Environmental Deliberative Democracy and the Search for Administrative Legitimacy: A Legal Positivism Approach

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ENVIRONMENTAL DELIBERATIVE DEMOCRACY AND THE SEARCH FOR ADMINISTRATIVE LEGITIMACY: A LEGAL POSITIVISM APPROACH

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The failure of regulatory systems over the past two decades to lessen the environment perils associated with modern human economic output has begun to undermine the legitimacy of environmental lawmaking in the United States and around the globe. Recent scholarship suggests that reversal of this trend will require a breach of the environmental administrative apparatus by democratization of a particular kind, namely the inclusion of greater public discourse within the context of regulatory decision-making. This Article examines this claim through the lens of modern legal positivism. Legal positivism provides the tools necessary to test for and identify the specific structural deficiencies of the administrative state as an environmental lawmaking institution. More importantly, legal positivism can be used to determine which changes to agency practice and procedure – of the many scholarly proposals to do so – would most likely correct these deficiencies. To do so, however, American legal positivists must overcome their obsession with the U.S. Constitution as the measure of legal legitimacy in the American system. Instead, legitimacy of the administrative state ultimately relies on fashioning rulemaking procedures that address American's innate distrust of official power. The view of a reformed regulatory state presented in this Article is one where regulators continue to function as the technical and scientific experts, and in making policy determinations weigh the expert knowledge with the informed opinion of electorate and peer officials in the political branches of our government.

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Introduction

No one can seriously deny that the scope and complexity of environmental problems facing the world today are of the very nature that the architects of the New Deal felt would require "institutions having flexibility, expertise, managerial capacity, political accountability, and powers of initiative" well beyond that of any one branch of government to solve.[1] The task of addressing continued industrial-era environmental concerns—air, water and land pollution,—require vast technical expertise, and emerging postindustrial environmental issues—climate change, biodiversity loss, deforestation, desertification, etc.—are complex, global problems that call for monumental new regulatory efforts.[2] Therefore, if we intend to save our

1. Cass Sunstien, Law and Administration after Chevron, 90 Colum. L. Rev. 2071, 2080 (1990); see also Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 **Harv. L. Rev.** 1512, 1518 (1991) ("The New Deal model contemplated that Congress should identify an area in need of regulatory control and turn the expert agency loose to regulate."); Alexander Dill, Scope of Review of Rulemaking After Chadha: A Case for the Delegation Doctrine?, 33 Emory L. J. 953, 953 (1984)("Congress [routinely grants] broad discretionary authority to agencies in order to accord them the flexibility necessary in highly technical areas such as nuclear energy and environmental health, as well as in areas of economic regulation . . . .").

2. See generally, Robin Morris Collin and Robert William Collin, Where Did All The Blue Skies Go? Sustainability And Equity: The New Paradigm, 9 **J. Envtl. L. & Litig.** 399, 401-403 (1994). As one commentator recognized, "[j]ust listing some of the many pressing environmental issues [needing regulation] can lead to despondency: species extinction, deforestation, desertification, toxic waste, acid rain, global climate change, and severe air and water pollution in large cities and poor countries." Eric W. Orts, Reflective Environmental Law, 89 **Nw. U. L. Rev.** 1227, 1230 (1995). This has lead some, including Justice Stephen Breyer, to even call for the creation of a "superagency larger and more powerful than the Environmental Protection Agency (EPA)" to implement bring order to the "irrational potpourri" of exiting environmental statutory mandates imposed on the

natural world from further environmental harm, we must first rescue the troubled American administrative state.[3]

The problem, of course, is that despite three-quarters of a century since the birth of modern administrative law,[4] the political legitimacy our nation's grandest structural reform of government since ratification of the U.S. Constitution is still unsettled in many Americans' minds.[5] There is both a longstanding mistrust of agencies as technical regulators in this nation,[6] and, more importantly,

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agency. Id. at 1231 & n.11 (describing Justice Breyer's proposal in **Breaking the Vicious Circle: Toward Effective Risk Regulation** (1993)).

3. See Jack Van Dorn, Environmental Law and The Regulatory State: Postmodernism Rears Its Ugly Head, 13 **N.Y.U. Envtl.** J. 441, 443 (2005).

4. While independent regulatory agencies existed well before the New Deal, the activities of these agencies were largely discrete and limited in nature, primarily aimed at particularized fields of economic activity. Robert L. Rabin, Federal Regulation in Historical Perspective, 38 **Stan. L. Rev.** 1189, 1252 (1986). It was the New Deal reforms in the accomplished by the Roosevelt administration in the 1930s that opened the door for the burgeoning, modern day administrative state. Id. at 1262-63; see also Dill, supra note 1, at 953("[S]ince their widespread introduction during the New Deal, federal administrative agencies have played an increasingly important role in developing and implementing congressional policies in various areas of national concern.").

5. See, e.g., Louis J. Virelli III, Scientific Peer Review and Administrative Legitimacy, 61 **Admin. L. Rev.** 723, 724 (2009); David L. Markell, Understanding Citizen's Perspectives of Government Decision Making Process as a Way to Improve the Administrative State, 36 **Envtl. L.** 651, 653 (2006). Indeed, it has been said that the question "Why is there an administrative state?" is not merely and academic question, but has been observed to "reflect[] the deepest of anxieties of our political culture." Peter H. Schuck, **Foundations of Administrative Law** 7 (2d ed. 2004).

6. See, e.g., David W. Case, The EPA's Environmental Stewardship Initiative: Attempting To Revitalize A Floundering Regulatory Reform Agenda, 50 **Emory L.J.** 1, (2001) (describing the American environmental regulatory landscape as a battleground wrought with distrust and conflict); Richard J. Lazarus, Assessing the Environmental Protection Agency After Twenty Years: Law, Politics, and Economics: The Tragedy Of Distrust In The Implementation Of Federal Environmental Law, 54-AUT

unending controversy over whether the political choices inherently involved in agency rulemaking should be left at all to institutions outside our constitutional tripartite national government.[7] As Professor James O. Freedman observed, "[t]he enduring sense of crisis historically associated with the administrative agencies seems to suggest that something more serious than mere routine criticism is at work."[8] That something, perhaps, is "the manifestation of a deeper uneasiness over the place and function of the administrative process in American Government."[9]

This unease is not without merit. In the field of environmental regulation, it is obvious that administrators increasingly refuse, often for political reasons, to make the painful public policy choices required by our nation's environmental laws.[12] The past few decades have seen few significant new environmental regulatory efforts in this country. Environmental control in the United States – once considered among the most stringent legal protections for public health, welfare, wildlife, and natural resources in the world – are now regarded as ineffective. Concerns about the poor quality of our air and water are

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Law & Contemp. Probs. 311 (1991) (discussing the "destructive cycle" of agency distrust and failure)

7. See Seidenfeld, supra note 1, at 1512; Steven P. Croley, Theories of Regulation: Incorporating the Administrative Process, 98 Colum. L. Rev. 1, 3 (1998); and Richard B. Stewart, The Reformation of American Administrative Law, 88 **Harv. L. Rev.** 1669, 1805 (1974).

8 James O. Freedman, **Crisis and legitimacy: The administrative process and American Government** 9 (1978).

9. Id.

12. See Lisa Heinzerling, Selling Pollution, Forcing Democracy, 14 **Stan. Envtl. L. J.** 300, 300 (1995) ("Cleaning the air can foul the water; saving the salmon might threaten the logger; preserving our climate could darken our rooms.").

now regularly in the news, and with regards to what may be the most significant crisis to ever face mankind – climate change – we have only just begun to contemplate a national regulatory plan. In short, despite pressing needs, regulators seem afraid to act, leaving us with a dismal regulatory record on public health and environmental issues in recent years.[13]

It should come as no surprise, therefore, that an emerging body of scholarly literature, which I will group and broadly define as Environmental Deliberative Democracy (EDD),[14] seeks to bring to an end the top-down, authoritarian nature of the current regulatory system. EDD calls for regulatory reforms to make public deliberation, and civic engagement, a required component of environmental rulemaking so to make the bureaucracy accountability directly to the people.[15] EDD is the product of the environmental community's realization that our existing form of government "has lost its democratic character just as it has also sacrificed its ecological sustainability."[16] Current legal structures, such as the administrative state, are designed to make citizens mere competitors in the lawmaking process, driving them to

13. For a general discussion on the failures of the environmental administrative apparatus, see Peter Lehner, The Logjam: Are Our Environmental Laws Failing Us Or Are We failing Them?, 27 **N.Y.U. Env. L. J.** 194, 194-196 (2008)).

14. See, infra Part II.A.

15. Such proposals advance, for example, use of citizen consultations, forms, or juries in all or part of the regulatory process; others go further and advocate for partial or total citizen control of regulatory outcomes. See infra notes 155-161 and accompanying text.

16. Walter F. Baber and Robert V. Bartlett, **Deliberative Environmental Politics: Democracy and Ecological Rationality** 5 (2005).

abandon all commitments to greater social needs and focus instead on their narrow self-defined interest in the regulatory outcome.[17] Administrative decision-making, in particular, lacks sufficient democratic elements to ensure that rulemaking is both a procedurally legitimate and substantively effective means to protect environmental rights, both human and non-human alike.[18]

Beyond its proposals for regulatory change, EDD also has the potential to transform 60 years of discourse among economists, political scientists, and legal scholars regarding the generational discontent with the administrative state.[20] Previously offered theories attempted to legitimize the administrative state largely as a basis of

17. See id.; see also Dorothy A. Brown, The Invisibility Factor: The Limits of Public Choice Theory and Public Institutions, 74 **Wash. U. L.Q.** 179, 182 (1996) (discussing a " 'legislative auction' where the special interest group with the highest 'bid' wins the legislator's services. The special interest group seeks legislation that benefits its group members, who have a high stake in the legislative outcome. The legislator receives the bid, and in turn, the special interest group receives the desired legislation.").

18. See generally, Jennifer Nou, Regulating the Rulemakers: A Proposal for Deliberative Cost-Benefit Analysis, 26 **Yal L. & Pol'y Rev.** 601, 629-630 (discussing "the democratic deficit created by administrative deligations"). For EDD advocates, the system must not only be democratic in nature, but representation must be extended "to entities which cannot participate in the decision-making process, like future generations, animals, plants, and nature as a whole, whose interests, though, can be represented by the present humans." James Wong, Debating Environmental Democracy: A Social Choice Theory Perspective, 5 (2008), at http://www.keele.ac.uk/research/lpj/ecprsumschool/Papers/James%20Wong.pdf.

20. Freedman, supra note 9, at 9; see also Cynthia R. Farina, The Consent of the Governed: Against Simple Rules for a Complex World, 72 **Chi.-Kent L. Rev.** 987, 987 (1997) ("Like an intriguing but awkward family heirloom, the legitimacy problem is handed down from generation to generation of administrative law scholars.")

political necessity,[21] but have failed to provide real legitimacy to the administrative state as measured, for instance, by environmental regulatory outcomes.[22] EDD, on the other hand, accepts the failure of the administrative state in our system, and assigns that failure to

21. For example, the pluralistic democracy theory seeks to justify the administrative state largely on the basis that agencies are in an equal, if not better, position than constitutional branches to evaluate and determine societal preferences with regards to distributing governmental benefits. See generally, Croley, supra note 11, at 3-6. As Professor Croley notes, "theories" in this context is "used loosely . . . as a less awkward term for what could instead be called 'perspectives' or 'visions' of administrative regulation." Id. at 4. Like capitalist markets, pluralistic democracy embraces regulatory deal-making. In essence, the government acts "to implement deals that divide political spoils according to pre-political preferences of interest groups." Seidfeld, supra note 1, at 1513. Accordingly, regulators should react only to those interest groups that find the status quo sufficiently intolerable to incur the cost of complaining and seeking change. Id. at 1521. Several theories have been spawned from pluristic democracy thought, including public choice theory, neopluralist theory, and public interest theory. As Professor Croley has summarized these theories:

> The public choice account holds . . . that agencies delivery regulatory benefits to well organized political interest groups, which profit at the expense of the general, unorganized public. The neopluralist theory also takes organized interest groups to be central to understanding regulations. On the neopluralist view, however, many interest groups with opposing interests compete for favorable regulation, and that competition is less lopsided than the public choice view contemplates [b]ecause the result of interest-group competition often crudely reflects the general [public] interest. . . . Whereas the neopluralists focus on interest group competition . . . the public interest theorist concentrates on the general public's ability to monitor regulatory decisionmakers. Where . . . the relevant decisonmakers operate without any oversight, they tend to deliver regulatory benefits [instead] to well organized interest groups at the public's expense.

Croley, supra note 11, at 5.

22. Van Doren, supra note **Error! Bookmark not defined.**, at 479 ("[C]ourt decisions in environmental law seem to mirror indeterminacy over time, as the regulatory state produces chaos, cycling, and unpredictability.");

its inability to produce rules in a manner consistent with the (democratic) properties our society deems essential to constitute a norm that is seen as legally valid.[23] EDD thus attempts to cure, rather than sidestep our uneasiness with bureaucracy.[27]

It is, however, only upon examination of EDD proposals through the lens of modern legal positivism that the potential for legitimizing the administrative state is truly revealed. As an initial matter, a legal positivist would reject existing theories that justify the administrative state based on mere appeal to a normative presupposition for its existence.[29] Rather, legal positivism teaches us that the validity of a legal system is solely dependent on its observation of, and obedience to, the rules constituting its foundation.[30] One of these foundational rules is H.L.A. Hart's "rule of

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23. See infra Part II.A.

27. Mark Seidenfeld, The Quixotic Quest for a "Unified" Theory of the Administrative State, Issues in Legal Scholarship: The Reformation of American Administrative Law (2005), at http://www.bepress.com/ils/iss6/art2.at 4 (noting that a careful reading of Richard Stewart's seminal article, "The Reformation of American Administrative Law," reveals a disbelief that any single theory can explain and justify all the exercises of administrative power that characterize the United States government today").

29. See Legal Positivism, **Stanford Encyclopedia of Philosophy** 5 (2003), available at http://plato.standford.edu/entries/legal-positivism/ ("The ultimate criterion of validity in a legal system is neither a legal norm nor a presupposed norm . . . ."); Stephen V. Carey, What is the Rule of Recognition in the United States?, 157 **U. Pa. L. Rev.** 1161, 1163 n.1 (2009) (Positivism is a broad concept, but may generally be defined as "[t]he theory that legal rules are valid only because they are enacted by an existing political authority or accepted as binding in a given society, not because they are grounded in morality or in natural law.")

30. Scott J. Shapiro, What is the Rule of Recognition (and Does it Exist)?, in **The Rule of Recognition and the U.S. Constitution** 235 (Matthew Adler & Kenneth E. Himma eds., Oxford University Press 2009).

recognition,"[31] which vaguely put,[32] states that every legal system contains one underlying rule that sets out the criteria or properties that other rules within that system must possess to be recognized as a valid rule of that system.[33] The rule of recognition works to reconcile the precise type of normative, second-order uncertainty with the administrative state identified by EDD scholars: the legitimacy of public officials (or institutions) to resolve first-order, environmental public policy disputes.[34]

This Article takes legal positivism from theory to practice by applying it to the troubled administrative state in the context of EDD. The Article demonstrates that a conflict exists between the administrative state and rule of recognition used to measure the validity of lawmaking institutions in our system. However, because democratic institutions (including the environmental administrative apparatus in this country) are structural mechanisms, it is therefore possible, as EDD advocates, to construct specific legal changes to agency practice and procedure to correct the identified conflict. With that in mind, however, it makes little sense to continue to suggest that administrative reform proposals be implemented, without first assessing whether the specific structural changes offered would

31. H.L.A. Hart, **The Concept of Law** 97-107 (1961).

32. Hart's own treatment and description of the rule has been called "frustratingly unclear." Shapiro, supra note 30, at 1.

33. Hart, supra note 31, at 100-103; Shapiro, supra note 30, at 4; David Dyzenhaus, The Demise of Legal Positivism?, 119 Harv. L. Rev. F. 112, 1 (2006).

34. See Shapiro, supra note 30, at 8, 16-18.

better ensure legitimacy based upon fidelity to the rule of recognition.

Part I introduces the foundations of modern legal positivism thought.[35] Relying primary on H.L.A Hart's theories Part II seeks to test legitimacy of the environmental administrative state as a lawmaking institution in our legal system. If officials in our system consistently demonstrate that they do not perceive agencies as valid legal actors, or bestow upon the norms derived from agency action the official respect equal to that expected to be granted sources of law in our society, then indeed the accepted conditions for legitimacy as a lawmaker are not met.[36] Reflection on recent environmental administrative law problems demonstrates that agency authority is regularly treated with substantially less respect and deference (in other words, comity) by the courts, the Executive Branch, and, to a lesser extent, by Congress than that due to a valid legal actor of our system.[37] Legal positivism, therefore, validates that the administrative state's illegitimacy with regards to environmental lawmaking.

Having demonstrated the illegitimacy of the current administrative system, Part III takes up consideration of the appropriate rule of recognition in our democratic system that, if followed, would produce administrative legitimacy. It is often said that the American rule of recognition is the United States

35. See infra Part I.A.
36. See infra Part I.B.iii.
37. See infra Part I.C.

Constitution, or some part of that document.[38] This assertion is rejected. Not only does Hart refuse to restrict the rule of recognition (or rules, as some have argued[40]) to the product of express agreement,[42] he repeatedly references the rule as part of a legal system's officially recognized social norms, customs, or values.[43] Accordingly, the rules of recognition in our system should be understood to include the democratic values that Americans accept and regularly examine to determine both the validity of law and the legitimacy of the lawmaking process.[44] From this, it is theorized that our oldest, and most cherished, democratic principle is the true "ultimate" rule of recognition—trustworthiness. Indeed, all other secondary rules of recognition in our system (including the Constitution) are designed to ensure sufficient checks and balances, primarily through well-defined engagement with other branches of government and the citizenry, to limit inevitable official self-interest and faction building.[45]

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38. See, e.g., Carey, supra note 29; Kent Greenawalt, The Rule of Recognition and the Constitution, 85 **Mich. L. Rev.** 621 (1987); Kenneth Einar Himma, Understanding the Relationship between the U.S. Constitution and the Conventional Rule of Recognition, in **The Rule of Recognition and the U.S. Constitution** 95 (Matthew Adler & Kenneth E. Himma eds., Oxford University Press 2009). If the Constitution is the final arbitrator of legitimacy in our system, then the problem is quite apparent—absent a constitutional amendment, true legitimacy of the administrative state will remain unattainable.

40. See infra notes 78-86 and accompanying text.

42. Hart, supra note 31, at 92

43. Id.; see also Greenawalt, supra note 39, at 626 ("What counts for law depends ultimately upon prevailing social practices, that is, what officials take as counting as law").

44. See infra Part II.B.

45. Infra notes 166-169 and accompanying text.

Finally, Part IV suggest, and defends, specific changes to agency procedure and practice that, in the spirit of EDD and in light of the rule of recognition, seek to provide democratic legitimacy to the environmental administrative apparatus through mechanisms designed to improve these agencies' trustworthiness as lawmaking bodies. Such procedures need not be in the Constitution to legitimize the environmental administrative apparatus. Part III should not be read to suggest a singular, take it or leave it approach to EDD or administrative reform. Rather, the purpose is to suggest that EDD scholarship requires greater appreciation of legal positivism, and that reform proposals must be designed to appreciate the system's rules of recognition. Moreover, through a structural approach to reform the administrative state to better meet our democratic values, will we begin not only better protect environmental values, but also restore the trust that we have lost for the American government due to its environmental regulatory inertia over the past two decades.

I. Legal Positivism and the Legitimacy of (Environmental) Administrative Law

A. The Foundations of Modern Legal Positivism

"The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry."[46]

In this quote rests the sole distinction between legal positivists like John Austin, Jeremy Bentham, and H.L. Hart, and the

46. John Austin, **The Province of Jurisprudence Determined** 157 (Ed. Wilfrid E. Rumble ed., Cambridge University Press 1995).

natural law views of those like St. Thomas Aquinas, Ronald Dworkin, and Kenneth Einar Himma. Law to a legal positivist is what is accepted as authoritative within a given legal system ("the existence of law"), and not necessarily what is just and right (its "merit or demerit").[47] Policies that appear just, wise, efficient or prudent, without more, cannot lay claim to the status of law any more that laws that are unjust, unwise, inefficient or imprudent can be denied that status.[49] Law is purely a matter of social fact.[50]

For the legal positivist theorist, H.L. Hart, this distinction was clear, but left unresolved the question of what constitutes society's ultimate criteria for what counts as law. Hart rejected Austin's view that the commands of a sovereign constitute valid law when based solely on the sovereign's claim to power.[51] In Hart's view, while some or even many might obey the commands of a dictator in fear of sanction, such a system of government "would not amount to a legal system."[52] Hart went to great length to distinguish, therefore, the difference between being obliged to follow an order by force, and

47. See Stanford Encyclopedia of Phil. supra note 29, at 1.

49. Id.

50. Carey, supra note 29, at 1165 ("Hart argued that law is a social fact and thus can be distinguished from morality.") and 1168 ("Hart constructs a complex explanation of the nature of law without appealing to moral or normative explanations. Laws, for Hart, are rules of behavior that require subjects and officials to behave according to certain socially determined standards"); Robin Bradley Kar, Hart's Response to Exclusive Legal Positivism, 95 **Geo. L. J.** 393, 397 (2007) ("Hart used the internal point of view to develop what has become known as a 'social practice' account of rules and obligations, according to which these phenomena are reducible to social conventions animated by a particular psychology.").

51. Greenawalt, supra note 39, at 621.

52. Dyzenhaus, supra note 33, at 2.

feeling one has an obligation (within the system) to do so as a citizen.[53] In Hart's view, only the latter constitutes law.[54]

From this premise flows Hart's theory of law as a union between primary and secondary rules.[55] Under primary rules, "human beings are required to do or abstain from certain actions, whether they wish to or not."[56] Primary rules exist in the form of statutes, ordinances, court orders, and regulations that apply to us everyday. Secondary rules "provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operation."[57] Secondary rules establish the legal structure of a system, providing us rules to determine who is in power, and how primary rules can be adopted.[58] Hart argues that the secondary rules are necessary in any well-defined legal system because even "the most unconstrained sovereign will still need to have his commands

53. Hart, supra note 31, at 20-25 and 79-84. As Hart described it, in a gunman situation (A orders B, at gun point, to hand over his money), "we would say that B, if he obeyed, was 'obliged' to hand over his money. There is a difference, [however], between the assertion that someone was 'obliged' to do something and the assertion that he had an obligation to do it." Id. at 80.

54. Id. at 83 ("The statement that someone has or is under an obligation does indeed imply the existence of a rule; yet it is not always the case that where rules exist the standard of behaviour required by them is conceived of in terms of obligation. 'He ought to have' and 'He had an obligation to' are not always interchangeable expressions . . . .").

55. Id. at 77.

56. Id. at 78-79.

57. Id.

58. Id. Primary rules, therefore, impose duties while secondary rules confer powers. Id.

recognized as such . . . ."[59] Thus for Hart, sovereignty itself is constituted by law.[60]

Secondary rules provide a cure to what Hart saw as a deficit in a simple social structure made up of only primary rules: uncertainty.[61] Hart identified such uncertainty when a dispute arises over what the primary rules are or their precise scope. In a system made up of only primary rules, there would be no secondary authority to turn to for resolution.[62] Hart believed this deficit to be ultimately fatal to any legal system, and, therefore, introduced us to a remedy: the rule of recognition.[64] For reasons to now be discussed, the rule of recognition also has the most bearing on the theories to be introduced in this Article.

B. H.L.A. Hart's Rule of Recognition

1. Background

The rule of recognition, to put it plainly, is the mechanism that enables citizens and officials within a given legal system to ascertain the primary rules of law. As one scholar has put it, the

59. Dyzenhaus, supra note 33 a 2.

60. Id.

61. Id. Hart actually believed that a "primitive" system made up of only primary rules would suffer from three deficiencies—uncertainty, static nature, and inefficiency in enforcement. See Carey, supra note 29, at 1166 n.21.

62. Hart, supra note 31, at 91. Hart actually believed that a "primitive" system made up of only primary rules would suffer from three deficiencies—uncertainty, static nature, and inefficiency in enforcement. See Carey, supra note 29, at 1166 n.21.

64. Id. at 92 ("The simplest form of remedy of uncertainty in the regime of primary rules is the introduction of what we shall call a 'rule of recognition'.").

rule of recognition explains "why the prohibition on insider trading in section 16 of the Securities and Exchange Act of 1934 is a rule of law while the moral prohibition on being nasty to your elderly mother is not."[67]

The rule is the embodiment of Hart's belief that there are two minimum conditions necessary for the existence of a legal system.[68] First, those rules of behavior that are recognized as valid with reference to the system's ultimate criteria of validity must be generally obeyed; second, the system's criteria of legal validity must be effectively accepted as common public standards of official behavior by its officials.[69] Thus, in Hart's view, a developed legal system has both a "behavioral element . . . and a cognitive element, where participants develop a critical, reflective attitude toward a norm and criticize deviations from that norm by others in the community."[70]

Unfortunately, while Hart provided substantial inquiry into the nature of the rule, his own attempt to identify or conceptualize the form of the rule in any system was, at best, confused.[71] Many scholars

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67. Frederick Schauer, (Re)Taking Hart, 119 **Harv. L. Rev.** 852, 870 (2006). To put it less plainly, but in Hart's own words, "[t]o say that a rule is valid is to recognize that it as passing all the tests provided by the rule of recognition and so as a rule of that system." Hart, supra note 31, at 100.

68. See Dyzenhaus, supra note 33, at 1.

69. Hart, supra note 31, at 113.

70. Carey, supra note 29, at 1166.

71. See, e.g., Greenawalt, supra note 39, at 630-31. The best he could offer was his view that "[i]n England they recognize as law . . . whatever the Queen of Parliament enacts . . . ." Hart, supra note 31, at 99; Greenawalt, supra note 39, at 630-31.

today assert that complex legal systems, like that of the United States, most likely have a hierarchical rule of recognition that is not a simple single rule, but consists of a bundle of rules each possibly directed at different officials or jurisdictions.[73] Hart himself often referred to "rules" of recognition,[74] and to a system of "relative subordination and primacy."[75] Yet, when read as a whole, Hart consistently argues that in such a system, "one [of the rules] is supreme;"[76] an "ultimate" rule of recognition he suggests does exist.[77] In his words:

> We may say that a criterion of a legal system is supreme if rules identified by reference to it are still recognized as rules of the system, even if they conflict with rules identified by reference to other criteria, whereas rules indentified by reference to the later are so recognized if the conflict with the rules identified by reference to the supreme criterion.[78]

One need not precisely identify the ultimate rule of recognition to test the validly of the modern administrative state in the United

73. See Greenawalt, supra note 39, at 635, 659-660; Carey, supra note 29, at 1178-79, 1192-94.

74. See, e.g., Hart, supra note 31, at 92.

75. Id. at 102.

76. Id. at 103.

77. Greenawalt, supra note 39, at 626 (noting that "Hart . . . reserves the words "rule of recognition" to refer to ultimate standards for identifying the law; in his terminology, a standard that can be derived from another legal standard is not part of the rule of recognition.")

78. Hart, supra note 31, at 103.

States.[79] Instead, Hart specifies an approach to test the validity of both primary laws and primary lawmakers against even a known unknown, which we can suppose the rule of recognition is at this time. To construct such a test, it is first necessary to address two additional facets of Hart's work: Hart's internal point of view hypothesis and a presumed first and second order application of the rule of recognition.

2. The Internal Point of View Theory

Is it possible to demonstrate the existence of the rule(s) of recognition in a given system, or must it remain assumed? Clearly, in the day-to-day lives of those within a legal system who apply or follow the primary rules, the basis for why a particular rule has the weight of law is generally left unexamined beyond reference to its status as a statute, ordinance, regulation, judicial decision, etc. In this regard, an *external* viewer – a hypothetical person watching millions of interactions of citizens within a system – might begin to develop theories on how certain actions will necessitate predictable reactions. An outside observer will quickly understand that a robbery, for instance, will result some form of incarceration as punishment. But the external observer will not understand why incarceration is the socially mandated and acceptable punishment in the United States, while, for instance, equitable retribution (and eye for an eye) is not.

[79] Identifying the rule of recognition is necessary, however, to evaluate proposed replacements or changes to the current administrative system. See _____.

For Hart, however, statements of legal validity made by *internal* members of the system about particular primary rules—whether by judges, lawyers, or ordinary citizens—also carry with them certain presuppositions.[87] What is left unstated is that the primary rule at issue is one accepted as an appropriate social norm within the system as ultimately measured, of course, by the rule of recognition.[88] Hart argues that it is not essential that every individual citizen specifically recognize application of the rule to legitimize the legal system as such.[89] Instead, what is important is that officials within the system regard these common standards or limitations on official behavior and appraise each other's deviations as lapses.[90] In other words, the presupposition that is the application of the rule of recognition is demonstrated every day by those internal officials within the system tasked with identifying what counts as law. The very acceptance of, or acquiescence in, primary rules by a majority of those officials demonstrates that they see rules in line with the

87. Hart, supra note 31, at 105.

88. See id. (Noting that the presupposed matters consist of two things. "First, a person who seriously asserts the validity of some given rule of law, say a particulate statute, himself makes use of the rule of recognition which he accepts is appropriate for identifying the law. Secondly, it is the case that this rule of recognition . . . is not only accepted by him but is the rule of recognition actually accepted and employed in the general operation of they system.").

89. Id. at 112-113.

90. See id. at 113; see also Dyzenhaus, supra note 33, at 2 ("The criteria employed need not be recognized by the populace; they are employed by officials.").

system's rule(s) of recognition.[91] This is Hart's internal point of view theory.[92]

3. First v. Second Order Application

As we have seen, through the rule of recognition Hart sought to provide resolution to "doubts and disagreements" that naturally arise within a system regarding which primary rules one is obligated to follow, and which may have moral appeal to some members in the group but are otherwise without legal force.[93] According to Professor Scott Shapiro, in dwelling extensively on resolving doubt over primary rules within a system (what Shapiro has labeled "first-order" uncertainty[94]), Hart, Shapiro argues, overlooks another type of uncertainty—that which arises over the legitimacy of public officials to settle first-order uncertainty.[95] As people within a system are bound to have different views regarding "the natures of justice, equality, liberty, privacy,

91. See Hart, supra note 31, at 105, 113; see also Dyzenhaus, supra note 33, at 2 ("What counts as law depends ultimately upon prevailing social practice, that is, what officials take as counting as law.").

92. See, e.g., Schauer, supra note **Error! Bookmark not defined.**, at 871. For Hart, an external observer of a system could, on the basis of recording regular responses to conformity and non-conformity with the rules, predict with a fair measure of success that deviation from the rules corresponds with a hostile reaction (reactions, reproofs, punishment, etc.). Hart, supra note 31, at 87. The external point of view, however, cannot reproduce the way in which the rules function as rules in the lives of those in the system. For them, "a violation of a rule is not merely a basis for the prediction of a hostile reaction will follow but a reason for hostility." Id. at 88.

93. See, e.g., Shapiro, supra note 30, at 16-18.

94. Id. at 16.

95. Id. at 17.

security and alike," there is certain to be disagreement over the proper form and function of government just as much as there will be difference of opinion over the meaning of primary rules.[96] As Shapiro argues:

> Recognizing the prevalence of second-order, as well as first-order uncertainty is imperative, for resolution of the latter cannot be had without resolution of the former. In other words, public officials can resolve doubts of, and disagreements between, private parties only if members of the group are not uncertain about the identity of the public officials.[97]

Herein lies what appears to be one of the many missing pieces of Hart's puzzle: it is imperative that a legal system have not only a means to test the validity of its primary rules, but also of it primary rule givers. As Shapiro appreciates, an efficient legal system cannot resort to member deliberation, negotiation, or bargaining over every second-order uncertainty dispute, nor can it require its members to simply guess over proper distribution of power.[98] Therefore, in the interest of efficiency, as with first-order disputes, uncertainty over the "content and contour of official duties" must necessarily be

96. Id. at 16.
97. Id. at 17.
98. Id. at 18.

resolved through appeal to the secondary rules,[99] and, in particular one must believe, the rule of recognition.

II. *Testing Fidelity to the Rule of Recognition: A Legal Positivist Account for the Ineffectiveness of Environmental Administrative Law*

A. Official Acceptance Within the U.S. Legal System: The Concept of Comity.

Hart's internal point of view theory is utilized daily in the United States by officials to resolve both first- and second-order uncertainty. The concept of comity, recognized as necessary to preserve a workable government, has a philosophical justification in Hart's rule of recognition. Indeed, our national government "is premised on each institution's respect for and knowledge of the others and on a continuing dialogue that produces shared understanding and comity."[100] Comity, of course, is necessary to preserve a workable government and, thus, can be said to have a functional justification. But comity also has a philosophical justification to the extent that, as Hart suggests, through respectful engagement both branches are legitimized as valid lawgivers.[101] Thus, when the Supreme Court upholds

99. Id.

100. Robert A. Katzmann, **Courts and Congress** 1 (Brookings Institution Press 1997)(emphasis added); see also City of Boerne v. Flores, 521 U.S. 507, 535-36 (1997)(Noting that our collective national experience reinforces that our legal system is preserved best "when each part of government respects both the Constitution and the proper actions and determinations of the other branches.").

101. See Adam Winkler, The Federal Government as a Constitutional Niche in Affirmative Action Cases, 54 **UCLA L. Rev.** 1931, 1949 (2007). Courts, for instance, in performing their function of reviewing the actions of the other branches place significant

an act of Congress, or demonstrates its reluctance to overrule legislative action even in the face of apparent constitutional defects,[102] the Court's actions speak equally to the validity of the primary rule as to Congress' legitimacy within the system. Similarly, when the Court overrules a popular act of Congress, and faces resounding criticism for the substance of its decision, the respect given by a majority of the Congress, as well as the President, to the Court by implementing its opinion fortifies certainty as to the status of each of the branches.[103]

Comity among the branches demonstrates the legitimacy of primary rules and legal actors in our system. However, what does it mean when

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weight on the presumed validity of legislative action (see Hardwood v. Wentworth, 162 U.S. 547, 892-94 (1986)), as well as on allowable deference afforded the executive branch in enforcing enacted laws (see Heckler v. Chaney, 470 U.S. 821 (1985)). Likewise, the Executive Branch is expected to heed to Congress where, through the proper use of legislative power, limits are set on presidential authority. See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 636-37 (2006) (Kennedy concurring). And of course, Congress is expected to respect the independency of the judiciary, accept the role of judicial review of its laws, and refrain from interfering in the disposition of pending cases. See Elisa Massimino & Avidan Cover, When Congress Slept, 33 **Hum. Rts.** 5, 5 (2006).

102. See Winkler, supra, note 101, at 1948-49.

103. The Supreme Court's decision in Citizens United v. Federal Election Commission, 130 S.Ct. 876 (2010), comes to mind in which the Court faced extreme criticism of its decision to overturn portions of the McCain-Feingold Act that prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate. See Adam Liptak, Justices, 5-4, Reject Corporate Spending Limit, N.Y. Times (Jan. 21, 2010), available at http://www.nytimes.com/2010/01/22/us/politics/22scotus.html. Of course, Congress can always seek to overrule Supreme Court decisions invalidating legislation through subsequent, valid legislative action. See, e.g., David T. Buente, Citizen Suits and the Clean Air Act Amendments of 1990: Closing the Enforcement Loop, 21 **Envtl.** 2233, 2238 (1991).

there is a lack of comity between branches, or more precisely, a lack of agreement among a majority of officials within the branches over the proper exercise or scope of power? In such circumstances, legitimate authority may still appear to exist, but is more often than not controversial and/or contested. For a legal positivist, the failure of a majority of public officials within the system to accept authority by a legal actor leads to the conclusion that such power is not only disputed, does not meet the social criteria we are calling the rule of recognition. For example, for over a century now the existence and parameters of presidential authority (as opposed to judicial authority) to refuse to implement constitutionally suspect statues has been "hotly contested," and a seemingly fair number of officials refuse to recognize the legitimacy of the President doing so.[104] In the same way, large numbers of officials challenge the so-called unitary executive theory, which purports to give the President direct authority over all administrative agency decision-making processes,[105] as a legitimate description of executive power[106] In both cases, the presence of disputed second-order authority invalidates the president's action under the internal point of view hypothesis.

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104. Dawn E. Johnson, Presidential Non-enforcement of Constitutionally Objectionable Statues, 63 **Law & Contemp. Probs.** 7, 8 and 14-16 (2000).

105. See, e.g., Peter M. Shane, Legislative Delegation, The Unitary Executive, and the Legitimacy of the Administrative State, 33 **Harv. J. L. & Pub. Pol'y** 103, 109 (2009)(the unitary executive theory, or "Presidentialism is the idea that the President has a wide range of powers virtually exempt from congressional regulation or judicial review, including the power of command over all discretionary policymaking of other executive officers").

106. Id. at 103-106.

B. A Demonstrated Lack of Comity For Environmental Administrative Apparatus.

History shows that actions by each of the three constitutional branches of government confirm a deficient respect of the environmental regulatory apparatus by other officials. Based on Hart's theories, this calls into jeopardy the authority of environmental regulators to issue primary rule to protect public health and welfare.

1. *The Courts' Hostile Treatment of Environmental Agency Decisions.*

In theory, the scope of judicial review of environmental regulatory action is considered narrow—a court is to show tremendous deference to the agency,[107] whether in interpreting its legal mandate under the Chevron doctrine,[108] or reviewing an agency's policy-related determinations during rulemaking under the APA's "hard look" review standard.[109] In reality, agencies more often than not face rigorous, probing review by the courts far beyond that given to either legislative or executive action under the Constitution.[110] Judge Wald,

107. Patricia G. Chapman, Has the Chevron Doctrine Run Out Of Gas? Senza Ripieni Use of Chevron Deference Or The Rule Of Lenity, 19 **Miss. C. L. Rev.** 115 (1998); Sidney A. Shapiro & Robert L. Glicksman, Congress, the Supreme Court, and the Quiet Revolution in Administrative Law, 1988 **Duke L.J.** 819 (1988); David M. O'Brien, Marbury, the Apa, and Science-Policy Disputes: The Alluring and Elusive Judicial/Administrative Partnership, 7 **Harv. J.L. & Pub. Pol'y** 443 (1984).

108. Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837 (1984).

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

110. See, e.g., Gordon G. Young, Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged

for example, described the "hard look" arbitrary and capricious standard of review,[111] as a "catch-all label for attacks on the agency's rationale, its completeness or logic, . . . or lack of evidence in the record to support key findings of law."[112] Likewise, some scholars have suggested that judicial review has become so intrusive that agencies ultimately stop trying to pursue their regulatory missions through rulemaking and/or dwell so extensively on excessive data gathering and analysis that the costs and delays of regulatory programs become unbearable.[113] These are not the type of views about the relationship between agencies and the courts that produces an image of comity in the mind.

The Supreme Court's recent opinion in Massachusetts v. EPA[114] reveals the insolence the Court can show to agencies and their decisions, even under the most deferential of standards. The case involved a challenge to EPA's denial of a rulemaking petition requesting that the agency regulate greenhouse gas emissions from new

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Demise and Actual Status of Overton Park's Requirement of Judicial Review "On the Record," 10 **Admin. L. J.** 179, 190 (1996).

111. 5 U.S.C. § 706.

112. Patricia M. Wald, Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On, 32 **Tulsa L. J.** 221, 233-34 (1996).

113. William S. Jordan, III, Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?, 94 **Nw. U. L. Rev.** 393, 394 (2000). While there is no good data regarding the number of agency decisions set aside by courts over the past 50 years, limited sampling by Judge Wald, formerly of the United States Court of Appeals for the District of Columbia suggests that the number may be as high as 47%. Patricia M. Wald, Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?, 67 S. **Cal. L. Rev.** 621, 636-37 (1994)

114. 549 U.S. 497 (2007).

motor vehicles under the Clean Air Act.[115] EPA denied the petition on the grounds that the agency lacked statutory authority, and in any event it would be unwise to do so absent a more comprehensive national and multi-national approach to climate change.[116] Indeed, EPA went so far as to suggest that the President's foreign policy powers would trump any Clean Air Act mandate.[117] A majority of the Court flatly rejected all of EPA's arguments.

It is not overly surprising that, given the broad definition of an "air pollutant" in the Clean Air Act[118] and the rather expansive mandate to regulate air pollution from new automobiles in Section 202 of the Act,[119] the Court rejected EPA's assertion that it lacked statutory authority.[120] What is most "stunning," in the words of Professor Ronald Cass, "is the seemingly effortless leap from [the

115. P. Leigh Bausinger, Welcome to the (Impenetrable) Jungle: Massachusetts v. EPA, the Clean Air Act and the Common Law of Public Nuisance, 53 **Vill. L. Rev.** 527, 536 (2008).

116. Id. at 536-37.

117. See Colin H. Cassedy, Massachusetts v. EPA: The Cause and Effects of Creating Comprehensive Climate Change Regulations, 7 **J. Int'l Bus & L** 145, 147 (2008).

118. 42 U.S.C. § 7602(g)("The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air.")

119. 42 U.S.C. § 7521(a)(1)("The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.")

120. See Ronald A. Cass, Massachusetts v. EPA: The Inconvenient Truth About Precedent, **Va L. Rev.** In Brief (May 21, 2007), available at http://www.Virginialawreview.org/2007/05/21/cass/pdf.

Court's] decision on authority to a conclusion that, because EPA may regulate, it must and must do so now."[121] Professor Cass argues that "the Justices stretch, twist, and torture administrative law doctrines to avoid the inconvenient truth that this is not a matter in which judges have any real role to play."[122] He goes on:

> [t]he majority opinion in Mass. v. EPA reads like a faculty discussion paper or political position paper, intended for a like-minded crowd. There is no sense of real openness to the [sic] EPA's analysis—questioning the clarity of global warming science or the immediate need to do anything and everything possible to combat it (even at the risk of impairing efforts at a better solution) is received by the majority as an obvious departure from common sense.[123]

Of course, from a legal positivist perspective, the opinion demonstrates that a majority of officials on the Supreme Court have serious questions over the legitimacy of EPA to make these decisions. As Professor Robert Percival points out, despite a 75 year relationship between the Courts and administrative agencies, the Mass opinion demonstrates that the tension between skepticism over the regulatory state and tolerance for it, so prevalent during the New

121. Id.
122. Id.
123. Id.

Deal, have failed to diminish in the Court's mind.[124] More importantly, the lack of demonstrated comity given by the Court suggests that the environmental administrative state lacks the requisite legitimacy to be fully trusted by the Court to accomplish its protective mandates.

2. *The Executive's Misuse of the Environmental Regulatory Apparatus.*

The Court's view of EPA (and other agencies) may be the consequence of the Executive Branch's escalating manipulation of the administrative decision-making process, in which politicians, rather than scientific or technical experts, make the relevant calculations.[125] Returning to the essential question in Massachusetts v. EPA, when asked to consider whether the government's climate change science may have been manipulated, the House Oversight and Government Reform Committee concluded that indeed "the risks posed by climate change were deliberately understated [by EPA] through the editing of scientific reports by non-scientists in the White House."[126] Such audacious interference with the independence of any agency, and

124. Robert V. Percival, Massachusetts v. EPA: Escaping the Common Law's Growing Shadow, 2007 **Supreme Court Review** 111, 112 (2008).

125. See Christine Klein, The Environmental Deficit: Applying Lessons from the Economic Recession, 51 **Ariz. L. Rev.** 651, 664 (2009).

126. Id. at 665 (citing US. House of Representatives, Comm. On Oversight & Gov't Reform, Interference with Climate Change Science Under the Bush Administration (Dec. 2007)). A similar recent example can be found in the White House's interference with decisions by the U.S. Fish and Wildlife in implementing the Endangered Species Act, 16 U.S.C. § 1531, et. seq.. Id.(citing U.S. Department of the Interior, Office of Inspector General, Investigative Report: The Endangered Species Act and the Conflict Between Science and Policy (Dec. 10, 2008)).

disregard for the very nature and purpose of the administrative state, again demonstrates that officials of the Executive Branch likewise lack the respect needed to establish this so-called fourth branch of government with the necessary legitimacy to function in our system.

3. *Congress' Distrust and Misuse of Environmental Regulation.*

Administrative law scholars often comment on an air of distrust and skepticism by Congress with regards to bureaucratic lawmaking.[127] The relationship between Congress and congressionally created regulatory agencies is characterized through intense and pervasive oversight,[128] which, in the case of EPA, for instance, appears to be consistently adversarial and negative.[129] In truth, this is not necessarily a problematic relationship, and is considered by some the intent of the Founders of our constitutional system.[130]

Yet, there is also evidence that Congress's distrust runs deeper; that it indicates a lack of acceptance of agency legitimacy. Take for instance the apparent trend of drafting tighter enabling statutes to

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127. Gary C. Bryner, **Blue Skies, Green Politics: The Clean Air Act of** 1990 180 (Congressional Quarterly Books 1995); Christopher H. Schroeder, Assessing the Environmental Protection Agency After Twenty Year: Law, Politics, and Economics, 54 **Law & Contemp. Probs.** 249 (1991).

128. See Richard J. Lazarus, The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves?), **Law & Contemp. Probs.**, Autumn 1991, at 205, 206; ClimateScienceWatch, Senate Appropriators Share Our Distrust of NOAA and the White House on Essential Climate Satellites, June 29, 2007, available at http://www.climatesciencewatch.org/index.php/csw/details/senate_approps_noaa_("The [congressional] Committee believes that continuous oversight by Congress is necessary given NOAA's track record").

129. Lazarus, supra note 126, at 206.

130. Richard B.Stewart, Madison's Nightmare, 57 U. Chi. L. Rev. 335 (1990); see also **The Federalist No.** 51, at 323-35 (James Madison) (Clinton Rossiter, ed, 1961).

leave little if any room for agency interpretation.[131] By intentionally limiting the range of agency discretion in making policy decisions, Congress, like the other branches, evinces that legislative officials have little respect or trust that the agency is capable any longer in performing the functions envisioned by the New Deal creators of the modern administrative state, at least in the independent, professional, and technocratic manner once perceived.[132] Conversely, Congress also been known to take advantage of the public distrust of the regulatory apparatus, such as intentionally punting to an agency "really tough policy choices,"[133] by misbranding policy issues, for instance, as capable of being resolved largely by agency scientific expertise.[134] In these instances, Congress' misuse of the agency as a means to avoid their own political accountability on an issue also suggests that these officials have little interest in ensuring a legitimate, properly functioning administrative state.

131. See Cass R. Sunstein, **After the Rights Revolution: Reconceiving the Regulatory State** 143 (Harvard University Press 1990); see also, Improving Regulatory Systems: Recommendations and Actions: REG09: Improve Agency and Congressional Relationships, available at http://govinfo.library.unt.edu/npr/library/reports/reg09.html.

132. See supra note 1.

133. Cynthia R. Farina, Deconstructing Nondelegation, 33 **Harv. J. L & Public Pol'y** 87, 95 (2010).

134. Wendy E. Wagner, Congress, Science, and Environmental Policy, 1999 **U. Ill. L. Rev.** 181, 197 (1999).

III. EDD and American Values: Does it Satisfy the Rule of Recognition?

A. The Promise of Environmental Deliberative Democracy

Today, most scholars accept that our nation's environmental story has become a story of Congressional inaction[135] and regulatory backsliding.[136] As Professor John Dryzek has put it, "[i]f two or more decades of political ecology yield any single conclusion, it is surely that authoritarian and centralized means for the resolution of ecological problems has been discredited rather decisively."[137] The problem most often cited is straightforward—"the incomplete representation of environmental interests [by the decision-making institution], allied with the lack of environmental accountability of the current state-centered political system[]."[138] Thus, the limited response to environmental concerns by government is considered "a reflection of a [] decision-making process most receptive to economic

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135. See, e.g., Carol A. Casazza-Herman, David Schoenbrod, Richard B. Stewart & Katrina M. Wyman, The Braking the Logjam Project, 27 **N.Y.U. Envtl. L. J.** 1, 1-2 (2008).

136. See, Klein, supra note 125, at 659-673.

137. John S. Dryzek, Strategies of Ecological Democratization, in **Democracy and the Environment: Problems and Prospects** 108 (William M. Lafferty & James Meadowcroft eds., 1996). At the root of this system, which has been labeled eco-authoritarianism, is the belief that "a strong and cohesive leadership is indispensable for identifying the right solutions to the environmental crisis as such and ensuring that they are implemented effectively to the society at large, which is only available in an authoritarian but not democratic regime." Wong, supra note 18, at 4.

138. Michael Mason, **Environmental Democracy** 47 (1999); see also Graham Smith, **Deliberative Democracy and the Environment** 53 (2003) ("Contemporary liberal democratic institutions are charged with lacking sensitivity to the plurality of values we associate with the non-human world, and with employing techniques to guide decision making . . . that misrepresent and distort the nature of environmental values.").

self-interest and powerful sectorial interest groups."[139] With regard to the administrative state, agency environmental decisions are often viewed not only with dissatisfaction, but as the mere product of an opaque process, with limited public participation and with no genuine accountability to democratic authority.[140]

Despite this realization about our environmental condition, optimistic new literature is emerging that seeks to examine and improve upon the relationship between environmentalism and democracy.[141] Chief among this literature is the concept of Environmental Deliberative Democracy (EDD), which is most basically defined as "a decision-making procedure which emphasizes the process of free and fair deliberation among individuals where their preferences and value orientations are debated with a focus of the need to realize the common good."[142] EDD shares with other liberal theories the desire to create political institutions that will resolve conflict, but also acknowledges that in the "process of engagement individual preferences and value orientation can be transformed."[143] Thus, the primary distinction between EDD and our existing system is the addition of a deliberative process—a defined platform, if you

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139. Mason, supra note 138, at 48; see also Baber & Bartlett, supra note 16, at 3 ("The environmental achievements of the past four decades have given rise . . . to a widespread environmental complacency and to entrenched and even more sophisticated "green" opposition of political and economic interests.").

140. See Markell, supra note 5, at 653.

141. Mason, supra note 138, at 2; Baber & Bartlett, supra note 16, at 1-2.

142. Wong, supra note 18, at 8.

143. Smith, supra note 138, at 56.

will, for citizens and stakeholders "to call to mind, raise, discuss and take care of interests not their own"—before the rendering of any decision.[144] According to environmental deliberative democrats, individuals are inclined to make more ethical or reasonable judgments when given the opportunity in a public sphere to reflect about the whole environment as a common good. This is particularly true when the public forum allows others to challenge their potentially narrow, self-interested viewpoints.[145]

EDD advocates also reject the currently constituted administrative state as a viable means to develop environmental policy. In particular, the rationality gained by assigning "specialization and competent fulfillment" of social tasks to expert agencies has provided no protection against paternalism and "self-empowerment" by the very administrative agencies charged with caring for the environment.[146] According to Professors Baber and Bartlett, improved environmental regulation requires:

> [m]ore focused production of information about environmental challenges that is broadly known, regularly reviewed, and used as a basis for strategy development, tactics formation, and resource allocation by agencies charged with environmental protection. And it goes without saying that this process of information

144. Wong, supra note 18, at 8-9.

145. Id.; see also Mathew Humphrey, **Ecological Politics and Democratic Theory** 95 (2007).

146. Barber & Bartlett, supra note 16, at 10.

> generation and deployment must involve frequent and meaningful opportunities for deliberative input from as many interested citizens as can be accommodated.[147]

These concerns over the administrative state resonate loudly in the United States, where administrative decision-making dominates the day-to-day environmental policy agenda.[148] Accordingly, American law scholars have, in recent years, produced a mounting collection of administrative law reform proposals, and while many do not specifically align their writing with the EDD movement, their ideas certainly overlap. As a general proposition, the scholars, like other administrative law theorists, accept that the administrative state is here to stay, and that a constitutional amendment to legitimize the branch is highly unlikely. Accordingly, they look to statutory mandated changes to agency procedure to better check agency authority and politicization.[149]

The American literature can roughly be grouped into three classifications, each increasingly more specific with regard to the role of the public in the agency deliberation process. At the lowest level are those suggestions grounded in the civic republicanism tradition.[150] These scholars often call for changes to the agency's

147. Id.

148. See generally, Croley, supra note 11, at 3 (Administrative agency "decisions dwarf those of the other three branches, certainly by volume and quite possibly by importance as well.").

149. See Fontana, supra note 153, at 100 n.118.

150. Modern civic republicans view the Constitution as an attempt to ensure that lawmaking results from deliberation that respects, and reflects, the values of all members of society.

information gathering process to allow for public input at earlier stages of the policy formation (in hopes of broadening both the agency perspective and range of possible regulatory alternatives).[151] Similar calls for reform are made regarding the scope of judicial review, giving the court authority remand decisions with orders to the agency to act in "a more deliberative manner" when issuing rules.[152] At the intermediate level, are those who desire greater direct public participation in the decision-making process, generally in the form of citizen advisory panels[153] or citizen-based mediation.[154] At the highest,

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Seidenfeld, supra note 1 at 1514. Two leading proponents of this theory, Cass Sunstien and Frank Michelman, argue that increased public participation and increased deliberation by Congress is the essential means to fulfilling the civic republican promise. See Lisa O. Monaco, Give the People What They Want: The Failure of "Responsive" Lawmaking, 3 U. Chi. L. Sch. Roundtable 735, 757 (1996). While Sunstien "adheres to the traditional principle that "basic value judgments should be made by Congress," other civic republicans argue that the theory is also consistent with "broad delegations of political decision making authority to officials with greater expertise and fewer immediate political pressures than directly elected officials or legislators." Seidenfeld, supra at 1514-15. In any case, civic republican theories are generally distinguishable from the next two levels of deliberative democracy on the grounds that civic republicans "promote insulated, expert bureaucrats deliberating over decisions in a 'public-regarding' way," as to outright citizen participation in the decision-making process. Nou, supra note 18, at 604 n. 17; Jim Rossi, Participation Run Amok: The Cost of Mass Participation For Deliberative Agency Decisionmaking, 92 **Nw. U. L. Rev.** 173, 212 (1997)(discussing that "as a conceptual matter, deliberation is quite separable from participation"). But see Jonathan Poisner, A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation, 26 **Envtl. L.** 53, 53 (1996)(suggesting "a possible reform to make citizen participation nearer the civic republican ideal [would be] the establishment of citizen lay juries with substantive authority over the NEPA process").

151. Seidenfeld, supra note 1, at 1559-60.

152. Id. at 1548-49.

153. See, e.g., John S. Applegate, Beyond the Usual Suspects: The Use of Citizen Advisory Boards in Environmental Decisionmaking, 73 **Ind. L.J.** 903, 921-26 (1998); David Fontana, Reforming the

most stringent level are those who call for giving citizens direct substantive authority over agency decision-making, possibly in the form of a citizen jury.[155]

Regardless of the classification, for a legal positivist, the primary rules we desire to put in place to check agency authority must first adhere to our system's underlying rules of recognition if there is any chance of official acceptance of administrative lawmaking. Thus, before turning to scrutinizing whether EDD can legitimize the environmental administrative apparatus, we are first duty-bound to identify the applicable rule of recognition in our system to judge the legitimacy of these bureaucratic lawmakers. Otherwise, it will remain unclear, and certainly untested, that EDD proposals stand any better chance at justifying the modern administrative state than the numerous other offers made by theorists over the decades.[156]

Administrative Procedure Act: Democracy Index Rulemaking, 74 **Fordham L. Rev.** 81, 88-89 (2005). See also Nau, supra, note 18, at 606 (arguing for "deliberative cost-benefit analysis" in which "deliberative forums of lay citizens engage in informed and structured discussion with regards to their individual preferences. The insights gained from such forums are then informs agency rulemaking.").

154. See, e.g, Applegate, supra note 153, at 914-920; Fontana, supra note 153, at 82-83.

155. See, e.g., Ethan J. Leib, Towards a Practice of Deliberative Democracy: A Proposal for a Popular Branch, 33 **Rutgers L.J.** 359, 363-365, 408 (2002); Poisner, supra note 150, at 92-94.

156. Indeed, for nearly 60 years economists, political scientists and legal scholars have advanced theoretical proposals to legitimize the post-New Deal administrative state. See, e.g., Croley, supra note 11, at 5-6. Or as Professor Jody Freedman explains it, "[a]dministrative law scholarship has organized itself [] around the need to defend the administrative state against accusations of illegitimacy." Jody Freedman, The Private Role in Public Governance, 75 **N.Y.U. L. Rev.** 543, 546 (2000).

B. The Rule of Recognition in the United States (Second-Order Uncertainty)

Legal philosophers often argue that the ultimate rule of recognition in the U.S. is the Constitution itself or some distinct part of the Constitution.[158] Take the proposition, for instance, that "the rule of recognition for federal law in the U.S. would be: The text of the 1787 Constitution (including the amending clause), and whatever is validated as law by that text (including both amendments to the original text and subordinate law, e.g., statues enacted pursuant to Article I or judicial directives issued pursuant to Article III), is law."[159] This may be an acceptable statement to resolve first order uncertainty, but

When it comes to resolving the type second order uncertainty questions that arise in the context of legitimacy of the administrative state, the constitutiuonal account of the rule of recognition in the U.S. fails on two fronts. First, that the ultimate rule of recognition must (or can) be embodied in an express, written agreement like the Constitution misconstrues Hart's own criteria; and second, it does not comport with real-world practice.

As suggested earlier, according to Hart, every legal system must contain one, and only one, rule that sets out the final test of

158. Frank I. Michelman, Constitutional Authorship By The People, 74 Notre Dame L. Rev. 1605, 1614 (1999); Greenawalt, supra note 39, at 642; Carey, supra note 29, at 1178-79.

159. Matthew D. Adler, Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?, 100 **Nw. U. L. Rev.** 719, 731 (2006).

validity in that system.[160] The key, therefore, is in locating "a master rule that exists by the fact of social acceptance and not on the account of any further rule of recognition."[161] Inversely, a norm that can be derived from reference to another norm is not, by definition, an ultimate rule.[162] In the American system, however, reaching beyond the text of the Constitution to some sort of higher authority is a well-entrenched practice by presidents, legislators, jurists, and lawyers tasked with judging the validity of primary rules and official acts. Thus, in considering the proper interpretation of the Constitution's separation of powers provisions, or its meaning with regards to an issue involving the balance of federal and state authority, it comes of no surprise to find a legislator, president, or jurist calling on the words of the Founders, or past officials, for guidance.[163] In doing so, what the official is looking for is a set of social facts—namely the shared norms, customs or values that underlie our collective understanding of what constitutes the American democratic system—for validation that the her interpretation of the law is the correct one.

160. See Shapiro, supra note 30, at 4; supra notes 73-78 and accompanying text.

161. Schauer, supra note **Error! Bookmark not defined.**, at 870.

162. Hart, supra note 31, at 102-103.

163. As Justice Scalia has acknowledged, the Founders' views, as contained in the Federalist Papers and other writings, are, for instance, valuable in implementing the Constitution because "their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood." Antonin Scalia, **A Matter of Interpretation** 38 (Amy Gutmann ed., 1997).

The Constitution, which contains a majority of rules of recognition used on a day-to-day basis, is often a convenient proxy for judging the validity of the nation's primary rules and legal institutions. However, those social facts that Hart would call the rules of recognition are not only capable of existing outside of a rigid constitution, but must if a legal system's understanding of what constitutes valid law is to evolve over time. In this regard, where the text of the Constitution cannot provide clear resolution when a question of uncertainly arises, officials should first look to "present consensus," which if exists, "should be seen as a sufficient condition for determining the ultimate criteria of legal validity."[164] If present consensus does not exist, however, then the proper way to resolve the dispute is by focusing "on the reasons that the system's constitutional designers had for adopting the basic institutional arrangements" in 1787.[165] Rules, and most certainly the ultimate rule, are cable of existing outside the Constitution as part of a common understanding of the societal values of what constitutes a democratic lawmaking institution, or a democratically enacted primary rule, in our system.

Interestingly, it is moralist legal philosophers that seem to agree that one need not turn solely to the Constitution to resolve

164. Shapiro, supra note 30, at 26.

165. Id. at 27. As Professor Shapiro sees it, "that a group of constitutional designers shared certain regarding goals, values, and/or trust is a social fact." Id. at 32. However, by privileging current consensus over historical social practice, Hart's theories of legal postivisim are not consistent with originalism, which would focus only on the Founder's thoughts regarding the Constitution. See Larry Kramer, Two (More) Problems with Originalism, 31 **Harv. J.L. & Pub. Pol'y** 907, 907 (2008).

legal uncertainty arising in our system. As Professor Suzanna Sherry proposed over 20 years ago, there is a strong historical record to demonstrate that the Founders themselves never intended "their new Constitution to be the sole source of paramount or higher law."[166] Instead, the Founders also recognized a "mixture of custom, natural law, religious law, and reason," which Sherry labels fundamental law,[167] which would continue to exist and might serve to invalidate legislative action, even in light of no apparent constitutional defect.[168] Through meticulous historical research, Sherry demonstrates that this unwritten fundamental law, universally accepted in both England and the colonies,[169] was often of chief importance to the Founders during debates over the Constitution,[170] was recognized by the first Congress,[171] and continued to play a role in judicial review of legislation after the Constitution was ratified.[172] She argues, however, that modern constitutional law has all but eradicated this link between the Constitution and fundamental law.[173]

Ironically, Sherry blames the loss of our understanding of fundamental law on "the legacy of legal positivism."[174] In some

166. Suzanna Sherry, The Founders' Unwritten Constitution, 54 **U. Chi. L. R.** 1127, 1127 (1987).

167. Id. at 1129.

168. Id. at 1128, 1167-68.

169. Id. at 1128-34.

170. Id. at 1157-61.

171. Id. at 1161-67.

172. Id. at 1167-76.

173. Id. at 76.

174. Id.

respect, this is true given the focus on the Constitution as the ultimate rule. Her argument, however, as well as those focusing on the Constitution, misconstrues Hart's understanding of the rule of recognition. Hart specifically believed that in a developed legal system, the rules could not be identified "exclusively by reference to a text or list," but instead "by reference to some general characteristic possessed by the primary rules."[175] In this regard, removing references to natural and religious law, Sherry's description of fundamental law is not so different than what is argued above to be Hart's understanding of the rule of recognition as a social norm, of a shared understanding of what is law based upon the existence of social facts accepted by those within the system.[176]

Perhaps, however, if unconvinced by theory alone that the Constitution must fail as the ultimate rule of recognition, consideration of the very condition of the modern administrative state today can better prove the argument. The administrative state, though strongly supported by constitutional structures, lacks the hallmarks of comity required for legitimacy. Clearly, there is no disagreement that both Congress, under its Article I authority, and the Supreme Court, under Article III, have repeatedly sought to legitimize administrative authority. Congress has not only passed legislation establishing specific administrative departments, it has on occasions too numerous to count, acted to provide agencies the power to carry out specific regulatory missions. Most telling of all, Congress has

175. Hart, supra note 31, at 92.

176. Id.; Shapiro, supra, note 30, at 16, 28.

acted through valid legislation—namely the Administrative Procedure Act[177]—to provide an overarching framework for the administrative state to operate within.[178] Likewise, the Supreme Court has regularly imprinted a constitutional seal of approval on the administrative state by upholding congressional delegations.[179] The endorsement of the administrative state by two branches of government, through constitutional action for that matter, should seemingly, according to the rule of recognition pronounced above, legitimize the agencies both as lawgivers and regulations as primary rules. Clearly, however, it has not and, therefore, it can scarcely be argued further that the Constitution is the ultimate rule of recognition in this country.[180]

So what is a better candidate for the ultimate rule? The answer is "trustworthiness." Trustworthiness is the one value shared among the Founders, as well as citizens and officials today, that time and

177. Pub. L. No. 79-404, 60 Stat 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

178. Remarkably, Professor Shapiro has argued that the APA, although not part of the Constitution, confers such rulemaking power to agencies that it should also be understood as partially constituting the rule of recognition in the United States. Shapiro, supra note 30, at 21.

179. See, e.g., Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001).

180. The notion that the administrative state is a legitimate source of primary rules it would eviscerate Hart's basic understanding of the rule of recognition (that the rules make the sovereign) and return us to the historical positivism approach of John Austin and Jeremy Bentham (the sovereign makes the rules). See Shapiro, supra note 30, at 1. As Professor Michelman observed, "[w]hatever you want to call it, [the ultimate rule] cannot itself consist in the command of any lawgiver because it supplies the standard by which claims to the status of lawgiver are verified (or not)." Michelman, supra note 158, at 1613.

time again stands out as an the foremost basis for the structure of the American legal system. Our government exists as a result of a social agreement in which all decline "to trust the goodness of rulers to protect the rights of citizens."[181] Again, as Professor Shapiro explains it: "The interpretive methodology the best furthers the designers' shared goals, values and judgments of trustworthiness is the proper one for interpreting the authoritative texts and hence for revealing the content of the system's shared plan."[182]

That it can be said that "[o]ur entire government is based on the distrust of official power" is not, of course, expressly evident in the text of the Constitution. That term is not used anywhere in the document. The Constitution is simply a framework document, laying out a government based on a system of checks and balances to address the Founders' underlying distrust of officials.[183] The Framers, of course, would feel no need to specifically set forth such values in a framework document. As they had already clearly indicated, the right of every person to address their grievances over abuse of official

181. See, e.g., William Bradford Reynolds, The Challenge for Constitutional Respect in America, 11 **Harv. J.L. & Pub. Pol'y** 13, 15 (1988).

182. Shapiro, supra note 30, at 28.

183. Yougstwon Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952) ("To that end [the Founders] rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity."); see also, Sherry, supra note ___, at 1130 ("A constitution was simply the norms by which a people were constituted into a nation.").

power is a "self-evident" social fact that existed, and continues to exist, in our system.[184]

C. Reconciliation: EDD and The Rule of Recognition

Part III.C. suggests that the ultimate rule within our system to judge legitimacy of a lawmaking institution, like the administrative state, is measured by the trustworthiness of the institution. Accordingly, until structural measures are put into place to bestow credibility on the environmental administrative apparatus, than no matter how deep their historical roots, and no matter how useful to society, public attitude will continue to focus on how the government power bestowed to administrative agencies "is [not] being held and exercised in accordance with [the] nation's laws, values, traditions, and customs."[185] Such measures need not be implemented by a constitutional amendment—it is enough that the structural form of the institution satisfies the ultimate rule.[186] Indeed, past practice demonstrates this to be true. Before the New Deal, agencies were widely used, but the sense of illegitimacy that surrounds them now was virtually non-existent. One reason might be because the delegations in

184. **The Declaration of Independence** para 2 (U.S. 1776).

185. See Freedman, supra note 9, at 10.

186. See David H. Rosenbloom, Retrofitting the Administrative State to the Constitution: Congress and the Judiciary's Twentieth-Century Progress, 60 **Public Admin. Rev.** 39, 43-44 (2000) (arguing that the focus of the courts and Congress since adoption of the APA in 1946 has been to make administrative procedures "more closely reflect democratic-constitutional norms for legislating and governing . . . .").

pre-New Deal times were far more limited,[187] generally involving ratemaking and other specific adjudications. More importantly, however, the function and procedures of these early agencies took better account of fundamental fairness and due process concerns so as to check arbitrary agency power.[188] Unfortunately, while the New Deal enlarged the scope of agency delegation, and expanded the function of the administrative state, the procedural checks on agency trustworthiness have not kept pace, notwithstanding the adoption of the Administrative Procedure Act in 1946.

EDD, correctly, suggests that additional democratic procedures are required to restore legitimacy, at least with regards to environmental administrative law. Social psychologists, in fact, tell us that that the extent to which a process is seen as "procedurally just" is extremely important to judgments about the legitimacy of an action.[189] It should be becoming clear, however, that in order to be successful in this endeavor, EDD theorists too are obligated to test their principles against the rules of recognition. The proposals must, of course, be designed with the ultimate rule of recognition in mind (i.e. instill trustworthiness into the system); but observance of all

187. See Field v. Clark, 143 U.S. 649, 692-93 (1892)(finding that the delegation in question was limited to discretion on the facts, not as to the law); Wayman v. Southard, 23 U.S. (10 Wheat) 1, 43 (1825)(distinguishing between "those important subjects, which must entirely be regulated by the legislature itself, from those of less interest, in which general provision may be made, and power given [to agencies] to act under such general provisions to fill up the details.").

188. See, e.g., United States v. Florida East Coast Ry. Co., 410 U.S. 224, 246, 253 (1973) (Douglas, J. dissenting).

189. Markell, supra note 5, at 677.

possible rules of recognition is also required. With this in mind, we can now turn to consideration of substantive EDD suggestions to legitimize the environmental administrative apparatus and, more importantly, improve the quality of environmental decision-making within these agencies.

IV. EDD: A Legal Positivist Proposal

A. Toward A Deliberative, Democratic, and *Trustworthy American Environmental Administrative State*

There is no single prescription for reforming the environmental administrative state. From a legal positivist position, however, some proposals might have greater promise, some less, and some might even further undermine the legitimacy of the administrative state. For instance, returning to the earlier discussion of three classifications of EDD literature,[190] it would seem that the highest level of EDD—giving citizens direct control over substantive agency authority—is itself conspicuously contrary to our accepted democratic values, which have long rejected that measure of citizen participation in government.[191] On the other hand, some level of citizen participation in government short of directly controlling official decision-making

190. Supra notes 150-155 and accompanying text.

191. See Monaco, supra note 150, at 739-40 (explaining that the Founders believed the country could only be governed only through representation and that direct control by citizens would result in "the instability of successive majorities."); Jim Rossi, Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking, 92 **MW. U. L. Rev.** 173, 192 (1997)(describing the Founders' distinction between a "republic" and a "pure democracy.").

is considered "sacrosanct to modern democracy."[192] Public awareness and involvement in agency decision-making eliminates regulatory "slack,"[193] and generates decisions that are more accountable and transparent to the public.[194] Thus, public participation in agency decision-making does appear to be a measure that can increase administrative legitimacy as measured by the rule of recognition.

My own view of a reformed regulatory state is one where regulators continue to function as the technical and scientific experts, and in making policy determinations weigh the expert knowledge with the informed opinion of electorate and peer officials in the political branches of our government. Such a system, I will argue, requires four specific reforms: procedural requirements to improve the quality of public participation; elimination of direct involvement in agency decision-making by all political actors; an obligation that an agency prepare a statement of overriding consideration when informed views of the people and other officials are disregarded in a decision; and limiting judicial review to questions of law and procedure. Each reform proposal is touched upon

192. Rossi, supra note 194, at 180-81.

193. As Professor Michael Levine explains it: " 'Slack' is the effect of information and monitoring costs that shield the actions of a regulator from observation by a rationale electorate. The operation of the economic theory of regulation implicitly relies on the existence of slack. After all, if all actions by regulators could be perfectly observed and understood and voted on, no regulator in a democratic system could survive instituting a policy that left an institutional polity . . . worse off than before." Michael E. Levine, Why Weren't the Airlines Reregulated?, 23 **Yale J. on Reg.** 269, 273 (2006).

194. See David Markell, "Slack" in the Administrative State and Its Implications for Governance: The Issue of Accountability, 84 **Or. L. Rev.** 1, 4-6 (2005); Rossi, supra note 194, at 182-83.

below, but largely the intent is to leave these proposals for future debate in the context of EDD and legal positivism.

Finally, in considering these reform proposals, and hopeful others brought in the future in the context of legal positivism, implementation should occur through Congressional action, and in particular through addition of specific provisions to the APA.[195] While some reforms could occur through issuance of an Executive Order, legislative action better conforms to existing structural mechanisms that our system has in place to avoid additional second-order uncertainty problems. In other words, legislative action is a more trustworthy, democratic process; unilateral executive action is not. Indeed, one of the concerns that has long dogged, for example, regulatory cost-benefit analysis is its imposition by the President alone, absent any mention of the process in the APA, an agency organic act, or many, if not most, action-specific statutes like the Clean Air Act, Clean Water Act, the Endangered Species Act, etc.

1. Improve the Quality of Public Participation

Critics complain that participation in traditional "notice and comment" rulemaking "suffers from problems of quality."[196] At one end of the spectrum is the argument that public participation in rulemaking is often just a means to ensure that the regulatory outcome

[195] Again, I make the assumption as others have, that reform of the administrative state will not occur through a constitutional amendment.

196. Beth S. Noveck and David R. Johnson, A Complex(ity) Strategy for Breaking the Logjam, 17 **N.Y.U. Envtl. L. J.** 170, 177 (2008).

is generally responsive to the interests of the regulated.[197] Others protest that participation has been dominated by a handful of individuals or groups who "carp, but offer little information to inform the process."[198] Even worse, regulators are often inundated with "postcard" comments," written and duplicated by an interest group without providing any new information to the regulator.[199] Clearly, the participation process is broken.

EDD advocates want to fix process by changing the nature and scope of public participation in agency rulemaking, typically by allowing for more one-on-one engagement with regulators through a discursive process. To be meaningful, and to generate more valid preferences for action, however, public deliberation also needs to be informed deliberation.[200] As Professor Sunstein has argued, deliberation alone more often than not leads to group polarization.[201] This effect is counteracted, however, where material on issue is presented with corresponding claims and values to group members.[202]

Agencies need, therefore, to not only reverse what can be seen a trend toward reduced openness to the public,[203] but need to take on the function of expanding the electorate's understanding of complex

197. Id.; National Labor Relations Bd. V. Wyman-Gorden Co., 394 U.S. 759, 764 (1969).

198. Noveck and Johnson, supra note 199, at 177.

199. Id.

200. See Nou, supra note 18, at 636

201. Cass Sunstien, Deliberative Trouble? Why Groups Go To Extremes, 110 **Yale L. J.** 71, 85 (2000).

202. See id. at 73 n6; Nou, supra note 18, at 636.

203. See, e.g., Markell, supra note 194, at 5.

environmental issues from a technical and scientific viewpoint. By fashioning public participation in the context of "the agency is listening" as opposed to "the agency is neutrally informing the debate,"[204] government has produced a climate in which most American's have chosen to shy away from involvement in, if not outright loathe, the rulemaking process. No wonder then that nearly 75 years ago, Yale botanist Paul Sears recommended that the United States hire a few thousand ecologists to directly advise citizens on how to participate in government decision-making in order to put the whole nation on a biological and economically sustainable track.[205] It is time to take heed and implement such a discursive proposal.

2. Eliminate Direct Involvement in Rule-making By Political Actors

As the Founders recognized in crafting the Constitution, good government relies on democratic, not political decision-making.[206] A legitimate administrative state, therefore, must be grounded in the idea of an independent lawmaking institution that relies on expertise, entrepreneurship and stewardship—not politics—to implement its

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204. EPA listening sessions are increasing held to obtain public opinion on complex environmental issues. See, e.g., 74 Fed. Reg. 57313 (Nov. 5, 2009) ("EPA is announcing a listening session to be held on November 23, 2009, during the public comment period for the external review draft document entitled, "Toxicological Review of Choroprene: In Support of Summary Information on the Integrated Risk Information System (IRIS).").

205. See Donald Worster, The Ecology of Order and Chaos, in **Out of the Eoods: Essays in Environmental History** at 4 (Univ. of Pittsburg Press, 1997).

206. See Stewart, supra note 130,, at 335 ("James Madison identified domination by economic and ideological factions as the central problem in a liberal polity.).

mission.[207] Procedures to insulate agency decision-making from direct political control from the White House or Congress are essential; not only must tampering with agency scientific and technical documents stop,[208] but unilaterally imposed Executive Branch requirements, such as the controversial use of independent cost-benefit analysis,[209] must be ended. Such direct (and literally unchecked) interference by one political branch is far removed from our understanding of separation of powers so imperative to the concept of trustworthiness in our system.

This is not to say, however, that Congress and the President should play no role in agency decision-making. Congress certainly has

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207. See Terence R. Mitchell & William G. Scott, Leadership Failures, the Distrusting Public, and Prospects of the Administrative State, 47 **Public Admin. Rev.** 445, 446 (1987). Expertise, of course, refers to the formal education, administrative training, and organization socialization that administrators are believed to possess which allows them to be an expert in their tasks. See id. at 447. Entrepreneurship refers to the administrator as a source of innovation and progress on addressing social problems through regulation. See id. Finally, stewardship refers to the legal, and some might consider moral, responsibility that an administrator has to the public or others through the obligation to regulate. See id. at 448.

208. See, e.g., supra notes 106 to 107 and accompanying text.

209. Cost-benefit analysis ("CBA") can be defined as "the systematic identification of all future monetized costs and benefits associated with a proposed regulation or policy decision." Nou, supra note 18, at 604. Initiated original by President Ronald Regan's Executive Order 12,291, and utilized by each President sense that time, CBA is argued by its advocates as a tool to "diminish interest-group pressures on regulation and also as a method for ensuring that the consequences of regulation are not shrouded in mystery but instead made available for public inspection and review." Id. at 612. CBA proponents respond that the procedure has resulted in greater control by political interest groups, and far less transparency in the rulemaking process. See Klein, supra note 125, at 662. For a detailed review of the arguments against CBA, see Thomas O. McGarity, Sidney Shapiro & David Bollier, **Sophisticated Sabotage: The Intellectual Games Used to Subvert Responsible Regulation** (Environmental Law Institute, 2004).

vast discretion in its delegations to establish the range of factors an agency should consider in reaching a decision,[210] or to set limiting parameters on the agency to prevent certain types of regulations.[211] The President also has significant authority to set a regulatory agenda—assuming that Congress has not set firm deadlines—that best meets his political needs or ideology.[212] Moreover, both branches should play a greater role in the public deliberation process for agency rulemaking. Indeed, a democratic system necessarily requires that an agency not only take into account the relevant scientific aspects of the problem, but, as mentioned, the informed political views of the public and government officials. What is most needed, however, is a rational process for agencies to weigh these inputs, and address how tension between science and policy is to be resolved by the agency. The vehicle for doing so, it is suggested, is not the

210. A classic environmental example would be the so-called five listing factors under the Endangered Species Act, 16 U.S.C. § 1533(a)(1).

211. For example, in amending the Clean Air Act in 1990, Congress included a special provision relating to emissions of hazardous air pollutants from certain electric generating units. This provision, known as section 112(n), prevented the EPA from regulating these sources until a scientific study was performed and a regulatory determination made that "such regulation is appropriate and necessary." 42 U.S.C. § 7412(n)(1)(A).

212. See Evan J. Criddle, Fiduciary Foundations of Administrative Law, 54 UCLA L. Rev. 117, 148-149 (2006); see also Steven Croley, White House Review of Agency Rulemaking: An Emperical Investigation, 70 **U. Chi. L. Rev.** 821, 837 (2003)("[B]y most acts of delegation Congress intends for agencies to apply their expertise in the course of exercising their discretion. Where instead Congress wants the president to have influence over particular decisions that agencies make, as opposed to agenda-setting influence in ordering their statutory priorities, Congress can so indicate by specifically delegating power to a White House agency. But in the normal course, Congress delegates regulatory power to agencies so that agencies, not the President, can exercise that power.").

traditional "concise general statement of [the rule's] basis and purpose" requirement of the APA,[213] but instead a detailed "statement of overriding consideration" reflecting on the agency's treatment of outside information.

3. Require Agencies to Prepare a Statement of Overriding Considerations

Quite possibility a unique requirement in American law, the California Environmental Quality Act requires that before an agency approves a project that has been shown to have unmitigated environmental impacts, the agency must first adopt a statement of overriding considerations, which is "a declaration identifying specific social or economic factors that justify the failure to mitigate the negative environmental consequences."[214] Similarly, federal agencies should be required to prepare a statement explaining why certain political concerns were elevated in the decision-making process where substantial technical or scientific evidence indicates that regulatory action would be a wise choice of action to protect environmental resources or public health. As already discussed, this proposal reflects the belief that even more important than the regulatory outcome to Americans, is the transparency and accountability of the regulatory process. If an agency indicates that it chose a specific regulatory actions as a means to address the President's economic polices, or because limitations on its authority

213. 5 U.S.C. § 553(c).

214. See George Lefco, Should CEQA Require Local Governments To Analyze The Impacts Of Development Displaced By Restrictive Land Use Planning?, 33 **Ecology L.Q.** 1015, 1023 (2006).

placed by Congress, than as with a poor decision by any other branch of government, there is at least a sense of legitimacy to the regulatory action grounded in process. Moreover, the American public will be in a better position to utilize other democratic processes to effectuate a change to underlying political basis for the regulatory decision.

4. Limit Judicial Review to Questions of Law and Procedure

Judge Wald provides a luminous, if not sometimes near-laughable, examination of the struggle courts have engaged in to establish the scope of review to apply to agency rulemakings since the 1970, with a seemingly illogical attempt to accommodate both judicial deference to, and scrutiny of, the agency within the same judicial doctrine.[216] Indeed, in the end Judge Wald acknowledges that under the "arbitrary and capricious" standard of review, most often the court is simply struggling to find some agency explanation that it can deem "adequate."[217] The lack of any defined components of an "adequate explanation," however, has "inevitably [left] the courts open to the charge that the results of our review are inconsistent and reflect the political or philosophical preferences of judges . . . rather than any objective system."[218] Such review, of course, can be considered necessary (or inevitable) in a system where agencies are seen as illegitimate actors, but it should no longer be tolerated in a system

216. Wald, supra note 112, at 229-30.

217. Id. at 234.

218. Id.

where agency decision-making is the result of a trust-inducing, deliberative processes and procedures.[219] In such a "reformed" system, judicial review could be relegated to review of agency interpretation and faithfulness to the law,[220] and its adherence to proper procedure. This, of course, is a function that the Founders intended that the courts would perform within our system where lawmaking institutions are considered both legitimate and co-equal.[221]

B. Defending EDD: Restoring American Environmental and Democratic Values

Inevitably, any proposal for regulatory reform will be challenged as costly and inefficient.[222] Certainly, for those who benefit from the current institutional arrangements—in which abuses of power and corruption are tolerated in exchanges for governmental benefits and services[223] -- such concerns are paramount. For those, however, concerned with restoring legitimacy to the American system of government, and afraid of the consequences if it is not, cost and efficiency plays little if any role in judging reform proposals. Surely, the Founders' desire to build a system to check political

219. See Fontana, supra note 153, at 119 (noting that the "political pressure brought to bear on a court by a deliberative deference-inducing agency process" would certainly result in a change in the standard of review).

220. I offer no opinion here as to the proper scope of such review. For now the starting point would be with the Court's opinions in Chevron and Mead. Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837 (1984); United States v. Mead Corp., 533 U.S. 218 (2001).

221. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

222. See Nou, supra note 18, at 643.

223. Mitchell & Scott, supra note 207, at 451.

power in a democratic fashion trumped their concerns over the bulkiness and cost of government.

With respect to long-term problems, like those posed by environmental policy and the legitimacy of the administrative state, broader focus is appropriate.[224] In this context, the importance of law "turns as much on its ability to help our successors share values, and to help both ourselves and our successors actually put those values into practice, as on its direct impact on current behavior . . . ."[225] And much is at stake. Not only is environmental policy in a decade-long standstill, there is deep agreement among the public that an "appreciable segment of regulatory policy is [simply] counter productive."[226] Not only does the belief that the government often does "more harm than good resonate strongly with many 'average' Americans,"[227] government decision-making is often seen to be largely undemocratic.[228] Our concern at this point should not just be in correcting the democratic deficiencies of the administrative state, but with the consequences of continued official acceptance of such a system and/or by the perceived use of the administrative state by the constitutional branches to circumvent constraints placed on them to

224. See Holly Doremus, Shaping the Future: The Dialectic of Law and Environmental Values, 37 **U.C. Davis L. Rev.** 233, 233 (2003).

225. Id.

226. Jeffry J. Rachlinski & Cynthia R. Farina, Cognitive Psychology and Optimal Government Design, 87 **Cornell L. Rev.** 549, 550-51 (2002).

227. Id.

228. See Austin Saret, Support for the Legal System: An Analysis of Knowledge, Attitudes and Behavior, 3 **American Politics Research** 3, 8 (1975).

ensure their trustworthiness. Under such conditions, it can only be so long, if it gas not already occurred, that illegitimacy, as measured by a lack of trust in the system, begins to afflict government institutions once considered secure under the rule of recognition.[229]

Certainly EDD does not hold the only answer to the illegitimacy problem. The process, however, that EDD promises to inject into administrative decision-making can play an important role in "promoting the legitimacy of administrative policies and protect against violations of the public trust by agency officials. More importantly, procedurally just processes, particularly those with public participation, are trusted to lead to better substantive decisions. This is the heart of what Americans believe to be democracy and what constitutes our ultimate rule of recognition.[232]

229. Indeed, while Congress was once a trusted to develop sound environmental and other social policies, it is now marked by a "blood feud" among the political parties that has resulted in "an era in which Congress is paralyzed." E. Donald Elliot, Portage Strategies for Adapting Environmental Law and Policy During a Logjam Era, 27 **N.Y.U. Env. L. J.** 24, 24 (2008)(describing the); see also Richard J. Lazarus, Congressional Descent: The Demise of Deliberative Democracy in Environmental Law, 94 **Georgetown L. J.** 619, 820-22 (comparing "an accent" in the 1970s and 1980s in Congress' welding of lawmaking authority to its more recent "decent" and the impact this has had on environmental law).

232. See Joseph Rez, Liberalism, Skepticism, and Democracy, 74 **Iowa L. Rev.** 761, 779 (1989)("Democracy is best understood as a political system allowing individuals opportunities for informed participation in the political process whose purpose is the promotion of sound decisions.").

Conclusion

"Culture, like the natural environment, will flourish if well tended and collapse if polluted and despoiled."[233]

Improving any existing governance structures to better address environmental protection has proven to be a formable challenge in the past.[234] Undertaking an administrative reform effort to improve environmental protection and restore the trust in government necessary to the legitimacy of the administrative state, therefore, would seem a near impossible undertaking. But as with any undertaking, such reform needs to be fashioned procedure-by-procedure, taking one step at a time. It is, of course, through the establishment of democratic agency procedure that it will be possible "for issues and contributions, information and reason to float freely" within agency decision-making space.[235] Such processes are necessary for the development of the political will-formation that will lead to just and agreeable decision-making that the populace can once again trust.[236] Moreover, through the lens of legal positivism, such processes are also necessary if our environmental administrative apparatus is to be seen as a legitimate source of primary environmental law. EDD offers such hope for administrative legitimacy; hope that stands a chance to

233. David W. Opderbeck, Deconstructing Jefferson's Candle: Towards A Critical Realist Approach to Culture Environmentalism and Informational Policy, 49 **Jurimetrics** 203, 204 (2009).

234. See Daniel A. Farber, Building Bridges Over Troubled Waters: Eco-Pragmatism and the Environmental Prospect, 87 **Minn. L. Rev.** 851, 882 (2003).

235. Mason, supra note 138, at 51.

236. See id.

prevail as measured by America's deeply rooted democratic values and beliefs that constitute our system's rules of recognition.

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