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Foreword

Agency Self-Regulation

Elizabeth Magill*

Discretion is at the center of most accounts of bureaucracy. It is no mystery why this is so. While agencies are hemmed in by statutes, the President, and courts, they still possess enormous discretion that they can exercise in ways that matter to the parties who have a stake in what they do. For many social scientists who study bureaucracy, that discretion is just a fact about the world that bureaucrats inhabit. Legal scholars have tended to take a more normative view. A few have celebrated agency discretion as making space for the exercise of expert judgment,¹ but the dominant modern approach tends to be skeptical of that discretion. Scholars working within this latter tradition exhort those with supervisory power to tame that discretion as a matter of law, politics, or constitutional command.²

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¹ See, e.g., JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23–24, 154–55 (1938).

² KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 52–161 (1969); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); THEODORE J. LOWI, *THE END OF LIBERALISM* 92–126 (2d ed. 1979). See generally DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 99–134 (1993) (arguing that the legislative and executive branches should not delegate their powers to agencies because broad agency discretion “weakens democracy,” “endangers liberty,” and “makes the laws less reasonable”).

Strangely absent from these accounts is a ubiquitous phenomenon: administrative agencies routinely “self-regulate.” That is, they limit their options when no source of authority requires them to do so. They *voluntarily* constrain their discretion. They adopt rules, guidelines, and interpretations that substantively limit their options—limiting either the range of outcomes they can reach or the rationales that can be used to defend their choices. They also limit their procedural freedom by committing to afford additional procedures, such as hearings, notices, and appeals, that are not required by any source of authority. The idea that an agent can have an interest in voluntarily limiting his own options is hardly novel.³ Indeed, it is an ancient proposition. Jon Elster put it simply in introducing his important work on the subject: “sometimes *less is more*.”⁴ Individuals, firms, governments, and, yes, of course, bureaucracies—*especially* bureaucracies—will sometimes have an interest in voluntarily limiting their options.

And yet, what this Article calls self-regulation is not now a category that exists in the study of administrative agencies. Some scholars of the administrative state, it is true, have argued that, when statutes delegate policymaking authority to agencies and those statutes are, in their crucial details, vague, agencies should be *required* to limit their discretion as a matter of constitutional or statutory command or administrative common law.⁵ But, other than urging agencies to limit

³ See generally JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 1–87 (2000).

⁴ *Id.* at 1.

⁵ The two observers most closely associated with that argument are Kenneth Davis and Henry Friendly. See DAVIS, *supra* note 2, at 55–57, 219; HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 142–47 (1962). Professor Bressman has advanced a version of this argument in the modern period. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 533 (2003) (“[A]gencies must supply the standards that discipline their discretion under delegating statutes, and it does not matter for legitimacy purposes whether they do so under ‘ordinary’ administrative law or ‘constitutional’ administrative law.”); Lisa Schultz Bressman, *Disciplining Delegation after Whitman v. American Trucking Ass’n*, 87 CORNELL L. REV. 452, 460–66 (2002) (arguing that agencies must articulate standards limiting their discretion); Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1415–31 (2002) (arguing in favor of agencies promulgating standards that limit their discretion).

A version of the Davis/Friendly argument was embraced by Judge Leventhal in a well-known lower court decision that rejected the claim that the Economic Stabilization Act of 1970 constituted an unconstitutional delegation of legislative power. See *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 758–59 (D.D.C. 1971) (upholding Nixon Administration price freeze in the face of claims that the action violated the nondelegation doctrine). More recently, Judge Williams of the D.C. Circuit relied on this argument in *American Trucking Ass’n v. EPA*. See *Am. Trucking Ass’n v. EPA*, 175 F.3d 1027, 1038–40 (D.C. Cir. 1999) (per curiam). The Supreme Court, however, rejected the argument. See *Whitman v. Am. Trucking Ass’n*, 531 U.S.

their discretion, this literature does not actually pay much attention to self-regulation. What, precisely, is self-regulation? When do agencies engage in it, and what can they accomplish when they do so? What are the implications of that behavior for various debates that we engage in about the administrative state?

The aim of this Article is to create the category of self-regulation and to persuade students of the administrative state that it has been a mistake to ignore it. To do that, this Article will identify in Part I the key features of self-regulation, outline in Part II what an agency can accomplish by self-regulating, and demonstrate in Part III the implications of serious study of these voluntary agency constraints for important debates about the administrative state.

The first step is to understand the key features of self-regulation. Doing so requires a working definition of self-regulation and a preliminary descriptive account of the types of self-regulation in which agencies engage. Self-regulation is defined here as an agency action to limit its own discretion when no source of authority (such as a statute) requires the agency to act. Paradigmatic examples include enforcement guidelines and “extra” procedures—that is, procedures that the relevant law would not require the agency to provide.

Understanding self-regulation also requires an understanding of the consequences of self-regulation—whether and, if so, how self-regulatory measures limit an agency’s options. Grasping the consequences of self-regulatory measures is the key to understanding what an agency can accomplish by self-regulating, and hence why it might do so. But it is no easy task to capture the consequences of self-regulation precisely. Understanding how binding an act of self-regulation can be depends on a host of factors, including having a clear picture of a less-than-clear corner of administrative law: under what circumstances will a court force an agency to follow its own self-regulatory measures? Administrative law doctrines actually allow agencies to make a binding commitment to their self-regulation because the law promises that, under certain conditions, a court will enforce self-regulatory measures against agencies if and when they violate them.

Having identified the essential features of the category of self-regulation, the Article then examines what an agency can accomplish through self-regulation. Agencies often need to control policy implementation by subordinates; they may wish to limit their own options

457, 472 (2001) (“We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.”).

in order to induce reliance by outside parties; they may hope to protect their own autonomous policy choices—either from being changed by a future administration or from being overridden by a political principal today. Self-regulation is a way for an agency to achieve all of these objectives. Self-regulation also allows the agency to produce certain collective goods, such as information and reputation, that the agency needs to do its job but may be underproduced unless affirmative steps are taken to assure their production.

The Article then turns to the implications of agency self-regulation. Part III shows why the study of agency self-regulation can change the way we understand agencies and the need for and utility and wisdom of various controls on their behavior. Understanding when, why, and how agencies self-regulate would round out our understanding of the options an agency has at its disposal to achieve its objectives, inform our assessment of the strengths and weaknesses of the institutions that monitor and control agencies (courts, the President, and Congress), and fruitfully inform the normative debate over delegation. Because self-regulation as it is defined here is a voluntary action by the agency, studying it may also be a particularly useful way to make progress on one of the most vexing questions for those of us who study bureaucracy: what makes an agency tick? Study of self-regulation may help us evaluate competing accounts of agency incentives. Part III is not intended to exhaustively explore the implications of self-regulation; it is instead aimed at demonstrating how many important debates about governance would proceed differently if we fully incorporated self-regulation into our understanding.

This Article kicks off a now-annual issue of *The George Washington Law Review* devoted to administrative law.⁶ Thanks to the *Law Review*, we have the luxury of stepping back and taking stock of where we are in our understanding of our field. It is thus a perfect occasion to point out that we students of the administrative state are missing something. Self-regulation is a feature of the landscape that agencies inhabit and it demands our attention. Or so this Article will argue.

⁶ See *Annual Review of Administrative Law*, 76 GEO. WASH. L. REV. 1095 (2008); *Annual Review of Administrative Law*, 75 GEO. WASH. L. REV. 695 (2007) (inaugural edition; slightly revised focus from long-standing annual issue devoted to review of the D.C. Circuit).

I. Understanding Agency Self-Regulation

A. Defining Self-Regulation

If one defines self-regulation as *any* agency action that limits its discretion, the universe is vast. Every time an agency makes a choice it takes one path instead of others at that moment in time and in that narrow sense limits its options. More than that, a large number of agency choices limit the agency's options in the future either because a decision, as a legal matter, binds the agency in some way or, even when that is not the case, the decision creates expectations and reliance that translate into meaningful pressure for the agency in the future.

For both practical and theoretical reasons, this Article does not define self-regulation as including so vast a universe. This Article defines "self-regulation" more narrowly to include voluntarily initiated agency actions that constrain agency discretion when no source of authority requires the agency to act. This universe will be fleshed out shortly, but paradigmatic examples of such self-regulation include enforcement guidelines, rules that dictate how front-line decisionmakers will do their jobs, and procedural measures (not required by law) that specify how an agency will proceed as it implements its statutory mandate.

As defined here, self-regulation must be voluntarily undertaken. "Voluntary" is a tricky word, of course, but it has a limited import here. It simply means that the agency limits its discretion even though no authoritative source requires it to act. "Source of authority" could be a statute, a court order, an Executive order, or some other form of presidential command.⁷ Thus, self-regulation does not include the many agency actions that limit discretion that are required by some authoritative source. In other words, this definition is not intended to

⁷ Statutes, court orders, and Executive orders do not all bind the agency in exactly the same way. The most obvious difference relates to the mechanisms available to enforce the commands contained in these instruments. Speaking generally, judicial enforcement is available for enforcement of court orders and statutory commands, while judicial enforcement is generally not available for commands contained in Executive orders. See Note, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659, 661–62 (1987) (arguing that courts should change their practices and enforce Executive orders more readily); SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, AMERICAN BAR ASSOCIATION, A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES § 6.024 (John F. Duffy & Michael Herz eds., 2005) (Executive orders not enforceable). Despite such differences, both court orders and Executive orders authoritatively bind the agency. That is the important point for present purposes, and identifying the differences among these various commands is beyond the scope of this Article.

include limits on discretion that an agency adopts when it is otherwise obligated, for instance, to adopt a rule. The practical reason for somehow narrowing the category should be obvious; one cannot fruitfully study any and all agency actions that limit discretion.

The other reasons for narrowing the category in this way are more important. Agency self-limitation that occurs even though the agency does not need to take any action at all is an especially revealing angle from which to observe agency behavior. In such a case, it will be easier to detect agency motivation because the limits on discretion are generated by the agency and not by the agency's understanding of the authoritative command. More than that, focusing on self-regulation that is voluntarily undertaken facilitates cross-agency comparisons. An examination of a common example of self-regulation, the adoption of enforcement guidelines, illustrates. Authoritative commands almost never require agencies to adopt enforcement guidelines, and yet some agencies nonetheless adopt them and some do not. As developed further in Part III of this Article, observing and studying that variance across agencies is a promising way to make progress in our study of agency behavior. Finally, self-regulation as defined here is the only way that an agency can accomplish some of the objectives set forth in Part II of the Article.

The justification for the definition aside, it is worth noting that there are circumstances where self-regulation as defined here is not an option for the agency because some source of authority limits the agency's discretion directly or requires the agency to limit its own discretion. The former case is self-explanatory. It refers to an authoritative command that requires the agency to, for instance, resolve a policy question in a particular way. Thus, an auto safety statute might require the agency to adopt an airbag requirement.

The latter case requires some explanation. Some statutes give an agency a task to do, but the statutory prohibition cannot be enforced until the agency adopts rules. A statute, for example, might authorize the agency to enforce clean air standards once the agency specifies them. Executive orders likewise might limit an agency's discretion directly (e.g., all agencies must use method *x* for determining cost-benefit analysis) or require the agency to do so (e.g., all agencies must develop their own guidelines setting forth how they will conduct cost-benefit analysis). It is true that an agency, in responding to these sorts of dictates, will often have the opportunity to limit its discretion more or less. These situations are nonetheless distinct from self-regulatory

measures of interest here because the agency is required to take *some* action in response to the command.

In the case of self-regulation, by contrast, the agency is not required by any source of authority to act in the way it has, but it has decided to do so and, in so doing, it has not expanded its options, but limited its options (by how much will be discussed below). Self-regulation is an option for agencies in a wide range of circumstances. Often an agency is given a task to do, and, if it chooses, it may (or may not) further specify the criteria or processes by which it will implement the task. Consider a common case. A statute declares unlawful “unfair or deceptive acts or practices” and authorizes an agency to prevent such practices.⁸ One option available to the agency is to bring a series of one-shot enforcement actions that, like the development of the common law, will articulate over time just what it is to be an unfair or deceptive act or practice. It is true that each time the agency picks one case from the universe of possible cases to bring, it is in some sense constraining itself by staking out a position that may exclude alternative readings of the statute at that particular moment in time and, more than that, may as a type of precedent constrain agency choices in the future.

But an act of self-regulation would limit the agency’s range of options even further than this. Instead of pursuing a series of individual enforcement actions, the agency could announce in advance what it intends to do in the future. That self-regulation could constrain the agency’s options as a substantive or procedural matter. Substantively, the agency could specify what it considers to be a deceptive trade practice. The agency could identify particular practices that it views as deceptive or, instead of identifying specific practices, it could identify the criteria by which it will decide what constitutes an unfair trade practice. The agency might also limit its options procedurally. Although no source of authority requires it, an agency might commit to conducting public hearings, guarantee the objects of an enforcement action a hearing, or endow several units of the agency with sign-off or review authority before important actions are initiated. Self-regulation, then, is a voluntarily adopted limit on an agency’s choices, and those limits can relate to the substantive meaning of a legal command or the process by which the agency will conduct its business.

⁸ See, e.g., Federal Trade Commission Act, 15 U.S.C. § 45 (2006). Many other regulatory statutes or parts of regulatory statutes have this structure. See, e.g., Federal Food, Drug, & Cosmetic Act, 21 U.S.C. § 342 (2006) (adulterated food); National Labor Relations Act, 29 U.S.C. § 158 (2006) (unfair labor practices).

B. *Examples of Substantive and Procedural Self-Regulation*

With this definition in mind, observers of the administrative state will agree that such self-regulatory measures pop up everywhere. Self-regulation with substantive reach is quite common. Consider just a couple of examples of agencies (voluntarily) translating general statutory standards into more rule-like commands. Many agencies have enforcement guidelines that specify how they will exercise their enforcement discretion.⁹ The agencies that have legal authority under the antitrust laws to approve mergers have enforcement guidelines that set forth with some specificity how they will exercise those authorities.¹⁰ Both the Federal Trade Commission and the Department of Justice have issued enforcement guidelines,¹¹ and those guidelines have changed over time as antitrust policy has changed.¹² It is worth

⁹ The literature contains no systematic discussion or analysis of enforcement guidelines adopted by agencies. Enforcement guidelines, when they are discussed, are mentioned as just one example of the broader categories of interpretive rules or policy statements. *See, e.g.*, Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1320 (1992); Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 696 (2007); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398 (2007). The few articles that discuss the development of enforcement guidelines in any depth focus on specific examples of agency enforcement guidelines. *See* Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 776 (2006); Erica Seiguer & John J. Smith, *Perception and Process at the Food and Drug Administration: Obligations and Trade-Offs in Rules and Guidances*, 60 FOOD & DRUG L.J. 17, 17 (2005). This lack of systematic treatment in the literature is not because agencies have few enforcement guidelines. The literature assumes that many agencies adopt enforcement guidelines on a wide variety of matters, and there are many disputes that revolve around enforcement guidelines in the courts. *See, e.g.*, *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 802–03 (D.C. Cir. 2006) (summarizing the National Highway Traffic Safety Administration policy indicating when regional recalls by auto manufacturers are permissible); *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 153 (D.C. Cir. 2006) (discussing the Secretary of Labor's enforcement guidelines about when to charge owner-operators and independent contractors with violations of mine safety laws); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 535–36 (D.C. Cir. 1986) (explaining the Secretary of Labor's enforcement guideline for independent contractors indicating usual conditions under which operator may be cited for violation); *United States v. Fitch Oil Co.*, 676 F.2d 673, 675 (Temp. Emer. Ct. App. 1982) (Department of Energy policy on targeted auditing); *United States v. Ewig Bros. Co.*, 502 F.2d 715, 724–25 (7th Cir. 1974) (discussing FDA interim guidelines indicating acceptable levels of DDT residues in fish).

¹⁰ Greene, *supra* note 9, at 778; Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 7–8 (2007).

¹¹ 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (Sep. 10, 1992); Non-Horizontal Merger Guidelines, 49 Fed. Reg. 26,823 (June 29, 1984) (see section 4 on Horizontal Effect of Non-Horizontal Mergers).

¹² *See* Greene, *supra* note 9, at 781–802; William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Merg-*

noting that not all similarly situated agencies do that, however. The Federal Communications Commission, which also enjoys premerger authority to approve the transfer of broadcast licenses that occurs when a merger takes place, has not issued similar enforcement guidelines.¹³

Agencies that primarily distribute benefits likewise have adopted substantive self-regulatory measures. A famous example for administrative lawyers is the Social Security Administration's "grid" regulations, which succeeded in turning the question of whether a party is disabled into a series of (more) objective questions.¹⁴ Another example is the Department of Interior's guideline that specifies the criteria by which it will determine whether a group of people constitutes a federally recognized Indian tribe and, hence, are eligible for the benefits that come with that status.¹⁵ The Attorney General has also gotten into the act, adopting and revising over time the *United States Attorneys' Manual*,¹⁶ a manual that commits the government to a variety of substantive policies that are not required by law. This is not the only self-regulatory measure of this sort at the Department of Justice,¹⁷ but it is an important one. For instance, the *Manual* precludes

ers, 71 ANTITRUST L.J. 207, 209 (2003); William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 399 & n.81 (2003); Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 114–21 (2002); Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1400–04 (1998).

¹³ Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29, 48–49 (2000).

¹⁴ See JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 114–23 (1983). The Supreme Court upheld the "grid" regulations in *Heckler v. Campbell*, 461 U.S. 458, 468 (1983).

¹⁵ 25 C.F.R. § 83.7 (2008); see also Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280 (Feb. 25, 1994) (codified at 25 C.F.R. pt. 83). For a discussion of the tribal recognition rules, see *Miami Nation of Indians v. U.S. Department of the Interior*, 255 F.3d 342, 345–47 (7th Cir. 2001).

¹⁶ U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, available at www.usdoj.gov/usao/eousa/foia_reading_room/usam.

¹⁷ Another example is the series of memos issued in recent years about corporate criminal prosecutions. The "Thompson Memo," issued in 2003, set forth nationwide standards for enforcement in the corporate crime area. Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Dep't Components and U.S. Attorneys (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm. For a discussion of the Thompson Memo, see Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095 (2006). The Thompson Memo was superseded by the "McNulty Memo" in December 2006. Memorandum from Paul J. McNulty, Deputy Att'y Gen., to Heads of Dep't Components and U.S. Attorneys (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

the initiation or continuation of a federal prosecution following a prior state or federal prosecution based on substantially the same transactions,¹⁸ a position that is not required by current constitutional doctrine, which would allow separate prosecutions by separate sovereigns.¹⁹ These examples are just the tip of an iceberg, but they are enough to convey the general pattern: agencies regularly adopt measures that limit their substantive options.

There is also no shortage of “procedural” self-regulation. Here, it is not that agencies turn standards into something closer to rules, but rather that agencies commit to offer more procedure than would otherwise be required. Various sources of law, most prominently the Administrative Procedure Act (“APA”)²⁰ and the Due Process Clause of the Fifth Amendment,²¹ specify minimum procedures that an agency must follow in a range of circumstances.²² Agencies cannot fall below the floors outlined by those legal sources, of course, but they can go above that floor. The APA says nothing, for example, about the process an agency must follow before an agency issues a notice of proposed rulemaking and very little about the process necessary to acting “informally” in a variety of circumstances. In such circumstances, the agencies might fill in the gap with procedural self-regulation. Even where the law has a lot to say about process, an agency might choose to afford even more procedure.

A well-known example of procedural self-regulation in recent years was the Food and Drug Administration’s decision to provide notice and invite comment on its “guidance documents” even though the APA would not have required it.²³ That requirement was imposed government-wide by President George W. Bush’s January 2007 Executive order,²⁴ which President Barack Obama revoked soon after he took office.²⁵ Many agencies have rules that set forth procedures for

¹⁸ U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL, § 9-2.031 (otherwise known as the “Petite policy”), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/2mcrn.htm#9-2.031; see also *Rinaldi v. United States*, 434 U.S. 22, 27 (1977) (discussing the “Petite policy”).

¹⁹ See *Rinaldi*, 434 U.S. at 28 (noting that previous Supreme Court decisions expressly permit both state and federal prosecutions for the same act).

²⁰ Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2006).

²¹ U.S. CONST. amend. V, § 3.

²² See *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976).

²³ Lars Noah, *The FDA’s New Policy on Guidelines: Having Your Cake and Eating It Too*, 47 CATH. U. L. REV. 113, 137–38 (1997).

²⁴ Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007).

²⁵ President Barack Obama, Revocation of Certain Executive Orders Concerning Regulatory Planning and Review, Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009), available at

investigations that go beyond what the law requires.²⁶ Many provide other procedural protections—such as the right to seek review of decisions—that would not be required by the relevant law.²⁷ Some agencies have guaranteed parties a right of consultation before a decision is made, even though the law would not require it.²⁸

Finally, agencies have processes that structure decisionmaking in important ways. A recent announcement by the Securities and Exchange Commission (“SEC”) about its enforcement processes is an excellent example. The new Chair of the Commission reversed previous practices that had required the full Commission to approve certain penalties imposed on companies and the decision to open a formal investigation.²⁹ This “streamlined” process is intended to, and no doubt will, have an effect on the pattern of the SEC’s enforcement actions, just as the process it replaced was intended to, and no doubt did, have an effect on those patterns.

C. *Self-Regulation as Constraint?*

Though there are many unanswered questions about the conditions under which an agency will self-regulate, there is no question that agencies do engage in self-regulation. Their reasons for doing so will be discussed shortly, but it is important to first understand how much constraint self-regulation can provide. So far this Article has

http://www.whitehouse.gov/the_press_office/Revocation-Of-Certain-Executive-Orders-Concerning-Regulatory-Planning-And-Review.

²⁶ See, e.g., *Blassingame v. Sec’y of the Navy*, 866 F.2d 556, 557 (2d Cir. 1989) (describing a Marine Corps regulation that imposes a duty to investigate possible erroneous enlistment); *Modern Plastics Corp. v. McCulloch*, 400 F.2d 14, 18 (6th Cir. 1968) (citing NLRB regulations regarding prehearing investigations).

²⁷ See, e.g., *Singh v. U.S. Dep’t of Justice*, 461 F.3d 290, 295 (2d Cir. 2006) (holding that INS regulations permit consideration of factors relevant to extreme hardship that statute does not make relevant); *Tunik v. Merit Sys. Prot. Bd.*, 407 F.3d 1326, 1333 (Fed. Cir. 2005) (stating that a Merit Systems Protection Board regulation authorizes ALJs to file actions for constructive discharge); *Chennareddy v. Bowsher*, 935 F.2d 315, 316 (D.C. Cir. 1991) (concluding that an agency regulation excuses employees from exhausting remedies); *Smith v. Resor*, 406 F.2d 141, 145–46 (2d Cir. 1969) (holding that for what would otherwise be highly discretionary decisions, Army regulations set forth binding procedural requirements, such as making certain matters part of the official record).

²⁸ *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 717–21 (8th Cir. 1979) (Bureau of Indian Affairs (“BIA”) personnel decision reversed when agency failed to consult with tribe before transferring BIA agent from one area office to another in violation of agency commitment to engage in such consultation).

²⁹ See Mary L. Schapiro, Chairman, Sec. & Exch. Comm’n, Address to Practising Law Institute’s “SEC Speaks in 2009” Program (Feb. 6, 2009), available at <http://www.sec.gov/news/speech/2009/spch020609mls.htm>; Floyd Norris, *Unleashing Enforcement*, <http://norris.blogs.nytimes.com/2009/02/06/unleashing-enforcement> (Feb. 6, 2009 15:25 EST).

assumed that self-regulatory measures provide *some* constraint on agency options, but whether and how they do so is complicated.

Consider first the range of relevant options of how constraining self-regulation might be.³⁰ At one end of the spectrum, self-regulatory measures could guide actors inside the agency only, but not be enforceable by any actor outside the agency. An agency official might be subject to some form of internal sanction for failing to follow the self-regulation, for instance, but an actor outside the agency would not have any way to force the agency to follow the measure and could not obtain any judicial relief. At the other end of the spectrum, an act of self-regulation could bind the agency, and private parties could rely on it being binding because they would be able to enforce the self-regulatory measure against the agency.³¹ There is a range of theoretical possibilities here for enforcement, including specific performance and damages for detrimentally relying on a self-regulatory measure, but consider the one that maps onto some existing institutional arrangements: a court could invalidate an agency action that failed to follow the self-regulatory measure.

Whether self-regulation does constrain the agency, then, depends on whether and, if so, how these self-regulatory measures bind the agency going forward. In other words, the question whether self-regulation constrains the agency reduces to an interesting question that is familiar to us from other contexts: can an agency make a credible commitment to the stability of the position it takes in a self-regulatory measure?

1. Government and Precommitments

There is a rich theoretical literature across a range of fields about voluntarily imposed constraints on choices,³² but the literature that is

³⁰ It could be that these acts of self-regulation are not intended to constrain at all. But if they are not intended to provide any constraint—even within the agency—then creating them in the first place is something akin to busy work. This Article puts aside that logically possible, but unlikely, option.

³¹ The further question of whether self-regulatory measures adopted by an agency could bind other actors in the executive branch, including the President, and, if so, how they could do so, is a complication beyond the scope of this Article and will not be examined here.

³² See ELSTER, *supra* note 3; OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* (1985); Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473 (1977); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989); Barry R. Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 J. INSTL. & THEORETICAL ECON. 286 (1993); Barry R. Weingast, *The Eco-*

most relevant here explores two questions.³³ Why would government (as opposed to individuals or private firms) wish to make credible commitments about its future behavior? And what are the mechanisms by which government can do so? To understand why these questions are worthy of attention, consider a commonly invoked example. Because government has a monopoly on the exercise of coercive powers, it has the authority, and sometimes the short-term incentive, to take private assets for its own purposes, ignoring property and contract rights in the process.³⁴ But without stable property and contract rights, those with resources will not want to engage in financial dealings with the government, and they will be leery of engaging in economic exchange more generally if they cannot be assured that their property and contract rights will be respected.³⁵ A government that seeks to induce investment by private parties and foster economic growth thus has good reason to promise that it will respect property and contract rights in the future.

That there are good reasons for government to limit its options in the future does not mean that there are good mechanisms for doing so. Government may announce today that it will respect contract rights tomorrow, but as the saying goes, talk is cheap, and next year when government needs cash it may change its mind and use its coercive power in violation of those earlier promises. So how can government credibly commit today that it will respect private rights tomorrow? Lawyers think of constitutional constraints (the Takings Clause³⁶ or the Contracts Clause³⁷) as mechanisms by which govern-

economic Role of Political Institutions: Market-Preserving Federalism and Economic Development, 11 J.L. ECON. & ORG. 1 (1995) [hereinafter Weingast, *The Economic Role of Political Institutions*]; Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519 (1983). This literature builds on insights from Thomas C. Schelling, *An Essay on Bargaining*, 46 AM. ECON. REV. 281, 282–87 (1956), and R.H. Strotz, *Myopia and Inconsistency in Dynamic Utility Maximization*, 23 REV. ECON. STUDIES 165, 173 (1955).

³³ See ELSTER, *supra* note 3; North & Weingast, *supra* note 32; Weingast, *The Economic Role of Political Institutions*, *supra* note 32; see also Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195 (Jon Elster & Rune Slagstad eds., 1988). In a recent work, Eric Posner and Adrian Vermeule have identified the mechanisms by which an executive can credibly signal benign motivations, including the self-binding mechanism explored here, in order to obtain more authority. See Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 894–913 (2007).

³⁴ See North & Weingast, *supra* note 32, at 806; Weingast, *The Economic Role of Political Institutions*, *supra* note 32, at 1–4.

³⁵ See ELSTER, *supra* note 3, at 147–48.

³⁶ U.S. CONST. amend. V, cl. 4.

³⁷ U.S. CONST. art. I, § 8, cl. 3.

ment attempts to make a credible commitment of this sort;³⁸ social scientists point to particular institutional arrangements like separation of powers or an independent judiciary (constitutionally protected or not) that make it difficult for the government to change course in the future because those arrangements tend to maintain the status quo and protect whatever policy the government commits to in the first instance.³⁹

2. Agencies and Precommitment

Translating these insights to the narrow context of the agency, the most striking fact is that an agency has limited ability to make credible commitments.⁴⁰ That is because an agency is (to invoke the embarrassingly obvious) an *agent*. It is formally controlled by other principals, like Congress, the courts, or the President.⁴¹ An agency does not even fully control its own destiny because those principals can force the agency to change its commitments. Congress can pass a new statute that displaces an agency's approach, a court can reject the agency's policy as an arbitrary choice or an unreasonable reading of a statute, or a (new) President can order his (newly installed) subordinate to change the previous policy choice. This status substantially limits agencies' ability to make credible commitments.

Accepting the important reality that agencies are subordinate to these principals, is there any room for an agency to constrain itself when it self-regulates? Some strategies that other government actors might adopt are not available to agencies. As just noted, an agency

³⁸ See John Ferejohn & Lawrence Sanger, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1929 (2003); Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707, 721 (2006); Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 639–41 (1991).

³⁹ See e.g., North & Weingast, *supra* note 32, at 804.

⁴⁰ There is some discussion of agencies and precommitment in the political science literature, but that set of arguments has a very different focus than the questions explored here. The primary argument is that the creation of and delegation to agencies is a way for a present coalition in *Congress* to make a credible commitment to a constituency about the stability of policy in the future. See MURRAY HORN, *THE POLITICAL ECONOMY OF PUBLIC ADMINISTRATION: INSTITUTIONAL CHOICE IN THE PUBLIC SECTOR* 7–24 (1995). The argument that bureaucratic structure and process is a mechanism of political control is to similar effect. See Barry R. Weingast, *Political Institutions: Rational Choice Perspectives*, in *A NEW HANDBOOK OF POLITICAL SCIENCE* 167, 178–79 (Robert Goodin & Hans-Dieter Klingemann eds., 1996).

⁴¹ See Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 246–53 (1987); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1701–02 (2002) (discussing entrenchment by agencies and the capacity of Congress to authorize or reverse that entrenchment).

does not even ultimately control the choices delegated to it, and it has little authority over its formal relationships with other governmental actors. It thus cannot facilitate credible commitments by rearranging its institutional relationships with those actors. Consider one example. A design choice that would facilitate credible commitments would be an arrangement where the agency's approach could only be changed if Congress consented to the change. But agencies have no such authority.

3. *The Accardi Principle and Precommitment*

Accepting all of this, an agency does have some limited capacity to make credible commitments.⁴² There are no doubt a variety of interesting reasons for this, such as an agency's ability to discern and rely on stable allocations of political, institutional, or economic power.⁴³ Here this Article focuses on one formal, legal reason why agencies can commit to the stability of their policy over time. This is due to the operation of an administrative law doctrine that goes by different names but will be called here the *Accardi* principle.⁴⁴ The

⁴² Professor Jonathan Masur has explored an agency's capacity to make credible commitments through another mechanism than the one identified here. He argues that agencies (previously) had the ability to credibly commit to interpretations of ambiguous statutes when those interpretations were endorsed by courts, and he laments that the Supreme Court unwisely eliminated this mechanism of precommitment in the *Brand X* case. Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1037–60 (2007).

⁴³ See REGULATIONS, INSTITUTIONS, AND COMMITMENT (Brian Levy & Pablo Spiller eds., 1996) (comparative study of regulation of telecommunications industry focused on the relationship between political institutions and regulatory institutions and how effective regulation is at encouraging private investment).

⁴⁴ What the principle is called may depend on which administrative law casebook one learned or teaches from. Here I have chosen to follow Professor Thomas Merrill, who in a recent work has given the doctrine this name. See Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 569 (2006). Professor Merrill gives the doctrine this name for what strikes me as a good reason. It comes from the case that the D.C. Circuit cites most often for the principle that an agency has an obligation to follow its own rules. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954) (holding that where self-regulatory measures vested authority over discretionary deportation determinations with the Board of Immigration Appeals, the Attorney General could not limit the Board's discretion or dictate its decision). Two follow-on Supreme Court cases were also important in creating the doctrine in the Supreme Court. See *Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959) (concluding that the power of the Secretary of the Interior to discharge an employee was constrained by previously adopted self-regulatory measures); *Service v. Dulles*, 354 U.S. 363, 388 (1957) (holding that the Secretary of State must conform with self-regulatory measures constraining his ability to terminate an employee). Others may call this the *Arizona Grocery* principle, following an early case laying out the doctrine. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 389 (1932).

For further discussion, see generally Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); Harold J. Krent, *Reviewing Agency Action for Inconsis-*

complexities of that doctrine will be explored shortly, but consider now a simple statement of it: an agency has an obligation to follow its own rules.⁴⁵ From the perspective of permitting an agency to credibly commit to future action, the most important feature of that doctrine is that its enforcement is not up to the agency, but is rather up to the courts.⁴⁶ It is true that the courts only enforce the *Accardi* doctrine if a proper party comes along and brings a timely challenge to an agency's failure to abide by its own rules, but if that occurs, a court can invalidate agency action that does not comply with existing rules. And all relevant parties proceed in the shadow of that possibility. Thus, if an agency chooses to embed its self-regulatory measure in a rule, it can rely on the fact that a court will require it to adhere to that rule in the future. This doctrine gives the agency some capacity to make credible commitments.

The problem of a government agent promising adherence to a policy in the future is that the government agent (or her successor), absent some effective enforcement mechanism, can thereafter ignore the promise.⁴⁷ Government can say today that it will respect contract rights, but tomorrow it can exercise its coercive powers in ways that ignore them. The availability of an effective third party enforcer of the original promise permits the agent to back it with some level of credibility and thus induces whatever behavior the original promise was intended to facilitate.⁴⁸ And an effective third party enforcer of self-regulation is what the *Accardi* doctrine provides. An agency can say today that it will only bring certain cases and not others, and, if the doctrine applies, parties can rely on the fact that a court will force the agency to follow it in the future.

The *Accardi* doctrine provides third party enforcement of a particular status quo baseline that the agency must follow—namely, the existing rules that limit the agency's discretion. It is worth noting that

Agency with Prior Rules and Regulations, 72 CHL-KENT L. REV. 1187 (1997); Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own "Laws,"* 64 TEX. L. REV. 1 (1985); Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 ADMIN. L. REV. 653 (1992); Rodney A. Smolla, *The Erosion of the Principle That the Government Must Follow Self-Imposed Rules*, 52 FORDHAM L. REV. 472 (1984); Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629 (1974).

⁴⁵ *Accardi*, 347 U.S. at 266–67.

⁴⁶ *See id.* at 268 (demonstrating the Court's willingness to enforce agency rules when the agency acts "contrary to existing valid regulations").

⁴⁷ *See supra* notes 36–39 and sources cited therein.

⁴⁸ *See ELSTER, supra* note 3, at 147–48 (describing the lack of credibility of the Chinese government's self-regulatory measures in the 1980s due to the absence of a third party enforcer).

it would be possible for the regime to be otherwise. It could be that every time a new administration begins its tenure, the prior administration's self-regulatory measures would not bind the new administration, or at least not be judicially enforceable by the courts. The new administration would start from scratch, as it were. Such a regime would have obvious advantages in terms of electoral responsiveness, but at a cost to stability. Regardless, it is not the regime we have.

It is important not to overstate the significance of an agency's capacity to make credible commitments about future behavior. As already noted, an agency's subordinate status means that the President, Congress, or a court can override an agency's self-regulatory measure.⁴⁹ Awaking the sleeping giant of Congress is no easy feat, but ultimately an agency's self-regulatory measure is not authoritative because one of its principals can reverse it.

Putting this point aside, the agency's ability to precommit is limited in another way. Although an agency can limit its own discretion with a self-regulatory measure and rely on the fact that a court will enforce that measure against it, an agency also has the power to reverse that self-regulatory measure in the future. The *Accardi* doctrine does force agencies to follow rules that exist, but the agency can always change those rules. This is unsurprising. It would be odd if a self-regulatory measure, once adopted, could only be altered by a statutory change and not by the agency adopting a new rule.

Changing a self-regulatory measure is not costless, though. There are two sorts of costs. There are the straightforward costs of investing the resources to change the rules, which are not trivial because the impediments to action are many.⁵⁰ But there is also another kind of cost imposed by the existence of judicial review of administrative action. An agency may adopt a new rule, but it must be ready to defend that rule as reasonable and nonarbitrary to a court. Among other

⁴⁹ See *supra* note 35 and accompanying text.

⁵⁰ See generally Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) (discussing the general costliness of adopting revisions to existing rules). While Professor McGarity's piece comments on the mounting costs associated with the informal rulemaking process, this author could find no research focusing on the cost of adopting a self-regulatory measure. The cost is likely to vary wildly, but at least some self-regulatory measures will be very costly to review. For example, the budget for the Antitrust Modernization Commission, an advisory group formed to merely recommend changes to the antitrust enforcement guidelines, was set by Congress at \$4 million. See Antitrust Modernization Commission, *Frequently Asked Questions*, at 3, <http://govinfo.library.unt.edu/amc/pdf/news/faqs.pdf> (last visited May 12, 2009).

things, the agency must explain its departure from the prior rules in a reasonable and nonarbitrary way.⁵¹

To those who do not operate within the world of administrative law, defending a choice as nonarbitrary in court may seem like a trivial obligation. One comparison that leaps to mind is the legislature's obligation to explain its statutory choices to courts (in the realm of social and economic regulation) as nonarbitrary under the Equal Protection or Due Process Clauses. That is, in the usual case, a minimal obligation.⁵² But in administrative law, the agency's obligation to explain its actions is rooted in the APA and is significantly more burdensome than the government's obligation to explain under rational basis review.⁵³ An agency must explain in a reasoned way why it acted the way it did. Those explanations must be supported by the record before the agency when it made its decision, and those reasons must be the reasons generated by the agency at the time it made its decision. Post hoc explanations offered by government litigators do not count.⁵⁴ The prior rule is not simply the status quo until the agency invests the resources to change it, but the agency must also be ready to explain to a court why its departure from that particular status quo is nonarbitrary.

4. *The Precise Scope of the Accardi Principle*

Despite these important limitations on agencies' ability to make credible commitments about their future actions, the *Accardi* principle does provide agencies with some limited capacity to make credible promises by providing for judicial enforcement of self-regulatory measures.⁵⁵ But the devil is in the details. Understanding the real reach of this commitment mechanism depends on understanding the details of the doctrine.

Although there were important antecedents,⁵⁶ the *Accardi* doctrine fully flowered in a series of cases decided by the Supreme Court

⁵¹ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 42 (1983); see also *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586–87 (D.C. Cir. 1997).

⁵² See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–91 (1955).

⁵³ *State Farm*, 463 U.S. at 43 n.9.

⁵⁴ *Id.* at 50.

⁵⁵ See *supra* notes 42–46 and accompanying text.

⁵⁶ See e.g., *Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 389–90 (1932); see also *Merrill, supra* note 44, at 571 n.7 (identifying *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155–56 (1923), as “the most prominent anticipation” of the *Accardi* principle).

in the 1950s.⁵⁷ Unfortunately, the clarity stops there. Those who have most closely studied the evolution of the doctrine since the 1950s have found confusion in the doctrine about a great many matters. There is no agreement on the underlying justification for the doctrine,⁵⁸ what counts as a “rule” that an agency has an obligation to follow,⁵⁹ or what the proper remedy is if the agency has violated that obligation.⁶⁰ Even so, certain features of the doctrine can be identified. Some of those features expand agencies’ capacity to make precommitments while others limit their capacity.

The first relevant point is that, while an agency has an obligation to follow its own rules, only certain “rules” are subject to that obligation. The status of the self-regulatory measure matters. Status does not refer to whether the self-regulatory measure imposes substantive or procedural limitations on discretion because courts apply the *Accardi* doctrine to both types of self-regulatory measures.⁶¹ Rather, it refers to the form and effect of the measure. Agencies can issue self-regulatory measures in a variety of forms with a corresponding variety of legal effects on the agency and third parties. Memos, circulars, guidebooks, press releases, interpretative rules, policy statements, and legislative rules can all be mechanisms by which an agency announces limits on its own discretion.⁶²

In the event that the agency (or an actor within the agency) later violates one of these self-regulatory measures, a judicial remedy under the *Accardi* doctrine is not always available. The D.C. Circuit, which has decided a large number of *Accardi* cases, holds that a self-regulatory measure must be followed by the agency only if it is “binding.”⁶³

⁵⁷ See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); see also *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957).

⁵⁸ See Merrill, *supra* note 44, at 569.

⁵⁹ See Schwartz, *supra* note 44, at 669–70, 674–78.

⁶⁰ See Merrill, *supra* note 44, at 570, 603–12.

⁶¹ See *Accardi*, 347 U.S. 260 (obligating agency to follow procedural self-regulation); *Miami Nation of Indians v. U.S. Dep’t of the Interior*, 255 F.3d 342 (7th Cir. 2001) (requiring agency to follow substantive self-regulation).

⁶² For a description of the wide variety of mechanisms by which an agency can announce its policy judgments, see M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1383–1403 (2004). See also Anthony, *supra* note 9, at 1312–13; William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023, 1027 (2004); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 804 (2001).

⁶³ See, e.g., *Vietnam Veterans of Am. v. Sec’y of the Navy*, 843 F.2d 528, 536–37 (D.C. Cir. 1988); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536–37 (D.C. Cir. 1986). In the most recent systematic work on the subject, Professor Merrill has argued that this statement best captures what the doctrine is and should be in the D.C. Circuit. See Merrill, *supra* note 44, at 592

There is no self-evident answer to what counts as “binding,” and there is frustrating ambiguity about which measures a court will deem “binding.”

There are some reliable guideposts, however. If an agency is attempting to predict whether a self-regulatory measure will be treated as “binding” and subject to the *Accardi* principle, one key question is whether it is a legislative rule.⁶⁴ In general, if the self-regulation is embodied in a legislative rule, it will be subject to the *Accardi* principle.⁶⁵ (Even if the self-regulation is not subject to the *Accardi* principle, an agency will be required to explain why it departed from its limitation, and its explanation may be deemed arbitrary and capricious.⁶⁶ But this is a lesser obligation imposed on the agency than that contained in the *Accardi* principle.⁶⁷)

There are important exceptions to this general rule that legislative rules are subject to the *Accardi* principle.⁶⁸ Most of the ambiguity here, however, arises in relation to whether self-regulation that does *not* appear in a legislative rule is binding. Courts, that is, have applied the *Accardi* principle in cases where the self-regulatory measure was *not* a legislative rule.⁶⁹ Thus, while an agency can generally count on a legislative rule being subject to the *Accardi* principle, it may be less easy to predict whether a self-regulatory measure that is issued as, for instance, a policy statement or interpretative rule will be subject to that principle.

The effects of these features of the doctrine on an agency’s capacity to bind itself point in different directions. Legislative rules are generally costly to develop and defend,⁷⁰ and in that sense the fact that legislative rules are the only instruments that are predictably sub-

(“Since the mid-1980s, however, the court has generally grounded the *Accardi* principle in the notion that regulations are legally binding.”); *id.* at 596–603.

⁶⁴ See, e.g., *Singh v. U.S. Dep’t of Justice*, 461 F.3d 290, 296 (2d Cir. 2006); *Tunik v. Merit Sys. Prot. Bd.*, 407 F.3d 1326, 1344 (Fed. Cir. 2005); *Chennareddy v. Bowsher*, 935 F.2d 315, 322 (D.C. Cir. 1991); see also *Merrill*, *supra* note 44, at 596–603.

⁶⁵ See SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, AMERICAN BAR ASSOCIATION, A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES § 6.022 (John F. Duffy & Michael Herz eds., 2005).

⁶⁶ *Id.*

⁶⁷ See *Merrill*, *supra* note 44, at 597–98.

⁶⁸ See *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (requiring agency to follow an internal rule of agency procedure that was a nonbinding guidance document).

⁶⁹ See, e.g., *Blassingame v. Sec’y of the Navy*, 866 F.2d 556, 560 (2d Cir. 1989); *Morris v. McCaddin*, 553 F.2d 866, 870 (4th Cir. 1977); *United States v. Heffner*, 420 F.2d 809, 812 (4th Cir. 1969); see also *Merrill*, *supra* note 44, at 593 (collecting cases on either side of the legislative/non-legislative rule line about what counts as “binding” in the D.C. Circuit).

⁷⁰ See *supra* note 50 and sources cited therein.

ject to the *Accardi* principle limits the agency's capacity to make precommitments. On the other hand, the clarity of this part of the doctrine creates an opportunity for the agency. Whether to adopt a self-limiting measure as a legislative rule (as opposed to some other sort of rule) is generally up to the agency, and the clarity of the doctrine means that the agency can opt into court enforcement of the rule in the future and therefore make its self-limitation more credible in the first instance. Finally, the ambiguity about which nonlegislative rules might eventually be subject to the *Accardi* principle undermines the agency's power to use nonlegislative rules to limit itself in a credible way. But the bottom line is that there is a clear, if costly, way for an agency to adopt self-regulatory measures that will be subject to judicial enforcement in the future.

The other relevant limitation on the reach of the *Accardi* principle undercuts an agency's ability to rely on the fact that a court will enforce a self-regulatory measure in the future, but perhaps in a way that does not much matter. Even where the *Accardi* principle would otherwise apply, the Supreme Court has recognized an exception to the principle. In *American Farm Lines v. Black Ball Freight Service*,⁷¹ decided in 1970, the Court held that the *Accardi* principle does not apply to rules that are procedural and enacted only for the orderly transaction of business.⁷² Under this exception, the agency is permitted to relax or modify such a rule unless substantial prejudice results.⁷³ In a follow-on case in 1979, the Court held that agencies were bound to follow their own rules only if the rules affected the rights of individuals.⁷⁴ As the *Black Ball Freight* factors have evolved in the lower courts, an agency is bound to follow its rules that affect the rights of individuals where substantial prejudice results from the violation of those rules.⁷⁵ This exception to the reach of the *Accardi* principle is probably not an important limitation on agency precommitment capacity, however. That is because the category of cases in which the agency's rules do not have an effect on individuals and no prejudice results from a breach of the rule are also likely to be cases in which

⁷¹ *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532 (1970).

⁷² *Id.* at 538–39.

⁷³ *Id.* at 539.

⁷⁴ *United States v. Caceres*, 440 U.S. 741, 754–55 (1979). The decade of the 1970s was a confusing one for the *Accardi* principle, as the Court not only created this important exception, but it at the same time endorsed the rigid rule of *Accardi* in both *United States v. Nixon*, 418 U.S. 683 (1974), and *Morton v. Ruiz*, 415 U.S. 199 (1974). See Merrill, *supra* note 44, at 578–84.

⁷⁵ See *Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005); *United States v. Calderon-Medina*, 591 F.2d 529, 531–32 (9th Cir. 1979).

the agency does not have much need to make a credible commitment to the stability of its rules.

One final dimension of the *Accardi* principle worth noting is a feature of the doctrine that expands the agency's capacity to make precommitments. By adopting a self-regulatory measure, an agency can create an opportunity for a party to challenge agency action where otherwise no such opportunity would exist. Understanding this feature of the doctrine must start with the understanding that, under the APA, there are certain categories of agency action that will not be reviewed by the courts because statutes preclude their review or they are "committed to agency discretion" by law.⁷⁶ Congress has chosen to preclude judicial review in a variety of contexts.⁷⁷ Actions that are not reviewable because they are "committed to agency discretion by law" include an agency's exercise of enforcement discretion⁷⁸ and allocations of resources across programs from lump sum appropriations.⁷⁹ Those who follow agency activity are keenly interested in such decisions, but, under the administrative law doctrine, a court will not review the agency's decision.

If the agency adopts a self-limiting rule, however, a court is likely to review the agency's actions to see if the agency complies with its self-regulatory rule. The *Accardi* doctrine, in other words, can transform unreviewable action into reviewable action. This appears to be the pattern in some of the important Supreme Court cases creating the doctrine,⁸⁰ and there are many modern cases that follow this principle as well.⁸¹ *Miami Nation of Indians v. U.S. Department of Interior*

⁷⁶ See 5 U.S.C. § 701(a) (2006).

⁷⁷ See, e.g., 5 U.S.C. § 8347(c) (2006) (precluding judicial review of Office of Personnel Management decisions about disability and dependency); 38 U.S.C. § 511(a) (2006) (precluding review of certain benefit decisions by the Secretary of Veterans Affairs). See generally Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990).

⁷⁸ Heckler v. Chaney, 470 U.S. 821, 831 (1985).

⁷⁹ Lincoln v. Vigil, 508 U.S. 182, 192 (1993).

⁸⁰ See Vitarelli v. Seaton, 359 U.S. 535, 546-47 (1959) (Frankfurter, J., concurring in part and dissenting in part) (explaining that in the absence of the regulations, the government would have been free to fire the employee); Service v. Dulles, 354 U.S. 363, 388-89 (1957).

⁸¹ See, e.g., *Miami Nation of Indians v. U.S. Dep't of the Interior*, 255 F.3d 342, 349 (7th Cir. 2001) (holding that an agency decision not to recognize an Indian tribe, which in the absence of agency regulations would have been unreviewable, is reviewable because the Department of the Interior issued regulations identifying criteria it would consult as it decided whether to recognize applicant); *Clifford v. Pena*, 77 F.3d 1414, 1417 (D.C. Cir. 1996) (concluding that an otherwise nonreviewable Maritime Administration decision to grant a waiver under the Merchant Marine Act to a domestic carrier to permit it to use foreign-built vessels in operations is reviewable because the agency had identified factors that guided its decisions with respect to such waiver applications); *Diebold v. United States*, 947 F.2d 787, 810 (6th Cir. 1991) (determining

provides a nice illustration.⁸² A group of individuals seeking recognition as a federal Indian tribe challenged the Department of Interior's refusal to recognize them. As Judge Posner made clear in his opinion, in the absence of agency regulations that identified the factors to be considered in deciding whether to recognize a group of individuals as an Indian tribe, the agency's decision would be beyond the ken of the courts—indeed, he wrote, it would be a classic example of a political question that the courts would not touch.⁸³ “But this conclusion assumes,” he went on to write, “that the executive branch has not sought to canalize the discretion of its subordinate officials by means of regulations that require them to base recognition of Indian tribes on the kinds of determination, legal or factual, that courts routinely make.”⁸⁴ He concluded that the regulations brought “the tribal recognition process within the scope of the Administrative Procedure Act.”⁸⁵

that the Army's decision whether to contract out food services, held unreviewable in other circumstances, is reviewable because OMB-supplied criteria adopted by Army regulations provided legal guidelines for making the determination); *Cardoza v. Commodity Futures Trading Comm'n*, 768 F.2d 1542 (7th Cir. 1985) (holding that the failure of the Commodity Futures Trading Commission (“CFTC”) to review disciplinary action by the Chicago Board of Trade, which would otherwise not be reviewable, is subject to judicial review because CFTC regulations provide standards by which to assess its action); see Merrill, *supra* note 44, at 605–06 & nn.155–60.

Professor Merrill, in his recent survey of this body of law, observes that there may be some retreat from this approach. See Merrill, *supra* note 44, at 591, 605. Several cases from the D.C. Circuit indicate this retreat. See *Fornaro v. James*, 416 F.3d 63, 66–67 (D.C. Cir. 2005) (holding that an applicable statutory regime provided the exclusive judicial review remedy which could not be supplemented by *Vitarelli* claims that the agency failed to follow its own rules); *Graham v. Ashcroft*, 358 F.3d 931, 935 (D.C. Cir. 2004) (same); *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003) (holding that federal agencies must follow their own rules, even “gratuitous” procedural rules that limit otherwise discretionary action, but FAA limitations on discretion here do not provide law to apply because the regulations give the administrator unfettered discretion to decide not to renew the license of an aircraft inspector); *Lopez v. FAA*, 318 F.3d 242, 248 (D.C. Cir. 2003) (determining that although the FAA failed to follow internal rules for renewing an aircraft inspector license, there was no prejudice); *Fried v. Hinson*, 78 F.3d 688, 690 (D.C. Cir. 1996) (declining to decide whether the court had jurisdiction to review the agency's decision not to renew a flight examiner designation).

Professor Merrill argues that claims which are unreviewable as a result of statutory preclusion should not be made reviewable through self-regulatory rules, but claims that are unreviewable because they are “committed to agency discretion by law” can be transformed into reviewable claims by the presence of a self-regulatory rule. Merrill, *supra* note 44, at 605–06. Regardless, it is safe to say that an agency can, on some occasions, turn otherwise unreviewable actions into reviewable actions by adopting a self-limiting rule.

⁸² *Miami Nation of Indians v. U.S. Dep't of the Interior*, 255 F.3d 342 (7th Cir. 2001).

⁸³ *Id.* at 347–48.

⁸⁴ *Id.* at 348.

⁸⁵ *Id.*

* * *

In the end, these features of the *Accardi* doctrine mean that an agency has a limited capacity to bind itself in the future by limiting its discretion today and offering the promise of judicial enforcement of that measure tomorrow. Its ability to make precommitments is limited because a political principal can reverse the agency (at some cost), and the agency itself can reverse itself (again at some cost). But consider a couple of examples of what an agency might be able to do as a result of the *Accardi* doctrine. An agency could adopt a legislative rule that sets forth how it will exercise its enforcement discretion.⁸⁶ In the absence of that rule, the agency's exercise of enforcement discretion would not be reviewable by a court.⁸⁷ But with the rule, a party would be able to challenge the agency's failure to comply with it.

An agency might also adopt various procedural rules that would entrench policy by making it difficult to change policy or giving certain parties within the agency a veto. It might adopt a rule, for instance, that both the general counsel and the relevant program official have to consent to policy changes before a rule or enforcement action is initiated. It might even adopt a rule requiring consensus among all relevant program officers before any significant action is taken. If these "procedural" rules, which would no doubt have substantive consequences, were embedded in legislative rules, the agency could credibly commit to the durability of the procedural rules (and their associated substantive consequences).

II. The Functions of Self-Regulation

With some sense of the key features of self-regulation, especially how binding a self-regulatory measure can be, we can turn to identifying what an agency can accomplish by adopting such measures. While there is no literature identifying the functions that self-regulatory measures in particular can serve within agencies, the literature that explores the structure of other political institutions, especially Congress, offers insights that can be applied to the particular context of

⁸⁶ See, e.g., *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 945 (D.C. Cir. 1987) (discussing FDA "action levels," which advised producers that the agency would not prosecute shipments of corn having twenty parts per billion or fewer of contaminants such as aflatoxins). For a discussion of the controversy engendered by that case, see Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation: CNI v. Young and the Aflatoxin Dance*, 44 ADMIN. L. REV. 131 (1992).

⁸⁷ See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

administrative agencies' decisions to voluntarily limit their own discretion.

The relevant literature focuses on the problems of collective choice within institutions.⁸⁸ Members of Congress have objectives they wish to accomplish, and they face a series of predictable problems as they attempt to achieve those objectives within an institutional setting. There is no reason to believe that agencies would be immune to these problems. It is true that there are important differences between, say, Congress and agencies. Compared to legislatures, agencies have many more constraints on their options fixed by authoritative sources like statutes. The heterogeneity of interests within an agency also has a different texture than it does in the legislature. In the Congress, although members have different specific aims to satisfy their constituencies, the relevant decisionmakers are shaped by somewhat similar factors—the need for re-election, for one. In contrast, the picture of incentive structures looks more complex within an agency. For example, both career personnel and political appointees are key decisionmakers, though they are not equals.⁸⁹

These differences between agencies and Congress are no doubt worthy of further exploration, but it is not necessary to do so in order to proceed with this Article's analysis. The particular heterogeneity of interests within the agency may make the task of collective choice in some ways more difficult and in some ways less difficult than in the legislature, but there is no reason to think it is impossible. And, although agency options are fixed in important ways by statutes and other authoritative sources of constraint, those sources do not crowd out all agency autonomy. The space where an agency is autonomous may be large or small, but within that space the agency must decide how to advance its objectives. The insights of the literature on collective choice within other governmental institutions, in other words, can be usefully applied to agencies.

Agencies can use self-regulatory measures to advance their policy goals, whatever those may be. There are a wide variety of plausible

⁸⁸ For an overview of this theory, see Barry R. Weingast, *Rational-Choice Institutionalism*, in *POLITICAL SCIENCE: STATE OF THE DISCIPLINE* 660 (Ira Katznelson & Helen V. Milner eds., 2002), and Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions*, 19 *LEGIS. STUD. Q.* 149 (1994).

⁸⁹ For an overview of the structure of the U.S. administrative state, see B. GUY PETERS, *THE POLITICS OF BUREAUCRACY* 148–50 (5th ed. 2001) (showing that, compared to other countries, the U.S. public sector is characterized by high levels of decentralization and political involvement).

goals.⁹⁰ The agency may wish to maximize its budget or the interests of Congress.⁹¹ Or it may wish to promote its own version of the public good—which could mean promoting the interests of “the public” (regulatory beneficiaries),⁹² neutral expertise,⁹³ or the interest of regulated parties.⁹⁴ Any of these goals are possible, but it is not necessary to settle on the most plausible one in order to see that an agency might sometimes turn to self-regulation. There are, to be sure, some circumstances in which an agency might best achieve its policy goals by placing no limits on its discretion.

In a variety of situations, however, an agency is likely to see self-regulation as an effective means of advancing its objectives. An agency can rely on both substantive and procedural self-regulation to do so. An agency can restrict its options substantively. It might articulate a particular enforcement strategy or approach to licensing. Or, an agency can adjust the process by which it makes decisions in ways that will have predictable consequences for policy development. Consider several situations where self-regulation would be in the interest of the agency.

A. *Control of Delegated Authority*

Perhaps the most obvious case is where self-regulatory measures are used to control the exercise of authority that is delegated *within* the agency. Just as the legislature delegates some decisions to agen-

⁹⁰ See ANTHONY DOWNS, *INSIDE BUREAUCRACY* 2 (1967) (identifying “power, income, prestige, security, convenience, loyalty, . . . pride in excellent work, and desire to serve the public interest” as agency policy goals); *id.* at 79–111 (classifying different types of officials who work in bureaucracies and describing how they behave); GREGORY HUBER, *THE CRAFT OF BUREAUCRATIC NEUTRALITY: INTERESTS AND INFLUENCE IN GOVERNMENTAL REGULATION OF OCCUPATIONAL SAFETY* 1–6 (2007) (contrasting political and Weberian conceptions of bureaucracy); *id.* at 15–24 (identifying a variety of perspectives within political science on bureaucratic power).

⁹¹ The budget-maximizing claim is put forward in WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971). The latter view is found in McCubbins, Noll, and Weingast’s well-known theory that, through design choices and procedural limitations, Congress is able to control agencies. McCubbins, Noll & Weingast, *supra* note 41. For criticism of this latter theory, see STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* 134–55 (2008) (contending that Congress participates in the administrative process in order to promote agency independence, not exercise control over agency action), and Terry M. Moe, *An Assessment of the Positive Theory of ‘Congressional Dominance,’* 12 *LEGIS. STUD. Q.* 475 (1987) (arguing that the congressional dominance model overlooks the role of bureaucracies in shaping agency action).

⁹² See CROLEY, *supra* note 91, at 142.

⁹³ MAX WEBER, *Bureaucracy*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 196, 214–16 (H.H. Gerth & C. Wright Mills trans., 1958).

⁹⁴ CROLEY, *supra* note 91, at 14–52; GEORGE J. STIGLER, *The Theory of Economic Regulation*, in *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* 114, 114 (1975).

cies⁹⁵ and delegates within its own institutions,⁹⁶ so there is a great deal of delegation within agencies.⁹⁷ Although the amount of decentralization of decisionmaking varies across agencies, those at the top of agencies simply cannot make all decisions. Some of this internal delegation is the result of statutory design,⁹⁸ and some is the result of agency decisions.⁹⁹ In many agencies, frontline and midlevel decisionmakers make hundreds, if not thousands, of decisions each month that represent the on-the-ground implementation of the laws the agency administers.¹⁰⁰ Administrative law judges determine who is eligible for social security disability benefits, FDA field inspectors determine whether a food product is misbranded or adulterated, customs and immigration officers make decisions at the border about the legal status of a product or an individual.

Where there is delegation, as night follows day, there will be strategies to control the exercise of that delegated authority.¹⁰¹ The agent does not have the same incentives as the principal and also can have superior information.¹⁰² Thus, the policy makers at the top of the

⁹⁵ See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 1–13 (1999); D. RODERICK KIEWIET & MATHEW D. McCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* 9–12 (1991).

⁹⁶ See GARY W. COX & MATHEW D. McCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* 9–14 (1993); KIEWIET & McCUBBINS, *supra* note 95, at 92–100; J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 *TEX. L. REV.* 1443, 1487–1500 (2003).

⁹⁷ See DOWNS, *supra* note 90, at 133–34.

⁹⁸ See, e.g., 21 U.S.C. §§ 393(e), 394 (2006) (granting the FDA Commissioner the authority to establish technical and scientific review committees as needed); 29 U.S.C. § 153(b) (2006) (providing that the NLRB may delegate to any group of three or more members any or all of the powers which it exercises; the NLRB may also delegate certain powers to regional directors); 29 U.S.C. § 153(d) (2006) (authorizing the General Counsel of the NLRB to exercise supervisory power over all attorneys, officers, and employees in regional offices and to have final authority, on behalf of the Board, to initiate investigations and issue and prosecute complaints).

⁹⁹ For example, until 1974, the Attorney General formally signed off on whether antitrust cases would be brought by the Antitrust Division of the Department of Justice. But in 1974, the Attorney General announced that he would no longer routinely review the division's recommendations. SUZANNE WEAVER, *DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION* 4 n.10 (1977). Gregory Huber also describes the internal organization of OSHA's enforcement activities. See HUBER, *supra* note 90, at 51–57.

¹⁰⁰ See, e.g., Cynthia B. Dauber, *The Ties That Do Not Bind: Nonbinding Arbitration in Federal Administrative Agencies*, 9 *ADMIN. L.J. AM. U.* 165, 165 n.2 (1995) (noting that 391,108 new cases were filed with federal ALJs in 1982–83 alone).

¹⁰¹ DOWNS, *supra* note 90, at 144–57; HUBER, *supra* note 90, at 33–36.

¹⁰² James E. Alt & Alberto Alesina, *Political Economy: An Overview*, in *A NEW HANDBOOK OF POLITICAL SCIENCE*, *supra* note 40, 645, 658–59 (Robert E. Goodin & Hans-Dieter Klingemann eds., 1996); DOWNS, *supra* note 90, at 134. If the principal that delegated the au-

agency will attempt to control the substance of the decisions made by those on the lower rungs of the hierarchy and to assure consistent application of those decisions across decisionmakers. Self-regulatory measures are a key mechanism by which top-level agency “principals” assert this control over agents exercising delegated authority.

Agencies can rely on self-regulatory measures to control the exercise of delegated authority. Most straightforwardly, an agency might instruct lower-level decisionmakers how to make their decisions.¹⁰³ In a more subtle way, self-regulatory measures might structure the decisionmaking process to facilitate desired outcomes.¹⁰⁴ A self-regulatory rule might allow field offices to make the decision whether to bring enforcement actions, or, conversely, it might allow (only) the central office to make such decisions; likewise, a self-regulatory rule might empower a large number of officials with sign-off authority before a major action is undertaken, or it might dictate a more streamlined process.¹⁰⁵ Finally, the agency might adopt various monitoring mechanisms to assure compliance with instructions.¹⁰⁶ Effectively controlling those who exercise delegated authority is a hard problem for any organization, and there are trade-offs associated with each mechanism of control.¹⁰⁷ That complexity aside, the point for present purposes is that many self-regulatory measures will be best explained as efforts by the top-level agency decisionmakers to control authority delegated to others within the agency.

thority is the legislature, as opposed to the agency head, there will be an additional principal-agent relationship between the agency head and the Congress.

¹⁰³ A variety of examples of such direct delegation is discussed above. See *supra* notes 97–100 and accompanying text.

¹⁰⁴ See HUBER, *supra* note 90, at 70 (arguing that OSHA structures enforcement of the statute, which includes choices about decentralization and enforcement strategy, in a “strategically neutral” way in order to advance its aims).

¹⁰⁵ A structure or process of this sort can be analogized to McCubbins, Noll, and Weingast’s argument that Congress designs the structure and process of agencies in order to assert control over them. See McCubbins, Noll & Weingast, *supra* note 41, at 248–49; see also *supra* note 91 and accompanying text.

¹⁰⁶ For example, when and how decisionmakers at the top of the agency review agency work product will affect the choices made. See WEAVER, *supra* note 99, at 107–12, for a discussion of Attorney General review authority over antitrust decisions, and HUBER, *supra* note 90, at 51–57, for a discussion of the internal decisionmaking process at OSHA.

¹⁰⁷ See GARY J. MILLER, *MANAGERIAL DILEMMAS: THE POLITICAL ECONOMY OF HIERARCHY* 75–177 (1992) (identifying tradeoffs associated with various managerial controls); Thomas H. Hammond & Paul A. Thomas, *The Impossibility of a Neutral Hierarchy*, 5 J.L. ECON. & ORG. 155, 156–57 (1989) (discussing the costs of various strategies used to control the actions of agency officials).

B. *Self-Constraint*

Agencies may also use self-regulatory measures to advance policy goals where there is little need to control delegation. That is, they may wish to constrain *themselves*. Consider enforcement strategy in an agency that makes only a few enforcement decisions a year. One option for the agency would be to pursue an enforcement strategy informally. As a matter of practice, for instance, the agency may choose not to bring enforcement actions against certain categories of violators.¹⁰⁸ Or, the agency could transform that practice into a self-regulatory rule to advance the same policy objective.¹⁰⁹

There are advantages to formalizing the agency policy in a self-regulatory measure. Some of those advantages are internal. The process of actually articulating the practice in writing may clarify the contours of the agency policy. Some ambiguities that do not arise as the policy is followed as a matter of practice may come to the surface and be resolved when the agency decisionmakers anticipate the widest range of possible circumstances. Articulating the policy formally may also satisfy an internal need of certain bureaucrats by providing them with an explanation for their decisions. The bureaucrats and bureaucracies described in the tradition that starts with Max Weber—neutral, impersonal, expert—would prefer to enforce rules written down to an amorphous set of informal practices.¹¹⁰

Formalizing the policy also provides external benefits. Although close observers of the agency will have known the earlier practice, a rule would publicize the policy in a broader way. More importantly, formalizing the policy evidences more commitment by the agency to the stability of the policy. If the agency, for instance, chooses to promulgate the self-regulatory measure in a legislative rule, it is opting into judicial enforcement of the rule against the agency in the future

¹⁰⁸ See Barkow & Huber, *supra* note 13, at 49 (comparing the Federal Communications Commission's informal approach to reviewing telecommunications mergers with the Department of Justice's and Federal Trade Commission's formalized enforcement guidelines).

¹⁰⁹ See, e.g., *Cnty. Nutrition Inst. v. Young*, 818 F.3d 943, 949 (D.C. Cir. 1987); *United States v. Fitch Oil Co.*, 676 F.2d 673, 675 (Temp. Emer. Ct. App. 1982). For a discussion of the "Thompson Memo" and the "McNulty Memo," see *supra* note 17 and accompanying text.

¹¹⁰ See WEBER, *supra* note 93; Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1450 (1983) ("A Weberian bureaucrat is an official governed by a rule that prohibits him from taking into account individual circumstances."); Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 146–57 (2003) (reviewing Weberian conception of bureaucracy).

and such commitment may induce desired reliance by external actors.¹¹¹

It is not all up side, of course. Articulating the policy in writing requires information, and information is costly to acquire. The transparent nature of self-regulatory rules has a down-side as well. It calls attention to the policy, which increases the risk of a decisive objection from political principals or agency stakeholders. Sometimes flying below that radar is better. Nevertheless, sometimes an agency will prefer (public) self-constraint to greater freedom.

C. *Entrenching Agency Policy Choice into the Future*

At a snapshot in time, then, an agency may choose to formalize limits on its own discretion for a variety of internal and external reasons. But another reason to adopt self-regulatory measures is to attempt to control policy choice in the future.¹¹² The attempt to entrench policy into a future administration is familiar from so-called “midnight” regulations.¹¹³

Self-regulatory measures are another way to entrench horizontally across time. An agency might embrace a particular enforcement strategy and formalize that approach in a legislative rule in order to impose the highest costs possible if and when a future agency wants to change the rule. An agency could also entrench policy by adjusting procedure in such a way that change in the future would be difficult. A self-regulatory measure might create a process that involves so many key actors that the status quo bias would be great because it takes so many to agree to change policies or because the specific actors empowered under the regime will predictably hold particular views. Whatever strategy is used, the agency’s ability to entrench its policy choice is facilitated by the *Accardi* principle, and the strength of the entrenchment will depend on the cost of undoing the policy in the future.¹¹⁴

¹¹¹ See *supra* notes 64–67 and accompanying text.

¹¹² See Posner & Vermeule, *supra* note 41, at 1666–67, for a definition of entrenchment.

¹¹³ See Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 953–98 (2003); Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the “Midnight” Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST. L. REV. 1441, 1442–50 (2005); Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 891–92 (2008).

¹¹⁴ The cost of undoing the policy in the future can be greater than preventing the policy’s adoption in the first instance. As Dan Carpenter has demonstrated in his study of agency efforts to achieve autonomy, once an agency gets a policy in place it can be more costly for others to undo it than it would have been for them to prevent its adoption in the first instance. In Carpenter’s account, agencies create this autonomy by developing reputations for trustworthiness. See

D. *Protecting Agency Autonomy Today*

Agencies may anticipate hostile political principals in the future, and, as just discussed, they may try to make it difficult for those as-yet-unknown principals to change agency policy. But an agency may also wish to protect its policy choice from interference by *today's* political principals. An agency can do so as a result of the same principle that allows it to entrench policy choice in the future. It can rely on the *Accardi* principle—that it must follow its own rules—to its advantage. If an agency has adopted a rule that sets forth limits on its discretion, a political principal cannot pressure the agency to act inconsistently with that rule.¹¹⁵ Imagine an agency rule that dictates that the agency grant licenses under certain conditions. Even if the President would like the agency to exercise its discretion in another way, the *Accardi* principle requires the agency to follow its rule.¹¹⁶ The same holds true for political pressure from Congress. Short of a statutory amendment, there is much that members of Congress can do to pressure an agency to act as the Members of Congress wish. In the face of threats from key appropriators to act in a way that is inconsistent with the self-regulatory rule, for instance, an agency must follow its rule.

This protection of autonomy cannot last forever. The President can order the agency to change the self-regulatory rule, and, if the agency head resists, find an appointee who will do his bidding. And Congress can pass a statute overriding the self-regulatory rule. But to do that, the political principals will have to care deeply about the policy difference and, even if they do, in the meantime, the agency is (happily) “required” by law to follow its self-regulatory rule—a requirement that a savvy agency can use to its advantage.

DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES 1862–1928* (2001); *see also* HUBER, *supra* note 90, at 15–16.

¹¹⁵ There will be exceptions to this. If for some reason there is no possibility that a court would apply the *Accardi* principle in a particular context, perhaps because it is settled that judicial review is not available in that context, then the agency would be unable to use self-regulation as a way to protect its autonomy. Self-regulation to protect the agency from political interference depends on the possibility of a court stepping in to enforce the *Accardi* principle.

¹¹⁶ *Cf.* *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954) (holding that where self-regulatory measures granted discretionary authority over deportation determinations to the Board of Immigration Appeals, the Attorney General could not interfere with the Board’s discretion or dictate its decision).

E. Collective Goods

Although the functions just discussed capture much of why an agency will self-regulate, they are not the only reasons why it might be in the agency's interest to limit its own discretion. The first part of this section, for instance, discussed self-regulation as a means to control the exercise of delegated authority within the agency, but not why agencies might choose to internally delegate in the first instance. But delegation itself is one example of a strategy that actors within institutions use to advance their goals.¹¹⁷

There is a variety of collective choice problems that agents within an institution must cooperate to overcome. At a basic level, an institution needs ways of acting that make it run smoothly; it needs to proceed without chaos. Agencies surely face many such problems of pure coordination that self-regulatory measures can be used to solve. The same can be said of externalities. Some units of the agency may make decisions while other units of the agency (or government) may capture the benefit or bear the costs of those decisions. Self-regulatory measures could be used to internalize costs and benefits within the appropriate units.

But the collective choice problem that seems most relevant to agencies is the need to produce various public goods. Take the important example of information.¹¹⁸ Agencies need to produce information in order to make a wide variety of decisions. They must determine the safety of a product, assess the cost of a regulatory measure, or uncover the effects of a merger. Such information is costly to acquire and, once acquired, is shared with all, meaning that without some intervention that provides incentives to produce information, it will be underproduced. Self-regulatory measures can be used to establish and delegate to entities that will produce that information and then invest in becoming experts—working groups, advisory committees, and the like. (Like any delegation, this creates risks discussed above,¹¹⁹ but that risk will not always outweigh the benefit of delegating.)

¹¹⁷ The typical problems are coordination, externalities, and public goods. See Shepsle & Weingast, *supra* note 88, at 162. For instance, Gary Cox and Mathew McCubbins argue in *LEGISLATIVE LEVIATHAN*, *supra* note 96, at 83–84, that legislators delegate certain decisions to political parties in order to overcome various collective dilemmas they face. Keith Krehbiel focuses on the pressing need that legislators have for information and argues that delegation to committees is a way of making certain that such information will be produced and shared widely. See KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* 68 (1991).

¹¹⁸ On the legislature's need for information, see KREHBIEL, *supra* note 117, at 66–68.

¹¹⁹ See *supra* notes 102, 107 and accompanying text.

Another collective good is agency reputation, and self-regulatory measures can be aimed at developing and maintaining a good reputation for the agency. An effort to control reputation might be a good explanation for cases in which agencies provide “extra” procedure. The Environmental Protection Agency (“EPA”) and the U.S. Forest Service, for instance, have both held hearings and solicited comments in rulemakings when the relevant statutes would not require it.¹²⁰ Both the Food and Drug Administration and the EPA have established mechanisms—committees, advisory bodies—that institutionalize reliance on expert bodies like the National Academy of Sciences.¹²¹ These measures are costly for the agency, but they can be seen as ways to assure the production of the public goods that are necessary to advance the agency’s goals. Extra procedures and mechanisms to rely on outside experts can be seen as ways to produce information, of course, but they can also be seen as a way of advancing agency reputation. Extra hearings, an inclusive process, or reliance on well-regarded experts can all improve the impression others have of the agency’s ultimate decision and hence, the agency’s reputation.¹²²

III. Implications of Agency Self-Regulation

So far this Article has argued that self-regulation is a distinct phenomenon that, in part due to features of administrative law, an agency can rely on to achieve a variety of objectives. This Part explores the implications of self-regulation for some debates that are central to

¹²⁰ See CROLEY, *supra* note 91, at 201 (Forest Service holds over two hundred public meetings on roadless initiative); *id.* at 183–84 (describing FDA’s hearings and solicitation of comment on tobacco rule); *see also* Noah, *supra* note 23, at 137–38 (FDA conduct of notice and comment for guidance documents).

¹²¹ See 21 C.F.R. § 170.20(a) (2008) (FDA’s Food Additive Regulation) (“In reaching a decision on any petition filed under section 409 of the Act, the Commissioner will give full consideration to the specific biological properties of the compound and the adequacy of the methods employed to demonstrate safety for the proposed use, and the Commissioner will be guided by the principles and procedures for establishing the safety of food additives stated in current publications of the National Academy of Sciences-National Research Council.”); Notice of Oxygenate Use in Gasoline Panel Meeting, 64 Fed. Reg. 31,852 (June 14, 1999) (Administrator of EPA created blue-ribbon panel of experts to review issues posed by methyl tertiary butylether and other oxygenates in gasoline); SHEILA JASANOFF, *THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS* 166–72 (1990) (discussing FDA’s reliance on the National Academy of Sciences in reviewing the efficacy of old drugs). For a general discussion of agency actions of this sort, see JASANOFF, *supra*; Lars Noah, *Scientific “Republicanism”: Expert Peer Review and the Quest for Regulatory Deliberation*, 49 EMORY L.J. 1033, 1047–57 (2000) (discussing use of experts, advisory bodies, and peer review by a variety of health and safety agencies).

¹²² *Cf.* COX & MCCUBBINS, *supra* note 96, at 109–12 (discussing the institutional role of political parties in maintaining reputation).

those who study agencies. By showing that understanding agency self-regulation could enrich, alter, or even shape these debates, the ultimate point of this section is to persuade those interested in these fields to sit up and take notice of this category of agency action.

A. A More Complete Picture of an Agency's Toolkit

Study of self-regulatory measures could help us understand the strategies that are available to agencies to achieve their interests (whatever they may be). Understanding when, why, and how agencies rely on self-regulatory measures could round out the picture of the tools that agencies have available to them as they seek to achieve their objectives.

It is the standard stuff of governance scholarship, old and new, to analyze how an agency can achieve what it wishes to achieve. Then Professor (now Judge) Ralph Winter's well-known studies about judicial review of National Labor Relations Board decisions warned that the courts' varying standards of review for law, policy, and fact could provide an incentive for the agency to shift from interpreting law to embedding its policy judgments in "carefully contrived" findings of fact.¹²³ Others have argued that one critical choice that agencies make—deciding which among a variety of instruments the agency will use to advance its policy objective—is best understood by considering the costs and benefits of each instrument from the agency's perspective, which include the likely judicial reaction, White House oversight, and the consequences of one choice or another for agency stakeholders.¹²⁴ The widespread concern, for instance, that agencies are "regulating by guidance" is rooted in an assumption that an agency will choose one of its options over another in order to achieve its objectives with the least possible cost.¹²⁵ Professor Stephenson has recently argued that an agency's choice between informal and formal ways of interpreting statutes is a way for the agency to signal otherwise unob-

¹²³ Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 74–75 (1968).

¹²⁴ See Magill, *supra* note 62, at 1443–45. See generally James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, 57 LAW & CONTEMP. PROBS. 111 (1994) (discussing the Environmental Protection Agency's choice between informal guidance documents and formalized legislative rules governing hazardous waste).

¹²⁵ See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (criticizing EPA's use of guidance documents in augmenting regulations); H.R. REP. NO. 106-1009, at 9 (2000).

servable information to reviewing courts.¹²⁶ Still other work analyzes agency behavior in the face of efforts by legislators or the President to control it.¹²⁷

All of this scholarship begins with an appreciation of the toolkit available to the agency and the relevant dimensions of each tool in the box. Professor Stephenson argues that an agency will pursue formal or informal methods in relation to the textual plausibility of its statutory interpretation;¹²⁸ Professor Winter warns that an agency might switch from law to fact in order to take advantages of standards of review;¹²⁹ and many have argued that an agency will wrongly choose guidance over legislative rules and will get almost all of what it wants without investing in the public process that makes the exercise of coercive state power acceptable.¹³⁰ Some of this work seeks to understand and make predictions about agency behavior, and some of it advances normative arguments about the legitimacy of that agency behavior. But all of it starts with an understanding of the relevant features of the choices available to an agency.

Self-regulation is not now treated as something in the agency's tool kit, but it should be. There are several features of self-regulatory actions that make them distinct from other forms of agency action. Self-regulation, first, is sometimes the only way for the agency to achieve some of its objectives. Recall the functions of self-regulation outlined in Part II. An agency can achieve some of those objectives through a variety of means. If an agency wishes to entrench policy, self-regulation is not the only way to do so. An agency can likely entrench policy in the normal course of promulgating legislative rules or adjudicating cases that implement the relevant statutes. But if the agency wants to control internal delegation, delegate within the institution, or otherwise create mechanisms to produce needed collective goods, self-regulation is likely the only way to do so. As the only

¹²⁶ Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 529–31 (2006).

¹²⁷ M. Elizabeth Magill, *The First Word*, 16 WM. & MARY BILL RTS. J. 27, 37–53 (2007) (identifying why and how an agency might not follow presidential wishes and, in light of that, demonstrating which strategies will work for presidents in certain circumstances). Professor Carpenter's account of the development of bureaucratic autonomy also analyzes agency behavior in the face of presidential efforts to control it. CARPENTER, *supra* note 114, at 361.

¹²⁸ See Stephenson, *supra* note 126, at 529–30.

¹²⁹ See Winter, *supra* note 123, at 74–75.

¹³⁰ See, e.g., *Appalachian Power Co.*, 208 F.3d at 1028.

means to certain ends, self-regulation is distinctive from the other tools available to the agency.

Self-regulation is distinct in another way. Even where the agency has multiple mechanisms to advance its objectives, certain kinds of self-regulation may be a superior choice for the agency because they will be especially effective at achieving those objectives. Consider an agency that wants to entrench its own policy preferences, either as against a future agency or as against present-day political principals. It is true, as just noted, that an agency can do this by interpreting its own statute, for instance, in the course of a legislative rulemaking. But such mechanisms of entrenchment will, as a general rule, be more transparent to political opponents. If an agency plans to entrench policy by adopting a brand new legislative rule interpreting the agency-administered statute, that move will be easy for opponents to see and, if necessary, mobilize opposition.

As an alternative, an agency could use a self-regulatory measure to rearrange a decisionmaking process in a way that will entrench existing policy. The agency could further decentralize or further centralize decisionmaking authority, it could increase the number of officials who have to sign off before action is taken, or it could empower an internal agency unit with predictable views to be in charge of the agency choice. These options could all work to entrench a particular policy and they have at least two advantages over a more straightforward attempt to entrench agency choices: the agency has inside information about the effect of such internal process changes, and the process change is not explicitly substantive. As a consequence, if the agency advances policy aims in this way, it may be more difficult for political opponents to oppose the effort or to dislodge it once it is in place.

B. Effectiveness of Agency Monitors

Study of self-regulation can also tell us something important about the effectiveness of external controls on agencies. Courts, the President, and Congress all have a variety of tools available to them to influence agencies: Congress appropriates money for agencies and is the primary architect of both substantive and procedural statutes that dictate agency action; the President participates in the legislative process and also appoints and, under certain conditions, removes the top leadership of most agencies; and courts determine whether an agency acts within its legal constraints. As this Article has pointed out, where

there are no explicit instructions from these principals, as is often the case, the agency can step in to fill the void by regulating itself.¹³¹

Agency self-regulation tells us something about the effectiveness of these controls on agencies. Consider first the effect of agency self-regulation on efforts by political principals to monitor and control an agency. The effect is straightforward, and has already been observed. If an agency self-regulates in the correct way, the agency can blunt the effect—perhaps only for a time, but perhaps longer—of attempts by political principals to influence and control its behavior.¹³² Whether this is a good thing or a bad thing will depend on one's normative views about administrative governance. Some observers of the administrative state prize agency autonomy and what are thought to be its attendant virtues of expertise and diffusion of power. For those who embrace that normative view, blunting the effectiveness of political controls would be, in the usual case, a positive good. Such scholars would seek ways to expand agency capacity to use self-regulation to avoid political controls. They might suggest, for instance, that the *Accardi* principle should apply to a broader range of agency "rules" than it now does, which would expand the agency's ability to deflect interference by political principals.

For those who prize accountability in administrative governance, the capacity of an agency to evade political controls in this way would be problematic. Such scholars would explore strategies that facilitate political control over agencies, even in the face of self-regulation. This might include more *ex ante* instructions from the President in order to short-circuit agency self-regulatory measures. If the President directed the agency to exercise its enforcement discretion in particular way, for instance, the agency would not be free to develop alternative enforcement priorities in binding enforcement guidelines. Directives like that, however, depend on the President having access to the appropriate information, and information is costly to gather and deploy. Another alternative would be to advocate for adjustments in the *Accardi* doctrine that would weaken the capacity of agencies to rely on judicial enforcement of self-regulatory measures.

What self-regulation can teach us about the relationship between agencies and their judicial overseers is just as important, but it is more complicated. Self-regulation could help scholars assess the strength of the relationship between judicial review and agency behavior. It is

¹³¹ See *supra* Part I.A.

¹³² See *supra* Part II.D.

almost universally assumed (including, the reader will note, in this Article) by legal scholars who write about agencies that agencies are *responsive* to judicial controls. To take just a few prominent examples, judicial review of agency action has been said to have “ossified” the rulemaking process so that agencies are turning away from rulemaking;¹³³ agencies are said to choose one policy instrument over another based in part on the standard of review that would apply when the agency is in court;¹³⁴ and, in some well-known accounts, judicial examination of agency action has been blamed for agency failure to implement its statutory mandates.¹³⁵ But there are many determinants of agency behavior. The prospect of judicial examination of agency action is one of many factors that might influence agency decisions *ex ante*. The strong assumption that agencies are responsive to judicial controls is just that—an assumption; it is rarely subject to testing.

Self-regulation could offer a method for testing the effect of judicial review on agency action. That is because the *Accardi* doctrine might serve as a disincentive for agencies to adopt self-regulatory rules in the first instance. This is so for two reasons. One is because the *Accardi* doctrine can transform unreviewable agency action into reviewable agency action by providing law for the court to apply.¹³⁶ The other is the straightforward effect of the principle, which is that it leads to the invalidation of agency action when any actor in the agency violates the self-regulation.¹³⁷ These “costs” imposed on the agency by the *Accardi* doctrine may undermine the agency’s incentive to self-regulate in the first place.¹³⁸

One could test whether this is so and thereby examine the connection between judicial review of agency action and agency behavior. Such study would take advantage of the varying institutional environments in which agencies exist. Some agencies are relatively insulated from judicial review because Congress has chosen to make a fairly large slice of their decisions nonreviewable in court. The Department

¹³³ See McGarity, *supra* note 50, at 1385–86.

¹³⁴ Magill, *supra* note 62, at 1443–45; see also Stephenson, *supra* note 126, at 544.

¹³⁵ See JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 95 (1990) (discussing a sharp drop in agency rulemaking activity following an adverse judicial decision on one of the agency’s rules).

¹³⁶ See *supra* notes 80–85 and accompanying text.

¹³⁷ See *supra* Part I.C.4.

¹³⁸ For an argument along these lines, see Krent, *supra* note 44, at 1189–90 (“Courts insufficiently recognize that permitting third-party review of an agency’s compliance with its own policy may have substantially adverse effects . . . [A]gencies may respond to such judicial decisions by rescinding regulations or changing directives to prevent judicial oversight.”).

of Veterans Affairs (“VA”) provides an excellent example. The VA, unlike many other benefit-conferring agencies, has had long stretches where certain of its benefit determinations were made (largely) without threat of judicial examination of its decisions.¹³⁹ Other agencies that distribute benefits, however, are not so insulated from judicial review by statute.¹⁴⁰ Thus, one could assess whether the VA behaves any differently with respect to self-regulation than agencies that also distribute benefits but are more subject to judicial examination of their decisions.

Such an investigation would usefully inform the many and varied debates about the proper structuring of judicial review of administrative action. If it turns out that the existence of judicial review has little effect on an agency’s willingness to self-regulate in the first instance, that would suggest that there is a relatively weak relationship between judicial review of administrative action and *ex ante* behavior by agencies. A wide range of scholarly arguments that assume a relationship between the two would be called into question, and it may prompt a fundamental rethinking of judicial controls on administration. On the other hand, if the study demonstrated that the existence of judicial examination did alter an agency’s behavior, that would be instructive as well. As a general matter, it would mean that agency behavior could be importantly shaped by adjusting judicial examination of it. But the precise nature of the relationship between judicial review and agency behavior would be more revealing because it could inform efforts to restructure judicial review. Consider one example. If a study demonstrated that certain kinds of judicial remedies had a stronger effect on *ex ante* agency behavior than others, that might suggest how, given a variety of goals that one might wish to pursue, judicial review could be structured differently.

C. *Informing Normative Views on Delegation*

It is a fact about the modern world that Congress passes statutes that delegate significant policymaking authority to administrative agencies.¹⁴¹ While statutes have become more prescriptive and de-

¹³⁹ Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155, 155 (1992) (“[U]ntil recently, judicial oversight was strikingly absent in one important area of agency decision-making—the disability and pension benefit awards of the Veterans Administration.”).

¹⁴⁰ See, e.g., 42 U.S.C. § 405(g) (2006) (authorizing judicial review of Social Security disability claims).

¹⁴¹ See *supra* note 95 and accompanying text.

tailed over time,¹⁴² there is little doubt that today's agencies have discretion to implement statutes in ways that matter greatly to those who follow what they do. For some observers of modern government, these facts are scandalous.¹⁴³ Critics have a variety of concerns about delegation. Some sound in a pure commitment to representative government—the “people's representatives” must make the key policy choices, period.¹⁴⁴ Other criticisms, however, focus on the way that delegated power is likely to be exercised by the agencies that possess it. A dominant theme of the modern era, captured in 1969 in Theodore Lowi's (self-described) “polemical” book, *The End of Liberalism*, is that delegation facilitates the delivery of rents to concentrated interests.¹⁴⁵

The objection to delegation that is rooted in claims about how an agency will exercise delegated authority should be informed by an understanding of how agencies actually *do* exercise power. While there are many studies of agency policymaking informing these normative debates about delegation, these studies do not focus on self-regulatory measures. But they should. The existence of self-regulation teaches that agencies sometimes voluntarily choose to limit their otherwise broad discretion.

The mere existence of self-regulation cannot inform debates over delegation because there are both optimistic and pessimistic stories about when and why agencies limit their own discretion. An agency may self-regulate in order to control *internal* delegations so that those within the agency do not have opportunities for arbitrary or corrupt exercises of state power. On the other hand, self-regulation may be aimed at delivering rents to regulated parties. We do not know which story is more accurate and under what conditions, and, while the task is difficult, serious study of self-regulation should allow us to draw at least some conclusions about which story is more plausible and, if both are plausible, identify the conditions under which pessimistic or optimistic stories are more plausible.

¹⁴² See Sidney A. Shapiro, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 821–45 (1988) (discussing Congress's move towards tighter control of the EPA).

¹⁴³ See, e.g., SCHOENBROD, *supra* note 2.

¹⁴⁴ ELY, *supra* note 2, at 131 (“The point is not that such ‘faceless bureaucrats’ necessarily do a bad job as our effective legislators. It is rather that they are neither elected nor reelected, and are controlled only spasmodically by the officials who are.”).

¹⁴⁵ LOWI, *supra* note 2, at 67–126; SCHOENBROD, *supra* note 2, at 49–57 (discussing how Sunkist dominated the Navel Orange Administrative Committee and wielded strong influence over the laws that governed its industry).

Understanding the functions self-regulation serves in particular circumstances and the conditions under which it is undertaken could alter and shape the debate over the wisdom of delegation. If the study of self-regulation demonstrates that there are certain conditions under which agencies use self-regulation to limit their authority in ways that are appealing, for instance, that could mitigate concerns about delegation in the first instance. More than that, though, such a study would teach us something about how to restructure agency supervision. Scholars could then consider how an agency could be encouraged to self-regulate on the right occasions. If self-regulation is a positive development because it limits the opportunities for corrupt or arbitrary exercises of state power, for example, then the White House should use its executive power to require agencies to self-regulate in the situations where it would serve those ends. Scholars could also consider how judicial review of administrative action could promote agency self-regulation in those circumstances. Adjustments to the *Accardi* doctrine, for example, that reward agencies when they self-regulate in the proper way and in the proper situations could help push the agency in the right direction.

D. *What Makes an Agency Tick?*

For students of bureaucracy, figuring out what makes an agency tick is a major—perhaps *the* major—unanswered question. A defining feature of bureaucracies is that their output is not measured by voluntary exchange in a market.¹⁴⁶ The disciplining mechanism of market transactions provides great insight into how firms behave and the absence of a similarly powerful mechanism for bureaucracies complicates efforts to figure out why they do what they do.¹⁴⁷ No public official, of course, has her outputs measured in the same way that firms do,¹⁴⁸ so the difficulty with bureaucracies is akin to the difficulty of understanding the incentive structure of public figures. But the problem with bureaucracies is more extreme. By comparison to those in bureaucracies, electorally accountable politicians look easy to understand. They at least face one powerful disciplining force: elections.

¹⁴⁶ See, e.g., DOWNS, *supra* note 90, at 24–25 (identifying four defining features of a bureau, including the requirement that “[t]he major portion of its output is not directly or indirectly evaluated in any markets external to the organization”).

¹⁴⁷ See CROLEY, *supra* note 91, at 19–22 (identifying “three crucial differences between regulatory decisions and competitive market decisions” which cause the marketplace analogy to “ultimately break[] down” before being of much help).

¹⁴⁸ See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345–48 (2000).

Into this void have come competing descriptions about what makes agencies behave the way they do.¹⁴⁹ In various accounts, bureaucracies seek to maximize one or some of the following: their budget, neutral expertise, discretion, bureaucratic autonomy, or leisure.¹⁵⁰ Or they seek to advance the interests of other actors—rent-seeking outside interests or political principals like the President or Congress.¹⁵¹

Studying when and how agencies engage in self-regulatory measures is one way to help make progress on the very difficult (and yet important) question of which description of agency incentives is more plausible. Agency self-regulation is a promising way to assess these competing accounts because it is *voluntarily* undertaken—and by that I mean it is generated by the agency even though no source of authority requires the agency to take an action.¹⁵² This cannot be said of many agency actions and it makes self-regulation an especially revealing window into agency motivation. When an agency takes a significant action, it is often difficult to untangle what part of that action can be traced to the agency's motivations and what part can be traced to the force of authoritative sources that constrain the agency's action. But when agencies self-regulate in the absence of such commands, that allows the observer to see what an agency chooses to do when it is (relatively speaking) left to its own devices.

1. *Public Choice Accounts*

To see how the study of self-regulatory measures could shed light on these difficult questions, consider more closely some of the competing accounts of agency behavior. While a traditional picture of agency incentives is that agencies seek to advance neutral expertise,¹⁵³ a prominent modern view, brought to us by public choice accounts of regulation, is that agencies seek to advance the interests of certain regulated parties by providing rents to concentrated interests.¹⁵⁴ Stud-

¹⁴⁹ See *supra* notes 90–94 and accompanying text.

¹⁵⁰ See *supra* notes 90–91, 93 and accompanying text.

¹⁵¹ See *supra* notes 92, 94 and accompanying text.

¹⁵² I do not mean to suggest that an act of self-regulation is an unconstrained choice. Even without an authoritative source requiring the agency to act, there are many powerful pressures, both internal and external, that will push an agency to adopt such “voluntary” self-regulatory measures. Even so, it seems to me that the absence of an authoritative source that requires the agency to act does allow the observer to have a (relatively) clearer opportunity to detect agency motivations.

¹⁵³ WEBER, *supra* note 93, at 214–16.

¹⁵⁴ See CROLEY, *supra* note 91, at 14–25.

ying self-regulation could shed some light on whether this public choice account is plausible and, if so, under what conditions.

Take the example of agency exercise of enforcement discretion.¹⁵⁵ It is often the case that that enforcement discretion is vast; there are, that is, many potential violators of the governing law and an agency has a great deal of discretion about which violators it will pursue. The agency's pattern of enforcement action will matter to regulated parties because an enforcement action imposes costs on the objects of the action and also advantages any competitors who are not subject to it. But an agency can choose—or not—to tame that enforcement discretion by adopting binding—or not—enforcement guidelines that dictate how it will exercise its discretion.

Issuance of binding enforcement guidelines that provide safe harbors—promises of nonenforcement—to segments of an industry would be an excellent way for an agency to provide rents to private parties.¹⁵⁶ If the agency chooses to pursue one class of violators instead of others, that places a burden on those who are pursued, and, if the two classes compete with one another, the agency's action provides a relative benefit to those who are not pursued. For example, if the Food and Drug Administration announces a safe harbor for manufacturers of certain over-the-counter medicines, that advantages those manufacturers in relation to competitors who do risk enforcement action.

In contrast, it is difficult to see why an agency would promulgate binding enforcement guidelines that offer safe harbors to certain actors if the agency's incentives were consistent with a more optimistic story. To be sure, an agency interested in neutral expertise might wish to gather information about patterns of violations and use it to deploy its enforcement resources, and perhaps it is even the case that such an agency would wish to announce the results of that investigation publicly. But it is hard to understand how the agency would be advancing neutral expertise by creating *binding* enforcement guidelines (the facts may change) or ones that offer *safe harbors* to certain classes of violators (there's no need to tell anyone they are safe from enforcement).

Thus, if the public choice account is correct, one would expect to see agencies that are in a position to deliver private benefits issuing

¹⁵⁵ See Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 126–31 (2002) (arguing that agency choices about enforcement are particularly prone to capture by regulated parties).

¹⁵⁶ See CROLEY, *supra* note 91, at 14–25.

binding enforcement guidelines that offer safe harbors to segments of industry. Such guidelines would not be consistent with a more optimistic picture of agency incentives. One way to test this public choice story is to take advantage of the fact that agencies operate in different institutional environments. Some regulate concentrated interests within industries and are thus, if the public choice account is true, actually in a position to deliver rents. This is true, for instance, of the Food and Drug Administration, the Federal Trade Commission, and the Federal Energy Regulatory Commission, to name just a few. By contrast, other agencies do their business where there are few concentrated interests of the relevant sort, such as benefit conferring agencies like the Social Security Administration or the VA. Thus, one could evaluate the type of enforcement guidelines issued by these agencies that operate in different environments and see whether their output varies in ways that confirm—or not—the prediction that only the agencies in a position to deliver rents produce the sort of enforcement guidelines that one would expect.

2. *Partisan Control*

The public choice account does not always play the villain to the heroic stories of agency motivation. “Politics”—partisan politics—is another foil. It is taken as a given in some fields that agencies behave in the way they do in order to serve their Democratic or Republican principals.¹⁵⁷ Traditional accounts in law or public administration have tended to put more faith in the possibility that agencies advance neutral expertise.¹⁵⁸ Study of self-regulation could provide some insight into the extent of political control of agencies.

If agencies behave the way they do because they are serving their partisan political masters, one would predict that the stronger that control, the more the agency would serve that master. Thus, when the entire government is united under one party, one would expect agencies to behave differently than they would when government is divided and political control is more clouded. Hence, one could compare agency self-regulation with policy content in order to see if the content of self-regulatory measures changes depending on whether government is united or divided.

¹⁵⁷ See McCubbins, Noll & Weingast, *supra* note 41, at 243 (introducing the strategies of “oversight” and “administrative procedures” employed by political actors to control bureaucratic decisions).

¹⁵⁸ See LANDIS, *supra* note 1, at 23–24.

* * *

This Part has only scratched the surface. It has not fully explored the implications of self-regulation for various debates about the administrative state. Nor has it even tried to take the next step, namely, to perform the work that would provide concrete answers to the questions posed here. But this Part did not intend to do either of those things. The points developed here are instead in the service of the more modest ambition of convincing the reader that serious study of self-regulation is worth our time because such study should be able to inform, alter, or shape these important debates about governance. How such study will actually do so must await future work. But if the reader is now persuaded that such work is worth our time, the agenda here has been satisfied.

Conclusion

In a variety of fields, the intellectual trend of the last several decades can be summed up with two words: “institutions matter.” Attention to institutions has deep roots in the law. To take one example, legal scholars associated with the legal process school have long asked a set of questions about comparative institutional competence—questions that are built around sensitivity to institutional difference. The new focus on institutions in the social sciences asks questions about institutions that are related to but different from the traditional questions that have occupied legal scholars. Those questions are about how institutional structures aggregate and filter preferences and how actors within institutional settings come together (or not) to advance their aims. Given legal scholars’ long-standing interest in and sensitivity to institutions, it is ironic that this set of questions about institutions is only now starting to penetrate the thinking of those of us in law who study agencies and their operation. At its most basic level, this Article is an argument for looking more closely—much more closely—at the behavior of the institutions that are at the center of our study.