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An interest group that is dissatisfied with an agency's policies may try to limit the adverse effects of the policies by demanding countervailing conduct from another agency. The widespread duplication and overlap of agency jurisdiction in the federal bureaucracy thus creates a "multiagency decisionmaking process," which affords underrepresented groups the opportunity to mold governmental policy. In other cases, a statute or regulation may require an agency to solicit opinions from agencies with overlapping concerns and give them thoughtful consideration. This arrangement also affords dissatisfied interests multiple forums for their arguments.

Because I believe that the interests most commonly associated with public interest advocacy—for example, racial and ethnic minorities, small retail consumers, people with low incomes, and citizens concerned with the environment—are sorely underrepresented in the political process, I find great value in multiagency decisionmaking. If I found that a single agency consistently made determinations favorable to such groups, I would urge expanding that agency's exclusive jurisdiction to eliminate duplication and overlap.[1] Such bodies, however, are rare and their policy biases are transitory. I therefore view multiagency decisionmaking as the best way to maximize the chances that an underrepresented group's views will prevail. Though some public planners lament the incon-

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1. A related topic is the typical reorganization proposal to consolidate in a single agency the jurisdiction shared by several agencies. A recent example was the ill-fated proposal to transfer the Economic Development Administration from the Commerce Department to a new department that would direct all federal economic development activities. Proponents argued that the move would make the program more sensitive to the needs of cities. Critics responded that the program worked well despite its location in a department particularly sensitive to business rather than urban needs. *See Carter Scans Plan on New U.S. Agency,* N.Y. Times, Feb. 4, 1979, § 1, at 12, col. 1; *Dispute Between Two Carter Aides Mires Economic Development Plan,* N.Y. Times, Feb. 15, 1979, at A24, col. 1; *President's Stand on Reorganizing Seen as an Attempt to Compromise,* N.Y. Times, Mar. 2, 1979, at A11, col. 1. It is thus an understatement to contend that "[r]eorganization is shuffling hoxes and moving people around." Drew, *Second Phase,* NEW YORKER, May 23, 1977, at 123 (quoting Hamilton Jordan).

sistency and inefficiency of multiagency decisionmaking, I argue that these drawbacks are frequently outweighed by the great value of this process in legitimating the administrative system and rendering it accessible to the widest possible range of diverse interests.

This view of the administrative process does not lend itself well to traditional academic scholarship. I would likely find it impossible to reach my conclusions about administrative structures if my resources were limited to scrupulously documented evidence and value neutral principles, or close facsimiles. Amassing unassailable evidence would be impossibly difficult and, therefore, logical reasoning would fail to construct a safe bridge to such conclusions. As an alternative, informed assumptions and accepted community values may be used to reach a wide range of socially useful conclusions, though at the risk of reduced accuracy.[2] As the assumptions and values become less controversial, however, the conclusions will become more persuasive. Consequently, this Article utilizes commonplace assumptions and values to reach conclusions supporting multiagency decisionmaking.[3] I assume that American society is pluralistic and, therefore, that American government is characterized by pressure politics in which competing interest groups vie for influence—a view shared by most contemporary political scientists.[4] I also rely heavily on the conservative value of legitimacy and posit the need for a more legitimated administrative process.[5] Legitimacy is a continuing problem for the administrative system.[6] Uneasiness

2. Depending on the subject of inquiry, several other methods of analysis help overcome the constraints of "positivist" scholarship. *E.g.*, Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) (developing and applying jurisprudential principles); Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 YALE L.J. 243 (1978) (employing detailed case studies); Stover & Eckart, *A Systematic Comparison of Public Defenders and Private Attorneys*, 3 AM. J. CRIM. L. 265 (1975) (combining statistical studies with interviews and field observation); Comment, *In Search of the Adversary System—The Cooperative Practices of Private Criminal Defense Attorneys*, 50 TEX. L. REV. 60 (1972) (relying on colorful interviews). Whether positivism can produce value free analysis is highly questionable. *See, e.g.*, Cohen, *The Political Element in Legal Theory: A Look at Kelsen's Pure Theory*, 88 YALE L.J. 1 (1978). Its style, however, shapes the direction of legal scholarship and limits its uses.

3. This study is limited to federal agencies, which receive their authority from the constitutional branches—the Congress, the Executive, and the Federal Judiciary. Much of the analysis, however, should apply to federal agency-state agency interactions as well.

4. The nontechnical definition of pluralism used here would include within its ambit the ideas in such contemporaneous works as R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956), and G. MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY (1966).

5. An agency's behavior is legitimate if it sufficiently meets the needs of some interests and does not so antagonize others that it significantly increases the adverse effects of political discontent. The administrative system enjoys political legitimacy to the extent that its conduct minimizes potential polarization and segmentation in society. *See* text accompanying notes 37-43 *infra*.

6. *E.g.*, J. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERI-

must arise when community values, a loosely constructed scheme of public law, and the idiosyncrasies of individual decisionmakers are the only forces constraining the power of competing interest groups.

This Article demonstrates how multiagency decisionmaking can enhance the legitimacy of the administrative system. After discussing the meaning of legitimacy in a highly stable society, it analyzes multiagency decisionmaking process from the perspective of the political scientist. I particularly emphasize "partisan mutual adjustment" analysis,[7] which views the system as adjusting continually to the conduct of interacting participants. This theory comports not only with the pluralistic, pressure politics model of American government, but also with the methodology of classical economics, which celebrates the product of competing, conflicting interests. The Article concludes by demonstrating that the multiagency process can increase legitimacy by furthering those constitutional values that most often call into question an agency's validity. Multiagency decisionmaking is not always the best administrative structure. Its many advantages, however, may frequently make it the most desirable option.

I. The Notion of Legitimacy in a Stable Society

A. *Defining Legitimacy*

To define political legitimacy in a pluralistic society requires packing complicated concepts into traditional democratic figures of speech, all the while hoping that the packages retain their contours and that the seams do not burst. We generally equate political legitimacy with political accountability, but this view raises a telling question—accountability to which interests? Specific government conduct rarely satisfies all interests in society, and interest groups exercise varying degrees of political clout.[8] Recognition of these two important facts permits us to identify two sources of discontent with a political system.[9] The first is the inability of any

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CAN GOVERNMENT (1978); Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041 (1975); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 *passim* (1975); *see* Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975) (agencies lack continuing accountability to the political process); Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 NW. U. L. REV. 120 (1977) (study of administrative law has focused on administrative legitimacy).

7. *See* text accompanying notes 74-82 *infra*.

8. *See, e.g.*, R. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 8 (1971); R. DAHL, *supra* note 4, at 124-51; G. MCCONNELL, *supra* note 4.

9. The following analysis derives in part from Dahl, *Introduction* to REGIMES AND

government policy to win the approval of all interests involved. The second is "perceived political inequality"—the belief by some groups that their interests are inadequately expressed, organized, and represented. In extreme cases, such feelings of discontent may foment political upheaval. In the context of our society, they can foster a political environment infected with dissatisfaction and cynicism, which encourages a narrow struggle to advance special interests that can immobilize government.[10] The contemporary phenomenon of single issue politics may illustrate the danger.

In this light, a government system or instrumentality enjoys political legitimacy to the extent that its conduct minimizes potential polarization and segmentation in society. This definition reflects James Madison's concern about the propensity of societies to break into factions and the resulting "instability, injustice, and confusion . . . the mortal diseases under which popular governments have everywhere perished."[11] An instance of legitimate conduct may evoke a very positive response from some interests and an accepting response from others, but it may also elicit hostility from still other interests. Occasionally a government or agency can even act in a politically illegitimate manner without causing fragmentation, provided its aggregate behavior falls within the boundaries defined by those to whom it owes political responsibility.[12]

In the most abstract sense, political accountability is accountability to the entire society in that a reckoning will draw closer if

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OPPOSITIONS 18-25 (R. Dahl ed. 1973).

10. The situation's severity depends on the level of antagonism, the number of sets of antagonists involved in each conflict, the extent to which the composition of sets of antagonists in one conflict is identical with the composition of sets involved in other conflicts (a high degree of identity reinforces the conflicts), and the extent to which all these factors persist unchanged over time. *Id.* at 20-21.

11. THE FEDERALIST No. 10, at 56-57 (J. Madison) (J. Cooke ed. 1961). Madison recognized that a faction could consist of a majority as well as a minority of citizens. *Id.* at 57. Factionalism and segmentation continue to concern contemporary observers. For example:

> Samuel Huntington, a principal adviser to the National Security Council, warns against the "excesses" of democracy—the problems of government are too complex to accommodate the conflicts inherent in democratic rule. Elsewhere in the world, the collapse of democratic experiments and the rise of authoritarian regimes lend support to the increasingly fashionable view that strong rule, not democracy, is the wave of the future.

Barnet, *No Room in the Lifeboats,* N.Y. Times, April 16, 1978, § 6 (Magazine), at 32, 33.

12. An arguable illustration is the FCC's 1975 decision to exempt from the equal time requirement newsworthy debates between political candidates and press conferences by candidates, including incumbents. Aspen Institute, 55 F.C.C.2d 697 (1975), *sustained sub nom.* Chisolm v. FCC, 538 F.2d 349 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 890 (1976). Though the circuit court upheld the FCC's statutory authority to make the ruling, the decision was one that Congress had informally reserved. In the litigation, the television networks supported the FCC, and the Democratic National Committee opposed it; public interest groups were divided.

conduct undermines the political system's stability. Practically, however, an agency's behavior enjoys legitimacy if it sufficiently meets the needs of some interests and does not so antagonize others that it significantly increases political discontent.[13] Conduct is efficacious if it not only meets this minimal criterion for legitimacy, but actually reduces the likelihood of political discontent. We can still employ the convenient shorthand of conventional political conversation and speak of "attending to society's needs, wishes, and demands," but only if we recognize the intricate meaning of that phrase.[14]

B. The Sources of Administrative Legitimacy

The legitimacy of administrative activity has long been a source of controversy.[15] The discussion has traditionally focused on three issues—(1) the extent of Congressional power to delegate authority, (2) the nature of judicial review, and (3) the fairness of

13. Herbert Simon's notion of "satisficing" is a kindred concept. *See* H. SIMON, ADMINISTRATIVE BEHAVIOR xxviii-xxxi, 38-41, 80-81, 240-44, 272 (3d ed. 1976). Also related is Pareto economic analysis. For a brief description, see B. ACKERMAN, *Introduction* to ECONOMIC FOUNDATIONS OF PROPERTY LAW xi-xiv (1975). An agency's limited options may preclude it from choosing the alternative that would maximize an interest group's satisfaction. Maximization might consist only of reflecting the group's preference among available choices. To the extent that the group proves successful in persuading an agency to select the preferred available option it obtains the satisfaction of exercising some control over its own destiny. *Cf.* Lane, *Markets and the Satisfaction of Human Wants*, 4 J. ECON. ISSUES 799, 821-22 (1978)(a market economy's best defense may be its ability, within limits, to enhance the individual's sense of control, rather than its occasional ability to maximize satisfaction). An unacceptably narrow range of choices, however, undermines legitimacy. Professor Bickel phrases the definition well:

> [L]egitimacy comes to a regime that is felt to be good and to have proven itself as such to generations past as well as in the present. Such a government must be principled as well as responsible; but it must be felt to be the one without having ceased to be the other, and unless it is responsible it cannot in fact be stable, and is not in my view morally supportable.

A. BICKEL, THE LEAST DANGEROUS BRANCH 29(1962).

14. "There is an accuracy that defeats itself by the over-emphasis of details. . . . The sentence may be so overloaded with all its possible qualifications that it will tumble down of its own weight." B. CARDOZO, LAW AND LITERATURE 7 (1931).

15. *See* notes 5-6 *supra*. Dean Freedman argues that threats to administrative legitimacy stem from agency failure to conform to the constitutional scheme of separation of powers, departure from judicial norms, public ambivalence toward economic regulation, concerns with bureaucratization, skepticism of administrative expertise, the lack of direct political accountability, and problems arising from broad delegations of legislative power. J. FREEDMAN, *supra* note 6. He identifies four sources of administrative legitimacy—the process' indispensability to the governmental scheme, its elements of political accountability, its effectiveness in meeting statutory responsibilities, and public perception of fair decisionmaking procedures. He emphasizes procedural fairness as an essential source. My approach insists on the primacy of perceived political and public accountability, but, as the Article demonstrates, incorporates into this notion an awareness of these other concerns.

formal agency procedure. The first two deal with accountability to the constitutional branches, and the third questions whether the agency conducts its affairs in a politically acceptable manner and whether it is accessible to affected interest groups.[16]

Critics of the administrative system frequently complain that the tools of the legislative, executive, and judicial branches have proven inadequate to ensure its political accountability.[17] Such statements may embody two criticisms—first, the constitutional branches in fact lack sufficiently effective tools of control; second, even if they were equipped with satisfactory tools, the branches would advance policies that inadequately reflect what society deems to be politically acceptable.

Our system deepens the discontent on both counts by relying heavily on the judicial branch as the primary direct check on the daily conduct of administrative agencies. The courts' powers prevent them from doing more than stopping arbitrary conduct and conduct that violates specific legislative, executive, and constitutional directives. A question of political legitimacy limits the propriety of more extensive judicial review by the least democratic branch. The only two political checks on the courts are limited and indirect. First, political legitimacy depends on the executive and Congressional powers of judicial appointment and on the legislative power to define the limits of judicial authority. The courts' other

16. The recent broadening of standing and growth of participatory rights in agency proceedings suggests that the traditional administrative model is giving way to a legislative model—a surrogate political process in which a wide range of affected interests enjoy the opportunity to participate. *See* Stewart, *supra* note 6. This legislative mode may be the result of broad delegation of power to agencies, since the political pressures that once focused on Congress must now focus increasingly on the administrative system. *See* Gellhorn & Robinson, *Perspectives on Administrative Law,* 75 COLUM. L. REV. 771, 778 (1975). The rulemaking proceeding is the most apparent parallel to the legislative process. *See, e.g.,* Nelson, *The Politicization of FTC Rulemaking,* 8 CONN. L. REV. 413 (1976). The model, however, looks to interest group participation through formal agency proceedings and relies on the courts for implementation. In this Article, I emphasize that interest groups influence agencies through the larger political process as well as by the threat of formal judicial review. *See* Stewart, *supra* note 6, at 1670 n.5, 1687; notes 127-42 *infra* and accompanying text.

17. *E.g.,* Cutler & Johnson, *supra* note 6 (proposing as a remedy the now-current proposal for a Congressional veto over agency rulemakings); *President Asserts He Won't Feel Bound by Congress Vetoes,* N.Y. Times, June 22, 1978, at A1, col. 1 (quoting Rep. Jim Wright (D. Tex.)):

> Increasingly in recent years, there has been a voracious thirst on the part of nonelected bureaucrats to write regulations that have the force and effect of law, without the inconvenience of running for Congress. . . . [The very possibility of a legislative veto] should serve as a brake on the overzealous administrator.

The American Bar Association recently endorsed a proposal to grant the President limited power to review critical agency regulations and to grant Congress some form of review over such presidential actions. *ABA Annual Meeting,* 48 U.S.L.W. 2134 (Aug. 21, 1979).

source of political legitimacy is the Constitution, which articulates the basic political structure to which society has assented. Consequently, the primary check on the administrative system issues from the branch of government most distant from the ultimate source of political validation—the people. This remoteness rationalizes authorizing only limited judicial power to check the discretion of administrative agencies, which are themselves remote from the ultimate source of political legitimacy.[18]

Though the three constitutional branches are the formal instruments for bounding administrative discretion, no agency can rely entirely on official definitions of politically legitimate behavior. For example, it has no guarantee that a Congressional directive accurately reflects society's perceived needs. The stability of government may require that overall legislative policy approximate society's priorities in the long run, but an agency has no assurance that any single statutory provision, or a series of them, enjoys full political legitimacy at any given time. Moreover, the directive may reflect priorities that have become outdated since its enactment.[19] Thus, if an agency permits its discretion free run within the bounds of officially imposed constraints, it may risk its political legitimacy.

The risk grows when an agency enjoys exceedingly broad discretion to determine what the public interest mandates, because it does not know how the politically accountable branches would decide specific cases.[20] The broad delegation of power, which may result both from Congressional reluctance to face controversial issues and from a thoughtful decision to sacrifice close control for administrative versatility and flexibility limits the agency's ability to effectively cite higher authority. To the extent that Congress relies on broad delegation to avoid controversy or to delay dealing with the matter, it creates a time bomb that an agency may find

18. The limited judicial check on administrative discretion does not automatically trigger itself. Though standing and due process safeguards have been expanded recently, potential litigants frequently lack the resources to invoke them. *See* COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 217-31 (1976). Despite such recent retrenchments as *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), however, the rights of underrepresented groups have advanced considerably since *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1975), *cert. denied*, 384 U.S. 941 (1966), and *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

19. *See* Cutler & Johnson, *supra* note 6, at 1407. Though legislative oversight hearings may alert the agency to changes in Congressional attitude, the signals come not from the entire body but from committees and subcommittees, which are often dominated by a few individuals.

20. J. FREEDMAN, *supra* note 6, at 17; Freedman, *supra* note 6, at 1048 (the loss of the safeguards providing separation of powers counterbalances the strengths of an agency that enjoys blended powers).

difficult to defuse.[21] The agency thus has an important task in persuading society that its course is sound.[22]

An agency must seek political legitimacy from two sources—the constitutional branches, which reflect societal priorities only indirectly, and society itself. Citizens generally rely upon the three constitutional branches to prescribe legitimate behavior for the agencies and to enforce their prescriptions. Nongovernment expressions of societal wishes are highly inarticulate. If a serious disparity arises between the government prescription and society's preferred prescription, the constitutional branches will feel pressure to direct agencies to alter their conduct. Societal interests, however, will also directly pressure the agencies to undertake their own reformation before the government branches impose more drastic changes.[23]

An agency faces a dilemma when its reading of societal priorities conflicts with specific directives from any of the three constitutional branches. Failure, for example, to comply with a Congressional policy may jeopardize an agency's well-being, but compliance may impair legitimacy. If the legislative mandate is not too constrictive, a balancing may be possible. The deregulation of commercial air rates offers an illustration. The Civil Aeronautics Board began pursuing deregulation even as Congress found itself unable to insure prompt passage of deregulation legislation. Yet the Board's policies seemed to find great support within the Executive branch, with at least some of the airlines, and among the general public. Though some in Congress grumbled about deregulation "by the back door," the agency sensed enough general support to take up its new course. Perceived societal priorities outweighed any impairment of legitimacy with Congress.[24]

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21. *See* Wright, Book Review, 81 YALE L.J. 575, 585-86 (1972). The Executive parallel to broad delegation and narrow judicial review is noninvolvement in regulatory affairs. An active role promises limited political gains at best. *See* Robinson, *On Reorganizing the Independent Regulatory Agencies,* 57 VA. L. REV. 947, 953 n.18 (1971). It also invites charges of excessive interference in the regulatory process. *See, e.g., Some in EPA Assail White House Moves,* N.Y. Times, Feb. 22, 1979, at A1, col. 2.

22. Invoking agency expertise is a common method of persuasion, though its effectiveness seems to be diminishing. *See* Freedman, *supra* note 6, at 1051-56; Stewart, *supra* note 6, at 1684-87. Conflict resolution often does not depend solely on technical determinations. Even when expert opinion strongly suggests a particular solution, the agency may lack the political muscle to implement it successfully. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 50-51 (1965).

23. The establishment of agency consumer assistance offices, for example, has been attributed not only to consumerist pressure, but also to the desire to deflect the threat of a legislatively established, aggressive consumer advocacy program. *See, e.g., Ford Consumer Plans Denounced, Defended,* 34 CONG. Q. 575 (1976).

24. *See CAB Unveils Plan for Deregulation of Air-Fare Cuts,* N.Y. Times, April 15, 1978, at 1, col. 3.

C. *Administrative Legitimacy and Interest Group Advocacy*

It is commonplace that many agencies are excessively solicitous of one regulatee at the expense of another regulatee, a competitor of the favored regulatee, or the ultimate consumer. Where such favoritism exists, the neglected interests may well feel underrepresented; they may voice their concerns themselves or rely on a sympathetic public official or agency. The political system employs two primary remedies for underrepresentation. First, it may mandate that an existing agency revise its jurisdictional responsibilities in order to give greater weight to allegedly neglected interests. The mandate might direct an agency to exercise authority over a new party or practice,[25] to shuffle the weights it assigns to various considerations in reaching a decision,[26] or even to weigh considerations hitherto ignored.[27] The political branches might also indirectly alter the might of various interests by increasing the resources of traditionally underrepresented interests. Attorneys' fees for public interest participants[28] and offices of consumer protection[29] are examples. Second, Congress and the Executive may create entirely new agencies to meet the concerns of emerging interests. Agencies flowing from the War on Poverty[30] are a recent example.

Combinations of the two approaches are possible when a new agency siguals the growing force of a previously represented interest. For example, the Environmental Protection Agency[31] began as a consolidation of authority previously parceled out to numerous agencies, and the Department of Energy[32] collected new and recon-

25. *E.g.*, Drug Amendments of 1962, Pub. L. No. 87-781, 76 Stat. 780 (codified in scattered sections of 21 U.S.C.) (mandating stricter regulation of drugs, drug advertising, and drug manufacture); *see* M. GREEN, THE OTHER GOVERNMENT 102-09 (1975) (recounting the pharmaceutical industry's success in weakening the final legislation).

26. *E.g.*, 49 U.S.C. §§ 303(a)(15), 309(b) (1976), *construed in* ICC v. J-T Transport Co., 368 U.S. 81 (1961) (criteria for granting permits to contract carrier motor vehicles).

27. *E.g.*, Community Reinvestment Act of 1977, 12 U.S.C.A. §§ 2901-05 (West Supp. 1979) (when examining a financial institution or evaluating its application for a deposit facility, a federal regulator must consider the institution's record in meeting the credit needs of the local community).

28. *E.g.*, Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, § 202(h), 15 U.S.C. § 57a(h) (1976) (reimbursement of expenses to certain participants in rulemaking proceedings).

29. *E.g.*, 49 U.S.C. § 26b (1976) (establishing an Office of Rail Public Counsel within the Rail Services Planning Office of the ICC). For a critical analysis of methods to increase consumer participation and a new proposal designed to meet the deficiencies of existing methods, see Leflar & Regol, *Consumer Participation in the Regulation of Public Utilities: A Model Act*, 13 HARV. J. LEGIS. 235 (1976).

30. *See* D. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING 61-101 (1969).

31. Reorg. Plan No. 3 of 1970, *reprinted in* 42 U.S.C. app., at 1725-30 (1976).

32. Exec. Order No. 12,009, 3 C.F.R. 142 (1977 Compilation) (implementing Depart-

structed agencies within a single cabinet department.

Even when the administrative structure requires agencies to attend to at least the more significant societal interests, complaints of inadequate representation may still arise. A practical cure, however, may not always be readily available. Inadequate representation stems from maldistribution of resources among participants. Resources[33] include power, weight, and influence;[34] competence relevant to the issue; possession of information relevant to the issue; analytical resources; and bargaining and persuasion skills. An interest group may lack adequate resources, or the agencies upon which it depends for representation may suffer similar deprivation. For present purposes, we emphasize the ways in which inadequate representation may be ameliorated by altering agency structures, mandates, practices, and resources. We must also assume that the distribution of resources is not so disparate that legitimacy is nonexistent or beyond ready reach. Reallocating power and perceptions of deserved power among societal interests is too ambitious a task.

An underlying question remains: how do we determine that an interest lacks adequate representation? If our present concern were pursuit of the democratic ideal, we might maintain that all interests should enjoy equal representation and wield equal political clout. From the perspective of legitimacy, however, it is not necessary to weigh particular complaints of inadequate representation against a philosophical standard of equal representation. If interest groups perceive the system as legitimate, they implicitly conclude that its process and results do not exclude their particular concerns to an intolerable degree. They are therefore willing to accept something less than equal representation. For some groups, legitimacy may mean only that the system gives them a realistic possibility of furthering their specific concerns. We therefore emphasize the perceptions that various interests actually have about their respective degrees of representation.

A particular interest may point to a number of criteria to demonstrate inadequate representation. It may declare that an interest with so powerful a role in society deserves greater consideration in the political process, but a low income group, for example, may feel powerless in society and still perceive itself as politically underrepresented. Its perception may be shaped by an ideal that assigns

ment of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (Aug. 4, 1977) (codified in scattered sections of 3, 5, 7, 12, 15, 42 U.S.C.)).

33. This definition of resources derives from George, *The Case for Multiple Advocacy in Making Foreign Policy*, 66 AM. POLITICAL SCI. REV. 751, 759 (1972).

34. *See id.* at 759 n.33.

power in proportion to votes. Alternatively, it may assume that the size of a group's voice should be based on the merits of its position. The group might also argue for greater political influence because society should exercise a general solicitousness toward powerless minorities. Sorting out these arguments would likely prove to be time consuming and fruitless, because different groups base their perceptions upon different presumptions concerning the nature of underrepresentation.

We adopt a more neutral approach—that government should attune itself to *perceptions* of inadequate representation. From the viewpoint of legitimacy, uneasiness should arise when a dissatisfied interest is powerful enough to impair the system's legitimacy. The perceived threat to legitimacy depends on the extent of the interest's power and the intensity of its perception of inadequate representation.

According to this analysis decisionmakers in federal agencies should consider the positions of significant societal interests. An agency, however, need not act as if it were a trade association for its regulatees. It should screen the arguments of regulatees, competitors, and consumers through a public interest filter and consider such values as economically efficient resource allocation, social equality, distribution of wealth, moral principles, and duties to nature.[35] To the extent that the process gives attention to the concerns of underrepresented and unrepresented interests, including future generations, it enhances legitimacy.[36] Deliberation may lead the agency to make a determination contrary to all the arguments placed before it. At a minimum, however, the process should insure participating groups access to a listening ear and a voice in the ultimate decision. This fact in itself would enhance the legitimacy of the process.

The question remains, however, whether administrative consideration is enough to deflect challenges to legitimacy. If an agency bombards an interest with consistently hostile responses, the interest will not retain a passive demeanor. Interests expect to prevail, at least occasionally. If an agency is dealing fairly with interest advocates and remains open to their concerns, however, the inter-

35. *See* R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 97-116, 163-97 (2d ed. 1978).

36. President Franklin Roosevelt described the federal regulatory agency as a "tribune of the people." HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, FEDERAL REGULATION AND REGULATORY REFORM, H.R. DOC. NO. 134, 95th Cong., 1st Sess. 1 (1977) [hereinafter cited as HOUSE REGULATORY REFORM STUDY]. By giving weight to the public interest, the agency remedies some deficiencies in the legislative model of administrative activity. *See* note 16 *supra*.

ests can reasonably expect some victories. If the significance of these victories is sufficient to provide appropriate satisfaction and allay serious dissatisfaction, the agency assures its legitimacy. Thus, an agency should not play special interest advocate. It should be sensitive to the needs of the interests with which it regnlarly deals; and it should employ that sensitivity not only in its own decisions, but in multiagency determinations in which it participates.

Participation by multiple agencies in the decisionmaking process even in the point of interagency conflict, can frequently assist the administrative system in gaining political legitimacy. Administrative bodies other than the agency principally engaged in making a decision (the "focal agency") present additional reflections on societal priorities and also additional indirect expressions of those priorities by the politically accountable branches of government. Moreover, aggregate administrative policy—the sum total of the decisions of all federal agencies—may also demonstrate a deeper understanding of those priorities. The process checks the formal system's Procrustean proclivity to ignore societal conflicts in hopes of furthering temporal efficiency.

II. The Dynamic of Multiagency Decisionmaking

The redundancy of multiple agency activity breeds conflict. Duplicated efforts and inconsistent, overlapping results create temporal inefficiency that can frustrate an interest group's demand for speedy gratification. Similarly, the multiagency process can disconcert a group that has the ear of one key agency, but not of the others. The political and substantive aspects of the resulting decisions, however, may receive more thorough consideration, and the decisions may therefore prove more lasting. Because the interests of more groups receive consideration, the final result may enjoy broader acceptability and therefore enhanced legitimacy.

The circumstances of each case determine the appropriate balance between temporal efficiency and the benefits of multiple agency participation. A preoccupation with short run efficiency induces an inappropriate striking of the balance. This preoccupation may arise when the benefits of a redundant system remain unclear. This section of this Article examines these benefits. It analyzes the nature of administrative conflict, the policies that result from excessive aversion to conflict, and the positive aspects of multiple agency activity.

A. Types of Administrative Conflict

The potential for conflict arises when one agency can interfere

with another agency's efforts to pursue its policy goals. The types of conflict can be systematically organized on a continuum with three modes—blockage, policy interference, and advocacy.

At one end of the spectrum is concrete conflict, or blockage, where one agency's conduct can block the specific effect of another agency's policy. In *Train v. Colorado Public Interest Research Group,*[37] for example, environmentalists unsuccessfully argued that both the Nuclear Regulatory Commission and the Environmental Protection Agency could independently set standards for certain radioactive emissions from atomic power plants. The case illustrates that the possibility of blockage might sometimes produce beneficial effects. Here, the suggested arrangement would have fostered a cautious approach on public health and safety by subjecting the nuclear industry to the stricter of the two agency standards. Moreover, the threat that the other agency might take the more exacting stance and acquire a decisionmaking monopoly might have encouraged negotiation and thoughtful exchange.[38]

At the middle of the spectrum, one agency may interfere with another agency's implementation of a chosen policy without completely negating it. Banking agencies, for example, might adhere to different policies in ruling on mergers by financial institutions. The lenient agency's policies might spur dissatisfied regulatees of the restrictive agency to reclassify themselves so that they would then fall within the jurisdiction of the more accommodating regulator. The restrictive agency's policy would then lose effectiveness to the extent that the competing policy triggered defections by regulatees and created discontent among those who could not defect. The injured agency could restore power and legitimacy by abandoning its policy or by persuading higher authorities to restrict the offending agency's power to interfere.[39]

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37. 426 U.S. 1 (1976). *See also* Schwartz, *Protecting Consumer Health and Safety: The Need for Coordinated Regulation Among Federal Agencies,* 43 GEO. WASH. L. REV. 1031, 1071 n.260 (1975) (conflict hetween Food and Drug Administration and Environmental Protection Agency over permissible levels of a pesticide residue in food products); Scott, *The Dual Banking System: A Model of Competition in Regulation,* 30 STAN. L. REV. 1, 20-21 (1977) (Federal Reserve Board and Comptroller issuing contrary rulings on the types of bonds issuable by state banks that are Federal Reserve members). In a recent, curious case of potential blockage, the FCC claimed that its jurisdiction reaches the U.S. Postal Service's electronic mail service. According to the FCC, the federal agency is its regulatee. *Electronic Mail Rift,* N.Y. Times, Aug. 2, 1979, at D1, col. 4.

38. If an agency fears blocking action by another agency, it may choose to do nothing but wait to see what the latter agency decides. *See* Strauss, *The NRC Role and Plant Siting,* 4 J. CONTEMP. L. 96, 97 (1977). Agencies frequently avoid conflict by agreements that divide overlapping jurisdiction. *See* note 94 *infra.*

39. *See* Scott, *supra* note 37 (examining the impact of differing merger and other policies on banking regulators and regulatees). The ability of a regulatee to shift from one

Finally, one agency may employ advocacy to battle another agency's policy. For example, sometimes a regulatory agency's approval can immunize a merger or other industrial reorganization from attack under the antitrust laws.[40] In such instances, the Antitrust Division of the Justice Department may be able to contest the transaction only by voicing its opposition in the relevant agency proceeding.[41] If the agency avoids legal improprieties in reaching its decision, the Division's advocacy can go no further. The focal agency, of course, may have good reason to give substantial weight to the Division's position. In addition to according deference to an important government body, the agency may wish to avoid creating ill feelings. It may rely on Justice to represent it in judicial proceedings,[42] and it may also fear that an antagonized Antitrust Division will intensify scrutiny of agency activity in search of questionable conduct that is not immune from antitrust attack.[43]

Redundancy thus may arise because agencies exercise concurrent jurisdiction over parties or because they concurrently pursue a general or specific policy. The resulting conflicts may be products of intentional or unintentional design, but their origins in conflicting delegations of authority enable the agency to attribute the loss of temporal efficiency to the political branches. For Congress and the Executive, the extent and nature of administrative conflict raise questions about the manner in which an administrative system should be designed. Because provisions for duplication of tasks and jurisdictional overlap build in conflict, the designing options range from a nonredundant unitary model to a redundant multiagency model.

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agency's jurisdiction to another's can induce regulators to engage in "competition in laxity." Keeffe & Head, *What is Wrong with the American Banking System and What to Do About It*, 36 MD. L. REV. 788, 798 (1977)(quoting former Federal Reserve Board Chairman Arthur Burns).

40. *E.g.*, United States v. Nat'l Ass'n of Securities Dealers, 422 U.S. 694 (1975) (immunity of certain sales and distribution practices of open-end management companies regulated by the SEC); Motor Carriers Traffic Ass'n v. United States, 559 F.2d 1251 (4th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978)(ICC has power to set conditions for granting immunity to rate bureau agreements); Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 30(a), 92 Stat. 1731 (1978) (amending 49 U.S.C. 1384 (1976) (authorizing CAB to grant immunity when "required in the public interest")).

41. The Justice Department also participates in administrative proceedings when an agency cannot bestow antitrust immunity. Since the mid-1960s, it has viewed this activity as a regular part of its role in implementing antitrust policy. *See* Kauper, *Competition Policy and the Institutions of Antitrust*, 23 S.D.L. REV. 1, 22-26 (1978).

42. *See id.* at 25 n.54.

43. The Division, in turn, may temper its criticism to maintain good relations with its client agency and to check any feeling that the agency should seek authority to do its own litigating. Participation in administrative proceedings may also broaden Justice's perceptions of the marketplace and public policy. *Id.* at 25-26.

B. *The Unitary Model and the Bias Against Redundancy*

The unitary or synoptic model grants each agency complete autonomy, but deprives it of any authority beyond sharply drawn jurisdictional lines. The highly centralized agencies interact only linearly; one agency performs its task and relies on another agency to perform a related but nonconflicting second task. Coordination and planning are the tools for avoiding conflict and assuring temporal efficiency. Lack of rationality and poor communications are the sources of inefficiency. The unitary model presumes that each agency is fully responsive to societal needs and is perfectible to the point that improvident decisions will be rare.[44] Just as redundant systems in natural organisms—for example, neural systems[45]—seek to assure survival, zero redundancy in public administration presumes survival[46]—that is, legitimacy.

Synoptic thinking results in huge agencies or cabinet departments that struggle to coordinate the policies and practices of their respective components. These centralized structures occasion risks of limited accountability and weak coordination among components; they also create the danger that dissenting views will lack the opportunity to prove their merits. Moreover, the unitary model fails to acknowledge the nature of the administrative system. Agencies are focal points for coordinating and controlling complex sets of tasks that are categorized according to topic (such as airlines, surface transportation, food and drugs) and function (such as antitrust, trade regulation, and environmental protection).[47] Overlaps are inevitable. Conflicts arise in part because of mechanical inefficiency and poor communication, but the serious conflicts stem from a lack of consensus on national policy.[48] No amount of coordination or agency consolidation can eliminate the latter problem. The synoptic solution merely suppresses it in hopes the disagreement is noncon-

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44. Professor Martin Landau draws an analogy to a house that is wired in series. He suggests that the need for perfection in all the system's parts compels the bureaucracy to adhere rigidly to regulations and to discourage discretion and other adaptive responses lest deviation from the rules result in system failure. Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. AD. REV. 346, 354 (1969).

45. *Id.* at 351 and sources cited therein. Information theory offers similar analogies. *Id.* at 349-51, 353. In both biological and information theory, error and failure have objective definitions; therefore, the value of redundancy lends itself to more definite measurement than in political contexts.

46. *See* Hlavacek & Thompson, *Bureaucracy and New Product Innovation*, 16 ACAD. OF MANAGEMENT J. 361, 363 (1973).

47. *See* P. SELF, ADMINISTRATIVE THEORIES AND POLITICS 77-85 (1973); Murane, *SEC, FTC, and the Federal Bank Regulators: Emerging Problems of Administrative Jurisdictional Overlap*, 61 GEO. L.J. 37 (1972).

48. *See* Jaffe, *Foreword* to J. LANDIS, THE ADMINISTRATIVE PROCESS, xx-xxi (1966).

troversial enough to remain suppressed. Because of the inevitability of overlap and conflict, the truly unitary model would consist of a single agency comprising the entire administrative system as a surrogate for the constitutional branches.

A possible "mixed system" alternative is the multiple advocacy model.[49] According to this model the unitary decisionmaker would consider various options presented by advocates from different parts of the administrative system as well as by outside partisans. As manager of the policy system, the decisionmaker would also insure that advocates present a sufficient range of policy alternatives, that advocates have sufficient resources with no great disparities among them, and that there is otherwise fair competition among advocates. The multiple advocacy model, however, could be classified as a type of centralized decisionmaking that reflects the internal organization of a single agency. As applied to multiagency activity, the model would still leave ultimate authority in the hands of a unitary policymaker, which merely consults with advocates in a highly structured setting. Equalization of resources would seem possible only for in-house advocates. Yet to the extent that other agencies overlap with the synoptic decisionmaker, potential conflict arises and the redundant multiagency model emerges. Depending on the specifics of the case, therefore, a mixed model lends itself to classification in either of the two polar categories.

Section 102(2)(C) of the National Environmental Policy Act[50] (NEPA) offers an illustration of the "mixed system" model. Under the statute, the federal official responsible for issuing an environmental impact statement must consult with federal agencies possessing pertinent jurisdiction or expertise and obtain comments from them.[51] The interagency contact is designed to insure a sound final product and reduce differences of opinion over the final statement.[52] The lead agency, which has the primary responsibility for

49. The model is proposed in George, *supra* note 33.

50. 42 U.S.C. § 4332(2)(C) (1976).

51. The statutory provision calls for the comments and views of "appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards . . . ." *Id.* Council on Environmental Quality guidelines also oblige the focal or lead agency to invite participation by affected government bodies and Indian tribes, the proponent of the action, and other interested persons. 43 Fed. Reg. 55,993 (1978) (to be codified in 40 C.F.R. § 1501.7(a)(1)). The guidelines provide for comment from these sources both during and after the drafting process. *Id.* at 55,993-98 (1978) (to be codified at 40 C.F.R. §§ 1501.6, 1501.7, 1502.19, 1503.1-1503.4). It remains unclear whether Council guidelines bind federal agencies. 2 F. GRAD, ENVIRONMENTAL LAW § 8.03[1], at 8-160 to -61 (2d ed. 1978). The Council holds that it issues regulatory mandates pursuant to Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (1977). 43 Fed. Reg. 55,978, 55,991 (1978) (to be codified in 40 C.F.R. § 1500.3).

52. 43 Fed. Reg. 55,992 (1978) (to be codified at 40 C.F.R. § 1501.1).

preparing the statement, assumes certain managerial responsibilities in its consultation with other interested agencies. It plainly lacks, however, the full power of a manager in the mixed system model, most notably the power to allocate resources among participants. Despite the exaltation of cooperation in the statute and implementing guidelines, NEPA actually prescribes a unitary model that entrusts all ultimate decisions to the lead agency. This fact perhaps contributes to the general feeling that most interagency comments are just so much paper.[53] Though lack of diligence of the lead agency in soliciting and considering other viewpoints has generated critical note,[54] courts have not required deference to criticism from other agencies.[55] The autonomy of the focal agency may well encourage the judicial practice of finding compliance when only minimal consultation has taken place.[56]

Under the "mixed system" model, an agency can occasionally generate sufficient political pressure to force a rewrite of the impact statement. Success may result because of a compellingly persuasive interagency comment. More likely, however, the challenging agency will rely on its power in the political arena to support its written contribution to the form NEPA process. In the political context, the two agencies will expend effort on the same issue, pursue their respective conflicting interests, and reach an adjustment. NEPA's mixed or unitary system thus gives way to the multiagency model.

The Council on Environmental Quality's role in interagency review offers another perspective of the mixed system model. The Council prescribes procedural regulations and recommends resolutions to disputes over environmental impact statements,[57] but lacks

53. I gather this impression from my conversations with those active in environmental concerns. *See* notes 53, 54, 55 *infra; cf.* 43 Fed. Reg. 55,983, 55,985 (1978) (bulky impact statements are often not even read by decisionmakers).

54. *E.g.*, National Wildlife Fed'n v. Andrus, 440 F. Supp. 1245, 1252-53 (D.D.C. 1977); *cf.* Akers v. Resor, 339 F. Supp. 1375, 1380-81 (W.D. Tenn. 1972) (finding noncompliance with NEPA as read in conjunction with the Fish and Wildlife Coordination Act of 1958).

55. Sierra Club v. Callaway, 499 F.2d 982, 993 (5th Cir. 1974), *rev'g and remanding* Sierra Club v. Froehlke, 359 F. Supp. 1289 (S.D. Tex. 1973).

56. *E.g.*, Alaska v. Andrus, 580 F.2d 465, 474 & n.40 (D.C. Cir. 1978); Columbia Basin Land Protection Ass'n. v. Kleppe, 417 F. Supp. 46, 52 (E.D. Wash. 1976); Simmans v. Grant, 370 F. Supp. 5, 18-19 (S.D. Tex. 1974) (finding noncompliance, but permitting the record of the court hearing to substitute largely for the Army Corps of Engineers' inadequate environmental record). *But see* Save Our Wetlands, Inc. v. Rush, 11 Envir. Rep. Cas. 1123 (E.D. La. 1977) (impact statement by Army Corps of Engineers was legally inadequate and Corps consultation with U.S. Fish and Wildlife Service was infrequent and unproductive); Environmental Defense Fund v. Corps. of Engineers, 325 F. Supp. 749, 757-58 (E.D. Ark. 1971) (impact statement was deficient, in part because of failure to satisfy requirement for interagency review).

57. 43 Fed. Reg. 55,993, 55,998-99 (1978) (to be codified in 40 C.F.R. §§ 1501.5(e), 1504.1-04.3); *see* note 51 *supra.*

decisional authority to evaluate an impact statement's legal adequacy. The Council thus enjoys some managerial power and some power in shaping the substantive decision, but it falls far short of being a unitary decisionmaker or mixed system manager. The Council, however, can exert considerable influence on the decisions of focal agencies. In 1975, for example, the Council criticized an Atomic Energy Commission (AEC) draft impact statement that discussed the consequences of permitting light water nuclear reactors to use plutonium as fuel. The Council argued that the AEC's analysis failed to consider fully the measures necessary to safeguard plutonium from theft and to assess the civil liberties questions that the measures might raise. The Nuclear Regulatory Commission, which succeeded the AEC, agreed not to license support facilities for a plutonium recycling industry until it completed a final impact statement addressing these concerns. The Council could wield this power because of its prestige and its reputation for opposing impact statements only where critical flaws exist.[58]

These illustrations demonstrate not only the elusiveness of the mixed system model, but also the difficulty of maintaining a unitary system except in a narrow formal sense. Yet the interagency consultation built into the NEPA process deserves some favorable recognition. As a mechanism for helping the unitary agency make a sound decision, it gives access to diverse arguments and realizes other salutary benefits of the multiagency model. By notifying agencies of impending action, which they might oppose, it improves the chances that agency interaction will enjoy full play. Interagency review thus does not conform to the multiagency model, but its contribution toward that model permits its recognition as a process that bolsters legitimacy.[59] At the same time it has limitations. Interagency coordination committees have not acquired a reputation for success. Differences in agency positions, idiosyncratic methodologies, and relative power often frustrate grand compromises.[60]

58. *See* R. NADER & J. ABBOTTS, THE MENACE OF ATOMIC ENERGY 280-81 (1977); 6 ENVIR. REP. (BNA) 150 (May 16, 1975); Telephone interview with John Abbotts, co-author of THE MENACE OF ATOMIC ENERGY, *supra.* (May 16, 1978).

59. Regulations also permit "teams" of federal, state or local agencies which must include at least one federal agency, to act as lead agency in preparing an impact statement. 43 Fed. Reg. 55,993 (1978) (to be codified in 40 C.F.R. § 1501.5(b)). This approach incorporates much of the multiagency process in a highly formalized structure. The Endangered Species Committee, *see* 16 U.S.C.A. § 1536 (West Supp. 1979), illustrates a similar incorporation. The committee includes cabinet level officers and representatives of states where a disputed development project is located. The body determines whether or not to exempt a project from the Endangered Species Act, 16 U.S.C. §§ 1531-43 (1976), which is designed to preserve endangered plants and animals.

60. *See* 5 SENATE COMM. ON GOVERNMENT AFFAIRS, STUDY ON FEDERAL REGULATION (REGU-

Though a unitary system seems unattainable from a practical viewpoint, many continue to propose it as a worthy goal. They include authors of numerous government reports advocating an administrative system devoid of duplication and overlap.[61] Only the recent Study on Federal Regulation by the Senate Committee on Governmental Affairs deviates from the unitary model and acknowledges that "a certain degree of 'redundancy' is not only natural, but also necessary for sound regulatory administration."[62] The conclusion is used to justify independent regulatory commissions that are free from executive control. The study's practical applications are twofold: it approves the independent status of the Federal Energy Regulatory Commission within the Department of Energy,[63] and it defends dual antitrust enforcement by the Federal Trade Commission and the Justice Department's Antitrust Division against the recurring recommendation to entrust Justice with sole jurisdiction.[64] The suspicion therefore arises that the study's drafters cared less about the benefits of redundancy than about championing the cause of independent agencies that are more responsive to Congress than to the Executive.[65]

The popularity of synoptic thinking in government circles should not be surprising. The unitary model's rationality appeals to officials who bear primary responsibility for structuring the administrative system. The synoptic approach implies that conflicts in the

LATORY ORGANIZATION), S. Doc. No. 91, 95th Cong., 2d Sess. 92-93 (1977) [hereinafter cited as SENATE REGULATORY REFORM STUDY]; P. SELF, *supra* note 47, at 106; Cutler & Johnson, *supra* note 6, at 1406 n.38.

61. *E.g.*, S. Res. 71, 94th Cong., 1st Sess., 121 CONG. REC. 13,805 (1975); HOUSE REGULATORY REFORM STUDY, *supra* note 36, at 4, 487-503; J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 24-30, 74-81 (1960), *reprinted in* LEGIS. REF. SERVICE OF LIB. OF CONG., SEPARATION OF POWERS AND THE INDEPENDENT AGENCIES: CASES AND SELECTED READINGS, S. DOC. No. 49, 91st Cong., 1st Sess. 1301, 1330-36, 1380-87 (1970) [hereinafter cited as LANDIS REPORT]; PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES 5-7 (1971) [hereinafter cited as ASH REPORT]. One recent product of such thinking is the Regulatory Council, which was formed by several federal agencies and designed to hold down the cost of regulation. It admits its lack of success in eliminating duplicative and overlapping regnlations. Wall St. J., Aug. 31, 1979, at 1, col. 5.

62. SENATE REGULATORY REFORM STUDY, *supra* note 60, at 6.

63. *Id.* at 10, 77-78.

64. *Id.* at 229-60.

65. The study emphasizes the distinction between executive agencies and independent regulatory commissions. As might be expected in a Congressional study, the latter format receives warm endorsement. *See id.* at 25-81. The *Ash Report*, *supra* note 61, displays a contrary bias. *See* Robinson, *supra* note 21 (rejecting *Ash Report* proposals for increased Presidential control over independent commissions). The controversy over independent agencies versus Executive agencies has only recently resurfaced. *See* notes 116-25 *infra* and accompanying text.

system are defects for which cures are available. To admit that extrarational forces dominate the system is to admit lack of control. The existence of logical solutions means that officials potentially have sufficient means for directing their agencies to act in an orderly, efficient manner. The only obstacles are inertia, special interests that exploit existing defects, and recalcitrant decisionmakers who fail to understand the problem. Synoptic thinking implies that decisionmakers can live up to their perceived responsibilities and maintain their legitimacy.

On their face, judicial rules of statutory construction do not disfavor duplication and overlap of administrative jurisdiction.[66] Courts readily uphold jurisdictional redundancies when legislative history documents such a Congressional intent.[67] Courts, however, dislike basing major change on implication.[68] Thus, where sanctioning duplication would significantly alter a pervasive regulatory scheme, judges usually require a clear indication of legislative intent.[69] In practice, therefore, an agency claiming a new but ambiguous statutory mandate or one it has only recently invoked may face a stumbling block. It must show that it clearly holds concurrent jurisdiction if another agency enjoys an older statutory mandate and conducts a pervasive regulatory operation. The presumption thus favors the nonduplicative status quo.[70]

In one curious line of cases some federal courts have utilized the principles of res judicata and collateral estoppel to prevent agency action against a party whose conduct already has triggered action by another agency. The underlying rationale presumes a truly unitary government, in that the first agency acts as privy for the second agency when it determines the issues fundamental to the latter agency's proceeding.[71] In practice, however, these courts apply the

66. *E.g.*, NAACP v. FPC, 425 U.S. 662, 672-74 (1976) (Burger, C.J., concurring) (recognizing the Congressional prerogative, but expressing distaste for diffused administrative responsibility).

67. *E.g.*, FTC v. Cement Institute, 333 U.S. 683, 693 (1948).

68. *E.g.*, Administrator, FAA v. Rebertson, 422 U.S. 255, 265-66 (1975); Regional Rail Reorganization Act Cases, 419 U.S. 102, 133-34 (1974).

69. Train v. Colorado Pub. Interest Research Group, 426 U.S. 1, 24 (1976).

70. *See id.*

71. The cases cite as authority Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940), in which the National Bituminous Coal Commission found that a coal producer was eligible for membership in the Bituminous Coal Code, under the Bituminous Coal Act of 1937. Eligible producers who failed to join were subject to a 19½% excise tax, to be collected by the Commissioner of Internal Revenue. According to the Court, the Commissioner could treat as res judicata the Commission's finding that the producer was eligible and therefore subject to the tax. The Court declared that the Commissioner was "merely the agency to collect taxes levied under the Act . . . . [and was] given no administrative functions whatsoever except tax collection." *Id.* at 401-02. The case therefore does not necessarily hold that all government

doctrine only in very limited circumstances.[72] The more contemporary judicial viewpoint recognizes that "a court should approach gingerly a claim that one agency has conclusively determined an issue later analyzed from another perspective by an agency with different substantive jurisdiction."[73] The unitary system, therefore, enjoys continued vitality as a policy goal. It attracts the eye of public planners and receives a neutral and sometimes favorable reception from the courts.

C. *The Multiagency Process*

Despite current disfavor, the value of redundancy and potential conflict in our political system was evident to the founding fathers. The federalism principle,[74] the bicameral legislature,[75] and the sepa-

agencies act in privity with one another. *See* Commissioner v. Heininger, 320 U.S. 467 (1943).

In the typical case, either the FTC or FDA has taken action against misrepresentations concerning a drug. The FTC has jurisdiction over misrepresentation in advertising, 15 U.S.C. §§ 45, 52-55 (1976), while the FDA's jurisdiction extends to misrepresentations on labels and accompanying circulars. 21 U.S.C. § 352 (1976). If the first agency's action fails, some courts will apply collateral estoppel to an action by the second agency. *See* United States v. Willard Tablet Co., 141 F.2d 141 (7th Cir. 1944); George H. Lee Co. v. FTC, 113 F.2d 583 (8th Cir. 1940). *But see* note 73 *infra*. In recent years, FTC-FDA cases have virtually disappeared from court dockets, presumably because an interagency liaison agreement restricts duplicative proceedings against the same parties "to those highly unusual situations where it is clear that the public interest requires two separate proceedings." Updated FTC-FDA Liaison Agreement—Advertising of Over-the-Counter Drugs, 3 TRADE REG. REP. (CCH) ¶ 9851 (Sept. 9, 1971) (updating Working Agreement Between FTC and FDA, *id.* at ¶¶ 9850.01, 9850.03 (June 9, 1954)). For an arguably "unusual situation," see Warner-Lambert Co. v. FTC, 361 F. Supp. 948 (D.D.C. 1973).

72. *E.g.*, FTC v. Texaco, Inc., 517 F.2d 137, 147 (D.C. Cir. 1975) (second agency knew of first agency's adjudicatory proceeding when it initiated its own investigation and could have intervened in the first proceeding), *vacated on rehearing en banc*, 555 F.2d 862 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 974 (1977); Safir v. Gibson, 432 F.2d 137, 142-43 (2d Cir.), *cert. denied*, 400 U.S. 942 (1970) (statutes and agencies had peculiarly close historical relationship). For an argument favoring a strong collateral estoppel doctrine at the investigatory stage, see Note, *Administrative Collateral Estoppel: The Case of Subpoenas*, 87 YALE L.J. 1247 (1978).

73. FTC v. Texaco, Inc., 555 F.2d 862, 881 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 974 (1977). For a similar view, see United States v. 42 Jars of Bee Royale Capsules, 264 F.2d 666, 669 (3d Cir. 1959). Judges have invoked a variety of reasons for rejecting collateral estoppel. *E.g.*, United States v. RCA, 358 U.S. 334, 352 (1959) (issues are not precisely the same); FTC v. Texaco, Inc., 555 F.2d at 878 (proceedings are still at investigatory stage); *id.* at 893 (Leventhal, J., concurring) (agency is exercising a legislative as opposed to an adjudicatory function); United States v. 42 Jars of Bee Royale Capsules, 264 F.2d at 669 (prior proceeding resulted in consent agreement); United States v. 3963 Bottles of Enerjol Double Strength, 265 F.2d 332, 334 (7th Cir. 1959) (agencies acted under statutes with different purposes and effects); United States v. Five Cases of Capon Springs Water, 156 F.2d 493, 495-96 (2d Cir. 1946) (findings in first proceeding did not favor the private party involved); United States v. 1 Dozen Bottles of Boncquet Tablets, 146 F.2d 361, 363 (4th Cir. 1944) (agencies seek different forms of relief).

74. THE FEDERALIST No. 51 (J. Madison), *supra* note 11, at 350-53.

75. *Id.* at 350, No. 62 (J. Madison), at 418.

ration of powers doctrine[76] manifest an understanding that interwoven and competing redundancies check the concentration and abuse of power.[77] Though Publius looked to "dependence on the people" as the primary control on government, he noted that "experience has taught mankind the necessity of auxiliary precautions" that "so contriv[e] the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[78] Multiagency decisionmaking speaks to these concerns.

Of the conceptual frameworks for analyzing political systems, partisan mutual adjustment accords the greatest formal acceptance to the values of agency redundancy.[79] According to this analysis most politically feasible policy changes differ only incrementally from existing policies. Decisions will not enjoy political acceptability unless the policymakers grapple with the interests, values, and arguments voiced by other policymakers, both government and nongovernment. This constraint limits realistic options to those that deviate only slightly from the status quo. Moreover, because existing policy reflects a previous adjustment of competing interests, any new policy will likely include only modest change—barring a major upheaval or reallocation of power among interested parties.

The incremental decisionmaking process also helps insure that the decisionmakers act within their competence. The limitation of incremental change discourages the policymaker from wandering too far from familiar experience. It need not explore the entire universe of alternatives, but only those acceptable to the partisan mutual adjustment system. This smaller universe limits the number and complexity of factors in need of analysis. The incremental process thus contrasts with a highly centralized system in which a few interests dominate because of the diminished effectiveness of partisan checks. In the latter system, the number of policy alternatives under consideration, the complexity of the process, and the probability of an unsatisfactory resolution all increase. The incremental

76. *Id.* No. 51 (J. Madison), at 348-49. Madison also recognized that as a practical matter, the division of power would succumb to encroachments by the legislative branch "unless these departments be so far connected and blended as to give each a constitutional control over the others . . . ." *Id.* No. 48, at 332.

77. Other redundancies in the national system include overlapping terms of office, the Bill of Rights, the veto, the legislative override, and judicial review.

78. THE FEDERALIST No. 51 (J. Madison), *supra* note 11, at 349, 347-48.

79. The model is developed in D. BRAYBROOKE & C. LINDBLOM, A STRATEGY OF DECISION (1963); C. LINDBLOM, THE INTELLIGENCE OF DEMOCRACY (1965); C. LINDBLOM, THE POLICY-MAKING PROCESS (1968). The analytical mode serves as a foundation for an extensive inquiry into political-economic systems in C. LINDBLOM, POLITICS AND MARKETS (1977).

model does not assume that all decisionmakers will aggressively press their interests. One may defer to another's judgment out of lack of interest or inadequate political power. The decisionmaker has nevertheless chosen a method of adjustment that reflects its values and the relative priority of its interests.

In the context of multiagency decisionmaking, the limitations of incremental analysis create little difficulty. As critics charge, partisan mutual adjustment does not necessarily assure high-quality policy decisions or effective competition among partisan interests with varying degrees of power. Some also doubt the practical value of so general a thesis; for example, the theory fails to answer such concrete questions as how much partisanship and how many decisionmakers are desirable in a given process. Because the model seems to presume a high degree of social stability, observers argue that it offers ideological reinforcement of the proinertia and anti-innovative forces prevalent in organizations.[80]

Incrementalism, however, offers particular insight into the administrative system where policy alternatives are far fewer than for Congress or the Executive. Bounded by statutory mandates as well as by limited resources, jurisdiction, and enforcement tools, agencies are necessarily circumscribed in what they can do. An agency can occasionally chance a precipitous shift in policy, but too many ambitious moves invite a check from the constitutional branches. Even major changes are frequently the product of a series of incremental decisions.[81] No general analysis promises firm diagnoses or predictions about actual behavior, but insights into the decisionmaking process on a case-by-case basis. Similarly, the incremental approach does not guarantee the substantive merit of each decision; but the process constraints encourage competence in decisionmaking. When a decision proves inadequate because higher authority has failed to direct a desirable fundamental change in policy, the agency's power to act in measured steps furnishes at least the opportunity to deal with changing circumstances. Our focus on multiple agency decisionmaking responds to concerns about the model's bias toward social stability. Because one agency must attend to the positions of overlapping and duplicative agencies, it

80. *See* Y. DROR, PUBLIC POLICYMAKING REEXAMINED 143-47 (1968); A. ETZIONI, THE ACTIVE SOCIETY 286-93 (1968); P. SELF, *supra* note 47, at 239-52; Etzioni, *Mixed-Scanning: A "Third" Approach to Decisionmaking*, 27 PUB. AD. REV. 385 (1967); George, *supra* note 33, at 760-61.

81. The FCC's periodic injections of competition into the common carrier industry offer an illustration. For a brief history, see Sirico, *Horse-Trading with Ma Bell: Who Benefits?*, in TELECOMMUNICATIONS POLICY AND THE CITIZEN, 219, 220-24 (T. Haight, ed. 1979).

must consider a broad range of alternatives and a wide variety of interests.[82] This consequence discourages the inertia typical in a unitary agency with tunnel vision. Multiagency decisionmaking also creates more points of access for partisan interests and may help frustrate dominance by one particular interest. By emphasizing the broadening function of partisan mutual adjustment, our argument harmonizes legitimacy's concern for stability and the dynamic of conflict.

Partisan mutual adjustment presents itself not as one possible design, but as the inevitable design of the entire political system. Attempts to thwart it with centralized, synoptic planning are doomed, at least in the long run. Of course, unitary planning can frustrate the system's self-adjustment for a considerable time, to the benefit of those interest groups that stand to gain from the unadjusted system. If the promise of ultimate adjustment becomes extremely remote, legitimacy suffers. The gravity of the imperfection, however, varies with the degree of illegitimacy. If the status quo causes only grumbling or passive resignation, the adjustment dynamic may come to a virtual standstill.

This analysis suggests two conclusions. First, the constraints against nonevolutionary conduct encourage agencies to move incrementally and to be sensitive to the concerns of other agencies and

82. Professor Etzioni proposes a "mixed scanning" model to combine the advantages of incrementalism with the examination of fundamental decisions about the course of policy. His approach calls for the incrementalist's detailed analysis of short-term, nonfundamental options together with a general scanning of long-term consequences and policy implications. ETZIONI, *supra* note 80, at 282-305. As Etzioni admits, however, "most incremental decisions specify or anticipate fundamental decisions, and . . . the cumulative value of the incremental decisions is greatly affected by the underlying fundamental decisions." *Id.* at 289. The larger policy questions cannot help but inform the positions of partisan interests and decisionmakers. Each decisionmaker, moreover, screens special interest arguments through a public interest filter—though the filter's fineness may vary—which requires the perspective Etzioni emphasizes. *See* notes 35-36 *supra* and accompanying text. To the extent that agencies are capable of fundamental decisions, the mixed scanning model simply articulates considerations incorporated in partisan mutual adjustment at the administrative level.

This analysis also speaks to the so-called "tragedy of the commons." In utilizing a scarce resource such as the environment, independent decisionmakers acting in a noncentralized system may leave themselves each worse off than if they had engaged in collective determination. *See* Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968); Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977) (applying the concept to federal and state agencies). To the extent that decentralized decisionmaking at the federal level creates this risk, the synoptic alternative offers no foolproof solution. The agency exercising ultimate power may not reflect the maximizing consensus of the parties concerned. The promise and failings of the unitary and mixed system models come into play. Without the consent of the governed, the agency must either not exercise its authority or risk losing it. The decentralized alternative is an agency designed to advance the perceived common interest; it sets policies to further its goal and to influence the result of the interagency process.

the various affected interests. Second, if agencies adjust too slowly to meet the significant demands of new interest groups and newly dissatisfied interest groups, they impair their existing level of legitimacy.

For the interest group, advocating the unitary ideals of a highly centralized agency and rigid jurisdictional lines is a sometime tactic to retain or gain an advantage. The assenting policymaker must presume that the resulting imperfect system enjoys sufficient legitimacy to withstand serious criticism. Because the diminution of legitimacy is such a subtle process in a stable society, this concern will likely not receive direct attention. Instead, the analysis will assume another form. In addition to appraising the substantive arguments of the opposing interests, the policymaker will gauge the relative satisfaction and dissatisfaction that the partisans will receive from each option and assess the political power that they wield. The decisionmakers will also weigh in the apparent efficiencies, that stem from assigning "dispositive" decisional authority to a centralized agency. The inquiry, however, remains incomplete unless the benefits of multiple agency decisionmaking and the mixed system hybrid undergo examination. The investigation should include both the general systems analysis just concluded and a close look at the specific ways that multiagency activity can contribute to the quality of decisionmaking.

D. Multiagency Decisionmaking

Assessing administrative structures requires measuring the potential of each for economy, efficiency, and accuracy. At first glance, the examination of unitary and multiagency processes seems to contrast the increased accuracy of the latter with the temporal and economic efficiency of the former. The analysis, however, is more complex.

Neither system can claim that it best satisfies the economy, efficiency, and accuracy criteria in all cases. The multiagency process suffers from dysfunctions that may impair the quality of its product, and a unitary system is not necessarily less costly in time or money. An unsatisfactory decision speedily reached may merely launch a protracted effort at revision. It may also require a determination either to expend financial resources to undo the harm done or to let society live with the costly error. Unitary structures can also produce wasteful expense. Different agencies with differing tasks may find themselves separately performing similar information gathering and analysis functions and thus duplicating costs and

avoiding economies of scale. Because the unitary approach fosters giant agencies, it also risks intra-agency conflict and noncoordination that create diseconomies of scale.[83]

A realistic analysis must therefore proceed on a case-by-case basis. The next few pages provide guidance for this undertaking. To counterbalance the bias favoring the unitary model, we examine the functions that a multiagency system can perform and suggest the circumstances in which it best performs them.

The decisionmaking process consists of four stages—gathering information (including the arguments of different groups), analyzing the problem in light of the information, making a decision, and executing the decision. For our purposes, we can consolidate this process into two stages—information-analysis and decision-execution. In general, the multiagency method contributes most at the former stage when the conflict potential among agencies is less concrete. In contrast, the same approach frequently offers more assistance at the decision-execution stage when the conflict potential is more concrete.

The multiagency system can improve the information-analysis process in at least four ways. First, conflicting preferences can motivate an agency to develop information and arguments to defend its choice. This activity can improve both the amount and quality of the evidence presented. Second, an agency in disagreement with the information and arguments of another agency is motivated to check the quality of evidence that the opposing agency presents. Thus conflicting agencies have a reciprocal incentive to develop high quality grist for the decisional mill.[84] Third, an opposing agency must grapple not only with the evidence and arguments it might likely have developed on its own, but also with data and positions developed through the idiosyncratic system of another agency. An agency's history, tradition, work methods and clientele as well as the personality and style of its leadership can give to the evidence and arguments a slant that would be hard to duplicate.[85] Regardless

83. The problem of diseconomies of scale in agencies has received only limited recognition. *E.g.*, SENATE REGULATORY REFORM STUDY, *supra* note 60, at 10; Schwartz, *supra* note 37, at 1074.

84. *See* Wichelman, *Administrative Agency Implementation of the National Environmental Policy Act of 1969: A Conceptual Framework for Explaining Differential Response*, 16 NAT. RESOURCES J. 263, 286-88 (1976).

85. *See, e.g.*, Kauper, *supra* note 41, at 24 (different executive agencies often have different perceptions of the public interest); Murane, *supra* note 47, at 39-43 (in regulating banking practices, the FDIC, SEC, and FTC are each primarily concerned with a different segment of the public). *See* C. LINDBLOM, POLITICS AND MARKETS 27-28 (1977) (describing the characteristics of bureaucracy, which help furnish each agency with an individual identity).

of the objective quality of the resulting idiosyncratic position, it offers information and analysis that other agencies would not otherwise have available. Fourth, the resulting multiplicity of developed viewpoints compels each agency to recognize more fully the competing goals and diverse interests that are involved.[86] In each of these instances, the threat of blockage or strong interference spurs beneficial effects. The power of other agencies intensifies the motivation to develop unassailable arguments, to question the counterarguments, and accordingly to pay greater heed to opposing positions.

In contrast, a unitary system runs a high risk of severely limiting the decisional environment. As lower level staff members analyze data and distill opinions, they conduct a filtering process. Their judgments determine which conflicts the higher authority will learn about and how much the ultimate decisionmaker will know about a conflict. To be sure, the unitary decisionmaker cannot help but hear about the most volatile controversies and feel the pressure of affected interests. That decisionmaker, however, may have less acquaintance with more subtle conflicts and possess only a limited knowledge of the various options for resolution.[87] In a multiagency setting, however, the presence of other agencies serves as a potential antidote to the filtering process.

At the decision-execution stage, the redundancy inherent in multiagency decisionmaking also makes a fourfold contribution. First, to the extent that agencies overlap, the chances increase that at least one agency will perform the required task.[88] The overlap may even generate competition to perform.[89] Second, an agency can assume a specific task that another agency has wholly failed to execute as part of its larger program; that is, one agency's activities can compensate for defects in another agency's performance.[90]

86. *See* Wichelman, *supra* note 84, at 286-88 (illustrations from environmental field). *See* Kauper, *supra* note 41, at 26 (Antitrust Division's participation in administrative proceedings can broaden its expertise and make its vision less parochial).

87. *See* O'Riordan, *Policy Making and Environmental Management: Some Thoughts on Processes and Research Issues,* 16 NAT. RESOURCES J. 55, 62-63 (1976).

88. *E.g.,* Lazarus & Onek, *The Regulators and the People,* 57 VA. L. REV. 1069, 1084 (1971) (FTC challenged tbe merger of two drug manufacturers—one headed by a close friend and campaign supporter of President Nixon—after Justice declined to contest it, despite the advice of its own Antitrust Division chief).

89. *E.g.,* Roll, *Dual Enforcement of the Antitrust Laws by the Department of Justice and the FTC: The Liaison Procedure,* 31 BUS. LAW. 2075, 2081 (1976)(intense rivalry for the "best" cases even when agencies have formally divided their concurrent jurisdiction).

90. *See, e.g.,* Volner, *Getting the Horse Before the Cart: Identifying the Causes of Failure of the Regulatory Commissions,* 5 HOFSTRA L. REV. 285, 294 (1977) (suggesting that the FTC has more rigorous standards than the Postal Service in defining false and misleading advertising, a subject over which both exercise their concurrent but uncoordinated jurisdiction).

Third, redundancy implies that several agencies should be launching efforts aimed at the same goal. To the extent that the performance of the respective agencies shares a common perspective, they send out to their specialized constituencies (whose number may likely outnumber the constituencies of a unitary agency) a forceful message on the status of government policy. Fourth, this multiplicity of efforts by agencies with different styles and enforcement powers opens the possibility of numerous approaches to a problem. The administrative system can thus acquire a portfolio of flexible responses.[91]

The impact of these positive effects varies according to the concreteness of the potential agency conflict. On the matter of insuring performance, redundancy offers a greater safeguard if the task in question is specific. Because an agency may choose among many options in pursuing a less defined goal, the option selected by one agency may not at all duplicate the options chosen by another agency. The more specific the task is, the smaller is the universe of options, and the chance of duplication increases. In like manner, concreteness enhances the compensating effects of redundancy. As for intensifying the policy message, agencies with a potential for concrete conflict are more likely to engage in the same conduct and send out the same message. Less concrete potential conflict will likely lead to more ambiguous communication. Finally, no matter how concrete or nonspecific the potential conflict may be, agencies will develop a multiplicity of approaches. A more concrete potential conflict, however, may generate solutions that are more readily interchangeable among agencies.

At both the information-analysis and decision-execution stages, one or more agencies may seek to avoid shared authority and retain autonomy. Such conduct amounts to a dysfunctional circumvention of the multiple agency process. In collecting and evaluating information, an agency may choose to bury internal conflict to increase its decision's strength as perceived by the outside world. For example, the agency may hide or distort information detrimental to its chosen or predicted stance and may stifle contrary arguments that deserve an airing. The burying mentality need not stem from a conspiracy; the agency's natural desire for shared values and group cohesiveness reinforces organizational consensus and narrow

91. The FTC's staff study on nutritional labeling argued that Commission inaction would unfairly dilute the impact of the FDA's labeling rules and contravene a national public policy favoring extensive labeling. 39 Fed. Reg. 39,858 (1974). Dual agency action certainly intensifies the message and puts the resources and enforcement tools of two agencies at tbe disposal of the national policy.

perspectives.[92]

At the decision-execution stage, agencies may avoid conflict by negotiating a *modus vivendi.* Such an agreement may amount to an abdication of jurisdiction or a deference in its exercise. Though the agency may voice a thoughtful rationale for its concession—for example, lack of expertise or resources[93]—it still reduces the benefits of the multiagency process. The deference arrangement may take the shape of a formal liaison agreement, an ad hoc understanding, or a unilateral determination.[94] If the concurrent agency has already set a policy course, including nonaction, the focal agency may treat that policy as conclusive. It might instead accept as conclusive or persuasive the concurrent agency's factual findings, analysis, or policy.[95] If the concurrent agency has yet to formulate a policy or complete the formulation, the focal agency may treat as conclusive or persuasive whatever findings, analysis, or policy the former has formulated.

As for the execution of a policy decision, a deferential agency may adopt one of three courses. First, it may opt for a hands-off position and rely on the concurrent agency to carry out whatever policy it has formulated or is formulating. Second, it may pursue a policy consonant with whatever policy or developing policy, analysis, or factual findings the concurrent agency has developed.[96] Fi-

92. *See* O'Riordan, *supra* note 87, at 62-63; text accompanying note 87 *supra.*

93. *See, e.g.,* Strauss, *supra* note 38, at 97-98 (stating that the Nuclear Regulatory Commission is ill-equipped to make environmental determinations about nuclear plant siting and proposing that a specialized agency assume the task).

94. *See, e.g.,* Updated FTC-FDA Liaison Agreement—Advertising of Over-the-Counter Drugs, *supra* note 71; Kauper, *supra* note 41, at 17-19; Roll, *supra* note 89; Schwartz, *supra* note 37. Conflicts, however, can arise even under a formal liaison agreement. Loosely drawn jurisdictional lines may leave ample room for overlap; one agency may grow impatient waiting for the other agency to implement an agreed-upon program; the competence and personalities of the liaison officers may impede coordination; the liaison officer may lack authority to commit the agency to a long range program, much less one coordinated with another agency; or ad hoc communications may frustrate a continuing exchange of information. Competition for the best cases, moreover, seems an inevitable phenomenon. *See* notes 89-91 *supra* and accompanying text. Because liaison presumes a political consensus, it works best only on mechanical, value-neutral matters. Lack of coordination has been characterized as an accepted Washington folkway. Robinson, *supra* note 21, at 954.

95. *See, e.g.,* Keeffe & Head, *supra* note 39, at 798 n.56 (though the Federal Reserve Board was aware of Franklin National Bank's weak condition, it accepted the Comptroller's declaration of the bank's solvency and loaned it $1.7 billion prior to the final crisis).

96. A seriously detrimental form of deference can arise when a regulatee can choose which agency will serve as its primary regulator—for example, a financial institution choosing between the Federal Reserve Board and the Comptroller. If regulatees flock to the more lenient regulator, then the stricter agency may feel pressure to shift policies and commence a competition in laxity. *See* note 39 *supra* and accompanying text; SENATE REGULATORY REFORM STUDY, *supra* note 60, at 208. Because the original disparity stemmed from a policy disagreement, the "competition in laxity" is a form of deference that submerges conflict more

nally, if the concurrent agency has yet to formulate a policy, the focal agency may elect not to act in any way until the concurrent agency has completed a formulation.[97] In this case, nonaction by the concurrent agency will leave the ultimate task unpursued.[98]

Abdication and deferral in jurisdiction result in one agency's assuming sole responsibility for the decision it makes; that is, the administrative process drifts closer to the unitary model. This phenomenon illustrates the tension between the inclination to "pass the buck" and the territorial imperative to retain jurisdiction. In these instances, however, the agency need not forfeit jurisdiction. It instead declines to exercise jurisdiction for the moment; as long as the option to act remains, the turf is safe.[99]

Though deference can impair the multiagency process, it can also curb unproductive conflict. If deference stems from fear of facing a difficult issue or from insufficient interest or information to make a thoughtful decision, it may merely frustrate the multiagency dynamic. If, however, it results because agencies share a policy consensus or because one agency has assigned the issue a low priority, then it eliminates needless steps in decisionmaking.

At the decision-execution stage, a second dysfunction may arise when one agency can completely block another agency's action. The blocking agency's veto power permits it to reject totally the policy concerns voiced by significant societal interests. The check, however, may also accord with societal priorities. If, for example, two agencies regnlate a matter pertaining to health and safety, dual jurisdiction may implement a conservative policy to ban from the market items of potential risk.[100] If, however, the vetoing agency's policy is more conservative than societal values warrant, it may

deeply than perhaps either agency would like. An alternative strategy is to permit the stricter agency to offer regulatees other rewards for not switching allegiance.

In a variation on the theme, a regulatee subject to dual enforcement agencies may attempt to "pick" the agency that will handle its case. Reycraft, *Dealing with Enforcement Agencies Prior to Filing of Suit*, 39 ANTITRUST L.J. 174 (1970); Roll, *supra* note 89, at 2083.

97. *See* note 38 *supra*.

98. In a curious variation on these three courses, the FCC in 1976 adopted a policy of referring to the FTC all cases involving "hypoing," a method of distorting audience ratings and misleading advertisers. Docket 20501, 58 F.C.C.2d 513, 522 (1976). The deferring agency had no reason to helieve that the FTC would accept the task, because the FTC failed to participate in the FCC proceeding and had previously indicated its disinterest. *Closed Circuit*, BROADCASTING, April 28, 1975, at 3. *See* Lee, *The FCC and Regulatory Duplication: A Case of Overkill?*, 51 NOTRE DAME LAW. 235, 242 (1975); Volner, *supra* note 90, at 294-95.

99. *See, e.g.*, Warner-Lambert Co. v. FTC, 361 F. Supp. 948 (D.D.C. 1973) (separate FTC and FDA proceedings, the former directed at Listerine and the latter at over-the-counter drug remedies including Listerine, despite a liaison agreement restricting duplicative proceedings to "highly unusual situations"); note 71 *supra*.

100. *See, e.g.*, note 37 *supra* and accompanying text.

interfere with the needs of producers[101] and consumers.[102]

Despite the benefits of the multiagency approach, the predisposition toward linear thinking remains excessive. An underlying concern with the more disorderly multiagency process may be a disinterest in long-term benefits when short-term alternatives seem readily available. The unitary system's less perfect short-term solutions produce at least the appearance of finality and, indeed, may prove sufficiently satisfactory to satisfy concerns for legitimacy. Though the multiagency process may offer ultimately more acceptable solutions, it also creates opportunities for confusion stemming from policy conflicts and from breakdowns in mechanical cooperation and information exchange. Administrative analysis must therefore grapple with the crucial question: is the more discursive game worth the candle?

In answering the question, the policymaker should note that a redundant system's drawbacks may loom larger in theory than they do in practice. In real life, the system may produce limited conflict. Agencies have strong inclinations and incentives favoring deference.[103] Redundancy will create conflict when the overlapping agencies lack a policy consensus or when the mechanical system for exchanging interagency information seriously malfunctions. The economic and political costs of duplicative effort check one agency from challenging the policies of other agencies, except in serious cases, and from excessively isolating itself from knowledge of other

101. The extensive political power of the food and drug industries makes this possibility quite unlikely. *See* GREEN, *supra* note 25, at 102-46.

102. This chart summarizes the above discussion:

Information-Analysis	*Decision-Execution*
Functions:	*Functions:*
Advocacy motivation	Increase chance of performance
Critical motivation	Compensating performance
Idiosyncratic perspectives	Intensify policy message
Awareness of diverse interests	Multiplicity of approaches
Dysfunctions:	*Dysfunctions:*
Bury conflict	Abdicate or defer jurisdiction
	Veto competing concerns in cases of concrete conflict

This analysis represents a first attempt at a systematic description of the multiagency dynamic. It demonstrates that multiple agency activity employs three basic methods of social control: exchange, authority (when concrete conflict allocates authority to the dominating agency), and persuasion. *See* C. LINDBLOM, *supra* note 85, at 12-13 (articulating the methods of social control).

103. *See* notes 83-102 *supra* and accompanying text.

agencies. Affected private parties provide another source of continuing information about the activities of other agencies and the impact of duplicative or conflicting proposals.[104] The great danger may be that bureaucratic inertia and the influence of affected interests will impede the multiagency process in the performance of its beneficial functions. The remedy may lie in increased redundancy.

III. The Administrative Process and Constitutional Legitimacy

The delegation of authority and separation of powers doubtless no longer pose serious judicial threats to agency activity. The fact that they continue to generate considerable discussion,[105] however, suggests that we are fundamentally dissatisfied with judicial decisions upholding the constitutionality of agency structure and conduct. In little more than the past decade, procedural due process has joined the two doctrines as a third test of constitutional legitimacy. Though the contours of the due process requirement remain the subject of judicial debate,[106] the legislature has become the primary arena for battles over the proper extent of procedural rights. The administrative system rapidly adjusted itself, or was adjusted by the courts, to the judicial demands of the developing principles, but it still has not fully allayed our concerns about procedural fairness and broad access to the decisionmaking process.[107]

All three doctrines continue to raise questions of constitutional legitimacy, because they ask how well the agencies fit into our political structure. The demise of the judicial challenge symbolizes a reduction in our uneasiness. Agency activity is sufficiently acceptable so that we need not invoke the ultimate sanction of constitutional invalidation. We nonetheless remain uncomfortable with the agency's hybrid nature and its semi-independence from the two principal sources of political authority—the constitutional branches and the public. The three legal doctrines serve as guides in exploring

104. A recent, apparently spurious message about conflicting agency directives was Sears, Roebuck & Company's suit against ten federal agencies for promulgating allegedly inconsistent rules on equal employment opportunities. Sears, Roebuck & Co. v. Attorney General, 47 U.S.L.W. 2734 (D.D.C. May 15, 1979). *See Sears Sues U.S. Over Job Bias Laws*, N.Y. Times, Jan. 25, 1979, at A1, col. 1.

105. *See, e.g.*, S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 37-85 (1979).

106. *See, e.g., id.* at 593-724 (due process hearing rights).

107. The literature on this subject is voluminous and it would serve no purpose to footnote these pages with lengthy citations to the standard cases and commentaries on well known issues and controversies. For a comprehensive summary and analysis, see Stewart, *supra* note 6.

uneasiness about agency legitimacy. As statements of judicial law, they are both formalistic descriptions of a political process and highly rational statements of acceptable normative behavior that define the outer limits of permissible agency conduct. They may also encourage structures and a political style sensitive to the demands of political accountability.[108]

Examination of the doctrines yields three conclusions about administrative legitimacy. First, we are concerned about the agency's relationship with its sources of authority. The delegation doctrine seeks to insure agency control by higher authority and due process requirements intensify accountability to affected societal interests. Second, we are concerned that agencies lack lateral legitimacy of the sort afforded by checks and balances among the constitutional branches. An agency usually invokes this legitimacy only indirectly; each branch exercises power over the agency and, as a consequence, over the other branches that use the agency as their instrumentality. Similarly, various interest groups use the agency forum to do battle and prevent an adversary from gaining excessive influence. Finally, we are concerned that agencies will stray too far from the political mainstream.

This concern pinpoints the underlying purpose of checks, balances, and accountability to authority—to insure that adjusting mechanisms keep agencies in line with the dynamic norm of acceptable conduct. This purpose highlights the stabilizing quality of legitimacy. The analogy to feudal theory is not inapposite. The social, political, economic, and legal relationships that characterized the feudal pyramid were designed to create a well-integrated society and assure nondisruptive behavior by the king's tenants and subtenants. In the same manner, the three constitutional doctrines, broadly viewed, weave a web of relationships that safely integrates agencies into the political structure.

The appearance of stability enhances the agency's role. The trust that it generates justifies broader independence. Interdependence with the constitutional branches also develops as the agency's policy judgments and expert determinations receive deferential treatment. The agency consequently gains an internal legitimacy that defines it as more than an instrumentality of political authori-

108. *See* C. LINDBLOM, *supra* note 85, at 126-30 (constitutionalism is a method for curbing authority and introducing some forms of popular control by imposing four constraints on authority—private property rights, specific definitions of broad authority, separation of powers, and checks and balances); *cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-17, at 288 (1978) (delegation doctrine facilitates the political processes that ordinarily check congressional action).

ties. Agencies have significantly satisfied the demands of the three constitutional doctrines and gained the deference due stable institutions. Their task lies in enhancing rather than establishing legitimacy. Agencies may find additional support by invoking a macroview of the administrative system, since interaction of agencies, even when adversarial, helps validate the entire administrative system as well as the individual agencies. We now examine the preceding statement, first from the focal agency's standpoint and then from the administrative system's standpoint. The three constitutional doctrines serve as the focal points of analysis.

A. Delegation

An agency need no longer fear a judicial determination that Congress has delegated excessive power to it.[109] It must, however, remain sensitive to the concerns underlying the constitutional delegation doctrine. The policy issues raised are very much alive in debates over the breadth and specificity that a legislative mandate should provide. Some critics argue that mandates with vague language about the public interest give the agency virtually no guidance and hand to the recipient a controversy that the legislature was unwilling or unable to resolve. According to this view, Congress not only relinquishes control over policy choices, but also fails to set criteria for appraising administrative performance. Other commentators maintain that broad mandates are inevitable if agencies are to respond to ever-changing needs and circumstances. They also question whether guidelines with the least degree of flexibility will constrict the discretion of an agency intent upon expanding its authority. At the judicial level, these concerns arise when a court determines whether or not an agency has acted within statutory bounds.

The nonconstitutional debates over the propriety of delegation go to the question of political accountability. If agencies have unbridled discretion or even very broad discretion, perhaps narrowed by self-imposed regulations and guidelines, they may prove insufficiently accountable to the sources of their authority. Multiple agency interaction can strengthen the administrative system's response to the delegation challenge. In the decisionmaking process, the focal agency must deal with the information, policies, and arguments of other agencies. It thus encounters expressions of multiple

109. *But see, e.g.*, National Cable Television Ass'n v. United States, 415 U.S. 336, 340-42 (1974); Kent v. Dulles, 357 U.S. 116, 129-30 (1958) (Court narrowly construes statutes to avoid delegation question).

policies and mandates from political authorities to the administrative system. New directives to other components of the administrative system help keep the focal agency politically current. The focal agency's ultimate decision can therefore claim legitimacy not just from the authority specifically delegated to it, but also from the authority delegated to other participant agencies, and can invoke congressional and executive mandates to the administrative system as a whole. At this abstract level, the agency pieces together requirements and guidance from pertinent expressions of political will.

Not only must the focal agency attempt to harmonize inconsistent and even conflicting statements of authority, it must also deal with them as other agencies interpret them. Other agencies engaged in a similar undertaking might well arrive at a different conclusion. Much like judicial efforts at statutory construction, the results are imprecise and the process can become bewildering.

The administrative process, however, is far more challenging than its judicial counterpart. The focal agency must grapple with disparate directives in a highly charged decisional environment. Given the limited scope of judicial review, a court can claim legitimacy if it backs its decision with reasoning consistent with accepted legal principles and precedents. Such facially neutral and rational judgments, however, are insufficient for the agency. An administrative decision must deal directly with value laden policy considerations and political realities. Its legitimacy is therefore more vulnerable to challenge. By giving good faith consideration to the arguments of sister agencies, however, the focal agency claims a broader base of authority for its decision. Thus, the legitimacy of an agency decision derives from delegations to the administrative system as a whole. Unlike the judiciary, however, the focal agency need not pretend that its deliberations discern a unitary legislative intent. Instead, the agency must determine how other directives support or contravene its interpretation of its own mandate—it must find legislative "sense" rather than legislative "intent" or "purpose."

The delegation argument takes on interesting dimensions when the focal agency's particular mandate is unhelpfully vague on a given issue and the mandates of participating agencies suffer the same infirmity. Broad delegation burdens an agency with a task impossible to perform and leaves it extremely vulnerable to criticism. Reconciling policy expressions emanating from uninformative mandates is a highly fictive exercise and therefore may further legitimacy in only a limited way. In these situations, however, even the minimal information provided becomes enormously helpful. Perhaps the very fact that Congress created another agency with over-

lapping jurisdiction is telling. Though the latter agency's mandate may lack specificity, its very existence requires the focal agency to act with an awareness that Congress wanted the administrative system to give consideration to a particular matter. The focal agency can thus rely on a structural determination by the political branches and claim a sort of "second best" legitimacy.

The political context of the administrative system strengthens the argument. In the absence of competing mandates, agency positions stem from special interest pressures, historical factors, bureaucratic tradition, reflections on the findings of agency experts, and like considerations. The agency must rely heavily on these factors to define its mission. In commissioning a broad mandate, the political authorities display trust in the agency to set a policy course by these lights. The trust, however irresponsibly placed, becomes a source of legitimation. Moreover, to the extent that the agency reflects the concerns of its regulatees and those affected by its regulatory activities, it demonstrates a direct political accountability to society and enhances its own legitimacy. Thoughtful interaction with other agencies further legitimates the decision by creating an indirect accountability to the constituencies of the participating agencies.

B. Separation of Powers

The separation of powers doctrine exercises a limited judicial check on the administrative system. Courts have consistently recognized that agencies are a permissible blending of executive, legislative, and judicial functions. As the *Federalist* explains, separation of powers is a general principle rather than a requirement of neat, exclusive categorization.[110] Once an agency receives delegated authority,[111] however, the three constitutional branches must respect the separations doctrine as they interact with the agency.[112] Thus, President Roosevelt discovered that he could not fire a member of the Federal Trade Commission without infringing upon Congressional rights;[113] and Congress discovered that it could not appoint members to the Federal Election Commission.[114] The mix of interactions and checks permits each branch to perform its functions and

110. *See* THE FEDERALIST No. 47 (J. Madison), *supra* note 11, at 325. Madison argues that some blending of powers is necessary to generate the checks and balances that control and maintain separate constitutional branches. *Id.* Nos. 47-48.

111. *E.g.*, J. Freedman, *supra* note 6, at 93-94; Wright, *supra* note 21.

112. *E.g.*, 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.3, at 152-57 (2d ed. 1978); Stewart, *supra* note 6, at 1693-97.

113. Humphrey's Ex'r. v. United States, 295 U.S. 602 (1935).

114. Buckley v. Valeo, 424 U.S. 1 (1976).

to restrain the others from overreaching.[115]

The concerns underlying the separations doctrine emerge in the political struggle that Congress and the Executive wage to control various agencies. In recent years, the two branches have intensified the debate over the benefits of two contrasting organizational structures—the independent regulatory commission and the executive agency. Each branch claims advantages for the structure that would theoretically award it the greater control.[116] Congress, for example, has recently favored the independent commission in structuring such new governmental agencies as the Consumer Product Safety Commission,[117] the Commodity Futures Trading Commission,[118] and the Federal Election Commission.[119] Illustrations of executive efforts at aggrandizement include use of the Office of Management and Budget to control not only general agency spending, but agency policy.[120] An intriguing compromise is the Department of Energy, which houses not only executive agencies but the Federal Energy Regulatory Commission, which was designed as an independent commission at congressional insistence.[121]

Whether one organizational format is more politically accountable than the other remains highly uncertain.[122] Some authorities even suggest that Congress may not enjoy more control over independent agencies than it possesses over executive bodies.[123] The resolution of these questions is not crucial to the present inquiry. The perceptions and conduct of each constitutional branch manifest concern with acquiring and retaining power and checking the other branches. The debate over organizational structure symbolizes the separations dynamic.

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115. The independence of agencies from the political process was a theme of the Progressive and New Deal eras. J. FREEDMAN, *supra* note 6, at 59-62.

116. Recent studies include the ASH REPORT, *supra* note 61 (arguing for greater Executive control) and the SENATE REGULATORY REFORM STUDY, *supra* note 60 (arguing the benefits of the independent structure).

117. 15 U.S.C. §§ 2051-81 (1976); *see* H.R. REP. No. 1153, 92d Cong., 2d Sess. 24-25 (1972).

118. 88 Stat. 1389 (codified in scattered sections of 5, 7 U.S.C.), *as amended by* Pub. L. No. 94-16, 89 Stat. 77 (codified at 7 U.S.C. §§ 6a, 6j, 18 (1976)); *see* S. REP. No. 1131, 93d Cong., 2d Sess. 20-22, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5843, 5861-62.

119. 2 U.S.C. §§ 437c-439c (1976). The FEC was designed as something of a hybrid. See Buckley v. Valeo, 424 U.S. 1 (1976). On Congress' organizational preference, *see* SENATE REGULATORY REFORM STUDY, *supra* note 60, at 25-39.

120. *See* SENATE REGULATORY REFORM STUDY, *supra* note 60, at 43-54; *see* note 21 *supra*.

121. *See* Byse, *The Department of Energy Organization Act: Structure and Procedure*, 30 AD. L. REV. 193, 234-35 (1978).

122. *See* Cutler & Johnson, *supra* note 6, at 1404 & n.28, 1410 & n.48; Robinson, *supra* note 21, at 952-53.

123. *See* 1 K. DAVIS, *supra* note 112, § 2:9, at 92-95 (1978).

The congressional-executive struggle similarly affects the legitimacy of administrative action. If an agency is very accountable to one branch and barely accountable to the other, the policy underlying the separations doctrine renders it vulnerable to challenge. The slighted branch may emphasize that the doctrine not only protects the independence of each branch, but also enables one branch to check the excesses of the other. An agency excessively beholden to one branch weakens the check. Because an agency blends the powers of all three branches, it wields enormous power and requires checks. An agency of limited accountability therefore threatens the constitutional system. On a practical level, the branch that feels slighted will aggressively exercise whatever controls it possesses and even create new controls, or perhaps a competing governmental body. Examples include the Executive's use of the former Office of Telecommunications Policy to influence communications decisions[124] and the continuing congressional trend authorizing independent commissions to conduct their own litigation instead of relying upon the Justice Department.[125]

By making decisions with the participation of other agencies, a focal agency can undermine such attacks. Each agency's policy can claim authorization from different mixes of legislative and executive mandates. By dealing with the positions and policies of other agencies, the focal agency gains a broader base of support. To the extent that the political branches exercise checks on the participating agencies, they guard against excesses that the focal agency's blended power might permit. The aggregate checks and balances will probably not reflect an ideal mix of legislative and executive power. The separations doctrine, however, does not require a perfect balancing of the branches, but instead seeks to prevent excesses by one branch. Multiagency participation should furnish enough checks to thwart extremes.

This argument may seem highly artificial. In practice, however, it has some persuasive value. If an executive-oriented agency reflects executive sentiments, it furnishes the Executive a vehicle to influence the decision of an agency with a congressional orientation.[126] The latter agency can then argue that it has considered the

124. *See* Lee, *supra* note 98, at 246-49.

125. *See* SENATE REGULATORY REFORM STUDY, *supra* note 60, at 58-62, 63-67.

126. The most active executive intervenor has probably been the Justice Department's Antitrust Division. *See Hearings on H.R. 39 Before the Subcomm. on Monopoly & Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 189-214 (1975) (letter of Thomas E. Kauper) (list of Antitrust Division's filings in regulatory agency proceedings to date). Different departments of the Executive will sometimes participate in the same regulatory proceeding and present divergent views. Kauper, *supra* note 41, at 24 n.52.

executive agency's position and perhaps modified its decision in response. The claim of broadly based decisionmaking thus leaves the agency less assailable.

C. *Procedural Due Process*

The growth of procedural due process safeguards points toward a "legislative model" or "interest representation model," which validates agency conduct by affording affected interests representation in the formal decisional process.[127] Broad congressional delegations to agencies may short circuit the process of interest accommodation that lawmaking entails.[128] A legislative model of administrative decisionmaking helps compensate for the loss by making the interested public a source of political legitimacy.[129] This benefit arises whether increased access to the process generates a new systems model or whether it simply furnishes another way to increase administrative accountability.

The legislative model reflects numerous developments in administrative law. Procedural safeguards, standing, attorneys' fees, extensive notification procedures, and freedom of information and sunshine laws encourage decisionmakers to give a fair hearing to all interested parties and carefully consider the information and arguments they offer.[130] In addition to contributing to the quality of the decision, interest group participation provides a safety valve for the dissatisfied and increases society's sense of control over the process.[131]

These developments, however, fail to furnish a basis for unassailable legitimacy. At best, the public has the opportunity to put

127. The idea is developed in Stewart, *supra* note 6; *see* note 16 *supra.*

128. *See* L. TRIBE, *supra* note 108, § 5-17, at 288.

129. In sharp contrast, New Deal theory denominated expertise and political independence as compensatory substitutes for political accountability. J. FREEDMAN, *supra* note 6, at 76.

130. Dean Freedman attributes the rise in trial-type administrative procedures to the increased need for confidence in government fairness in an era of heigbtened social conflict marked by the deceptions and misjudgments of the nation's actions in Vietnam, public distress with bureaucratic insolence, and mistrust of administrative expertise. J. FREEDMAN, *supra* note 6, at 27-28, 47.

131. Studies in social psychology suggest that the perception of control over a source of psychological stress helps limit the negative effects of stress. Broadened participation in the administrative process may help increase satisfaction by offering a feeling of control over bureaucracy, a source of stress. Empirical studies, however, yield varying conclusions. *See* DiMento, *Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Direction for Future Research,* 1977 DUKE L.J. 409, 433-34 & nn.123-26. *But see* C. LINDBLOM, *supra* note 85, at 201-33 (arguing that business uses polyarchical rhetoric and class indoctrination to continue its control of the political-economic system, primarily on the grand issues).

forth its views, but it exercises no decisive check on the agency's ultimate decision. Perhaps the record the parties build may circumscribe the judicially acceptable options available to the agency, but a rather expansive universe of possible solutions will remain. If the affected parties dislike the final decision, their recourse is to Congress and the Executive. Direct political accountability is thus severely limited.

The additional public accountability runs not to the entire society, but only to those directly interested parties with the focused interest, resources and legal authority to exert influence. To argue that procedural developments enhance the legitimacy of agency decisions requires indulging in two presumptions: that agencies have traditionally permitted certain powerful societal interests to unduly influence their decisions, and that increased representation of other interests helps counteract this bias and renders agency decisions more acceptable to the range of societal interests. These presumptions are not without support.[132] To the extent they are accurate, increased participation enhances legitimacy not only by checking unacceptable agency conduct, but also by affirmatively promoting acceptable conduct.[133]

The contribution of broadened participation to agency legitimacy remains largely unrealized. The vehicles for increasing access to the process are limited, and the resources of many would-be participants are even more limited. On the judicial front, the procedural revolution seems to be winding down, as evidenced by *Alyeska Pipeline Service Co. v. Wilderness Society*[134] and *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*,[135] and the battle has shifted to Congress and, in some cases, to the agencies as well. In these latter arenas, developments have been remarkably modest. New bills occasionally offer the promise of attorneys' fees or extensive procedural safeguards for an administrative activity, but any sort of across the board legislation languishes in the hopper. As for the agencies, few have moved aggressively.[136]

132. *See* COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 18, at 165-205 (describing the success of public interest lawyers in a variety of areas); Rosenblatt, *supra* note 2, at 258-64 (case studies indicate that due process can contribute significantly to administrative implementation of substantive health care legislation); C. LINDBLOM, THE INTELLIGENCE OF DEMOCRACY 300-02(1965).

133. *See* J. FREEDMAN, *supra* note 6 (fair and efficient procedures that are responsive to democratic values and constitutional restraints are a major source of administrative legitimacy).

134. 421 U.S. 240 (1975).

135. 435 U.S. 519 (1978).

136. One difficulty is the agency's uncertain authority to grant financial assistance to

Yet, even if legislative and administrative proposals encountered smashing success, the legislative model would still not reach full flower. Traditionally underrepresented groups would remain underrepresented because their interests are diffused and unorganized and because they lack adequate resources to make their voices heard.[137] No government support program would truly equalize political power. To document the permanence of inequality, we need only look to the source of the legislative model—Congress itself. There, where standing and procedural roadblocks do not discriminate against any particular interest group, financial resources readily translate into effective representation. Dedication, enthusiasm and persuasive ability by less affluent forces can make up only so much of the difference. Full realization of the legislative model therefore requires greater representation of a greater variety of interests than seems likely to occur.

These limitations aside, public interest groups and other special interests do not necessarily indicate their priorities in selecting the proceedings to which they devote their limited resources. Different types of proceedings require different types of commitments. A group, for example, may be concerned with the anticompetitive effects of a corporate reorganization. It may, however, forego a challenge because participation would consume resources that could yield greater impact if spent on less demanding, lower priority projects. No invisible hand insures that groups with limited resources will distribute their efforts in direct proportion to the relative importance an issue holds for them.[138]

Given this state of affairs, agencies can play an important role in broadening participation by representing interests hitherto underrepresented in a given decisionmaking process. An agency might voice the private interests of its regulatees before another agency. An agency, however, plays a more significant role in vitalizing the legislative model when it represents the interests of traditionally underrepresented groups. The Antitrust Division, for example, polices agency proceedings where it is concerned about the possible anticompetitive effects of an agency decision.[139] The Division has

intervenors without specific congressional direction. *See* Greene County Planning Board v. FPC, 559 F.2d 1227 (2d Cir. 1976), *cert. denied,* 434 U.S. 1086 (1978)(denying financial assistance absent specific legislation); United States Chambers of Commerce v. Department of Agriculture, 47 U.S.L.W. 2261 (D.D.C. Oct. 10, 1978) (an agency may have implied statutory authority to fund public participation).

137. *See* Rosenblatt, *supra* note 2, at 246 n.8.

138. *See* note 13 *supra* (an unacceptably narrow range of administrative choices undermines legitimacy).

139. *See* note 126 *supra.*

the expertise, resources, and focused interest to make the sort of case that would be impossible for traditionally underrepresented, diffused groups to maintain. Thus, the Division's participation enhances the legitimacy of the process by making it more pluralistic.

The thrust of the ill-fated Consumer Protection Agency proposal was to create a government instrumentality to represent underrepresented public interests.[140] Denied this resource, these interests must continue to rely heavily upon existing agencies for surrogate representation.[141]

The result of multiagency participation, however, is still an imperfect pluralism. Accommodating a larger welter of competing interests does not necessarily maximize the legitimacy of government policy. We must still presume, then, that in today's world, movement toward the legislative model increases legitimacy.[142]

D. The Three Doctrines and the True Multiagency Model

The preceding discussion examines decisionmaking by the focal agency in a "mixed system" model. Its analysis, however, also extends to the true multiagency model, where the final decision is not the product of one agency but the in-process, aggregate product of many agencies. Applying the analysis requires no rigor. In terms of the delegation argument, authority granted to the agencies helps validate the system's composite result. The separation of powers doctrine assumes a stronger role because the checks and balances of all the relevant agencies come into play, not just those of agencies consulted by a focal agency. As for the benefits of procedural due process, an increased legitimacy derives from the aggregation of societal groups whose interests are reflected in the decisions of the relevant agencies.

In theory, application of constitutional analysis to the true multiagency model would seem to make the arguments supporting that model quite forceful because broad agency interaction weaves a richly textured relationship to the sources of legitimacy. Yet it is difficult to state the arguments in conventional political language when we speak about the validity of the entire administrative system. We may persuasively argue, for example, that a focal agency seriously considers the positions of other agencies and therefore the

140. *See Speaker Calls Off Consumer Agency Vote*, 33 CONG. Q. ALMANAC 436 (1977).

141. Some agencies have consumer advocacy offices, but many have only information-oriented consumer assistance offices. *See, e.g.*, B. COLE & M. OETTINGER, RELUCTANT REGULATORS: THE FCC AND THE BROADCAST AUDIENCE 74-76 (1978); Shulman, *Is Structural and Procedural Change a Better Answer for Consumers Than the "Reform" of Abolishing the FCC?*, in TELECOMMUNICATIONS POLICY AND THE CITIZEN, *supra* note 81, at 82-83; note 23 *supra*.

142. *See* note 132 *supra* and accompanying text.

interests to which the latter are particularly sensitive. It is less persuasive, however, to contend that the end product of serial administrative decisions reflects the concerns of many interests and therefore closely approximates society's wishes.

The paradox lies in our perception of agencies as separate entities rather than as parts of an administrative process. In part, the perception has historical roots. Agencies have taken birth one at a time to deal with specific issues. Resolution of an agency conflict therefore seems to be a matter of eliminating duplication and coordinating irreducible overlap. As a result, we rarely view agencies as supporting or checking each other's conduct, much less as creating a system. This perception also stems from our tendency to focus on individual agencies as decisionmakers rather than on an abstract system. In contrast, however, virtually any grade school student readily comprehends the entire government system as an entity and also as three branches. The idea of checks and balances among the branches is so understandable that the student can visualize not only the parts and the abstract whole, but also the relationships among them.

Why does such abstract thinking come easily at the constitutional level, but not at the administrative level? The answer is threefold: we have learned to teach the constitutional arrangement effectively; we can easily perceive the federal government, but not the administrative system, as a single entity; and we have not created graphic symbols for agency interactions, as we have for the analogous constitutional checks and balances.

The interrelationship of the three constitutional branches is not only an integral part of our government, but is also an integral part of our popular political self-image. We therefore inculcate the concept from grade school and have acquired the ability to teach it well. The concept lends itself to easy instruction. Government seems so remote that we are comfortable in seeing it first as an entity before we break it down into its components. With agencies, however, it is easy to think first of the individual agency, but difficult to then grasp the abstract notion of an administrative system.

Checks and balances among the constitutional branches also lend themselves to easy teaching. For example, the student can readily grasp the structural significance of a veto or of a court's striking down a statute or executive order. Such actions, of course, are not the sole methods of rejection, and they do not have the finality they imply. They are, however, serviceable shorthand descriptions. The popular definitions of checks and balances thus serve as concrete symbols for a range of subtle yet direct interrela-

tionships. The relationships among agencies, however, lack analogous symbols and are therefore harder to teach. For example, when one agency opposes another through conflicting regulation or policy, the student views the move not as a veto, but as a conflict that perhaps narrows the consequences of the other agency's action. Though an executive veto may also be an inconclusive event, its symbolic finality possesses a graspable concrete quality that an interagency confrontation lacks. The lack of administrative symbols likewise afflicts the ultimate product of the agency process, so that we perceive a jumble of agency policies rather than a single ongoing event.

Society's ability to change its perception of agency activity seems highly questionable. Be that as it may, arguments favoring the multiagency model exercise more force in specific, concrete cases than they do in the abstract. Such arguments, for example, might have an impact when a legislative or executive reorganization proposal seeks to entrust to a single agency the jurisdiction that several agencies currently share. One illustration might be the periodic attempts to deprive the FTC of the antitrust enforcement authority it shares with the Justice Department.[143] The arguments might also play a role in restructuring agency relationships to gain linear efficiency and to foster creative tension, as exemplified by the recent decisions of the Federal Energy Regulatory Commission, an independent agency, within the Department of Energy, a Cabinet office.[144] In these cases, the advocate and the decisionmaker can readily perceive how a decentralized structure offers more access points for influence from the constitutional branches and from interest groups, and thus furnishes the lateral checks and balances that bind administrative policy to contemporary political norms.

IV. Conclusion

Both the political science and constitutional analyses that we have undertaken focus on the gap between myth and reality in the administrative system. The myth of the unitary ideal generates political science prescriptions for abolishing administrative duplication and overlap in the name of efficiency. Our incremental analysis suggests that in reality the prescription can never be filled. In many cases, moreover, the construction of rigid jurisdictional lines interferes with sound decisionmaking. Our constitutional analysis explores the uneasy legitimacy of the administrative process. It ig-

143. *See, e.g.*, Weston, *A Merger of the Trustbusters?*, N.Y. Times, May 15, 1977, § 3, at 18, col. 3.

144. *See* note 121 *supra* and accompanying text.

nores the myth that only the direct controls of the constitutional branches assure legitimacy and it demonstrates how interaction in the multiagency system promotes acceptable conduct by the agencies.

Both analyses advance the structural solution of the multiagency model, perhaps because they share an appreciation of group interaction. Because of this appreciation, our political science analysis would remove impediments to natural interactions in a pluralistic society, and our constitutional analysis would give greater play to interactive mechanisms already at work in the political process. These arguments are quite conservative in that they call for greater reliance on accepted conduct and principles already at work in the administrative system as well as most other political, social, and economic arenas.[145]

Despite the conservative nature of the arguments, multiagency activity promises a profound impact on the administrative process. A highly legitimated process offers greater freedom to the participants, and multiple agency participation expands the opportunity for previously underrepresented groups to influence decisions. Legitimation thus does not constrain the administrative system, but actually energizes it by invigorating the dynamic of social change.

145. Professor Wildavsky makes a related point by noting that democracy is less concerned with avoiding error than with detecting and correcting error. His three criteria for evaluating institutions are the ability to reverse actions, the possession of diverse sources of ideas, and accountability for conduct. Wildavsky, *Book Review,* 88 YALE L.J. 217, 232-33 (1978). In focusing on accountability, we have argued that a multiagency system may enhance the qualities of reversibility and diversity. The administrative process therefore employs qualities inherent in democratic thinking and structures. Professor Wildavsky would not rely on bureaucracy as the primary guardian of democracy. *Id.* at 234. Nor would I.