmatic and functional approach” was initially applied only to instances of statutory construction and was only extended to discretionary decisions in *Baker v. Canada (Minister of Citizenship and Immigration)*. [1999] 2 S.C.R. 817, 854–55 (Can.).

26. The existence of privative clauses should not be taken to be definitive in determining a deferential approach, but they are indicative that deference might be due.

court that adjudicates the rights of the parties, it should be considered an inferior court, and its decisions should be subject to a thorough review. If the agency promulgates policies or balances competing public interests, the courts should grant it more deference. The Canadian Supreme Court based its deference on an understanding of the policymaking process in agencies and executive departments, and it developed the concept of polycentricity. A polycentric issue is one that involves delicate balancing among different interests. If agencies are competent to resolve polycentric issues, courts should usually defer to their decisions. The Canadian Supreme Court first used the concept in *Pushpanathan*.<sup>27</sup> It explained that:

[W]hile judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint.<sup>28</sup>

The Court thus recognizes that some issues are not properly dealt with using the usual institutional arrangement of a court even if the decisions resolve an individual case, such as an antitrust dispute. If an issue is more “political” than legal, it should be resolved by institutions that are designed for making policy.<sup>29</sup> The courts act as a backstop and can intervene in particularly extreme cases, but otherwise the policymakers have the right to choose. The courts recognize that the judicial model is a poor template for regulatory policymaking.

Under the third prong, courts must evaluate whether the specific issue

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27. *Pushpanathan v. Canada (Ministry of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (Can.).

28. *Id.* at 1009.

29. *See id.* (developing the concept of polycentricity, the Court held that a board decision to deny refugee status to an individual with a criminal conviction was not a polycentric one but involved the correctness of the board’s interpretation of a human rights convention). For a recent decision where the Court found that the issue was polycentric, see *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, 767 (Can.). *See also* *Trinity W. Univ. v. B.C. Coll. of Teachers*, [2001] 1 S.C.R. 772, 777 (Can.). In *Voice Construction Ltd. v. Construction and General Workers Union, Local 92*, the Supreme Court characterized the arbitrators’ decisions as adjudicative, whereas decisions of the labor board would be polycentric. [2004] 1 S.C.R. 609, 610 (Can.). *See also* *Lévis (City) v. Fraternité des Policiers de Lévis Inc.*, [2007] 1 S.C.R. 591, 610 (acknowledging polycentricity in an arbitrator’s decision). For discussions on the polycentric nature of the issue, see, e.g., *Barrie Pub. Utilities v. Canadian Cable Television Ass’n*, [2003] 1 S.C.R. 476, 492, 522 (Can.) and *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, 161 (Can.).

under review falls into the area of agency expertise. If it does, judicial review is limited. Thus, for example, although courts will not defer in cases where the precise issue under review is the interpretation of a term of art in civil law,<sup>30</sup> they will defer on issues involving complex and technical assessments that the agency seems better placed to address, such as antitrust litigation<sup>31</sup> or financial market regulation.<sup>32</sup> The Supreme Court referred to three important dimensions of expertise: (i) the court must characterize the expertise of the agency in question; (ii) it must consider its own expertise relative to that of the agency; and (iii) it must identify how the specific issue before the administrative decisionmaker relates to this expertise.<sup>33</sup> Hence, expertise is a relative concept: it must be assessed in relation to that of the tribunal and relative to a given question. The Canadian Supreme Court also makes clear that expertise does not necessarily require specialized knowledge. It can stem from the use of special procedures or non-judicial means of implementing the Act, or from the contextual sensitivity obtained through making decisions over time.<sup>34</sup>

Finally, under the fourth prong, courts must evaluate the nature of the question at issue.<sup>35</sup> Whereas questions of law (such as constitutional and human rights issues) should be subjected to exacting review, questions of fact and of policy are given more deference.<sup>36</sup>

This pragmatic and functional approach allows the courts to strike a balance among the three-fold aspects of legitimacy: rights, democratic responsiveness, and competence. If competence or democratic responsiveness is critical to the decision under review, courts will usually

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30. See *Union des Employés de Service, Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 1049–50 (Can.) (finding that the term “alienation” was typical of civil law, and thus was a general question of law, requiring no deference to the agency’s interpretation).

31. See *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 774–775 (Can.) (holding that because the antitrust agency had a majority of lay members, that fact suggested the court should defer. See also David J. Mullan, *Establishing the Standard of Review: The Struggle for Complexity*, 17 CAN.J. ADMIN. L. & PRAC. 59, 66 (2004).

32. *Pezim v. B.C. (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 598–99 (Can.) (deciding that the interpretation of the legislative expression “material change” required specific knowledge of the regulation of financial markets; hence it deferred to the agency).

33. *Pushpanathan*, 1 S.C.R. 982, at 1007.

34. See *Canada (Attorney Gen.) v. Mossop*, [1993] 1 S.C.R. 554, 598 (Can.) (“Where the question is one that requires a familiarity with and understanding of the context, there is a stronger argument that a higher degree of deference may be appropriate.”).

35. After *Dunsmuir*, the relevance of the fourth prong may have increased. In dissent, Justice Deschamps claimed that “any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law.” *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 197 (Can.) (Deschamps, J., dissenting).

36. *Dr. Q v. Coll. of Physicians & Surgeons of B.C.*, [2003] 1 S.C.R. 226, 235, 241 (Can.).

defer to the agencies' choices because of their higher political accountability or technical expertise. If, however, the protection of rights is particularly salient, the courts will intervene.

### B. *United States*

In the United States, the courts frequently review the way agencies construe statutes. In the famous *Chevron* case, the United States Supreme Court accepted an agency's statutory interpretation and seemed to signal a deferential approach to agency legal interpretations.<sup>37</sup> However, subsequent case law presents a mixed picture. Even if statutory interpretation is not in question, courts can still review the substance of regulations using an "arbitrary and capricious" or a "substantial evidence" test. Even the former, seemingly less demanding standard, is sometimes applied quite aggressively. Also, the line between review of an agency's interpretation of statutory terms and review of its application of a statute to a policy choice is often quite blurry.

#### 1. *The Administrative Procedure Act*

In the absence of constitutional provisions, the APA, passed in 1946, provides a framework for the administrative process and for judicial review.<sup>38</sup> It has the status of a "landmark statute" that provides important background conditions and is well-entrenched in American public law.<sup>39</sup> The statute distinguishes rulemaking, licensing, and adjudication, but the section on judicial review is applicable across the board to "agency action."<sup>40</sup> The distinction that the Canadian court makes between deferential review of polycentric policymaking and stronger review of applications of the law in particular cases is reflected in the APA's distinction between informal and formal processes. Informal rulemaking is polycentric. Formal procedures are court-like with on-the-record decisions and provisions for cross-examination.<sup>41</sup> They are usually used for adjudications. As Thomas Merrill argues, these provisions largely track the judge-made law in effect before the passage of the APA.<sup>42</sup>

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37. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

38. 5 U.S.C. § 551 *et seq.* (2012).

39. See Bruce Ackerman, *Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737, 1811 (2006); see also William N. Eskridge Jr. & John Ferejohn, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010) (developing a broader category called super-statutes, which also includes the APA).

40. 5 U.S.C. § 702.

41. 5 U.S.C. §§ 556, 557.

42. Thomas W. Merrill, *The Origins of American-Style Judicial Review*, in *COMPARATIVE*



The informal rulemaking process requires only notice, an opportunity for public input, and a statement of reasons accompanying the published final rule.<sup>43</sup> The federal courts have given agencies leeway to decide how to proceed—whether by rules or adjudications, and whether by informal or formal rulemaking.<sup>44</sup> Not surprisingly, agencies seldom use formal procedures unless they are required by statute. The choice of “informal rulemaking” should be seen not as a failing but as an appropriate response to the nature of the agencies’ policymaking tasks. True, the courts, over time, have amplified the requirements of informal rulemaking to facilitate their own review and to enhance public accountability. However, these elaborations retain the essentially policy-oriented and polycentric nature of the process.<sup>45</sup>

Substantive review of rules usually occurs under the APA’s “arbitrary and capricious” standard that seems similar to Canada’s “reasonableness” standard. Some statutes impose a “substantial evidence” test, nominally stronger but hard to distinguish in practice.<sup>46</sup> In this context the federal courts developed the so-called “hard look” doctrine that can be read in two ways. Under one view, it requires the agency to take a hard look at the options with the courts checking to be sure it did so—an essentially procedural review. Alternatively, it can mean that the court itself takes a hard look at the agency’s decision—in other words, it reviews the substance. In many cases it seems to be a mixture of both.<sup>47</sup> The former is

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ADMINISTRATIVE LAW 389 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

43. 5 U.S.C. § 553. Section 553(c) permits but does not require formal proceedings under §§ 556 and 557.

44. Nat’l Labor Relations Bd. v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (stating that “the choice between rulemaking and adjudication lies in the first instance within the Board’s discretion”); see also Nat’l Petroleum Refiners Ass’n v. Fed. Trade Comm’n, 482 F.2d 672, 697–98 (D.C. Cir. 1973) (deferring to agency choice to engage in rulemaking); Nat’l Labor Relations Bd. v. Wyman-Gordon Co., 394 U.S. 759, 765–66 (1969) (permitting the National Labor Relations Board to act through adjudication instead of rulemaking); United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 246 (1973) (refusing to require formal rulemaking when the agency chose to use informal rulemaking).

45. Active review by the D.C. Circuit on procedural grounds was halted by the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978).

46. On the difficulty of making the distinction, see Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899, 933–37 (1973) (pointing out that the APA’s substantial evidence test refers to decisions made “on the record” under the formal rulemaking and adjudication provisions of the APA).

47. The debate over “hard look” review was most famously developed in opinions by Judges Harold Leventhal and David Bazelon in *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir. 1976). See also Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974). See the discussion *infra*, at note 154.

obviously more deferential and rooted in the administrative process than the latter. Overall, somewhat contradictory messages have come from the Supreme Court. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Supreme Court characterized the arbitrary and capricious test as “searching and careful.”<sup>48</sup> More recently, it reversed a lower court, observing that “the arbitrary and capricious standard is extremely narrow . . . and allows the Board wide latitude in fulfilling its obligations. . . . It is not for the Federal Circuit to substitute its own judgments for that of the Board.”<sup>49</sup>

## 2. *Statutory Construction and Judicial Review*

Frequently, agencies need to interpret their authorizing statutes before proceeding to regulate. Some of the most difficult problems of judicial review arise under regulatory statutes that require the application of expert, technical knowledge, outside the comfort zone of most judges. Where does statutory interpretation end and policymaking under the law begin?

Courts often state that they are particularly qualified to judge “pure” questions of statutory interpretation.<sup>50</sup> These seem like archetypal issues for judicial resolution. Yet, if the meaning of a statutory term depends upon expert non-legal knowledge, courts will be poorly equipped to judge whether agency actions are compatible with their statutory mandate. Law and policymaking under the law do not sit in self-contained boxes. This tension in the context of the U.S. Clean Air Act led to the *Chevron* decision, reviewing a rule promulgated by the Environmental Protection Agency (EPA) that changed the interpretation of a legal provision used by the previous administration. The Court deferred to the EPA’s interpretation of the statutory term because Congress had not defined it carefully (step one) and because the agency’s interpretation was reasonable (step two). The Court deferred on both political and technical grounds. An incoming administration has leeway to rethink the meaning of a statutory term consistent with its own policy priorities. Deference reduces the focus on law and increases the focus on policies that follow from the law, and it sheds light and attention on the agencies’ choices, augmenting their political responsibility.<sup>51</sup>

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48. *Citizens to Pres. Overton Park, Inc., v. Volpe*, 401 U.S. 402, 416 (1971).

49. *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6–7 (2001).

50. In *Chevron* itself, the Supreme Court stated in a famous footnote: “The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

51. See 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, 16 (2005) (arguing that the *Chevron* doctrine of deference has transferred power in the agencies from lawyers to

The actual impact of the *Chevron* doctrine is much debated. It is among the most heavily cited cases of all time,<sup>52</sup> and some empirical studies show that the percentage of administrative decisions that Courts affirmed rose after *Chevron*.<sup>53</sup> Others, however, have found that the Supreme Court continues to impose its own interpretations of the law on agencies, often without even citing *Chevron*.<sup>54</sup> Subsequent cases have narrowed the reach of *Chevron*, giving greater deference to policies enacted through processes such as notice-and-comment rulemaking or adjudications under the terms of the APA.<sup>55</sup> It defers on substance, not process, but a democratically legitimate or a more formal process can convince the Court to defer.

These developments illustrate the interaction between legal substance and the administrative process. To the extent that the agency follows informal rulemaking procedures that suit the issue at hand and are not heavily judicialized, the courts will give great weight to agency legal interpretations. Court-like procedures are not necessary for the courts to defer to agency readings of the law, especially because such court-like formalities are not appropriate for the production of general rules that do not decide individual cases.

The deeply intertwined nature of law and policy is at the heart of the *Chevron* decision. One can read it as an effort to respect the policymaking authority of government agencies by giving them leeway to interpret their legal mandate. This focus on policymaking through statutory interpretation is clear in *Chevron* itself, but also in many other decisions. For instance, in *Pauly v. Bethenergy Mines, Inc.*,<sup>56</sup> the Supreme Court stated:

As *Chevron* itself illustrates[,] the resolution of ambiguity in a statutory text is often more a question of policy than of law. . . . When Congress, through express delegation or the introduction of an interpretive gap in the statutory

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policymakers).

52. As of February 2011, *Chevron* had been cited 10,720 times by the federal courts. The number greatly exceeds the mentions of other important public law cases. STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN, ADRIAN VERMEULE, & MICHAEL E. HERZ, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 287 (7th ed. 2011).

53. See, e.g., Peter H. Shuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1026 (1991); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study on the Chevron Doctrine in the U.S. Court of Appeals*, 15 YALE J. ON REG. 1, 1–4 (1998).

54. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

55. See *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001) (holding that a U.S. Customs Services (now Customs and Border Protection) tariff classification was not entitled to deference under *Chevron*, given its informality and its lack of precedential value).

56. 501 U.S. 680, 696 (1991).

structure, has delegated policymaking authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited.<sup>57</sup>

Moreover, *Chevron* deference only applies to agencies that hold delegated policymaking authority, further evidence of the link between policymaking and judicial deference.<sup>58</sup>

However, although the courts may defer to agency interpretations of the law, the timing of review gives the courts a greater impact on government policymaking than in Canada. Review of a rule can occur before the rule goes into effect under *Abbott Laboratories v. Gardner*, giving the courts the opportunity to influence an agency's actions before it has taken steps to lock in its regulatory policies.<sup>59</sup>

### 3. *The Practice of Chevron*

Although the *Chevron* doctrine is based on a theory of deference, its practical application has sometimes departed from this orientation. Under step one, the Court is supposed to assess whether "Congress has directly spoken to the precise question at issue."<sup>60</sup> In practice, courts use the so-called "traditional tools of statutory construction" to decide this issue, and sometimes they reach out to find and resolve ambiguity against agency interpretations. Courts frequently conclude that a given text is not ambiguous, but only after a rather long analysis of the purpose of the statute or its legislative history. In addition, dissenting opinions undermine the majority's claim that the language is indeed clear.

Step one seems like a more "legal" step; whereas step two considers how the agency translated law into policy. It is certainly easier for courts to legitimize their action when they annul an administrative decision for "legal reasons," and not for the unreasonableness of the policy, and as a result, it is rare for a court to set aside an agency action in step two. At times, courts seem to use the traditional tools of construction in step one to regain the powers of statutory construction that they lost with *Chevron*. An example is *FDA v. Brown & Williamson*.<sup>61</sup> The case involved the Food and Drug Administration's (FDA's) limited effort to regulate the sale of cigarettes. The five-judge majority overturned these regulations as exceeding the agency's statutory mandate. The opinion acknowledged the adverse health

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57. 501 U.S. at 696.

58. See *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152–53 (1991).

59. *Abbott Labs. v. Gardner*, 387 U.S. 136, 155–56 (1967).

60. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

61. 529 U.S. 120 (2000).

effects of tobacco, but held that Congress had not given the agency authority to regulate tobacco products. The four dissenters would have left space for the agency, with its expertise and policy mandate, to reinterpret statutory terms in light of changing scientific evidence, its own best judgment, and a new administration's policy priorities.<sup>62</sup>

Decisions such as *Brown & Williamson* limit the public accountability benefits of the *Chevron* doctrine, by enhancing the presumption in favor of the Court's interpretation of statutory terms. The problem, as Richard Pierce puts it is that:

If reviewing courts are free to use any combination of the "traditional tools of statutory construction" they choose in the process of applying *Chevron* step one, few if any cases will reach *Chevron* step two. It is the very indeterminacy of the 'traditional tools' that gives judges the discretion to make policy decisions through the process of statutory construction. The purpose of the *Chevron* test is to place policymaking in the hands of the politically accountable agencies to which Congress has delegated that power, rather than in the hands of politically unaccountable judges. The Court should restate step one of *Chevron* in simple, commonsense terms.<sup>63</sup>

### C. Comparison between the American and Canadian Cases

In Canada, a finding of statutory ambiguity that leads to judicial deference is quite straightforward and arises from the courts' analysis of the text. The courts use the "traditional tools of construction," only after the ambiguity has been located, to assess the reasonableness or correctness of administrative statutory construction.<sup>64</sup> Still, if a term requires long analysis to ascertain its "correct" meaning, Canadian courts will usually defer to the agency's interpretation so long as it is "reasonable."<sup>65</sup> In short, in the face of complexity and ambiguity, the Canadian courts generally accept agency interpretations of statutory texts.

In principle, there does not seem to be any fundamental bar to the U.S. Supreme Court moving in the Canadian direction toward greater

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62. *Id.* at 161–63.

63. RICHARD PIERCE, ADMINISTRATIVE LAW TREATISE 237 (5th ed., vol. 1, Aspen Publishers, 2010).

64. *See* *Union des Employés de Service, Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 1050 (Can.).

65. *See* *Nat'l Corn Growers Ass'n v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, 1326; *Canadian Union of Pub. Emps., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, 230, 242 (Can.) (analyzing four possible meanings of a statutory term and concluding that all were equally reasonable); *see also* *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 787 (Can.) (holding that although an agency finding could be "difficult to accept" it was not "unreasonable").

deference to agencies. The text of the APA would not prevent such a development. The Court would only need to soften *Chevron* step one to permit agencies to implement a more open-ended range of statutory interpretations. Many of the canons in use today by courts in the United States, as William Eskridge points out, have little logical or conceptual grounding.<sup>66</sup> Some are based on grammatical rules about how to read a text, but many are open to contestation as indicated in conflicting Court of Appeals decisions and in Supreme Court cases that generate dissents or that overturn lower court interpretations.<sup>67</sup> Others are tied to an understanding of the proper role of the courts, and their reluctance explicitly to resolve partisan disputes or reach out to find a statute unconstitutional.

Both Canadian and American judges recognize that policymaking may require polycentric, informal efforts to gather information and balance a range of options. This implies both judicial deference to agency choices and acceptance of procedures very different from those used in court. Canadian law distinguishes between questions of law where “correctness” is the proper standard and others where for a variety of reasons, including expertise, deference is appropriate. The U.S. courts, which provide much more review of rulemaking, leave considerable space for agency policymaking under delegated authority. Nevertheless, the courts continue to struggle with both the meaning of *Chevron* and with its relationship to the arbitrary and capricious standard.

One reason for the continuing differences between Canadian and U.S. case law is the contrasting objects of review. The U.S. courts frequently review agencies’ interpretations of statutes when they promulgate rules and regulation but before the agencies apply these rules in individual cases. These decisions, of which *Chevron* is an example, raise issues of statutory interpretation in a particularly clear form that force the U.S. courts to evaluate the way agencies make general policy under the law. Such cases are quite uncommon in Canada because there is no formal provision for review of rules before they go into effect. Of course, the U.S. courts could follow the Canadian model and could defer to most agency interpretations. That would simplify U.S. courts’ review of rules and permit agencies to

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66. The origin of the term “canons” in the dogma of the Roman Catholic Church is consistent with the use of the term to signal a principle that should be accepted on faith. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY CONSTRUCTION* (1994).

67. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995). The decision turned on how a list of conditions should be read. The majority assumed that each term must add something to coverage of the act. *Id.* at 701–03. The dissent argued that all the items referred to the same kind of thing. *Id.* at 718–20 (Scalia, J., dissenting). For an example of judicial disagreements, see *OfficeMax, Inc. v. United States*, 428 F.3d 583 (6th Cir. 2005) (discussing the meaning of the word “and” in a statute).

develop their own interpretations of legal terms in accord with their statutory mandates and the political environment. As we argue below, a deeper concern for process could replace substantive review of agencies' interpretation of legal terms as applied in technical areas. In short, the Canadian approach to substantive review responds better to the relative competence of courts than the U.S. approach. However, adoption of that approach would be more difficult in the U.S. because courts more often review general norms or rules in ways that invite them to examine agencies' interpretations of the underlying statutory text.

#### D. Italy

We turn now to two countries in the civil law tradition: Italy and France. Although the civil law–common law contrast is sharpest in private law, the interactions between courts and agencies also differ from the Canadian and U.S. cases. Furthermore, the contrast between Canada and the U.S. carries over to the European cases. Like Canada, France and Italy do not have a generic requirement for notice-and-comment rulemaking that is subject to judicial review for compliance with the underlying statutory law.

Italy has a separate system of administrative courts that culminates in the Consiglio di Stato.<sup>68</sup> This body is responsible for most of the case law dealing with judicial review of executive policymaking.<sup>69</sup> Substantive review of administrative rulemaking is very rare. We thus focus on the review of administrative adjudication. Recent developments in the case law illustrate the tensions that arise when the courts defer to policymaking that arises out of a series of adjudications. Italian public law began with a period of strict review followed by a shift to deference for decisions that applied expertise to policy. Finally, the courts settled back into a phase of non-deferential review.

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68. For an overview in English, see generally Franco Gaetano Scoca, Essay, *Administrative Justice in Italy, Origins & Evolution*, 2 ITALIAN J. OF PUB. L. 118 (2009), available at <http://www.ijpl.eu/archive/2009/issues-2/administrative-justice-in-italy-origins-and-evolution>.

69. The Italian administrative jurisdiction (*giurisdizione amministrativa*) is headed by the *Consiglio di Stato*, and the *Tribunali Amministrativi Regionali* (TAR) are the courts of first instance. The Consiglio di Stato acts both as an administrative court and an adviser to the government, like its French counterpart. Both the Consiglio di Stato and the TARs are staffed by administrative judges, not by civil judges. One-fourth of the members of the Consiglio di Stato are nominated by the government; another fourth are chosen by public competition; half of the members come from the different TARs. Consiglio di Stato rulings can only be challenged for jurisdictional violations, Art. 103, 111 Costituzione [Cost.] (It.). The Consiglio has jurisdictional powers over the decisions of the TARs. The whole case before the TAR goes to the Consiglio di Stato on appeal—not only questions of law. Legge 10 ottobre 1990, n. 287 (It.).

### 1. *Rare Instances of Substantive Review of Administrative Rulemaking*

Administrative rulemaking in Italy is virtually exempt from substantive judicial review—a situation that has led some authors to refer to this domain as a “land of nobody” (*terra di nessuno*).<sup>70</sup> First, review for unconstitutionality is not available. The competence of the Constitutional Court applies only to “statutes and acts having the force of law.”<sup>71</sup> The Constitutional Court can check the constitutionality of a statute that unlawfully confers rulemaking competence, but it cannot check the constitutionality of the administrative rule itself.

Second, administrative courts usually refrain from reviewing the legality of rules on the grounds that their “generality” means that they cannot violate legal rights or interests. Only on the rare occasions, where a direct violation is deemed possible, is substantial review available. As the regional administrative court of Lazio puts it, “a direct challenge to an administrative rule is exceptional.”<sup>72</sup> Normally, judicial review is only available for measures that implement an administrative rule.<sup>73</sup>

In addition, administrative courts have for decades refused to “disapply” (*disapplicare*) an administrative rule that was contrary to legislation. Such rules had legal force so that the courts could annul specific adjudications that violate them. From 1992, the courts’ doctrine changed, and judges now may “disapply” or set aside an unlawful rule in a specific matter (without annulling the rule).<sup>74</sup>

### 2. *The Development of the Case Law on Administrative Adjudications*

Traditionally, Italian courts work within a binary framework, giving limited review to discretionary decisions and stronger review to non-discretionary decisions.<sup>75</sup> Administrative discretion (*discrezionalità*

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70. Fabio Cintioli, *L’effettività della tutela giurisdizionale nell’annullamento dei regolamenti*, 2 FORO AMMINISTRATIVO T.A.R. 2779 (2003).

71. Art. 134 Costituzione [Cost.] (It.); *see also* Corte Cost. (Constitutional Court), 18 ottobre 2000, n. 427, Giur. it. 2000 (It.).

72. *See* TAR Lazio, sez. ii, 25 febbraio 2008, n. 1685.

73. *See, e.g.*, Cons. Stato, sez. iv, 29 febbraio 1996, n. 222.

74. *See* Cons. Stato, sez. v, 26 febbraio 1992, n. 154. Subsequent case law confirmed and expanded the instances where the “disapplication” is possible. *See* Cons. Stato, 24 luglio 1993, n. 799; Cons. Stato, sez. v, 19 settembre 1995, n. 1332; Cons. Stato, sez. iv, 29 febbraio 1996, n. 222; Cons. Stato, sez. v, 10 gennaio 2003, n. 35; Cons. Stato, sez. v, 4 febbraio 2004, n. 367; TAR Lazio, Roma, sez. ii, 14 ottobre 2004, n. 11000; Cons. Stato, sez. vi, 24 gennaio 2005, n. 123; Cons. Stato, sez. v, 25 gennaio 2005, n. 155; Cons. Stato, sez. vi, 29 aprile 2005, n. 2034.

75. Usually, to annul a decision on abuse of power (*eccesso di potere*) grounds, the decision must be shown to be unreasonable, illogical, incoherent, or improperly justified. *See* Michele



*amministrativa*) has a very specific meaning: it corresponds to the balance of competing public interests. Only in cases requiring balancing do courts engage in limited review; traditionally, judges do not defer to agencies' construction of ambiguous statutory terms.

Eventually, going against this tradition, courts developed the concept of "technical discretion" (*discrezionalità tecnica*) for instances where the administrative authorities interpret ambiguous or debatable technical legislative terms.<sup>76</sup> For example, the Consiglio di Stato deferred to the administration's determination of whether a building was of "particular historical or artistic interest" (*di particolare interesse storico-artistico*),<sup>77</sup> and in another case it deferred on whether an advertisement could be considered "dangerous" (*la pericolosità di una immagine pubblicitaria*).<sup>78</sup> The courts' limited review of these administrative actions<sup>79</sup> was harshly criticized by legal scholars on the ground that the so-called "technical discretion" was not really "discretion" because it did not involve the balance of competing public interests.<sup>80</sup> Accordingly, the critics argued that "technical discretion" should be subject to stringent review.

In 1999, after a landmark decision, technical discretion became reviewable on non-deferential terms.<sup>81</sup> The case concerned a judge with a range of pre-existing health conditions, who claimed a connection between his heart attack and his working conditions. The Consiglio di Stato overturned the findings of two expert commissions and awarded state benefits to the plaintiff. This case represented a clear and acknowledged departure from previous case law. In subsequent cases, however, the Consiglio di Stato provided only limited review of expert choices, particularly antitrust agency decisions.<sup>82</sup>

The Consiglio di Stato sought to explain the confusing state of affairs in

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Corradino, DIRITTO AMMINISTRATIVO 192 (2d ed. 2009).

76. This "debatable nature" (*opinabilità*) distinguishes technical discretion from other kinds of technical decisions that were never subject to limited review (e.g., *accertamenti tecnici*).

77. Cons. Stato, sez. iv, 12 dicembre 1992, n. 1055.

78. Cons. Stato, sez. iv, 30 novembre 1992, n. 986.

79. See, e.g., Cons. Stato, sez. vi, 5 novembre 1993, n. 801; Cons. Stato, sez. iv, 12 marzo 1996, n. 305; Cons. Stato, sez. vi, 23 marzo 1998, n. 358; Cons. Stato, sez. v, 22 giugno 1998, n. 463.

80. See Paolo Lazzara, *'Discrezionalità tecnica' e situazioni giuridiche soggettive*, 2000 DIRITTO PROCESSUALE AMMINISTRATIVO 182, 212–15 (relating to Cons. Stato, sez. iv, 9 aprile 1999, n. 601).

81. Cons. Stato, sez. iv, 9 aprile 1999, n. 601.

82. See, e.g., Cons. Stato, sez. vi, 14 marzo 2000, n. 1348; Cons. Stato, sez. vi, 12 febbraio 2001, n. 652; Cons. Stato, sez. vi, 20 marzo 2001, n. 1671; Cons. Stato, sez. vi, 26 luglio 2001, n. 4118. These antitrust decisions were the object of further criticism in legal literature.

two cases in 2001 and 2002.<sup>83</sup> First, the cases confirmed the changes brought about by the 1999 decision: actions involving mere “technical discretion” could be reviewed. However, where technical decisions were intertwined with *real* administrative discretion, such as the balance of multiple public interests, the courts would use “weak review.”<sup>84</sup> Instances where “technical discretion” and administrative discretion were mixed together and inseparable were called “complex technical assessments” (*valutazione tecniche complesse*). Examples are the evaluations performed by the antitrust agency when it interpreted and applied indeterminate legal concepts, such as “relevant market” and “abuse of dominant position.”<sup>85</sup>

The court applied this deferential orientation toward “complex technical assessments” consistently in later cases,<sup>86</sup> until a new change of direction in 2004. Arguing that its reference to “weak review” had been misinterpreted, the Consiglio di Stato abandoned the concept and began to stress that review had only one limit: the judge could not substitute the decision of the authorities with its own, and the court must annul the administrative decision and remand the case back to the agency.

The first case decided under the new approach concerned agreements among competitors to provide lunch vouchers to the public administration.<sup>87</sup> However, that decision sought to incorporate the new approach into the older doctrines. Later cases completely abandoned the previous language, rejecting “weak review” and characterizing their standard as “full and particularly penetrating” (*pieno e particolarmente penetrante*) and “certainly not weak” (*certamente non debole*).<sup>88</sup> Whereas the Consiglio di Stato previously invoked indeterminate legal concepts to justify limited review, it now uses “full review *also in regard* to indeterminate legal concepts.”<sup>89</sup> Whereas the Consiglio di Stato previously highlighted the agencies’ institutional positions to suggest the need for judicial deference, it

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83. See Cons. Stato, sez. iv, 06 ottobre 2001, n. 5287 (*Formambiente*), item 9; Cons. Stato, sez. vi, 23 aprile 2002, n. 2199 (*RC Auto*).

84. See Cons. Stato, sez. vi, 23 aprile 2002, n. 2199, item 1.3.1 (providing “weak review” (*sindacato debole*) limited to the assessment of the reasonableness and technical coherence of the administrative decision).

85. The idea of complex technical assessments was linked to the so-called indeterminate legal concepts (*concetti giuridici indeterminati*). See Cons. Stato, sez. vi, 23 aprile 2002, n. 2199, item 1.3.1.

86. See, e.g., Cons. Stato, sez. vi, 23 aprile 2002, n. 2199; Cons. Stato, sez. vi, 19 luglio 2002, n. 4001; Cons. Stato, sez. vi, 1 ottobre 2002, n. 5156; Cons. Stato, sez. vi, 16 ottobre 2002, n. 5640.

87. Cons. Stato, sez. vi, 02 marzo 2004, n. 926.

88. See, e.g., Cons. Stato, sez. vi, 3 febbraio 2005, n. 280; Cons. Stato, sez. iv, 8 febbraio 2007, n. 515; Cons. Stato, sez. vi, 17 dicembre 2007, n. 6469.

89. Cons. Stato, sez. vi, 3 febbraio 2005, n. 280, item 2.1 (emphasis added).

now states that a full review is needed because independent agencies are insulated from the political arena (*fuori del circuito dell'indirizzo politico*).<sup>90</sup> It remains to be seen exactly how this approach will develop over time.

### 3. *The Current State of Italian Case Law*

The concept of “administrative discretion” (*discrezionalità amministrativa*) in Italian law is equivalent to polycentricity in Canadian law—the balance by the administration of multiple and competing public interests.<sup>91</sup> In Italian law, however, courts traditionally do not acknowledge the existence of policymaking or the balancing of competing public interests in cases of statutory construction.

Nevertheless, during two different periods, judges challenged this traditional orientation. Before 1999, using the notion of “technical discretion,” courts applied limited review to cases where the terms interpreted were “technical” and “debatable.” Between 2002 and 2004, courts deferred to “complex technical assessments,” claiming that category involved both the interpretation of debatable technical terms and the balance of competing public interests. This two-year period brought Italian law closer to American and Canadian practice. For a short period, Italian courts explicitly admitted that the construction of ambiguous legislative terms can give rise to policymaking, and hence, to limited review.

The courts did not properly justify the abandonment of this deferential position after 2004. The Consiglio di Stato introduced its new approach by claiming that it was just an explanation of its previous case law—in fact, it represented a complete change of direction. The Consiglio di Stato presented no justification for its new stringent review. The judges provided no theoretical explanation to explain why it was now possible to review aspects of the decision that were beforehand deemed to include a “balance of public interests.” In 2002 the Consiglio di Stato very explicitly affirmed that cases of “complex technical discretion” involved a combination of technical and administrative discretion, and hence only limited review was possible.<sup>92</sup> When it decided to change its orientation and to provide “complete and effective review,” it did not reconsider the degree of pure discretion embedded in regulatory decisions—it just ignored the issue.

The hesitations and inconsistencies that still persist in Italian law illustrate the difficulties of applying stringent review to the complex

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90. Cons. Stato, sez. vi, 2 marzo 2004, n. 926, item 3.3.

91. In the United States, the Supreme Court has highlighted that administrative institutions are better designed than courts to “reconcile competing political interests.” *E.g.*, *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 864–66 (1984).

92. *See, e.g.*, *supra* note 83.

decisions of specialized administrative bodies.<sup>93</sup> Although Italian judges had to craft new criteria to explain their approach, such as complex technical assessments, intrinsic and extrinsic review, and weak and strong review, they acknowledged for a period between 2002 and 2004 that the day-to-day work of regulatory and antitrust agencies involved policymaking and that courts should not step in.

The judicial movement towards more stringent review was aimed at “more effective” protection for the rights of citizens,<sup>94</sup> and was accompanied by several “judge-empowering” legislative reforms.<sup>95</sup> However, the more stringent review left little space for judicial deference to the administration’s policymaking choices. These changes brought Italian case law closer to French case law (discussed further below), even though Italian rules on standing<sup>96</sup> and on the costs<sup>97</sup> of judicial review remain less

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93. Although the new stringent approach is now clearly dominant, there are cases in which the Consiglio di Stato still uses the discourse of the deferential era. *See, e.g.*, Cons. Stato, sez. vi, 8 febbraio 2008, n. 421; Cons. Stato, sez. vi, 8 febbraio 2008, n. 424; Cons. Stato, sez. vi, 20 febbraio 2008, n. 594. Panels with different composition heard the appeals, and different judges drafted the decisions. Though every judgment upheld the decision of the Antitrust Authority, the reasoning in each was distinct. One advocated for a deferential review. Cons. Stato, sez. vi, 8 febbraio 2008, n. 421. Others advocated for very stringent review, making reference to the current case law of the Council of State. Cons. Stato, sez. vi, 8 febbraio 2008, n. 424; Cons. Stato, sez. vi, 20 febbraio 2008, n. 594. *See generally* R. Caranta & B. Marchetti, *Judicial Review of Regulatory Decisions in Italy: Changing the Formula and Keeping the Substance?*, in NATIONAL COURTS AND THE STANDARD OF REVIEW IN COMPETITION LAW AND ECONOMIC REGULATION 145 (Oda Essens et al., eds., 2009).

94. The Consiglio di Stato was criticized during the deferential period on the ground that its review was ineffective in protecting the rights of citizens. In the post-2004 cases, the Consiglio di Stato often underlines the “strong, complete, and effective” nature of the review it now applies. *See, e.g.*, Cons. Stato, sez. vi, 20 febbraio 2008, n. 594.

95. Until the end of the 1990s, administrative courts in Italy could not hire their own experts to review factual and technical matters. They could use only the instrument of *verificazione*, Regio Decreto 17 agosto 1907, n. 641, which was limited to precise questions and raised concerns of partiality. This situation changed, first, for cases related to public servants, Decreto Legge 31 marzo 1998, n. 80, and was then extended to all administrative matters. Legge 21 luglio 2000, n. 205 (It.). This change paved the way for more stringent review. The same law also introduced an “abbreviated procedure” (*rito abbreviato*) that only affects review of independent administrative agencies. See the Art. 119 of the Code of Administrative Procedure. Finally, many recent laws, passed to reform the administrative jurisdiction, increased the powers of the administrative judges, making more stringent review possible. The Code of Administrative Judicial Procedure (2010) consolidated and extended this trend. This code should not be confused with the Legge 7 agosto 1990, n. 241, which is the equivalent of American Administrative Procedure Act (APA). The Code of Administrative Judicial Procedure of 2010 regulates the procedure used by the administrative courts, whereas the L. n. 241/1990 regulates the procedures used by the administrative agencies.

96. In comparison to their French counterparts, see discussion *infra* Part II-E, Italian

generous than the French procedures. The reforms that empowered judges to review administrative actions for violations of rights can also lead judges to interfere with the administration's democratic legitimacy and technical competence. This tradeoff needs to be acknowledged in the debate over the role of the judiciary vis-à-vis the administration. Aggressive review for rights may have negative effects on the executive's ability to respond to technical considerations and democratic pressures. It may also result in the imposition of the subjective views of the courts over the comparatively more technically informed and democratically accountable views of the executive. Yet, as we discuss below, the courts can maintain a viable role if they concentrate on procedural, rather than substantive, issues.

Thus, in Italy, public law is left with a sharp dichotomy. If the administration regulates by issuing general rules, it can avoid judicial oversight. Judicial deference is not an issue because the courts simply lack jurisdiction. Alternatively, if an administrative body uses case-by-case adjudication to carry out its mandate, it will be subject to aggressive review based on claimed violations of rights; official expertise is not an acceptable reason to defer on substance if rights are at stake.

### *E. France*

France has had a consistent pattern of non-deferential review of substance over its recent legal history. Most cases, however, deal with adjudications. Although the administrative courts have the authority to review ordinances and directives, their review has not interfered greatly with the government's interpretation of its statutory or constitutional mandates.

#### *1. Judicial Review*

France has a three-tiered system of administrative courts culminating in

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courts have less generous rules of standing. The *ricorso giurisdizionale* "is not a remedy given in the interest of justice," but on behalf of each person whose interests have been violated by the administration. Cons. Stato, sez. iv, 19 giugno 2006, n. 3638. According to the Italian case law, these interests must be (i) concrete; (ii) current; and (iii) direct, Cons. Stato, sez. vi, 22 giugno 2004, n. 4412, but courts have evolved from a very strict comprehension of a "direct interest" to a more generous one.

97. In contrast to French procedure, in Italy, parties must be assisted by a lawyer to go before the courts. According to Article 91 of the Code of Civil Procedure, which applies to the administrative courts as well, the judge will require the losing party to reimburse the costs of the prevailing party. Codice di procedura civile (1940). Persons who cannot afford these costs can apply for "legal aid" (*gratuito patrocinio*). This aid was originally available only in criminal, military, and civil proceedings, but in 2002 it was extended to administrative cases.

the Conseil d'État. With Conseil d'État approval, issues of constitutional rights can be referred to the Conseil Constitutionnel.<sup>98</sup> The Conseil d'État remains the main forum for the review of agency action, with two important exceptions. First, in a series of recent cases, the Conseil Constitutionnel has interpreted the Environmental Charter in the French Constitution to require the public's participation in policymaking. Second, the Cour de Cassation, the highest civil court, reviews agency adjudications in fields such as antitrust and financial regulations.

The French courts generally provide very intensive judicial review in areas where they accept jurisdiction. Both structural and substantive factors contribute to this "judicialization of the administration." Access to the administrative courts is quite easy. Rules governing standing,<sup>99</sup> third-party interventions,<sup>100</sup> and jurisdiction are generous. The liberal standing rules remain unscathed even after many reforms aimed to mitigate the overload of administrative cases. Furthermore, cost-shifting rules and other cost reductions are widespread,<sup>101</sup> and in some cases plaintiffs do not need

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98. The change arose from the 2008 constitutional revision that introduced the *question prioritaire de constitutionnalité* (QPC), which began to operate in March 2010.

99. Those who have an "interest in the annulment of the administrative decision" have standing. In practice, administrative courts are very generous in interpreting this standard. The person filing the challenge does not have to demonstrate a "specific" or "exclusive" interest. Thus, a user of a public service was able to challenge decisions related to its organization. Conseil d'État (CE) Dec. 21, 1906, Rec. Lebon 962, *Syndicat des propriétaires et contribuables du quartier Croix-de-Seguey - Tivoli*. Likewise, a taxpayer could challenge a town's expenses. Conseil d'État (CE), Mar. 29, 1901, Requête n. 94580. Someone who might want to camp in the future could challenge a town's regulation on camping. Conseil d'État (CE) Sect., Feb. 14, 1958, *Abisset*. Those decisions demonstrate an intention to encourage such challenges.

100. Groups that would not have standing are almost always able to intervene as third parties. If the Conseil d'État reviews regulatory agencies' decisions, third party interventions are also generally accepted. *See, e.g.*, CE Sect., Apr. 27, 2009, Requête n. 312741; CE Sect., July 24, 2009, Requête n. 324642. The latter concerned the regulation of interconnection fees. The company Free was allowed to intervene, even though it was not yet an operator. *See* Rozen Noguellou, *Le Conseil d'État et La Régulation des Télécommunications*, 2010 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ÉTRANGER 825, 830 (2010).

101. In general, the proceedings before administrative courts are less expensive than proceedings before civil courts. A law passed on December 30, 1977, exempted applicants from most of the costs in both jurisdictions. Before the administrative courts, besides a minimal *droit de timbre* reestablished by a law of July 29, 2011, the only costs that parties face are lawyers' fees and fees for expertise and inquiries required by the courts. Those costs are usually borne by the party that loses the case, unless the particular circumstances of the case recommend otherwise. In addition, judicial aid for poor citizens can reduce or eliminate even those few costs. *See* CODE ADMINISTRATIF [C. ADM.] art. R441-1 (Fr.); Conseil d'État, (CE) July 22, 1992, *Marcuccini* n. 115425. According to article L761-1 of the Code of Administrative Justice, the judge can condemn the losing party to pay any other costs that the winning party has faced (*frais irrepétibles*), but the judge should take into consideration the

lawyers.<sup>102</sup> Individuals can challenge most administrative decisions in court without having to mount an administrative challenge first.<sup>103</sup> In 2000, reforms allowed the administrative courts to issue injunctions that suspended the effects of administrative decisions in a wide range of cases.<sup>104</sup> Although since 1956 the courts can levy fines on those who abuse the right to challenge administrative actions, fines are very rare and are almost never imposed at the maximum value of €3,000.<sup>105</sup>

The administrative courts seek to check excesses of power by public officials,<sup>106</sup> and over time the Conseil d'État has widened the grounds for action for abuse of power (*recours pour excès de pouvoir*). Courts also review the strength of factual claims (*contrôle de l'exactitude matériel des faits*). The public interest goal behind such review explains the courts' openness to citizen complaints.<sup>107</sup> The courts seek not only to right individual wrongs, but also

economic situation of the parties. CODE ADMINISTRATIF [C. ADM.] art. L761-1 (Fr.).

102. As a general rule, parties must hire a lawyer when they challenge administrative actions. CODE ADMINISTRATIF [C. ADM.] art. R431-2. However, there are some exceptions. CODE ADMINISTRATIF [C. ADM.] art. R431-3. A lawyer is not necessary for a *recours pour excès de pouvoir*, or REP. The goal is to facilitate these challenges and to preserve the legality of administrative action. Some challenges involving pensions or elections are also exempt from the lawyer requirement. That said, a 2003 reform established a general requirement for lawyers in appeals with the aim of reducing the caseload of the Administrative Court of Appeals. See Loi 2003-543 du 24 juin 2003 relatif aux cours administratives d'appel et modifiant la partie Réglementaire du code de justice administrative [Decree 2003-543 of June 24, 2003 concerning administrative courts of appeal and amending the regulatory part of the code of administrative justice], J. OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 25, 2003, p. 10657.

103. There is no general obligation to administratively challenge a decision before taking it to the administrative courts. Many authors, however, suggest that parties be required to file prior administrative remedies (*recours administratifs préalable*) before taking the matter to the courts.

104. A law of June 30, 2000, created the *référé-suspension* and the *référé-liberté* and reformed the system of *mesures d'urgence*, CODE ADMINISTRATIF [C. ADM.] art. L521-1. The *référé-suspension* is similar to a traditional injunction sought in U.S. courts, and it must be requested by a lawyer. A *référé-liberté* performs a similar function, but it is reserved for imminent infringement of one's civil liberties and can be requested without a lawyer.

105. See CODE ADMINISTRATIF [C. ADM.] art. R741-12.

106. The right to judicially challenge an administrative action is considered a fundamental liberty, Conseil d'État (CE) Mar. 13, 2006, Requête n. 291118, Bayrou et Assoc. de Défense des Usagers des Autoroutes publiques de France, and a constitutional right by both the Conseil Constitutionnel, see Conseil constitutionnel [CC][Constitutional Court] decision No. 96-373DC, Apr. 9, 1996, J.O. 5724, and the Conseil d'État, July 29, 1998, Rec. Lebon 188715, Syndicat des avocats de France. This right is also established in the European Convention of Human Rights. See Eur. Consult., *Eur. Convention on Human Rights*, Art. 13, 15 (June 1, 2010); see also Kudla c. Pologne, 2000-XI Eur. Ct. H.R. 35 (2000); Ihlanc c. Turquie, 2000-VII Eur. Ct. H.R. 25 (2000).

107. Administrative actions face two kinds of challenges (*recours*): those based on a claim

to assure a well-functioning public sector.

Judicial review has become progressively less deferential (under the standard of *contrôle normal*), and some authors talk about the decline, or the death, of the deferential standard of review (*contrôle restreint*).<sup>108</sup> Furthermore, occasionally the courts apply stringent review where they balance the advantages and disadvantages of a given decision in order to assess its legality, the so-called *contrôle du bilan*<sup>109</sup> that some authors call “maximum review.”<sup>110</sup> In some cases, such as the review of administrative sanctions, the European Court of Human Rights (ECHR) imposes a non-deferential standard, but the Conseil d’État has recently extended this approach even in the absence of legislation.<sup>111</sup> Thus, France’s background norm of stringent review appears to be developing toward even more aggressive oversight.

## 2. Review in the Modern Regulatory State

The system, however, is not well-adapted to the review of the actions of

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of “objective” illegality (*recours objectifs*) and those based on a claim of violation of individual or collective right (*recours subjectifs*). The *recours objectifs* promote the general interest in legality, and they are subject to very lenient rules of admission. The most important *recours objectif* is the action for abuse of power (*recours pour excès de pouvoir*).

108. See, e.g., DIDIER TRUCHET, DROIT ADMINISTRATIF 216–17 (3d ed. 2010).

109. See Conseil d’État (CE), May 28, 1971, Requête n. 78825.

110. See CE Sect., Feb. 15, 1961, Rec. Lebon 121; Conseil d’État (CE) Feb. 3, 1975, Requête n. 94108; Conseil d’État (CE), Nov. 2, 1973, Requête n. 82590; Conseil d’État (CE), Feb. 6, 2004, Requête n. 255111; CE Sect., Mar. 10, 2006, Requête n. 264098. There is a controversy in French legal literature regarding the number of standards of review. Most find two standards: the restricted review (*contrôle restreint*) and the regular review (*contrôle normal*). Some authors claim that in some cases the administrative judges apply a third, more intrusive standard, which they call maximum review (*contrôle maximum*). Restricted review applies to situations where the administration has discretionary powers. The judge will only annul the decision where there is a “manifest error of appraisal” (*erreur manifeste d’appréciation*).

111. See Conseil d’État (CE), Feb. 16, 2009, Requête n. 274000; Pudas v. Suede, A125-A Eur. Ct. H.R. 83, 94 (1987); CE Sect., June 9, 1978, Requête n. 05911; CE Sect., June 27, 2007, Requête n. 300143. The Conseil d’État ruled that in the case of fines imposed by the administration, judicial review is unlimited, even in the absence of a specific legislative provision. Conseil d’État (CE) Feb. 16, 2009, Requête n. 274000. This holding might be the result of pressure from the European Court of Human Rights that had already decided administrative sanctions can only be imposed when unlimited judicial review is available. Pudas v. Suede, A125-A Eur. Ct. H.R. 83, 94 (1987). The review of administrative sanctions is evolving towards more intense review. From the 1970s, courts started to subject the amount of the sanction to the standard of “manifest error of appraisal.” CE Sect., June 9, 1978, Requête n. 05911, Lebon. Currently, they do not hesitate to assess the proportionality of the sanction and to reform it. Conseil d’État (CE), June 27, 2007, Requête n. 300143.



the modern regulatory welfare state. Independent regulatory agencies fit awkwardly into the French legal structure, as does any type of expert-based regulation, such as the general rules governing air and water pollution. The French courts have not created any new concepts in their review of technical, complex decisions taken by regulatory agencies and ministries. They apply the same concepts that they developed in the review of non-specialized administrative actions.<sup>112</sup> Theoretically, French administrative courts apply a deferential standard of review to highly technical<sup>113</sup> or politically sensitive cases.<sup>114</sup> In practice, however, they are clearly less prone to find such instances when compared to their Canadian and American counterparts.

A good example of this tendency to overlook technical complexities is the case law on mergers.<sup>115</sup> The Conseil d'État has always applied "regular review" (*contrôle normal*) when considering the relevant decisions taken by the French Minister, or since a recent reform, by the antitrust agency. It carried out a regular review of technical assessments as well as factfinding. As a consequence, no margin of appreciation is left to administrative authorities. The Conseil d'État has reviewed for correctness the identification of the relevant market and the evaluation of anticompetitive

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112. See Didier Théophile & Hugues Parmentier, *L'étendue du Contrôle Juridictionnel dans le Contentieux du Contrôle des Concentrations en Droit Interne et Communautaire*, 2006 CONCURRENCES: REVUE DES DROITS DE LA CONCURRENCE 39, 41 (2006) (noting that French law does not have the concept of "complex economic assessments," that leads to deferential review under European law—and, until recently, under Italian law. Occasionally, the *rapporteurs publics* do refer to some inadequacies in the tools of judicial review to address regulatory problems. See, e.g., CE Sect., Apr. 27, 2009, Requête n. 312741.

113. See, e.g., CE Ass., Apr. 27, 1951, Rec. Lebon 236 (applying restricted review on whether a hair lotion was poisonous); Conseil d'État (CE) Oct. 14, 1960, Rec. Lebon 529, Syndicat Agricole de Lalande-de-Pomerol (applying restricted review to determine whether a wine was worthy of an appellation contrôlée). More recently, some telecommunication regulation cases have also received restricted review due to their complexity. See, e.g., Conseil d'État (CE) July 10, 2006, Requête n. 274455 (applying restricted review to determine the distribution of the costs of the universalization of the service); CE, Dec. 5, 2005, Requête n. 277441, 277443–277445 (applying restricted review to the establishment of a price floor regulation to dominant companies).

114. Two examples are the review of the so-called *mesure de haute police*. See Conseil d'État (CE) July 25, 1985, Requête n. 68151; Conseil d'État (CE), Feb. 3, 1975, Requête n. 94108. These cases dealt with measures against foreigners on French soil and refusals to apply an administrative sanction due to the principle of prosecutorial discretion (*opportunité des poursuites*). See Conseil d'État (CE), Dec. 30, 2002, Requête n. 216358; Conseil d'État (CE), July 28, 2000, Requête n. 199773.

115. Technically complex decisions reviewed for correctness are also common outside the realm of antitrust. In the regulation of telecommunications, see, e.g., Conseil d'État (CE) May 19, 2008, Requête n. 311197 and Conseil d'État (CE) Dec. 29, 2006, Requête n. 288251.

effects,<sup>116</sup> assessed the very existence of a merger,<sup>117</sup> and established the criteria under which making an “exception for a failing firm” could be accepted.<sup>118</sup> In the opinion that inaugurated this approach, the *rapporteur public* Jacques-Henri Stahl argued that the relevant market is an “objective notion that is imposed upon economic actors and the antitrust authority, which has no leeway to choose one market over another.”<sup>119</sup> The notion of a relevant market may very well be objective, but the definition of which market is relevant for a given merger operation is often a highly technical and debatable issue that administrative institutions are usually better placed to address.

Likewise, the political component of many regulatory decisions is not officially recognized in court. This is particularly clear in the domain of statutory construction. Canadian and American courts defer systematically to agencies’ interpretation of ambiguous terms in legislation. French courts, however, usually claim legitimacy to interpret these ambiguous terms.<sup>120</sup> They view such concepts as “legal” because they are in the statutory text; therefore, the courts can interpret them. French courts define the realm of law broadly, allowing for far-reaching review. Thus, in cases where Canadian and American courts would acknowledge that agencies are engaged in policymaking and should be left alone, French courts tend to view agencies as making legal decisions that are therefore reviewable.

Indeed, French courts only vary the intensity of review in instances of legal classification of facts (*qualification juridique des faits*). Claims of direct violation of law (generally understood rules or unwritten principles) or wrongful constructions of statutes<sup>121</sup> always give rise to a review for correctness. To illustrate the different approaches in France and Canada, compare the Conseil d’État opinion in *GSD Gestion*<sup>122</sup> with the Canadian Supreme Court opinion in *Pezim*.<sup>123</sup> The cases concern the interpretation by the financial market regulator of similar statutory provisions. In

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116. See Conseil d’État (CE), Oct. 6 2000, Requête n. 216645; CE Sect., Apr. 9, 1999, Requête n. 201853.

117. See CE Sect., May 31, 2000, Requête n. 213161.

118. See CE Sect., Feb. 6, 2004, Requête n. 249267.

119. See CE Sect., Apr. 9 1999, Requête n. 201853.

120. See Conseil d’État (CE), June 7, 1999, Requête n. 193438 (broadcasting authority’s domain); Conseil d’État (CE), May 18, 1998, Requête n. 182244 (same); Conseil d’État (CE), July 30, 1997, Requête n. 153402 (same).

121. The “wrong construction of statutes” is one of the instances of error of law (*erreur de droit*) alongside decisions grounded on an invalid or revoked law.

122. See Conseil d’État (CE) Feb. 4, 2005, Requête n. 269001.

123. See *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (Can.).

Canada, the statute required companies to disclose any “material change” in their business or operations.<sup>124</sup> In France, a similar obligation existed in the case of “changes in the characteristic elements” that had been previously reported to the regulator. In both cases, the courts upheld the decisions of the administrative authorities to levy fines on operators deemed to have violated this obligation.<sup>125</sup> However, the Canadian Supreme Court did so by applying a deferential standard of review and by affirming that the interpretation of the expression “material change” in the relevant legislation required specific knowledge of financial markets.<sup>126</sup> The Conseil d’État and its *rapporteur public* made no such finding. Subjecting the decision of the administrative authority to non-deferential review, it interpreted the statute directly, finding that the agency did not commit an error of law or of appreciation when it found that “changes in the characteristic elements” of the company had occurred.

In general, French jurists are comparatively less likely to accept claims that administrative authorities are best suited to deal with technical issues. Although such claims do occasionally appear in some opinions of the *rapporteurs publics*,<sup>127</sup> they are much rarer than in Canadian and American case law. As a consequence, both democratic legitimacy and deference to expertise play a comparatively less pronounced role in French judicial review of administrative action. Under the influence of the European Union (EU) and ECHR, rights have risen in importance,<sup>128</sup> but there is little straightforward confrontation with democratic values or technical competence as grounds for either review or deference.

Part of the reason for this difference is the relative paucity of cases dealing with the validity of rules as opposed to adjudications in individual cases. Nevertheless, such cases do exist. For example, one case required the state to act under an EU directive. It held that silence or inaction by the minister could be an abuse of power just as much as action.<sup>129</sup> A second case involved a quite aggressive review of a substantive rule that set

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124. *See id.* at 575.

125. Conseil d’État (CE), Feb. 4, 2005, Requête n. 269001. In both the French and Canadian cases, the relevant statutes brought further precision and examples of what could constitute a “material change” or “changes on the characteristic elements.”

126. *See* Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557, 588 (Can.).

127. *See, e.g.*, Conseil d’État (CE), Apr. 27, 2009, Requête n. 312741; CE Sect., Feb. 25, 2005, Requête n. 247866.

128. *See generally* MITCHEL DE S.-O.-L’E. LASSER, JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE (2009) (elaborating on the situation in France).

129. *See* CE Ass., Feb. 3, 1989, Requête n. 74052.

doctors' fees.<sup>130</sup> The case turned on an interpretation of the principle of equality.<sup>131</sup> The decision takes on the substantive merit of a policy in a fairly functional way even if the ground is the familiar one of abuse of power.

For one class of statutes, however, the legislature has reacted to the administrative courts' lack of economic expertise simply by denying them jurisdiction. Some disputes over antitrust and financial regulation are heard in the civil courts.<sup>132</sup> The law gives first instance jurisdiction to the Court of Appeals of Paris—a court with expertise in business law.<sup>133</sup> The civil courts have provided non-deferential review in cases concerning anticompetitive behavior.<sup>134</sup>

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130. See CE Ass., July 16, 2007, Requête n. 293229; see also J. Boucher & B. Bourgeois-Machureau, *Redéfinition des règles de calcul des redevances pour service rendu*, 35 ACTUALITE JURIDIQUE DROIT ADMINISTRATIF 1439, 1807 (2007); L'HEDONISME AU CONSEIL D'ÉTAT, RICHER & ASSOCIES, <http://www.cabinet-richer.com/articles/hedonisme-conseil-etat.htm> (last visited Feb. 2, 2014). The Conseil d'État reviewed a decree that set the fees charged to private doctors for the use of public hospitals. The decision examined the substance of the decree and held that the government could take account of the economic benefit to the doctors of using these facilities, as well as the hospital's cost of production. Commentators point to the case as an example of the Conseil d'État's willingness to engage in economic reasoning. However, the case looks more like a controversy over the division of the rents or excess profits of certain medical specialties, such as plastic surgery.

131. French judges work with a number of "general principles of the law" to resolve cases. Besides equality, other general principles of the law deal with liberty (e.g., freedom of trade), security (e.g., right to judicial review, right to administrative appeal, natural justice, bias, non-retroactivity, the obligation to revoke an illegal act, the right to live a normal life), respect for the dead (e.g., for doctor's ethical obligations), the continuity of public services, etc. See LASSER, *supra* note 127; see also Susan Rose-Ackerman & Thomas Perroud, *Policymaking and Public Law in France: Public Participation, Agency Independence, and Impact Assessment*, 19 COLUM. J. EUR. L. 225, 228 (2013).

132. See, e.g., Conseil constitutionnel [CC] [Constitutional Court] decision No. 86-224DC, Jan. 23, 1987, J.O. 924 (Fr.). The general rule is that the review of the decisions of the independent administrative agencies rests with the administrative jurisdiction, but the rule may be derogated by law "in the interest of good administration of justice."

133. The review of civil courts is always intense under French law because such courts are the "guardians of fundamental liberties." See CODE CIVIL [C. CIV.] art. 561 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] com., Jan. 31, 2006, Bull. civ. IV, No. 134 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] com., June 29, 2007, Bull. civ. IV, No. 1020 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] com., Sept. 26, 2006, Bull. civ. IV, No. 8 (Fr.).

134. The decision in the *Sandoz* case illustrated such intense review. The Competition Council had imposed fines on Sandoz for abuse of its dominant position. The Cour d'appel provided a thorough review of Competition Council's ruling. See Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Mar. 30, 2004, BOCCRF 2004, (Fr.); see also Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Dec. 20, 2005, RG 2006, 01498, (Fr.). However, even in those areas, although the civil courts review individual cases, review of secondary legislation remains at the Conseil d'État, which also reviews draft rules in its

The French administrative courts engage in stringent review of adjudication inside the executive and the agencies, but this review does not reflect a nuanced view of the nature of expert policymaking under delegated authority. It is generally embedded in a traditional framework that fails to acknowledge the political nature of these policy decisions. Either there is no law to apply—so certain administrative actions are entirely devoid of review—or the courts hold that the action falls into a conventional category and can be reviewed like any other case.

If review does occur, the Conseil d'État's impact on government and agency policymaking is problematic for several reasons. First, the Conseil d'État's decisions have traditionally been very concise. Conclusions are often left unexplained beyond references to legal texts. Courts make crucial decisions concerning the regulation of important areas like telecommunications or energy in a few short paragraphs.<sup>135</sup>

Second, in most cases the Conseil d'État does not discuss opposing arguments or explain why its reasons are better than the contrary reasons. The lack of dissent compounds this problem along with the secrecy of the deliberations. Third, if the Conseil d'État characterizes an issue as merely a legal question, this tends to hide the fact that there is room for alternative interpretations. If the legislation is ambiguous, the courts tend to choose an option and claim that it is the only legally possible solution. Political choices are presented as legal impositions. Fourth, open-ended “legal” concepts like “proportionality” and “general interest” empower courts to make their own balance of interests when they decide cases that are essentially political in nature.

However, there is a basic limitation to the claim that the French courts provide overly aggressive review of executive and agency policymaking. In spite of permissive standing and jurisdiction doctrines, much government policymaking is made through decrees and ordinances and is seldom subject to judicial review. In such cases, the only review the Conseil d'État provides is *ex ante* in its advisory capacity. It reviews draft secondary legislation from both executive departments and independent agencies before the documents are issued. Although the review could be wide-ranging, in practice, it appears to focus on the rule's legal basis. These

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advisory capacity.

135. This problem is partially mitigated by the reasons given by the *rapporteur public*, a member of the Conseil d'État who proposes a solution to the case. The *rapporteur public*'s reasons are often longer and more developed than those in the actual decision. However, the reasons given by the *rapporteur public* are not necessarily the reasons of the Conseil d'État itself. The Conseil d'État does occasionally issue long opinions, but this does not yet seem to be a trend. See, e.g., Conseil d'État (CE), Dec. 21, 2012, Requête n. 353856; Conseil d'État (CE), Dec. 21, 2012, Requête n. 362347, 363542, 363703 (jointly issued).

reports, unlike the Conseil d'État's judicial decisions, are not made public unless the government wants to release them. Thus, one can only examine a biased sample. However, available examples are sufficient to conclude that they are similar to Conseil d'État judicial opinions. Subsequently, decrees and ordinances do sometimes come to court in a lawsuit, but most of them are not given in-depth review. Given the current state of French public law, this seems adequate, but it is a second-best solution that eliminates the possibility of review that examines the policymaking process.<sup>136</sup>

### F. Conclusions

Even though French and Italian courts now apply a similarly stringent standard of review to the cases they decide, their routes to this result were very different. In France, there was no "period of deference," and strong review has been consistently applied since the inception of the decentralized regulatory state. Conversely, in Italy, courts in two different periods gave deferential review to decisions that involved technical assessments only to settle recently on stringent review. Whereas the French Conseil d'État has virtually ignored the difficulties of reviewing the decisions of specialized regulatory institutions, Italian courts first acknowledged these difficulties and then ignored them without explaining their change of position. The end result is the same: a situation in which the administrative courts have done little to accommodate public law doctrines to the realities of the modern regulatory state. This does not mean that the French and Italian approaches to judicial review are problematic overall. However, they privilege the protection of legality to the detriment of other goals, such as administrative efficiency, technical competence, and political accountability.

The more stringent review applied by both France and Italy might be due to the fact that both countries have a separate administrative system of tribunals. That institutional feature reduces one of the concerns about generalist courts carrying out intrusive scrutiny of administrative decisions in ways that could violate the separation of powers. Our claim, however, is that the institutional capabilities of the French and Italian administrative courts are no stronger than those of the ordinary courts in Canada and the United States. All are poorly adapted to address technically complex or politically sensitive issues.

If one accepts this claim, then the Canadian courts seem to have done

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136. For a more complete discussion of these issues, see Rose-Ackerman & Perroud, *supra* note 130.

the best at both acknowledging the reality of modern executive policymaking and finding a limited role for judicial review. If the nature of the issue and the institutional features of the agency suggest that it is better placed to make the challenged decision, Canadian courts will limit themselves to reasonableness review. Judicial review of substance in the United States, on one side, and in Italy and France, on the other, is more problematic. Review in the United States acknowledges the need to defer to agency expertise, but because courts often review generic rules before they are enforced, they tend to look quite carefully at the consistency between agency rules and statutes, even when the judges have little expertise. Sometimes, as in the review of health, safety, and financial standards, they review technical decision as if they had knowledge that they, in fact, lack. In France and Italy, review of rules and regulations is less common, but this means that major policy initiatives are not reviewed at all while individual decisions of less overall importance obtain very stringent oversight.

## II. PROCEDURAL SAFEGUARDS

Aggressive judicial review of the substance of regulatory policy can lead to undemocratic and technically flawed results. However, that does not imply that courts should simply decline to rule on challenges to regulatory actions. Instead, they can concentrate on the process and check to be sure that policy is made in an accountable, transparent, and responsive manner that draws on necessary expertise.

Procedural requirements can balance the three types of legitimacy that we outlined above: democratic legitimacy, competence, and the protection of rights. Through their enforcement, courts can give sufficient leeway to the technical and political choices of government bodies and at the same time assure that the decisions are both transparent and well-informed. Of course, courts will not be able to evaluate the administrative process without some knowledge of the substance and of the political interests and technical knowledge at stake. Nevertheless, checking process and assessing policy are not equivalent.

In our case studies, the publication of administrative rules and decrees is taken for granted. Outside of certain national security areas, these advanced democracies publish all officially promulgated rules. Over and above such basic transparency, the important issues concern the accountability and competence of policymaking in the executive and the agencies. In this section we examine how our four jurisdictions deal with two centrally important procedural guarantees: (i) the duty to give reasons and the (ii) right to be heard or to participate.

First, the duty to give reasons arises from fundamental rule of law

principle under which the state should not enforce the law against persons without explaining why they must bear the relevant cost.<sup>137</sup> This requirement is part of the general principle that public officials, as well as private citizens, are subject to the law and hence must justify their exercises of power over others. In administrative law, this principle is most strongly institutionalized when a public agency has adjudicatory responsibilities that are analogous to the activities of courts. Either the state determines that an individual has violated a law, or it justifies a cost imposed on an individual by demonstrating that the cost is legally permitted or is balanced by a public benefit. The agency operates under an existing statute or piece of secondary legislation, and it explains to the citizens—and to any court that later reviews the action—how its actions are consistent both with the legal text and with individual rights.

In addition to the protection of individual rights, compliance with the duty to give reasons also serves broader goals of transparency and political legitimacy. The obligation to explain decisions is a corollary of the public administration's policymaking activities. If an agency makes substantive choices that affect the use of public resources and the behavior of regulated entities, citizens should have access to the reasons for those choices. If the government presents clear and comprehensive reasons for its actions, citizens will be more aware of the importance of choices, even if the decisions involve complex, technical matters. Furthermore, if citizens can access the courts, the agency's stated reasons will help non-expert judges understand what is at stake.<sup>138</sup>

Second, in adjudication, the right of participation usually translates into a right to be heard, which is linked to the protection of individual rights. Participation in rulemaking processes has a broader justification. It is a source of democratic legitimacy that allows citizens to influence the adoption of policies that reflect their beliefs and interests. Broad participation rights require administrators to accept input and data from those concerned with agency action. Agencies can lower the cost of outside participation by their own efforts of outreach. Such actions can help mitigate the information asymmetry that arises if the regulated industry dominates the consultation process. In ensuring a better balance, rights of participation can help make administrative decisions both more democratic and better informed—enhancing competence.<sup>139</sup>

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137. See Jeremy Waldron, Essay, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 57–61 (2008) (explaining that this requirement is canonical in discussions of the rule of law).

138. Reason-giving can also provide guidance for non-parties to an adjudication or for those subject to a regulation, and it makes it harder for an agency to act precipitously.

139. The extent to which public participation leads to better regulation is much debated. Some have argued that the uninformed general public can mislead the experts, who should



Three issues are especially relevant. First, to what extent do courts in our four jurisdictions require these two procedural mechanisms in agency decisionmaking? Are they general obligations affecting every administrative action, or are they confined only to some of them? Second, if adjudications make policy, do they require greater procedural protections than adjudications that simply resolve individual cases without affecting overall policy? Third, what is the justification for the enforcement of procedural mechanisms? Are the procedures linked to the goals of democratic legitimacy and competence, or are they understood only as legal tools to ensure the protection of individual rights?

We begin with the two cases where procedural guarantees are taken particularly seriously. In the United States, procedural requirements are integral to rulemaking through the process of notice-and-comment. Reason-giving and participation rights are routes to democratic legitimacy, and not just legal tools to protect the individual against state overreaching. In the last two decades, Italy has increased the rights of participation in rulemaking processes and has established a duty to give reasons that is relatively widespread, but that duty does not reach rulemaking, except in the case of the independent agencies.

We then contrast these two cases where process is important with the two other jurisdictions in which these guarantees are less powerful. In the absence of general rules of procedure, Canadian courts distinguish between adjudication and rulemaking. They review process more carefully in the former than in the latter. In France the courts have been reluctant to adopt a general duty to give reasons, adopting the requirement only in a certain number of decisions, mostly connected to the restriction of rights. However, the French Conseil Constitutionnel has begun to enforce participation rights in the area of environmental law under the Charter for the Environment, which is appended to the French Constitution. Some statutes are beginning to increase participation in French policymaking, but these initiatives are relatively new or are limited to particular areas of government activity.

#### A. *United States*

In the United States, both participation rights and the duty to give reasons are central to the notice-and-comment provisions of the APA.<sup>140</sup>

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therefore be “isolated” in their process of decisionmaking. *See generally* CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005). For a critique of the antidemocratic nature of this argument, see Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1108 (2006) (book review).

140. APA, Pub. L. No. 79-404, §§ 4(a)–(b), 60 Stat. 237, 238–39 (codified as amended at

The focus is on political legitimacy and competence, not the protection of individual rights. The provisions apply to rules made under delegated authority in federal statutes.<sup>141</sup> A typical rulemaking process includes both the interpretation of statutory terms and policymaking choices derived from the statutory text. Sometimes the line between these categories is quite blurry. Participation is open-ended in notice-and-comment procedures while in adjudications it can be limited to those with an individual stake in the outcome. The procedural requirements for both rulemaking and adjudication are subject to judicial review. They are not just recommendations for good governance.

### 1. *Participation in Rulemaking*

If an agency engages in notice-and-comment rulemaking, it must organize the process so that it is open to public input.<sup>142</sup> This aspect of the statute has become so routinized that it seldom generates lawsuits so long as the agency issued its rule using notice-and-comment. However, certain substantive policy choices are exempt from the notice-and-comment process,<sup>143</sup> and agencies can make policy choices outside that process by issuing interpretive rules and policy statements.<sup>144</sup> Some agencies that are legally exempt from notice-and-comment rulemaking requirements, nevertheless, use them to enhance their public legitimacy. For example, the Department of Housing and Urban Development issued its own regulations that require the Department to use notice-and-comment rulemaking.<sup>145</sup> Outside of such voluntary actions, controversies arise over the range of choices that require notice-and-comment and over the legal status of agency actions that are exempt.<sup>146</sup> These challenges, however, concentrate on the overall scope of the law and do not isolate public participation from other requirements. Agencies do not limit the range of people and organizations that can submit comments.

Comment periods are usually several months in length and are routinely

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5 U.S.C. § 553(b)–(c) (2012).

141. The provision includes numerous important exceptions, most notably for benefit programs. In some cases more formal, court-like procedures apply under §§ 556 and 557, but these are seldom used unless explicitly required by statute. See 5 U.S.C. §§ 556–57 (2012).

142. *Id.* at § 553(b)–(c).

143. See § 553(a) (exempting military or foreign affairs, agency management or personnel, and loans, grants, benefits, and contracts).

144. See § 553(b)(3)(A)–(B).

145. 24 C.F.R. § 10.1 (2013).

146. On the exceptions, see *Am. Hosp. Ass'n. v. Bowen*, 834 F.2d 1037, 1041 (D.C. Cir. 1987), and *Cnty. Nutrition v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987).

extended if outsiders request an extension. Agencies do not want to risk a court challenge claiming that they did not consult sufficiently. The number of comments received is sometimes very large, but many rulemaking dockets generate little interest. A Forest Service rulemaking docket generated more than one million comments, although many were form letters.<sup>147</sup> In contrast, a study of eleven rulemaking dockets found that the number of comments ranged from 1 to 268;<sup>148</sup> another study of forty-two dockets found that the average number of comments was thirty.<sup>149</sup>

## 2. *Review of Policymaking Processes*

The courts enforce the reason-giving requirement included in the notice-and-comment provisions of the APA and can strike down an agency action that is “arbitrary and capricious.”<sup>150</sup> This is a deferential substantive standard, but courts have often applied it in a way that concentrates on the rulemaking process, turning it into a procedural safeguard. The APA also instructs the courts to “hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law.”<sup>151</sup> Thus a court can void an agency action that is procedurally flawed even if it seems substantively reasonable. In practice, however, procedural failures are often connected with substantive inadequacies. For example, the Supreme Court has voided decisions that were not accompanied by logical reasoning, including agencies’ failures to elaborate when and how it relies on predictive judgments or uses broad models or tests.<sup>152</sup> It has disallowed decisions that did not take into consideration an important aspect of the problem, such as the costs of a given public policy or factual circumstances that were crucial to the decision.<sup>153</sup> Failure to evaluate important policy alternatives led the Court to vacate and remand a deregulatory policy in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance*

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147. See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before A New President Arrives*, 78 N.Y.U. L. REV. 557, 623 (2003).

148. Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. & THEORY 245, 252 (1998).

149. William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 71 (2004). For a review of the empirical literature on participation in U.S. rulemaking, see ROSE-ACKERMAN, *supra* note 1 at 219–27.

150. 5 U.S.C. § 706(2)(A) (2012).

151. *Id.* at § 706(2)(D).

152. See *Motor Vehicle Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29 (1983).

153. See *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 662 (1980).

*Co.*<sup>154</sup> In the review of rules, the federal courts have imposed a broad obligation on agencies to consider alternatives that are significant or important.<sup>155</sup>

The duty to give reasons for both rules and adjudications is reinforced in the United States by the so-called *Chenery* doctrine, under which “the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”<sup>156</sup> The courts will not reach out and articulate their own reasons. That case, which predated the APA, involved the reorganization of a public utility holding company, not a generic rulemaking. However, the Supreme Court continues to follow this doctrine even for rules and adjudications that are not made using formal on-the-record procedures. The case does not impose court-like procedures; it only requires coherent reasons. Thus, even though the case itself dealt with a narrow agency decision, it operates to enhance policymaking accountability through limited judicial review.<sup>157</sup> If the federal courts find the reasons inadequate, they remand the decision to the agency to produce a new rule accompanied by a better informed and reasoned document.<sup>158</sup> The courts will not take on the task of reason-giving themselves.<sup>159</sup> Thus, even if review is nominally substantive, the effect of such decisions is to push the agency to use procedures that produce outcomes that are more capable of justification.

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154. 463 U.S. 29, 57 (1983).

155. The classic case dealing with so-called “hard look” review is *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 37–38 (D.C. Cir. 1976) (en banc). The case for such review is presented in Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 523–24 (1974). His opinion in *Ethyl* and that of Judge David Bazelon have framed the debate with Judge Bazelon, arguing that judges should not get involved in a review of technical details. Efforts by the D.C. Circuit to impose additional procedural requirements on agencies were halted after *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 548 (1978).

156. *Sec. & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

157. *Chenery*, 318 U.S. at 88. The Supreme Court argues that it would violate the separation of powers for it to substitute its own policy reasoning for that of the agency.

158. The courts do not impose a similar standard on statutes. They are subject only to a minimal rational basis standard. For a discussion of these contrasting approaches and a comparison with German, South African, and EU jurisprudence, see SUSAN ROSE-ACKERMAN, STEFANIE EGIDY, & JAMES FOWKES, “DUE PROCESS OF LAWMAKING”: THE UNITED STATES, SOUTH AFRICA, GERMANY, AND THE EUROPEAN UNION (forthcoming 2014).

159. This negative stance can sometimes be quite intrusive. The courts often remand to the agency with a fairly clear message about what future agency actions will be acceptable. For example, in *EME Homer City Generation, L.P. v. Environmental Protection Agency*, 696 F. 3d 7, 37 (D.C. Cir. 2012), the Court of Appeals remanded to the Environmental Protection Agency (EPA) with a very explicit statement about how the EPA could satisfy the court’s interpretation of the Clean Air Act.

### 3. *Review of Agencies' Statutory Construction*

Reason-giving is also relevant to judicial review of agencies' statutory constructions under step two of *Chevron*. In *Chevron*, the Court affirmed that the EPA had "advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives" of the Clean Air Act and that "its reasoning is supported by the public record developed in the rulemaking process, as well as by certain private studies."<sup>160</sup> The reasoning approximates the arbitrary and capricious standard, but applied to statutory interpretation rather than policymaking under a clear legal mandate.<sup>161</sup> Once again this standard appears to be a substantive judgment, but as it has developed, it has taken on a procedural character.

The Court does not always defer as fully as it did under *Chevron*. Rather, it may use a weaker standard, articulated in *Skidmore* and *Mead*, where it accepts an agency's statutory interpretation if it is persuaded by the "validity of its reasoning."<sup>162</sup> In *Christensen v. Harris County*, the Supreme Court stated that the interpretations of the agency "are 'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'"<sup>163</sup> Although, on its face, this looks like a less deferential substantive standard, a procedural aspect is embedded in the post-*Chevron* cases. There are two aspects to these decisions. In *Mead*, the Supreme Court quoted the language of *Skidmore* that highlighted the "thoroughness evident in its consideration."<sup>164</sup> The more attentive and careful the agency's analysis, the more probable it is that it will be entitled to deference. Second, if Congress has mandated notice-and-comment rulemaking, the Court will read the statutory text as signaling intent to delegate policy choices to the agency. Hence, in *Chevron*, the Court's deference arose in part, from the agency's use of notice-and-comment rulemaking, a process not used to determine the tariff classification at issue in *Mead*. Although the opinion in *Chevron* does not explicitly refer to EPA procedures, they form the background of the agency's rule. *Mead* makes this background condition clear. Congress's intent to delegate is inferred from the process required. The authority to interpret the law could be delegated by requiring notice-and-comment rulemaking, adjudication, or

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160. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984).

161. *See, e.g.*, *Nat'l Cable & Telecoms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980–81 (2005); *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996).

162. *Mead Corp.*, 533 U.S. at 219; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

163. 529 U.S. 576, 587 (2000).

164. *See Mead Corp.*, 533 U.S. at 228 (citing *Skidmore*, 323 U.S. at 140 (1944)); *see also Reno v. Koray*, 515 U.S. 50, 61 (1995).

“some other indication of comparable congressional intent.”<sup>165</sup> If the agency engages in a process that requires notice, hearings, and reason-giving, then the courts will be more likely to accept the agency’s interpretation of its mandate. The reasons articulated by the agency do not need to persuade the court that it has selected the most accurate reading of the law. The interpretation just needs to be reasonable. Substance and process intertwine in a way that is consistent with our own views of the proper role of the courts—deferential review of the substance of policy and of the interpretation of the statute so long as the agency has carried out a process that invites broad participation, canvasses the relevant technical material, and ends up with a reasoned policy judgment.<sup>166</sup>

#### 4. *What Are Reasons For?*

Although reason-giving in the U.S. is clearly bound up with democracy and expertise, it is also often invoked as a way for the courts to be sure that agency action is consistent with congressional will. Two conflicting notions of democratic accountability are in play. Under the first, the courts check to be sure that the executive is carrying out the congressional will. Reasons help the courts determine if agencies are overreaching their legislative mandates. The second emphasizes the need for agencies to be accountable to the public directly, not just through the mediation of the legislative process and the voting booth. Both of these values exist in American administrative law, but sometimes one and sometimes the other come to the fore. The second model, however, is the one of most interest to us; it provides a way for courts to help enhance the operation of the executive—not just as a reflection of legislative will, but also as a legitimate policymaker in its own right.<sup>167</sup>

For an example of the first notion of democratic accountability consider *Federal Communications Commission v. Fox Television Stations, Inc.*<sup>168</sup> Both the majority opinion by Justice Scalia and the dissent focus on the reasons given by the Federal Communications Commission (FCC) for changing its policy on “fleeting expletives” toward more stringent enforcement of their occurrence in the broadcast media. The majority opinion is only

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165. *Mead Corp.*, 533 U.S. at 227.

166. Notice, however, that such notice-and-comment procedures are sufficient but not necessary under *Mead*. The Court leaves vague what the “other indications” might be, and this lack of clarity provoked a sharp dissent from Justice Scalia. See *Mead Corp.*, 533 U.S. at 239 (Scalia, J., dissenting).

167. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 94 (1985).

168. 556 U.S. 502 (2009).

concerned with whether the agency has “good reasons” for the new policy. The views of the public on the adequacy of the reasons are not relevant.<sup>169</sup> Even the dissent by Justice Breyer focuses on the way reason-giving permits the Court to review the agency’s action. He does, however, stress that the agency should go through a process of learning “through reasoned argument” that would have been provided by the notice-and-comment provisions of the APA.<sup>170</sup> That process, of course, might require open-ended hearings to get public input and reason-giving designed for both the court and the public. According to Justice Scalia, democratic accountability here means consistency with the will of Congress.<sup>171</sup> The Court says that it cannot check for consistency with the statute unless the FCC provides it with a better statement of reasons. The remedy is remand to the agency to provide reasons that could satisfy the courts.

Cases that remand an agency decision because of the failure to give adequate notice or to hold hearings fall into the second category, stressing public accountability. A rule may also be sent back to the agency if the reasons reflect inadequate responses to public comments. An internal guideline can be challenged when applied in a particular case. The only way to avoid that possibility is to promulgate a rule through a public notice-and-comment process.<sup>172</sup>

If an agency acts too precipitously and provides poor justifications for its actions, it may have to revisit a policy choice. For example, in *Motor Vehicle Manufacturers’ Association v. State Farm Mutual Automobile Insurance Co.* the Supreme Court held that the speedy repeal of the passive restraint rule for motor vehicles was arbitrary and capricious.<sup>173</sup> An agency may change its view of the public interest, and this change can be related to a change in the party and policy priorities of the President. However, the new administration must provide reasons for the change beyond a simple appeal to political shifts. Repeal of a rule requires the same notice-and-comment

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169. *Fed. Commc’ns Comm’n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (the agency “need not demonstrate to the court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices . . . that the agency *believes* [the new policy] to be better”). *See also* *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (finding that the agency had not stated adequate reasons for changing its policy). The justices do not refer to a need for accountability to the general public or for transparency; rather, reason-giving permits the courts to “complete the task of judicial review.” *Wichita Bd. of Trade*, 412 U.S. at 805–06.

170. *Fox Television Stations*, 556 U.S. at 548 (Breyer, J., dissenting).

171. *Id.* at 524–25 (Scalia, J). This portion of the opinion was not joined by Justice Kennedy, so it only expresses the view of four justices.

172. *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988).

173. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46 (1983).

process as promulgation and faces the same standards of review.<sup>174</sup> Although the *State Farm* decision concentrates on substantive failures, the argument has a procedural base. The agency held hearings and accepted comments, but it then rushed through the change and did not carefully consider the alternatives. Even the non-expert Court was able to critique the agency's lack of care. It did not order a specific result, but it voided the recession and remanded to the agency.

Hence, in the United States, the duty to give reasons when promulgating legally binding rules is deeply bound up with the democratic acceptability of policymaking in the executive. The courts distinguish between the justifications needed for policy made under delegated authority and for legislative enactments. As the Court stated in a footnote in *State Farm*:

The Department of Transportation suggests that the arbitrary[ ]and[ ]capricious standard requires no more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause. We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.<sup>175</sup>

##### 5. *Adjudication and Policymaking*

Democratic accountability is much more difficult to achieve for policies made through adjudications than through rulemaking. Policy can be made by means of incremental case-by-case adjudications. However, even if the courts require agencies to justify individual decisions, the courts may be unable to track and review policy changes that occur gradually over time through the accumulation of individual adjudications. Unlike the clear rescission of a rule in *State Farm* or the changed interpretation of a statutory term in *Chevron*, notice-and-comment rulemaking is not an option for policy built up through individual adjudications. This generic problem of case-by-case policymaking might be somewhat countered by requiring or permitting participation in agency adjudications by those concerned about the underlying policy but not directly affected by the individual administrative decision. However, in the United States such individuals and businesses would be unlikely to obtain standing in court after the agency acts; hence, agencies face no legal pressure to consult widely.<sup>176</sup>

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174. *Id.* at 41–42.

175. *Id.* at 43 n.9.

176. The reverse, however, is true. If a plaintiff has standing in court, then it can raise any type of challenge to the agency action, including claims that are not related to reasons it was granted standing. *See* Fed. Comm'ns Comm'n v. Sanders Bros. Radio Station, 309



By acknowledging the broader policy consequences of adjudications, courts could draw attention to the more general aspect of the duty to give reasons: one that is related to ideals of democratic accountability and technical competence. In other words, if the statute contains vague or open-ended language and if policy is de facto made by administrative agency adjudications, then these exercises of agency discretion ought to be open to judicial review. Such review would not just address questions of statutory construction, but it could also consider the democratic legitimacy of agency procedures. An agency could carry out an open and transparent adjudicatory process not just to inform the courts, but also to involve and inform the public.

The contesting justifications for reason-giving, based either on individual rights or on democratic accountability, suggest that there is a lacuna in U.S. administrative law. In the executive, policy can be made through rulemaking procedures or through the build-up of case law. The U.S. EPA operates largely through rulemaking; the Antitrust Division of the Department of Justice uses case-by-case adjudication. If an agency makes policy through rulemaking, it must provide reasons for its policies. In contrast, if it operates through case-by-case adjudications, the agency is legally required to provide reasons only in two cases. First, it must provide notice and “a brief statement of the grounds for denial” when it turns down “a written application, petition, or other request of an interested person.”<sup>177</sup> Second, it must provide reasons under the formal adjudication procedures of the APA that apply to “every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.”<sup>178</sup> If an agency anticipates a court challenge, it would be wise to articulate reasons in all cases. Nevertheless, the reasons need not articulate the broad policy behind individual cases. That policy builds up through a series of cases and enforcement actions. Each case may be justified with a statement of reasons, but the overall policy may never be open to public comment or be justified in a transparent manner. Rather than subjecting its policies to an open notice-and-comment process, the agency may prefer to govern through adjudication.<sup>179</sup> Review of the rulemaking process is central to U.S. administrative law, but policies developed through case-by-case adjudication need not incorporate broad public input and are not subject to review except insofar as they affect individual cases. The focus is on

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U.S. 470, 477 (1940).

177. APA, 5 U.S.C. § 555(e) (2012).

178. *Id.* at § 554(a). The reason-giving requirement is in 5 U.S.C. § 557(c)(3)(A); *see also* *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U. S. 402, 419–20 (1971).

179. *See* JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 253 (1990).

violations of rights and on consistency with statutory purposes, not on accountability to citizens other than those directly affected.

### B. Italy

In Italian law, courts have evolved from a traditional orientation that linked procedural safeguards to the protection of rights (the so-called *funzione garantistica*). They now acknowledge that in some cases these mechanisms can enhance both the democratic accountability and the efficiency of public administration. This trend is clearer and more effective in the review of independent agencies, where courts have held that procedural guarantees compensate for the agencies' lack of legitimacy and help them to produce better regulations.

#### 1. *The Traditional Approach: Procedural Safeguards and Their Funzione Garantistica*

Before 1990, there was no generalized statutory duty to give reasons in Italian law. The 1948 Constitution, Article 111, establishes such a duty only for judicial decisions. However, even in the absence of specific legal provisions, administrative courts began to recognize the need for a statement of reasons in cases that led to a direct violation of individual rights. Administrative decisions could thus be reviewed and annulled for excess of power (*eccesso di potere*) if reasons were insufficient (*insufficienza della motivazione*) or contradictory (*contraddittorietà della motivazione*).

Eventually, the 1990 Italian Administrative Procedure Act codified judicial practice and introduced a duty to give reasons.<sup>180</sup> In a first phase, this procedural guarantee was understood in a rather legalistic way, and courts firmly linked it to the protection of individual rights.<sup>181</sup> According to this approach, the duty to give reasons permits one to interpret government decisions, makes judicial review possible, and protects the rights of the citizens. The idea was referred to as *la funzione garantistica della motivazione*. The general rules for participation give the relevant rights only to those “directly affected” by the administrative action.<sup>182</sup>

The Act explicitly exempts “normative acts and those of general

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180. Legge 7 agosto 1990, n. 241 (It.) [Italian Administrative Procedure Act]. For an English translation, see *The Italian Administrative Procedure Act Law: Law N. 241 dated 7 August 1990*, 2010 ITALIAN J. OF PUB. L. 371, 371–405 (2010).

181. For example, in some decisions the Consiglio di Stato stated that the reasons are given to the persons affected by the act, and not to others or the generality of the population. See Cons. Stato, sez. v, 30 aprile 2002, n. 2290 (It.); see also Cons. Stato, sez. iv, 29 aprile 2002, n. 2281 (It.).

182. See L. n. 241/1990 art. 7, 9 (It.).

application.”<sup>183</sup> The exemption codifies the prior case law based on claims that such acts are “largely discretionary” or “political” in nature. They usually do not cause direct violations of individual rights and hence do not have to be based on reasons that are subject to judicial review. The political nature of general normative acts is taken as a reason to exempt them from the reason-giving obligation.<sup>184</sup>

## 2. *Procedural Rules and the Legitimacy Deficit of Independent Agencies*

In recent years, courts and the legal literature have begun to understand procedural mechanisms in a more nuanced manner. In addition to the *funzione garantistica*, they now stress that both the duty to give reasons and rights of participation enhance administrative accountability and competence.<sup>185</sup> A recent decision of the Constitutional Court acknowledges the constitutional status of the duty to give reasons, linking it not only to the constitutional provision that guarantees the redress for violations of individual rights, but also to the constitutional principle of a “good and impartial administration.”<sup>186</sup>

The trend produced clear results for economic regulation. Specific statutes require reason-giving for the normative and generic acts issued by independent authorities in areas such as energy and gas, telecommunications, and financial regulation.<sup>187</sup> Administrative courts have asserted that the duty to give reasons is widespread for regulatory decisions.<sup>188</sup> The judges argue that the combination of normative powers and independence from the central government makes agency policymaking democratically problematic. Rather than condemn the practice, they instead require that agencies publicly justify their actions.<sup>189</sup>

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183. See L. n. 241/1990 art. 3 (It.).

184. The exemption contrasts with the Treaty on the Functioning of the European Union, art. 296, Dec. 13, 2007 O.J. 1 (C53) (describing broad obligations, but only for EU provisions).

185. See Eduardo Chiti, *La Dimensione Funzionale del Procedimento*, in LE AMMINISTRAZIONI PUBBLICHE TRA CONSERVAZIONE E RIFORME 211 (2008) (referring to the “triple goal” of the intervention of citizens in administrative procedure: participation, cooperation, and defense).

186. Art. 113. Costituzione [Cost.] (It.); see Corte costituzionale [Corte Cost.], 5 novembre 2010, n. 310 (It.).

187. See Legge 28 dicembre 2005, n. 262, art. 23 (financial sector); L. n. 481/1995 (regulation of public utilities). See also Decreto Legge 1 agosto 2003, n. 259 (It.).

188. See, e.g., Cons. Stato, sez. vi, 11 aprile 2006, n. 2007; Cons. Stato, sez. vi, 20 aprile 2006, n. 2201; Cons. Stato, sez. vi, 27 dicembre 2006, n. 7972; Cons. Stato, sez. vi, 2 maggio 2006, n. 2448; Cons. Stato sez. vi, 14 marzo 2006, n. 1409.

189. Monica Cocconi, *La Motivazione Degli Atti Generali Delle Autorità Indipendenti e la Qualità Della Regolazione*, OSSERVATORIO SULL’ANALISI DI IMPATTO DELLA REGOLAZIONE (2011),

Reason-giving is a partial compensation for the so-called deficit of legitimacy that affects independent agencies.<sup>190</sup>

In addition, the agencies provide generous rights of participation,<sup>191</sup> and these rights are enforced by the Courts.<sup>192</sup> Thus, in a 2006 case, the Consiglio di Stato annulled a rule passed by the *Autorità Energia Elettrica e Gas* (AEEG) because it violated procedural guarantees. The administrative court observed that the AEEG did not uphold the participation rights of a company that challenged the rule, and that the AEEG did not take into consideration the comments made by companies during the process that preceded the passage of the rule. Here, the Consiglio di Stato explicitly confirms the importance of the rights of participation as a way to make the authority better informed and more accountable.<sup>193</sup>

In the domain of regulatory agencies, both the duty to give reasons and the rights of participation are further reinforced by the obligation to perform a regulatory impact assessment before promulgating a regulation.<sup>194</sup> Italian regulatory impact assessment is connected to the *consultazione* procedure, inspired by American notice-and-comment rulemaking. The actual procedure varies for each economic sector,<sup>195</sup> but

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available at [www.osservatorioair.it](http://www.osservatorioair.it). See also Bruti Liberati, *La regolazione dei mercati energetici tra l'autorità per l'energia elettrica e il gas e il governo*, RIV. TRIM. DIR. PUBBL. 435 (2009); Marcello Clarich, *Le Autorità Indipendenti Nello "Spazio Regolatorio": L'ascesa e il Declino del Modello*, DIR. PUBBL. 1035 (2004); Stefano Baccarini, *Motivazione ed Effettività Della Tutela*, 2007 FORO AMMINISTRATIVO T.A.R. 3315 (2007).

190. Some authors talk about a "legitimacy filter." See M. CLARICH, *AUTORITÀ INDIPENDENTI: BILANCIO E PROSPETTIVE DI UN MODELLO* 154 (2005). Barra Caracciolo refers to a "democratic 'relegitimation' in the form of 'direct democracy.'" L. Barra Caracciolo, *I Procedimenti Davanti alle Autorità Amministrative Indipendenti tra Diritto Interno e Diritto Comunitario*, QUAD. CONS. STATO 81 (1999). Moris Foglia, *I Poteri Normative Delle Autorità Amministrative Indipendenti*, 26 QUADERNI REGIONALI 559 (2008); MICHELE PASSARO, *LE AMMINISTRAZIONI INDIPENDENTI* 250 (1996).

191. See Sveva del Gatto, *La Partecipazione ai Procedimenti di Regolazione delle Autorità Indipendenti*, 9 GIORNALE DI DIRITTO AMMINISTRATIVO 947, 949 (2010).

192. See, e.g., Cons. Stato, sez. vi, 2 marzo 2010, n. 1215. In another case, the Consiglio di Stato suggested that the rights of participation also have a constitutional status, stemming from Article 97 of the Italian Constitution. See Cons. Stato, sez. v, 18 novembre 2004, n. 7553.

193. See Cons. Stato, sez. vi, 27 dicembre 2006, n. 7972. See also Cons. Stato, sez. vi, 1 ottobre 2002, n. 5105; Cons. Stato, sez. vi, 11 aprile 2006, n. 2007; Cons. Stato, 8 luglio 2008, n. 5026; TAR Lazio, 10 aprile 2002, n. 3070; Cons. Stato, sez. vi, 10 ottobre 2002, n. 5105. The Consiglio di Stato affirms that "una regolazione che venga disposta senza contraddittorio con i soggetti interessati . . . non può che dirsi viziata."

194. Legge 29 luglio 2003, n. 229, art. 12 (It.) (establishing the obligation to promote a regulatory impact assessment for independent administrative authorities).

195. See, e.g., CODICE DELLE COMUNICAZIONI ELETTRONICHE, Decreto Legislativo 1 agosto 2003, n. 259 (It.); CODICE DELLE ASSICURAZIONI PRIVATE, D.Lgs. n. 209/2005 (It.);

generally consists of (i) the publication of a notice opening the procedure; (ii) the publication of a draft regulation; (iii) the establishment of a deadline for the presentation of comments; and (iv) the adoption of the final rule. Stakeholders and, indeed, anyone concerned with the policy have an opportunity to be heard and, through their participation, can help the agencies to assess the impact of the proposed regulation. The agencies must state the reasons for the rules they adopt and in doing so must refer to the comments received.<sup>196</sup> The adoption of a regulatory impact assessment obligation is linked to the need to promote *good* regulation.<sup>197</sup> Regulatory quality is linked to participation.<sup>198</sup> The process, however, is a rather recent addition so the quality of the assessments and their actual effects should be carefully studied.

### 3. *Efficiency v. Accountability: The Doctrine of Motivazione Postuma*

The Italian courts are evolving toward procedural guarantees, such as the duty to give reasons and the rights of participation. They have moved from a strictly legal orientation concerned with the protection of rights to one that also acknowledges administrative accountability and efficiency. It is thus important to consider how Italian law reacts to situations where these two goals are at odds.

A conflict can arise if an administrative authority wishes to amend the reasons for its actions when it is challenged in court. As seen above, in American law the *Chenery* doctrine holds that “the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”<sup>199</sup> Italian case law, in contrast, is not clear on whether officials can amend their reasons before the courts. The traditional and still dominant orientation does not allow so-called “posthumous reasons” (*motivazione postuma*). Reasons given by agencies

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CODICE DEI CONTRATTI PUBBLICI RELATIVI A LAVORI, SERVIZI E FORNITURE, D.Lgs. n. 163/2012; D.Lgs. n. 262/2005 (establishing the procedure to be followed by the Consob, ISVAP and Banca d'Italia). See also AUTORITÀ PER L'ENERGIA ELETTRICA ED IL GAS, LINEE GUIDA SULL'INTRODUZIONE DELL'ANALISI DI IMPATTO DELLA REGOLAZIONE (2005).

196. See Cons. Stato, sez. vi, 27 dicembre 2006, n. 7972.

197. Italian authors usually refer to Organization for Economic Cooperation and Development (OECD) recommendations as having a strong influence on legislative drafters. Among the documents cited are RECOMMENDATION OF THE COUNCIL OF THE OECD ON IMPROVING THE QUALITY OF GOVERNMENT REGULATION (1995); REGULATORY IMPACT ANALYSIS: BEST PRACTICE IN OECD COUNTRIES (1997); and GUIDING PRINCIPLES FOR REGULATORY QUALITY AND PERFORMANCE (2005).

198. See Edoardo Chiti, *La disciplina procedurale della regolazione*, 54 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 700 (2004) (It.).

199. Sec. Exch. Comm'n v. *Chenery Corp.*, 318 U.S. 80, 87 (1942).

when they issue decisions would thus bind them before the reviewing court.<sup>200</sup> However, under the influence of recent procedural reforms, courts are progressively adopting the opposite approach.<sup>201</sup> An amendment to the Italian Administrative Procedure Act sought to avoid annulments on “mere formal grounds.” According to this provision, administrative decisions should be upheld when their content would not be different in the absence of such formal irregularities.<sup>202</sup>

The new orientation has the effect of avoiding useless annulments, and thus enhances efficiency. However, its prevalence could discourage agencies from putting much effort into articulating the reasons for their decisions, given that those reasons can be amended or reformed before the courts. The practice lowers government accountability to the public because the reasons it gives up front could be adjusted *ex post* to suit the court. Reason-giving ought not to be seen as a mere formal requirement.

### C. Comparison between the United States and Italy

Both the United States and Italy have quite robust notice-and-comment procedures for rulemaking, although the Italian coverage is much narrower. Both countries justify these procedures as a way to further both democratic legitimacy and high quality regulation. Neither limits procedural concerns to the protection of individual rights, although that is obviously an additional justification, especially in adjudications.

In the United States, the notice-and-comment provisions of the APA apply to any federal agency that makes rules, including independent agencies. There is no distinction in the rulemaking processes required for agencies that are under the President and those with independent, multi-member boards. In contrast, notice-and-comment provisions only apply to Italian independent agencies, not to rules made inside cabinet departments. The justification for this distinction is a concern for the democratic legitimacy of independent agencies. Procedural guarantees can make agencies both more transparent, by stating the reasons for their actions, and

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200. See Cons. Stato, sez. v, 14 aprile 2006, n. 2085 (“Va escluso che la motivazione del provvedimento impugnato possa essere integrata o sostituita in giudizio, per l’evidente ragione che non è possibile riferire le nuove considerazioni come presenti all’organo amministrativo nel momento in cui è stata decisa la misura de qua.”). See also Cons. Stato, sez. iv, 16 settembre 2008, n. 4368; Cons. Stato, sez. iv, 07 maggio 2007, n. 1975; Cons. Stato, sez. iv, 29 aprile 2002, n. 2281.

201. See, e.g., Cons. Stato, sez. v, 9 ottobre 2007, n. 5271; TAR, sez. ii, 8 maggio 2006, n. 1173.

202. Legge 11 febbraio 2005, n. 15, art. 2 (It.) (amending Legge 7 agosto 1990, n. 241, art. 21).

more responsive, by receiving public input and taking those views into consideration, hence improving their public legitimacy. However, it is not clear why rules issued by cabinet ministries should be less well-justified or less open to public participation. To make that case, one would have to have a high level of trust in the ability of the legislature to monitor the output of the government combined with confidence that the legislature itself is a reliable conduit for citizen concerns.<sup>203</sup>

Except for its independent agencies, Italy is closer to the cases of Canada and France discussed below, where the political and policy nature of government and agency policymaking limits both procedural mandates and court review. Yet, there is a paradox here. Why should the political nature of the government's decision exempt it from having to carry out open-ended hearings and to explain the reasons behind policy initiatives? Part of the reason is a distrust of the courts' ability to carry out a modest review of process without stepping in and dictating policy. That is a real concern—one that is especially salient if the courts themselves extend their oversight in the absence of statutory or constitutional provisions. The advantage of the U.S. model—even though it is based on a statute, not the Constitution—is that it gives the courts a text with which to orient their review. Such a text would be desirable if the Italian state wishes to move toward more judicial review of policymaking processes while avoiding too much judicial activism.

#### D. Canada

We now turn to the review of process in Canada and France. In both systems rulemaking is not often subject to procedural oversight by the courts, and procedural review of adjudication concentrates on the protection of rights.

Procedural requirements are uncommon in Canadian federal legislation that covers rulemaking and adjudication. Lacking legal texts, the courts approach each type of agency action differently. For adjudication, the courts use a contextualized test that varies procedural rights according to the circumstances of the case. Conversely, for rulemaking, the courts

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203. The exemption of cabinet ministries seems to be based on the idea of electoral accountability. Because the government was elected, its actions are therefore legitimate and no reasons need to be given. This is certainly *one* way of ensuring the democratic legitimacy of administration, but should not necessarily be the only one, nor is it the most effective. Reason-giving is important both to the minority and the majority. In short, even though the reasons for a duty to give reason are clearer in the context of independent agencies (which lack even this form of electoral accountability), they are also relevant for the central administration.

consistently refuse to review procedural aspects.

1. *Adjudication: “Implied Procedural Obligations”*

Canada does not have a federal administrative procedure act that establishes the procedure to be followed for administrative adjudications. However, courts have long enforced a “duty of procedural fairness.” The leading case is *Nicholson v. Halimand-Norfolk Regional Police Commissioners*.<sup>204</sup> It concerned the dismissal of an employee, Nicholson, from a county’s regional police force. The police force did not give him a hearing before his termination and it did not state any reasons for his dismissal. The employer claimed only that Nicholson was still in his probationary period and that the relevant legislation permitted discretionary terminations in such cases.

Departing from its previous formalistic orientation,<sup>205</sup> the Canadian Supreme Court stated that the procedural rights of citizens before administrative agencies stem from the “duty of procedural fairness,” which is variable and depends upon the specific context of each case. In this case, the Court stated that Nicholson should have been heard and should have been given reasons, due to the serious consequences resulting from the administration’s decision.<sup>206</sup> Thus, the duty to give reasons was a key aspect of procedural fairness, not to aid the court or to enhance public accountability, but rather to ensure Nicholson’s rights.<sup>207</sup>

To make its position clearer, the Canadian Supreme Court in *Baker*

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204. [1979] 1 S.C.R. 311.

205. Before the decision of the Supreme Court in *Nicholson*, Canadian courts enforced procedural requirements only in cases where the decision under review was qualified as “judicial” or “quasi-judicial” as opposed to those qualified as “legislative” or “administrative.” See, e.g., *Canada Minister of Nat’l Revenue v. Coopers & Lybrand Ltd.*, [1979] 1 S.C.R. 495 (listing five non-exhaustive factors that should be considered to determine whether the decision at hand was “judicial” or “quasi-judicial”). In such cases, courts would apply the principle of natural justice, which was composed of the right to be heard and the right to an unbiased decisionmaker. In *Nicholson*, the Canadian Supreme Court stated that procedural rights should not depend entirely on such formal distinctions. Whereas the traditional procedural rights could be reserved to the cases or decisions of a judicial nature, a lesser category of procedural entitlement, which the Court referred to as a “duty of fairness,” could be applied to other decisions, particularly those affecting individuals.

206. Audrey Macklin, *Standard of Review: The Pragmatic and Functional Test*, in *ADMINISTRATIVE LAW IN CONTEXT* 224 (Colleen Flood & Lorne Sossin eds., 2008).

207. See also, *Martineau v. Matsqui Inst. Disciplinary Bd.*, [1980] 1 S.C.R. 602 (confirming *Nicholson* and refusing a dichotomy between the principles of “natural justice” and “procedural fairness,” while establishing instead a continuum or spectrum of procedural protection that depended on the context and characteristics of the decisions under review).



explained the non-exhaustive five factors that it will use to identify implied procedural obligations in its judgments. These are: (1) the nature of the decision and the process used; (2) the statutory scheme; (3) the importance of the decision to the individuals affected; (4) the legitimate expectation of the person bringing the challenge; and (5) the procedural choices made by the agency.<sup>208</sup> The case concerned a decision of the Ministry of Citizenship and Immigration to deport a Jamaican citizen who had four Canadian children and was under treatment for paranoid schizophrenia. The Canadian Supreme Court enforced a duty to give reasons, considering it a consequence of the agency's wide discretionary powers to decide whom to deport. Here, the Court provides limited review of substance, but requires that reasons be given. The standard is "reasonableness *simpliciter*" for an individual decision, not the more deferential test of "patent unreasonableness."

Like *Nicholson*, *Baker* involved an individual decision, not a general policy, and the duty to give reasons was linked to the "importance of the decision" to the person affected by it (the third factor).<sup>209</sup> These decisions will have implications for other people in similar circumstances. However, the Court did not tie reason-giving to the public accountability and competence of the public administration. As part of the duty of procedural fairness, the duty to give reasons is linked to the protection of the rights of individuals vis-à-vis the state, rather than to the democratic legitimacy or competence of the administration.

A recent decision of the Canadian Supreme Court, nevertheless, may be taking a step to extend the duty to give reasons. In *Dunsmuir*, the Canadian Supreme Court elaborated on the content of its new standard of reasonableness that applies to the substantive review of administrative decisions. The Court requires that the decision be "justif[ied], transparen[t] and intelligib[le]," in addition to being within the range of possible, acceptable outcomes which are defensible based on the facts and law.<sup>210</sup> Under this new regime, reasonableness is more related to the quality of the agency's reasoning than to the outcome, that is, it is more linked to process than to substance. Although the Court refuses to decide among different possible outcomes, it seeks to ensure that the decision is procedurally acceptable under its jurisprudence.

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208. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 819. On this decision, see David Dyzenhaus & Evan Fox-Decent, *Rethinking the Process/Substance Distinction: Baker v. Canada*, 51 U. TORONTO L.J. 193, 195–97 (2001); Geneviève Cartier, *Keeping a Check on Discretion*, in *ADMINISTRATIVE LAW IN CONTEXT* 286 (Coleen Flood & Lorne Sossin eds., 2008).

209. *Baker*, [1999] 2 S.C.R. 817, para. 25 (key holding).

210. *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, para. 47.

In a later case, the Canadian Supreme Court confirmed that this orientation “reinforces in the context of adjudicative tribunals the importance of reasons, which constitute the primary form of accountability of the decisionmaker to the applicant, to the public and to a reviewing court.”<sup>211</sup> The Court, thus, does not limit itself to the protection of rights. In the context of the new reasonableness test, justifying a decision in a transparent and intelligible way is linked to legal validity, irrespective of any violation of individual rights.

## 2. *Rulemaking: Few Rules and Refusal to Review*

In making rules, the Canadian public administration acts both formally, through rules and regulations, and informally, through guidelines, policies, and directives.<sup>212</sup> Canadian law does not generally require participation in federal administrative rulemaking. Only in the specific case of formal regulations<sup>213</sup> must agencies abide by legally mandated procedural rules. The various forms of informal rulemaking are not subject to any legislatively required procedures. This is true both at the federal level and within the provinces.

Even for formal regulations, the current participatory requirements were established only after long hesitation. The debates date back to the 1960s, where parliamentary commissions did not recommend the establishment of a general participatory requirement (already in force in the United States), on the grounds that it “would cause unnecessary delay and merely duplicate the time already spent in informal consultation.”<sup>214</sup> During the following decades, as the American model was becoming more established, Canadian law’s resistance to participation in rulemaking began to fall.<sup>215</sup>

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211. Canada (Citizenship and Immigration) v. Khosa, [2009] 1 S.C.R. 339, para. 63.

212. Alice Woolley, *Legitimizing Public Policy*, 58 U. TORONTO L.J. 153, 156 (2008) (arguing that informal rulemaking is very common and can be carried out by every agency or government ministry). Informal rulemaking is not subject to any legislatively required procedures, either at federal level or in the provinces. *Id.*

213. The Federal Statutory Instruments Act, R.S.C. 1985, c. S-22, defines regulations as a “statutory instrument (a) made in the exercise of a legislative power conferred by or under an Act of Parliament, or (b) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament[.] [They include] a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, [and] any instrument described as a regulation in any other Act of Parliament.”

214. DAVID J. MULLAN, *ADMINISTRATIVE LAW: CASES, TEXT AND MATERIALS* 678–79 (5th ed. 2003); (citing ROYAL COMMISSION INQUIRY INTO CIVIL RIGHTS, MCRUER COMMISSION, R. NO. 1, at 362). *See also* MACGUIGAN COMMITTEE (1969).

215. David J. Mullan mentions three official studies during the 1970s and 1980s that reached different conclusions from those of the McRuer Commission and the MacGuigan

The province of Québec took the lead and established a participatory procedure for the enactment of formal regulations. According to its 1986 Regulation Act,<sup>216</sup> proposed regulations must be published in the *Gazette officielle du Québec*, after which interested parties have at least forty-five days to submit comments.

The initiative was gradually put in place at the federal level. The Cabinet Directive on Streamlining Regulation and the Statutory Instruments Act (SIA) state the current procedural requirements for the enactment of formal regulations.<sup>217</sup> The procedure has several phases. First, the administrative authority must identify the parties who are “interested and affected” by the regulation. These parties must then be given opportunities to take part in consultations at all stages of the regulatory process. Then the draft regulation is published in the *Canada Gazette* along with a Regulatory Impact Assessment. The draft regulation will then be subject to analysis and comments from the public for at least thirty days. When the regulation is issued, the agency must summarize the results of the consultation requirement including the government’s responses, and these are also published in the *Gazette*. Hence, under the Cabinet Directive, the government must justify its policy choice, but there is no judicial review of the adequacy of the explanation. The requirement is simply an order by the government to its own ministers. However, the SIA does give the legislature a role. The regulation must be placed before the relevant parliamentary committee, which can veto the regulation with a motion of disapproval.<sup>218</sup>

Outside of formal regulations and in the absence of legislative requirements, Canadian courts have refused to impose procedural obligations on agency rulemaking.<sup>219</sup> The leading case of *Inuit Tapirisat of Canada* established this approach in 1980.<sup>220</sup> The case concerned a

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Committee: (i) ECONOMIC COUNCIL OF CANADA, RESPONSIBLE REGULATION: AN INTERIM REPORT (1979); (ii) STANDING JOINT COMMITTEE ON REGULATIONS AND OTHER STATUTORY INSTRUMENTS, R. NO. 4 (1980); (iii) HOUSE OF COMMONS SPECIAL COMMITTEE ON REGULATORY REFORM, in JOHN EVANS, ADMINISTRATIVE LAW: CASES, TEXT AND MATERIALS 679–80 (5th ed., 2003).

216. Regulations Act, R.S.Q. 1986, c. R-18.1.

217. CABINET DIRECTIVE ON STREAMLINING REGULATION, available at <http://publications.gc.ca/collections/Collection/BT22-110-2007E.pdf>; Statutory Instruments Act, R.S.C. 1985, C8-12.

218. Statutory Instruments Act, R.S.C. 1985, C8-12, art. 19.

219. Municipal bylaws and resolutions are exceptions. Though legislative in nature, they must comply with common law procedural principles. See DAVID PHILLIP JONES & ANNE S. DEVILLARS, PRINCIPLES OF ADMINISTRATIVE LAW 122–24 (4th ed. 2004).

220. Atty Gen. of Can. v. Inuit Tapirisat of Can., [1980] 2 S.C.R. 735; see also Cardinal v. Dir. of Kent Inst., [1985] 2 S.C.R. 643; Knight v. Indian Head Sch. Div. No. 19, [1990]

challenge to Canadian Radio-Television and Telecommunications Commission decisions to approve a new rate structure for Bell Canada. The challenge was filed by Inuit Tapirisat of Canada on the grounds of denial of a fair hearing. The Canadian Supreme Court ruled that the powers delegated to the public administration in the relevant legislation were not explicitly limited by procedural guarantees.<sup>221</sup> Moreover, the Court called the decision “legislative action in its purest form” even though it was, of course, not voted on by the legislature.<sup>222</sup> According to the Court, considerations of natural justice and the duty of procedural fairness are relevant for the review of quasi-judicial or administrative decisions, but they do not “affect the legislative process, whether primary or delegated.”<sup>223</sup>

Some authors have contrasted this approach with that taken in adjudication. *Inuit Tapirisat* is indeed very different from *Nicholson*,<sup>224</sup> where the Canadian Supreme Court enforced “implied procedural obligations” due mainly to the effects of the decision on the individual concerned. The different treatment was criticized in the legal literature,<sup>225</sup> but it persists today. Individualized decisions that involve policy considerations are usually subject to procedural requirements,<sup>226</sup> but general decisions are free of any such constraints unless they are classed as “regulations.” Agencies and government ministries can, at their discretion, hold public hearings or follow certain procedural steps before passing other kinds of rules, but

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1 S.C.R. 653; Reference Re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525; Wells v. Newfoundland, [1999] 3 S.C.R. 199.

221. In *Inuit Tapirisat*, the Federal Court of Appeal followed *Nicholson* and applied the procedural requirements to administrative decisions of a legislative nature. This understanding was reversed by the Supreme Court. *Inuit Tapirisat*, [1980] 2 S.C.R. at 760.

222. Att’y Gen. of Can. v. Inuit Tapirisat of Can., [1980] 2 S.C.R., at 754. The exemption depends not on the nature of the body taking the decision but on the legislative nature of the decision itself.

223. In this case the Court was making reference to a passage of *Bates v. Lord Hailsham*, [1972] 1 W.L.R. 1373 (Eng.).

224. *Nicholson v. Haldimand-Norfolk Reg. Police Comm’rs.*, [1979] 1 S.C.R. 311 (Can.).

225. See Geneviève Cartier, *Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?*, 53 U. TORONTO L.J. 217 (2003); see also Grant Huscroft, *The Duty of Fairness: From Nicholson to Baker and Beyond*, in ADMINISTRATIVE LAW IN CONTEXT 115 (Colleen Flood & Lorne Sossin eds., 2008).

226. *But see Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 (holding that a ministerial decision to extradite the applicant was “at the extreme legislative end of the continuum of administrative decisionmaking” and denying his claim to further procedures). In this case, however, the applicant had warranted a full extradition hearing. Alternatively, supposedly legislative decisions can be subject to the duty of fairness if the Court finds that, despite their formal appearance, they are restricting individual rights. See *Homex Realty & Dev. Co. v. Vill. of Wyo.*, [1980] 2 S.C.R. 1011.

neither the legislature nor the courts oblige them to do so.<sup>227</sup> The judicial enforcement of rulemaking procedures is thus minimal in Canada.

### *E. France*

Like Canada, France has no general, legally enforceable procedures for the promulgation of secondary legislation. The French constitution explicitly permits the executive to issue decrees and ordinances, and it permits the executive to issue legally binding instruments in many areas even without a statutory mandate.<sup>228</sup> These procedures are not subject to any generic participation or reason-giving requirements. There is no statute like the United States' APA to provide a procedural framework for rulemaking. The only procedural mandate is the requirement that the Conseil d'État review draft decrees and ordinances.

Traditionally, the duty to give reasons has been particularly restricted in France for both rules and adjudications.<sup>229</sup> At present, there are a few moves in the direction of legally enforceable participation rights, but both the Conseil d'État and the Conseil Constitutionnel have consistently refused to recognize a general obligation to provide reasons for administrative decisions in the absence of a statutory provision. If applicable, the obligation is tied to the protection of rights and especially to adjudications where the outcome for the individual is particularly burdensome.

Recently, however, the Conseil Constitutionnel has held that there is a right to participate in environmental policymaking. To comply with that ruling, France passed a law at the end of 2012 setting up a participatory process for environmental rules and regulations. In addition, the Conseil d'État has examined procedures and found them wanting in a few cases outside of the environmental area. It has done this in spite of a general practice of overlooking procedural irregularities that do not affect the outcome.

#### *1. The Duty to Give Reasons under Statutory Provisions*

Absent specific statutory provisions,<sup>230</sup> the only decisions that have to be

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227. Some agencies nevertheless voluntarily follow some procedures before making rules. Those procedures involve, for example, internal consultation, public hearings, and consultations with stakeholders. See Alice Wooley, *Legitimizing Public Policy* 58 U. TORONTO L.J. 153 (2008).

228. 1958 CONST. art. 34, 37 (Fr.).

229. See CE Sect., Jan. 26, 1973, Requête n. 87890; see also Conseil d'État, Oct. 21, 1988, Requête n. 91916.

230. Specific statutory provisions can also derogate this general rule. For example, the

explained by public officials are (i) those which derogate a law or a regulation; and (ii) some unfavorable decisions.<sup>231</sup> The seven types of unfavorable decisions<sup>232</sup> that must be explained include those that inflict a sanction,<sup>233</sup> restrict civil liberties (*libertés publiques*),<sup>234</sup> or derogate previous decisions that had conferred individual rights.<sup>235</sup> General rules, favorable decisions, and decisions falling outside the statutory list are free from the duty to give reasons unless a particular statutory provision applies.<sup>236</sup>

To decide whether a decision is “unfavorable,” courts take into consideration its impact on the person or firm to which it is directed.<sup>237</sup> For example, if a government agency assigns a license for the use of radio frequencies to an applicant, it does not have to provide a statement of reasons because the decision is beneficial to the firm, even though other companies interested in competing for the license could have been harmed by the choice.<sup>238</sup> However, the Conseil d’État sees this obligation as a way to protect rights and to allow for judicial challenges. It is not connected to more general ideas of transparency and political legitimacy. The Conseil d’État has stated that, where reason-giving is required, the agency should include all elements of fact and law “to enable the affected person to challenge their legality.”<sup>239</sup>

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*Code des Étrangers* provides a derogation concerning refusals of entry visas into France. *Code des Étrangers* [C. CIV.] art. L211-2-1 (Fr.); see also CE Sect., July 25, 2008, Requête n. 305697.

231. See, e.g., Loi 79-587 du 11 juillet 1979 de relative à la motivation des actes administratifs et à l’amélioration des relations entre l’administration et le public [Law 1979-587 of June 11, 1979 on the Motivation of Administrative Acts and Improving Relations between the Administration and the Public]; see also Conseil d’État (CE), July 30, 1997, Requête n. 153402.

232. See Loi 79-587 du 11 juillet 1979 de relative à motivation des actes administratifs et à l’amélioration des relations entre l’administration et le public [Law 79-587 of July 11, 1979 on Motivation of Administrative Acts and Improvement of Relations between the Administration and the Public], at Art. I.

233. Conseil d’État (CE), Jan. 30, 2008 Requête n. 297828, Sté Laboratoires Mayoly Spindler; Conseil d’État (CE), Dec. 19, 1990, Requête n. 85669.

234. Conseil d’État Sect., June 17, 1983, Requête n. 28115; e.g., Gaz. Pal. 1984, 2, 34.

235. Conseil d’État (CE), June 17, 1988, Requête n. 30673.

236. See Conseil d’État (CE) July 7, 2000, Requête n. 205842.

237. See, e.g., Conseil d’État (CE) Sect., Dec. 9, 1983, Requête n. 43407, e.g., D. 1984. A.J. 81; Conseil d’État (CE), Apr. 29, 2002, Requête n. 235000, Chambre des métiers de Haute-Corse.

238. Conseil d’État (CE) Apr. 30, 2007, Requête n. 286348, Ass’n. Magnum Radio. The same problem is pointed out by Jean-Louis Autin, *La Motivation des Actes Administratifs Unilatéraux, Entre Tradition Nationale et Évolution des Droits Européens*, 137 REV. FRANÇAISE D’ADMINISTRATION PUBLIQUE 85 (2011).

239. Conseil d’État (CE) May 18, 1998, Requête n. 182244, Sté World Satellite Guadeloupe.

The Conseil Constitutionnel has also ruled that it is not possible to extract a general duty to give reasons from constitutional rules or principles.<sup>240</sup> Like the Conseil d'État, it has not recognized executive reason-giving as an essential feature of republican government under its mandate. French law has been criticized by scholars who find the lack of a general duty to give reasons to be “a hardly justifiable archaism”<sup>241</sup> or as posing a threat of “anachronistic authoritarianism.”<sup>242</sup> However, even under EU law reason-giving only applies to cases involving individuals, not to broad policymaking. The focus is on rights, not accountable and competent policymaking.

## 2. *The “Substitution of Reasons” and “Overabundant Reasons”*

The doctrines of the “substitution of reasons” and “overabundant reasons” add to the problem. Although praiseworthy from the point of view of efficiency, those doctrines create further incentives to limit the transparency of executive policymaking.

In France, reasons given by agencies when they issue decisions do not bind them before the reviewing court. They can ask for the “substitution of reasons” (*substitution des motifs*) while the suit is still pending.<sup>243</sup> Hence, the judge can correct the legal ground of a decision, instead of annulling it.<sup>244</sup> In most cases, the substitution is requested by the administration.<sup>245</sup> However, judges can also make the switch on their own initiative.<sup>246</sup> The judge can substitute either the legal grounds (*base légale*, for example, specific legislative provisions) or the legal reasoning (*motifs*) of the challenged decision. The French model resembles the orientation that Italian courts are starting to apply under the influence of recent procedural reforms. Our critique of the Italian case applies here as well: even though the doctrine of the “substitution of reasons” has the effect of avoiding useless annulments—and thus enhances efficiency—it also discourages agencies from putting much effort into articulating the reasons for their decisions, given that those

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240. Conseil constitutionnel decision No. 2004-497DC, July 1, 2004, J.O. (Fr.).

241. Jean-Louis Autin, *La Motivation des Actes Administratifs Unilatéraux, Entre Tradition Nationale et Évolution des Droits Européens*, 137 REV. FRANÇAISE D'ADMINISTRATION PUBLIQUE 85, 87 (2011).

242. JACQUELINE MORAND-DEVILLER, COURS DE DROIT ADMINISTRATIF 403 (11th ed. 2009).

243. Contrast this with the *Chenery* doctrine in American law. *See supra* notes 156–57 and accompanying text).

244. CE Sect., Dec. 3, 2003, Requête n. 240267.

245. Conseil d'État (CE) Dec. 19, 2008, Requête n. 294357, *Ministre Économie, Finances et Industrie*.

246. Conseil d'État Sect., Sept. 27, 2006, Requête n. 260050.

reasons can always be amended or reformed before the courts. Furthermore, the practice lowers government accountability to the public because the reasons the agency gives up front can be adjusted ex post to suit the court.

In addition to being able to rule on the basis of substitute reasons, a French judge can also apply the so-called *théorie des motifs surabondantes*. This doctrine is applied when a multiplicity of reasons is given by the administration (*pluralité des motifs*), and only some are illegal. The judge can disregard the illegal reasons and maintain the decision so long as the remaining reasons are sufficient.<sup>247</sup> The judge thus has the power to evaluate the illegal reasons given by the administration as either “decisive” or “overabundant” (*surabondantes*).<sup>248</sup> One can apply the same reasoning as in the doctrine of the substitution of reasons. Even though this doctrine has the effect of avoiding useless annulments, it might undermine government accountability. Indeed, the application of the doctrine gives agencies an incentive to supply multiple reasons as a way of increasing the chances of avoiding eventual annulments. Multiple and inaccurate reasons can be as detrimental to accountability as no reasons at all.

### 3. *New Developments*<sup>249</sup>

Traditionally public involvement in government decisions was limited to the inquest that is required for large public and private projects such as port developments, highways, and shopping centers. The inquest is mostly an exercise in elite oversight, but it requires that the project plan be available to the affected public so that it can comment. There is no active participation and no reason-giving requirement, although reason-giving may be part of any subsequent administrative court case. The ultimate decision is in the hands of a *Commissaire* or a committee closely tied to the national government. Recent requirements to include environmental and social impacts may be having some effect on public accountability, but the structure of the inquest implies that the effect will be limited.<sup>250</sup>

In response to criticisms of the inquest for coming too late in the process

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247. See Conseil d'État (CE) Jan. 12, 1968, Requête n. 70951, *Ministre Économie et Finances*.

248. See Conseil d'État (CE), Jan. 12, 1968, Dame Perrot, e.g., D. 1968 A.J. 179; Conseil d'État Sect., Apr. 22, 2005, Cne de Barcarès, e.g., D. 2005 A.J. 16321.

249. This section summarizes material in Rose-Ackerman & Perroud, *supra* note 131, at 253–272.

250. Cécile Blatrix, *La Démocratie Participation en Représentations*, 74 SOCIÉTÉS CONTEMPORAINES 97, 104–05 (2009), available at <http://www.cairn.info/revue-societes-contemporaines-2-9-2-page-97.htm>. See also Y. Jégouzo, *Principe et idéologie de la participation*, in MELANGES EN L'HONNEUR DE MICHEL PRIEUR 577–78 (2007).



to affect the decision, France created a National Commission on Public Debate that organizes public consultation processes at the regional and local level for large projects. These consultations produce recommendations but do not require the ultimate decisionmaker to use material from the public debate. The Conseil d'État has ruled that certain projects cannot go forward without a consultation, but it does not judge the quality of the debate. Furthermore, the law does not impose a reasoning requirement on the project sponsor.<sup>251</sup> Outside of the legally mandated arenas, governments at all levels have organized public consultations that may be limited to named "stakeholders" or open to all with an interest in the policy topic. These, however, are purely voluntary initiatives spurred by political calculations that heightened input will produce more politically acceptable policy.

However, a potentially important legal development is occurring in the environmental field. In 2008 the Constitution was amended to give the Conseil Constitutionnel the ability to rule on rights violations. The Conseil Constitutionnel began to exercise this new jurisdiction in March 2010. Previously, it could only review statutes before their promulgation to check on their constitutionality. Now, either the Cour de Cassation or the Conseil d'État can refer such constitutional issues to the Conseil Constitutionnel. The limit to rights violations might seem to rule out cases that challenge administrative policymaking processes. However, in the environmental area, the Conseil Constitutionnel has taken a broad view of its jurisdiction. The French Constitution includes a Charter for the Environment, and Article 7 of the Charter gives individuals a right to participate in environmental policymaking. In a series of cases beginning in fall 2011, the Conseil Constitutionnel enforced this right and voided parts of several environmental statutes as lacking sufficient opportunity for broad

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251. See Rose-Ackerman & Perroud, *supra* note 131, at 258–260. Loi 95-101 du 2 février 1995 de relative au renforcement de la protection de l'environnement [Law 95-101 of Feb. 2, 1995 on strengthening the protection of the environment], J. OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.], 3 février 1995, No. 29. The law created an independent National Commission on Public Debate (CNDP), established in 1997, to organize the debates. In 2002 its mandate was broadened to include socio-economic and development impacts as well as environmental effects. Loi 2002-276 du 27 février 2002 relative à la démocratie de proximité [Law 2002-276 of Feb. 27, 2002 on Local Democracy], J. OFFICIEL DE LA RÉPUBLIQUE FRANCAISE [J.O.], 28 février 2002. For background material consult the website of the CNDP, available at <http://www.debatpublic.fr/>. The history of the CNDP is summarized at [http://www.debatpublic.fr/cndp/rappel\\_historique.html](http://www.debatpublic.fr/cndp/rappel_historique.html). See also Blatrix, *supra* note 249, at 106–07; Cécile Blatrix, *Genèse et Consolidation D'une Institution: Le Débat Public en France*, in LE DEBAT PUBLIC : UNE EXPERIENCE FRANÇAISE DE DEMOCRATIE PARTICIPATIVE 43–56 (2007).

public participation.<sup>252</sup> The Conseil Constitutionnel did not explain what types of participation would satisfy the constitutional provision, but it aggressively signaled that the government must implement environmental laws using participatory methods. This constitutional right only involves environmental issues, but the background justifications for broad participation have a wider reach. It remains to be seen whether the Conseil Constitutionnel will limit its jurisprudence to the environment where a textual hook exists, or whether it will reach further. Alternatively, strong participation rights in the environmental field may push advocates in other policy areas to demand expanded participation.

In response to the Conseil Constitutionnel decisions, France amended its environmental statutes. A law passed in December 2012 sets up a structure for public participation in environmental policymaking that is a direct response to these decisions.<sup>253</sup> The law is a modified version of US-style notice-and-comment rulemaking. When it makes policy, the government must publish a proposal that explains the policy's context and objectives; the proposal is then open to public comment, and the final decision must be accompanied by a document that summarizes the comments and explains which ones were taken into account. The law, however, takes a quite limited view of participation, and it reflects a certain hesitation on the part of the government to open up the process. A list of forthcoming policy decisions will be published every three months; the minimum time for comments is short, only three weeks; and the minimum time between the end of the comment period and the issuance of the final decision is four days. The law requires that the government authority make public a summary of the comments.<sup>254</sup> One provision also sets up an eighteen-month experiment under which all comments will be immediately made public on the internet so as to encourage discussion.<sup>255</sup>

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252. The first case is *Ass'n France Nature Environnement*, Conseil constitutionnel decision No. 2011-183/184QPC, Oct. 14, 2011, available at [www.conseil-constitutionnel.fr/decision/2011/2011183184qpc.htm](http://www.conseil-constitutionnel.fr/decision/2011/2011183184qpc.htm). The subsequent cases are Conseil constitutionnel decision No. 2012-262QPC, July 13, 2012; Conseil constitutionnel decision No. 2012-269QPC, July 27, 2012; and Conseil constitutionnel decision No. 2012-270QPC, July 27, 2012.

253. Loi 2012-1460 du 27 décembre 2012 de relative à la mise en oeuvre du principe de participation du public définie à l'article 7 de la Charte de l'environnement [Law no. 2012-1460 of Dec. 27, 2012 on the implementation of the principle of public participation defined in Section 7 of the Charter of the Environment], J. OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [Official Gazette of France], Dec. 28, 2012, No. 302.

254. *Id.* at art. 2.

255. *Id.* at art. 3.

*F. Comments on France and Canada*

Neither Canada nor France has an administrative procedure act that specifies required procedures for the overall production of administrative rules and regulations. Canadian courts have developed a set of procedural requirements for individual adjudications that are flexible and case specific; they reflect an ideal of procedural fairness that includes an unbiased decisionmaker and a requirement to give reasons. France has a less well-specified body of law for adjudications; its law concentrates on official abuses of power that violate individual rights. The strongest protections are for state actions that impose costs on individuals.

Canada does have legally required procedures for formal regulations, but not for rules or for various informal documents. The Canadian government operates under the Directive on Streamlining Regulations that imposes requirements on the ministries to balance costs and benefits and justify their policy initiatives. However, the Directive has no legal force and does not enhance levels of judicial review of the rulemaking process. France does not have even this limited procedural window. Thus, not surprisingly, secondary legislation is seldom challenged on procedural grounds. The courts in Canada and France can review rules; in France the key concept of an “administrative act” applies to both rules and adjudications. However, there is little case law dealing with the policy process, and the few cases that deal with rules, such as the recent French cases, apply the concept of rights to these procedures. The courts in Canada and France lack a vocabulary and a conceptual framework for overtly taking on the task of monitoring the democratic and technical legitimacy of policymaking inside the administration.

Given this history, current developments in French environmental law will be especially important to study. The Conseil Constitutionnel has taken a striking procedural turn in interpreting the Charter for the Environment. The 2012 law is a response to the Conseil Constitutionnel’s decisions and takes tentative steps that give legal force to public participation in government policymaking. However, the law represents a quite modest move toward greater public input, and it risks being a merely symbolic gesture that may satisfy the Conseil but do little to enhance the public accountability of environmental policymaking. The short timelines of three months and four days mean that the process risks irrelevance. Hence, its impact will depend upon the ability of environmental groups and concerned citizens both to use the new procedures and to assure that government actions really do incorporate public input. The timelines are only minimums so that the government could respond to legitimate demands for more in-depth opportunities for public input. The role of the

courts will be important. It remains to be seen whether the Conseil d'État and the Conseil Constitutionnel will engage in review of environmental policymaking processes in a way that could be a spur to democratic accountability.

#### CONCLUSION

If courts review government decisions based on technical scientific or economic information, judges are frequently at a disadvantage because of their lack of expertise outside of the law. Yet these decisions require oversight because of the risk of capture and of simple incompetence. Public choices can lack both democratic legitimacy and technical validity, and they can violate rights. However, courts are not equipped to provide in-depth review of regulatory substance. Hence, our first claim is that judicial review of the substance of executive branch policy is likely to be poorly executed, especially in technically complex areas. The French case study illustrates the pathologies that can arise; in contrast, Canada's deferential review for "reasonableness" is a positive model. Concern for the protection of individual rights has motivated the French courts, but they have carried out their aggressive review in a way that could undermine executive policymaking under delegated authority.

The limitations of substantive review lead us to consider judicial review of the policymaking process. Such review needs to recognize that executive policymaking is quite different from deciding individual adjudications in court. Much of the academic discussion of judicial review in administrative law concentrates on what is called "due process" or the processes that the state must follow if it is to impose a cost on an individual by, for example, taking her property, denying him a license, or levying a fine for noncompliance with the law. These are clearly important foundations for the protection of rights, but they are not our primary focus. Rather, as with our discussion of substance, we concentrate on procedures that help determine broad policies, either in the context of individual cases or in rulemakings. Insofar as the courts concentrate only on conventional due process protections and fail to check the adequacy of broader policy processes, they risk limiting the democratic legitimacy of government actions.

Leaving the protection of individual rights to one side, there are two other fundamental reasons for courts to review the administrative policymaking process. First, the administrative process may help the judges themselves to understand what the government or agency has done. In particular, the courts require that rules or adjudications be accompanied with reasons so that they can judge if the underlying policy is in accord with the legislative text. They act as guardians of the will of the legislature.

Second, they monitor the administrative process not to help them decide cases but to ensure that the policymaker is accountable to the public. Here, accountability flows directly to the citizenry rather than indirectly through the legislature to the voters. To the extent that the courts recognize a role for such a direct connection between citizens, on the one hand, and government ministries and independent agencies, on the other, judicial review can emphasize both public participation and reason-giving. Under this second justification, it is not important whether or not the courts approve of the policy, but rather whether the policy has been made in a way that both invites broad public input and is justified in a public and understandable way. Sometimes these alternative views of democratic accountability—aiding the courts to uphold the legislative will and aiding the public to hold government to account—become blurred in practice. However, they represent distinct views of the judicial role, with the latter stressing transparency and direct public involvement in the policymaking process.

Rulemaking procedures are the most obvious place to look for the intersection between policymaking and judicial review. Heavily judicialized processes are inappropriate for multi-faceted policy issues that affect large numbers of people and depend on specialized technical knowledge. These decisions represent political/policy choices, but they are made by cabinet ministers, independent agency officials, or senior bureaucrats, not by the legislature directly. Such processes should take account of public concerns as well as tapping into expertise outside of government. Looking across our cases, administrative law ranges from strictly hands off, on the one hand, to legal requirements close to those followed by the courts, on the other. Judicial review of process tracks these alternatives, ranging from nonexistent to a level of scrutiny approaching that of an appellate court reviewing the decision of a lower court.

At the most intrusive pole is formal rulemaking under the United States APA. There the procedures are identical to those for formal, on-the-record adjudications and approximate judicial procedures. Courts can review the agency action for conformity with these processes. This is an extreme example of the U.S. administrative process copying judicial procedures without much recognition of the distinctive nature of rulemaking. In practice, formal rulemaking is seldom used. Instead the “informal” notice-and-comment procedure of the APA is the norm, requiring notice, public input, and reason-giving with judicial review for conformity with these provisions. Even given the extensive gloss given to these barebones provisions by the courts, the emphasis is on transparency, openness to outside views, accountability, and functional policymaking, not individualized due process rights. None of our other three case studies have

the kind of pervasive review of rulemaking procedures common in U.S. administrative law. Rather, they recognize the value of public participation and reason-giving but provide judicial review in only a narrow range of cases, leaving it to political and bureaucratic actors to structure most policymaking exercises absent judicial oversight.

In some countries, courts understand that their decisionmaking template is inappropriate for policymaking. One response is for the courts to refuse to review executive and agency rulemaking. With a few notable exceptions, this is the situation in Canada, Italy, and France. A second response is a limited review that concentrates on whether rulemaking processes further democratic legitimacy and competence. This is the approach, at least in the ideal, under the U.S. APA; although it has obviously led to sharp disagreements among the Supreme Court justices and across the courts of appeal over the application of these principles in individual cases.

Canada appears the most superficially similar to the U.S. In the United States the APA exempts “interpretive rules” and “general statements of policy.”<sup>256</sup> Canada distinguishes between regulations and rules. The former must be issued only after notice and a hearing and with a statement of reasons, and the courts can review the adequacy of the process.<sup>257</sup> However, procedurally protected formal rulemaking is relatively uncommon in Canada. Instead, the government often resorts to soft law. The rarity of formal regulations may be a reflection of Canada’s parliamentary system where most statutes are drafted by the government. Only in very special cases would the government want a statute to include strict procedural protections for public input and reason-giving. They may choose to engage in such practices if they are politically expedient, but if they are not, there is no legal way to constrain the government to act otherwise.

Italy is also a parliamentary system so a similar empirical argument would suggest that Italy would not have judicially enforceable rulemaking procedures, and indeed that is so as a general matter. However, there is one important exception. Under pressure from EU directives, Italy has privatized a number of formerly state-run public utilities. Because these firms retain considerable monopoly power, the Italian state created independent agencies to regulate these industries. This raised an issue of political accountability. The agencies needed to be independent of the rest of the state because some firms were still partly state-owned and also

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256. 5 U.S.C. § 553(b)(3)(A) (2012).

257. *See, e.g.,* *Enbridge and Union Gas v. Ontario Energy Bd.* (2005), 74 O.R. 3d 147 (C.A.) (where the applicants claimed that the Ontario Energy Board did not comply with the notice-and-comment requirements established in the Ontario Energy Board Act).

because of a fear that regulation would be used for political ends. However, the opposite concern was that the agency would be captured by the large firms it was supposed to be regulating with little recourse for the state. One response was to require these independent agencies to be more directly responsive to the public by requiring public consultation and reason-giving. However, because they are understood as a way to compensate for the “deficit of accountability” of independent agencies, these procedural requirements only apply to such agencies. In Italy, rules made by the core executive are exempt from any similar procedural requirements. This option expresses an excessive trust in electoral accountability. Because the rules passed by the core executive are responsive to the political interests of the government in power, incumbents see the pressure for external input as unnecessary to ensure political accountability.

France is similar to Italy and Canada in having no general legally enforceable provisions for public participation and reason-giving. Even in those cases where procedures are legally required, the courts will not enforce them unless they judge that procedural violations could have affected the outcome. Yet, there is increased interest in publicly accountable policymaking in France. One recent law requires ministries to accept comments when they make policy; however, as yet, the process is untested and the role of the courts is unclear. A second sets up participatory processes for environmental policies. The EU is pushing for more participation and openness in the new independent regulatory agencies, much as in Italy.

Less transparent and more difficult to study are situations where broad policies are made through a series of adjudications. Here the procedures are often similar to those used in courts and the broader public policy implications of the individual decisions may be difficult or impossible to raise, either in the agency or in court. The agency may recognize that it is *de facto* making policy, but all it has to do procedurally is protect the rights of individual people and firms by, for example, giving them a hearing and an opportunity to cross-examine opponents. Nevertheless, the parties to a dispute before the agency may not represent the broader public interest. Can the courts require the agency to move beyond court-like adversarial processes to take account of civil society or other interest group concerns? This seldom happens even in the U.S. with its strong commitment to accountable rulemaking processes. To some extent the U.S. Supreme Court dealt with this issue in *Overton Park v. Volpe* where it imposed certain procedural requirements on informal adjudications not

covered by the APA.<sup>258</sup> However, that case dealt with an individual highway siting decision, not overall highway policy.

Putting together the limits of substantive review and the promise of procedural review of policymaking, and considering the goal of balancing the three aspects of state legitimacy through the courts, France appears to have the worst combination of our four cases. It has very aggressive review of substance and weak review of process. Italy comes next. Although its courts also engage in aggressive review of substance, it offers a greater review of process, at least in the context of independent agencies. As noted above, this does not mean that the French and Italian approaches to judicial review are problematic overall. However, they privilege the protection of legal rights to the detriment of other goals, such as administrative efficiency, technical competence, and political accountability. Canada has found a good balance for review of substance but lacks review of rulemaking procedures, except for the cases of formal regulation. The United States has a rather inconsistent record on the review of substance, but its relatively deferential judicial practice places it just behind Canada. On judicial review of the rulemaking process it dominates the other cases in its explicit concern for the democratic legitimacy of delegated policymaking. However, this favorable view is conditioned by the time consuming nature of the process, which delays the implementation of important rules.

The decision to adopt procedural requirements that further state legitimacy is just a first step. A further discussion concerns the actual procedures required. Who should be given the opportunity to participate? If participation is restricted to interested parties, how should they be defined? How can we ensure that some (better organized, better financed) groups will not dominate the consultation process? How can participation be designed to avoid excessive cost and delay? The answer to these and other questions will help to balance democratic responsiveness with the other conflicting goals of administrative law.

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258. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402 (1971).