

**A TRIPTYCH OF REGULATORS:  
A NEW PERSPECTIVE ON THE ADMINISTRATIVE STATE**

*Yair Sagy\**

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\* Assistant Professor of Law, University of Haifa Faculty of Law, Haifa, Israel. For their valuable comments and suggestions, he is grateful to Kevin Arlyck, Oscar Chase, Chris Desan, Noah Feldman, Morton Horwitz, Robert Katzmann, Shmuel Leshem, Doreen Lustig, Jerry Mashaw, Richard Primus, and Richard Stewart.

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## I. INTRODUCTION

### A. *Three Types of Regulators*

Recasting prevailing conceptions of regulation and restructuring them around three distinct prototypes of regulators, this Article offers a new conceptualization of public regulation.<sup>1</sup> I name the three prototypes “the Guardian,” “the Facilitator,” and “the Technician.” Each type weaves some of administrative regulation’s key features into a coherent, expansive, conceptual map, providing a wide context for evaluating regulatory enterprises.

Through a comprehensive study of (both legal and non-legal) literature on federal regulation from the late nineteenth century until the present, this Article identifies, introduces, and systematically explores a triptych of regulators that comprise the U.S. administrative state. Furthermore, it argues that when scholars analyze the modern phenomenon of public regulation, their work embeds the three types of regulators, even if the authors themselves do not acknowledge it. Demonstrating this typology’s pervasiveness and tenacity throughout the

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1. While economic regulation is the focus of this study, at some points it will touch upon forms of administrative activity less commonly referred to as “regulation,” such as the award of welfare benefits. In any event, the governmental activity discussed in this Article is carried out by specialized public bodies: administrative agencies. See generally Robert A. Kagan, *Regulators and Regulatory Processes*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 212, 219-23 (Austin Sarat ed., 2004). In this discussion, “commissions,” “agencies,” “tribunals,” and similar terms should be regarded as synonymous, along the lines of the expansive definition of “agency” in the Administrative Procedure Act (APA), 5 U.S.C. § 551(1) (2000). Moreover, throughout the discussion I do *not* address the distinction between rulemaking and adjudication, which is a key feature of the APA. I refrain from heeding the distinction based on the following observation: “Our existing models of administrative law have largely developed in response to a *single* method of regulation: the command method.” Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 454 (2003) (emphasis added) [hereinafter Stewart, *Twenty-First Century*]. So viewed, rulemaking and adjudication are two facets of the (single) command method. See Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and ‘Fine-Tuning’ Regulatory Reform*, 37 STAN. L. REV. 1267, 1267 n.2 (1985). It should be added, finally, that the command system has been under fierce attack for a while now. For surveys of critiques of the command system, see, for example, Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 103-18 (1998), and Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985).

intellectual history of federal regulation, this Article suggests it is part of a collective *unconscious* shared by students of regulation.

Indeed, throughout the history of U.S. administrative regulation, commentators have rarely *consciously* grappled with different perceptions of the administrative regulator.<sup>2</sup> This deficiency is symptomatic of administrative-law scholarship, where very little is explicitly said of the officials who occupy the halls of administrative agencies,<sup>3</sup> but much is told about their handiwork. This Article wishes to fill this serious gap in the literature by introducing, for the first time, a comprehensive typology of American administrative regulators.

The essentials of the tripartite typology are the following. The *Guardian* prototype is modeled on an image of a statesperson. It is an executory figure, a pragmatic official, who “possesses a broad understanding of men and affairs.”<sup>4</sup> Her *métier* lies in her leadership, initiative, and analytical and social skills; her mission is to shepherd a distressed community to Arcadia. Think here of the Environmental Protection Agency (EPA) Administrator's powers under the Clean Air Act (CAA)<sup>5</sup> to identify “air pollutants,” publish consonant air quality criteria, and regularly revisit national ambient air quality standards (NAAQS) for air pollutants.<sup>6</sup>

The *Facilitator*, much like a psychotherapist, assumes a suggestive role. Her aspiration is modest but profound, namely, to provide a platform for an informed and open communal contemplation whereby a baffled public can realize what lies in its best interest. EPA-made Environmental Management Systems (EMSs), to be adopted by private organizations, present a case in point: EMSs are sets of procedures,

2. There are notable exceptions, such as E. PENDLETON HERRING, *FEDERAL COMMISSIONERS: A STUDY OF THEIR CAREERS AND QUALIFICATIONS* (1936); Harold J. Laski, *The Limitations of the Expert*, 162 *HARPER'S MONTHLY MAG.* 101 (1930); Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 *HARV. L. REV.* 1183 (1973).

3. The focus of the Article is public regulation. I will therefore speak of regulators, administrators, and bureaucrats interchangeably, following Justice Breyer's observation that “all regulation is characterized by administration through bureaucracy.” STEPHEN BREYER, *REGULATION AND ITS REFORM* 6 (1982).

4. HERRING, *supra* note 2, at 90-91.

5. 42 U.S.C. §§ 7408-7626 (1994).

6. This procedure is outlined in §§ 108-109 of CAA, 42 U.S.C. §§ 7408-7409 (1994), and *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1135-46 (D.C. Cir. 1980). On the NAAQS in general, see *Alaska Dep't. of Env'tl. Conservation v. EPA*, 540 U.S. 461, 469-74 (2004); Robert W. Adler, *Integrated Approach to Water Pollution: Lessons from the Clean Air Act*, 23 *HARV. ENVTL. L. REV.* 203, 230-50 (1999); ROY S. BELDEN, *CLEAN AIR ACT* 11-21 (2001). See also *infra* text accompanying notes 244-250 (further discussion of the NAAQS).

whose aim is to instill environmentally-conscious thinking in organizations.<sup>7</sup>

The *Technician* is a skilled practitioner, qualified by certified training or formal experience, whose task is to apply a specific body of knowledge to a given situation. Although executory in nature, her sphere of operation is always limited. Turning once again to the field of environmental regulation, the Clean Water Act (CWA)<sup>8</sup> provides an example of a Technician-led regulatory scheme. It establishes a national permit program, the National Pollution Discharge Elimination System (NPDES).<sup>9</sup> This program is straightforward: “Under NPDES, all facilities which discharge pollutants from any point source into waters of the United States are required to obtain a permit”<sup>10</sup> either directly from the EPA or from states authorized to do so by the EPA.<sup>11</sup>

To be sure, there is nothing abnormal in the plurality of prototypes that underlie the EPA’s various duties. Different types regularly cohabit under the roof of one agency.<sup>12</sup> Taken together, the three types cover the full gamut of officials in the U.S. administrative apparatus.<sup>13</sup> Normally,

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7. On EMSs, see generally Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1275-87 (1995); PHILIP J. STAPLETON & MARGARET A. GLOVER, ENVIRONMENTAL MANAGEMENT SYSTEMS: AN IMPLEMENTATION GUIDE FOR SMALL AND MEDIUM-SIZE ORGANIZATIONS (2d ed. 2001). For further discussion of the EMSs, see also *infra* notes 219-224 and accompanying text.

8. 33 U.S.C. §§ 1251-1387 (2006).

9. See 33 U.S.C. § 1342 (2006). See also *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205-08 (1976) (analysis of Section 402); *infra* note 11 and text accompanying notes 263-266 (further discussion of the NPDES).

10. OFFICE OF WASTEWATER MGMT, U.S. ENVTL. PROTECTION AGENCY, WATER PERMITTING 101 (1999), available at <http://www.epa.gov/npdes/pubs/101pape.pdf>.

11. Although the program was introduced with the understanding that the lion’s share of permits would be handled by the states, NPDES belabored—and still does—the EPA with the formidable task of issuing and re-issuing a very large number of permits. See 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER 373-87, 445 (1986). See also *E.I. Du Pont de Nemours & Co. v. Train, Administrator, EPA*, 430 U.S. 112, 132-33 (1977); *NRDC v. Costle*, 568 F.2d 1369, 1380-81 (D.C. Cir. 1977) (“We are and must be sensitive to [the] EPA’s concern of an intolerable permit load.”). According to the EPA website, forty-seven States are approved to issue NPDES permits. See *NPDES State Program Status*, EPA (last updated Apr. 14, 2003 1:58 PM), <http://cfpub.epa.gov/npdes/statestats.cfm>.

12. See IAN AYERS & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 31-34 (1992), and Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1811 (1991) (noting with regard to the various programs included in the Clean Air Act Amendments of 1990, 42 U.S.C. §§ 7408 *et seq.* (1994), “[e]ach of these programs is tailored to the problem it seeks to address, and each is quite different in its approach.”). Representative Waxman, the Chairman of the House Energy and Commerce Committee’s Subcommittee on Health and Environment at the time, “was a central architect” of the Amendments. *Id.* at 1721 n.\*.

13. Administrative Law Judges may be one exception to this generalization, as, due to their abnormal (independent) position within the administrative apparatus, it is indeed difficult to classify

the Technician is distinctly a lower-level official, while the Guardian and the Facilitator prototypes are embodied in high-ranking officials, typically heads of the agencies. In the course of the discussion, I highlight additional dissimilarities between the three types with regard to such central issues as administrators' degree of independence, scope of reputed competence, span of discretion, characteristic procedures and remedies, as well as their source of legitimacy, use of information, and the "kinds" of power they exercise.

It should already be clear that, rather than going down the essential, yet well-trodden path of case-law digest, this study takes the analysis one step "deeper" in the sense that it exposes and describes a previously-unnoticed, extended intellectual tradition shared by lawyers, judges, and legal (and other) scholars.<sup>14</sup> Specifically, this Article shows how the work of *fin de siècle* Progressive theoretician and regulator Charles Francis Adams, one of the forefathers of the Facilitator types, resonates with current strategies to "reinvent" the administrative process;<sup>15</sup> how theories laid down by the legendary New Deal lawyer and regulator James Landis inform beginning-of-the-twenty-first-century descriptions of the Guardian by Justice Stephen Breyer;<sup>16</sup> and finally, how early-twentieth-century analyses of administration by political scientists who sought to found a "science of administration" parallel current formulations of the Technician type.<sup>17</sup>

In combining past and present perspectives, this Article makes an important contribution to the literature: by isolating the three general prototypes pervading the literature, it introduces a greater degree of theoretical precision to the understanding of public regulation, and goes on to demonstrate how current regulatory schemes can be better understood using the triad of prototypes. This Article also suggests why we can expect these types to persist in future public regulation. At the

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them under the Article's tripartite scheme. See generally STEPHEN BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 713-18 (6th ed. 2006).

14. Indeed, the Article has a descriptive orientation. This did not prevent me from generally disregarding the difficult distinction between authors' descriptive and prescriptive formulations in making observations regarding their underlying approaches to regulation. After all, description and prescription are often blended in the literature, even more so in works that use ideal types in the analysis (such as this one). See, e.g., Jody Freeman and Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 804-05 (2005); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 1-4 (1997). See also Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 59-60 n.8 (1984); Matthew D. Adler, *Beyond Efficiency and Procedure: A Welfarist Theory of Regulation*, 28 FLA. ST. U. L. REV. 241, 245-47, 268 (2000).

15. See *infra* Sections II.A. & IV.A.

16. See *infra* Section II.B. & IV.B.

17. See *infra* Section II.C. & IV.C.

same time, this Article joins and contributes to the study of the intellectual history of U.S. regulation by identifying deep undercurrents running throughout that history.

### B. *Methodology, Sources, Structure*

The archetypes are three theoretical complexes.<sup>18</sup> They are construed in an ideal-type fashion,<sup>19</sup> based on a review of a broad, yet specialized body of literature that scrutinizes various facets of public regulation. The types are not “just” isolated metaphors, but rather *conceptual maps*<sup>20</sup> that cover an array of issues in the world of regulation and provide different meanings to organs’ actions within that world.<sup>21</sup>

The database informing the investigation is expansive and heterogeneous, but not limitless, of course. The analysis draws on sources that were produced, roughly, during the past century and a half,

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18. See, e.g., C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 46-49 (1962). See also *infra* note 19. Admittedly, one of the dangers in using such models is that they are liable to create the impression of constancy over time, if not of the models’ immutability throughout the decades. For the analysis’s novelty and scope, I am hopeful that in this case the advantages outweigh the disadvantages in this methodology.

19. Legal scholarship is no stranger to ideal-type analysis. See notably Jerry L. Mashaw, *Conflict and Compromise Among Models of Administrative Justice*, 30 *DUKE L.J.* 181 (1981); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 *HARV. L. REV.* 1276, 1281-82 (1984); Richard H. Fallon Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 *COLUM. L. REV.* 1, 40-41, 55-56 (1997). On Weber’s ideal-type methodology, see 1 MAX WEBER, *ECONOMY AND SOCIETY* 19-22, 215-16 (Guenther Roth & Clauss Wittich eds., Ephraim Fischhoff et al. trans., 1978). See also Donald McIntosh, *The Objective Bases of Max Weber’s Ideal Types*, 16 *HIST. & THEORY* 265 (1977); Susan J. Hekman, *Weber’s Ideal Type: A Contemporary Reassessment*, 16 *POLITY* 119 (1983); ROGER COTTERRELL, *LAW’S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE* 134-59 (1995). Admittedly, ideal-type analysis is often conducted in concert with a broad historical study. For lack of space and theoretical clarity, I do not conduct historical analysis here, though I begin to do it elsewhere. See Yair Sagy, *The Manager, The Judge, and the Empiricist: American Administrative Law as a Theory of Expertise* (2006) (unpublished JSD Dissertation, NYU) (on file with the NYU Law School Library).

20. I borrow this term from STEVEN LUKES, *POWER: A RADICAL VIEW* 15 (2d ed. 2005).

21. To state the obvious, the analysis has inescapably involved interpretation. This is the case in virtually every academic work, even more so in works that use ideal types in the analysis. See sources cited *supra* note 14. As noted, rarely have scholars openly addressed notions of administrative regulators. Still, having the research question at hand in mind, a previously-out-of-sight, yet distinct pattern has emerged in the germane literature—starting with administrative law theory must-reads, such as JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938) and STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); and seminal works in political science and organization theory, such as Professor Woodrow Wilson, *The Study of Administration*, 2 *POL. SCI. Q.* 197 (1887) and MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955). As I examined more and more sources, focusing on sources commonly cited to this day, my understanding of the pattern was further refined, resulting in the present delineation of the three types of administrators.

and whose focal point is the modern phenomenon of federally-orchestrated public regulation. Discipline-wise, this corpus is not confined to legal literature. Rather, the following analysis draws heavily on the writings of prominent political scientists, economists, organization theorists, and historians alongside the works of leading administrative-law theoreticians, thus presenting an integrated field of public-regulation scholarship.<sup>22</sup>

This Article unfolds in five parts. The next Part (Part II) outlines the prototypes' main features (their general function, scope of discretion, and main tools of regulation), thus laying out the basis for the ensuing discussion. Next, Part III is dedicated to a critical examination of the types. Special attention is given to the following aspects of public regulation: failures in regulators' handling of *information*; the interactions between *politics* and *regulation*; modalities of *power* (couched in Foucauldian terms) regulators exert on other members of society; *legitimacy* concerns associated with regulators' ordering of public affairs; and *organizational* considerations.<sup>23</sup>

Part IV focuses particularly on the present and on contemporary schemes of regulation. It illustrates how the three types are manifested in current regulatory schemes. This Part draws most of its examples from the ongoing campaign to reinvent environmental regulation as well as from the fields of occupational and food safety. Following the theoretical exposé in Part III and the analysis of on-the-ground regulatory schemes embodying the types in Part IV, Part V integrates the

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22. This presentation deliberately conceals an important parallel story about the complicated relationship between legal and non-legal approaches to public administration. See generally Robert A. Katzmann, Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513 (1980); Keith Whittington, *Crossing Over: Citation of Public Law Faculty in Law Reviews*, 14 LAW & COURTS 5 (2004). Cf. Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005) (comparing lawyers' and political scientists' conceptions of judicial review). In a word, it is a story of persistent mutualignorance throughout most of the history of federal regulation. Parts of the story are told in Sager, *supra* note 19. The last generation of scholars has witnessed a growing sensitivity to disciplinary parochialism, but it is clear that here, too, old habits die hard. See Susan Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341, 347 (1988) (“American administrative law remains a court-centered field . . .”), and Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS 63, 72 (2005). For calls on scholars and judges to be mindful of what administrative processes really look like, see Cass Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 408-09 (1990); Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1254-55, 1329 (1992); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 25-31 (1998).

23. On the considerations leading to the selection of these axes of analysis, see *infra* text accompanying note 105.

research findings into one comprehensive framework, allowing for an informed, critical evaluation of the three types “in-action.” Finally, Part VI concludes.

## II. TYPES OF REGULATORS

This Part will provide an elaborated description of the types. The prototypes may be best introduced by referring to the list of relevant features, shown in *Table 1*.

TABLE 1: GENERAL OUTLINE OF THE TYPES

	<i>Facilitator</i>	<i>Guardian</i>	<i>Technician</i>
<b>Function: Generally</b>	Advisory judgment; convener	Overall-execution; managerial	Objective and efficient task-execution
<b>Scope of Discretion</b>	Limited	Widest	Purportedly none
<b>Leading Tools of Regulation</b>	Information; negotiation; collaboration	Command-and-Control; formulation of policy	Permit; voucher; monitoring; bookkeeping

### A. *The Facilitator*

#### 1. Synopsis

The setting stipulated by this type is of an agitated society, ready for action, but lacking a roadmap—a map which is surely “out there,” waiting to be unfolded once all the facts are set in order. Herein lies the need for this type of commissioner: she facilitates public action by providing civic fora where fact-gathering and fact-processing mechanisms are employed, so the community is able to see for itself the causes of and remedies for a given public menace. Under this scheme, the regulator’s intervention is necessary, but not sufficient, to bring about “actual” regulation. It is principally for the various (private) groups of society, rather than the Facilitator-commissioner alone, to carry out the needed regulatory agenda—if they so choose. The type’s general suspicion of direct state regulation and strong belief in the merits



of private action is coupled with the conviction that, conducted in this fashion, regulation is likely to serve a unified public interest.

## 2. Bureau of Statistics

The clearest presentation of the Facilitator type was made more than a century ago by a Progressive Bostonian by the name of Charles Francis Adams, Jr.<sup>24</sup> As we shall see,<sup>25</sup> the work of this early theoretician very much resonates with contemporary theories.

Adams, a keen student of the day's burgeoning railroad industry, observed early on that as previously remote localities drew closer with the coming of railways, a one-directional movement was certain to evolve. This movement would encompass food and commodities, men and nations, ideas and artifacts: "The tendency of steam has universally been towards the gravitation of the parts to the centre,—towards the combination and concentration of forces, whether intellectual or physical."<sup>26</sup> According to Adams, the gravitational movement manifested itself not only in the modern configuration of the industrial world,<sup>27</sup> but also, concurrently, in the sphere of public governance. "To succeed," he declared, "centralization is necessary; diffusion insures

24. Adams was born in 1835 and died in 1915. CHARLES FRANCIS ADAMS 1835-1915, AN AUTOBIOGRAPHY (1916) [hereinafter ADAMS, AN AUTOBIOGRAPHY]. He emerged on the public scene first as a Progressive muckraker who bitterly criticized the railroad barons of the time for their corruption. See notably Charles Francis Adams, *A Chapter of Erie*, in CHARLES FRANCIS ADAMS, JR., & HENRY ADAMS, CHAPTERS OF ERIE AND OTHER ESSAYS 1-99 (1871) [hereinafter Adams, *Chapter of Erie*]. Important for our purposes, Adams was the founding father and consequently the Chairman of the Massachusetts Board of Railroads Commissioners, created in 1869 by an act authored by Adams himself. The following discussion will reveal the key features of the Commission. ADAMS, AN AUTOBIOGRAPHY, *supra*, at 178. The Massachusetts Board became a "national prototype" at the end of the nineteenth century and went down in history as a "sunshine" commission employing a form of "weak" (i.e., purely advisory) regulation. See THOMAS K. MCCRAW, PROPHETS OF REGULATION 1-57 (1984). See also ADAMS, AN AUTOBIOGRAPHY, *supra*; EDWARD C. KIRKLAND, CHARLES FRANCIS ADAMS 1835-1915: THE PATRICIAN AT BAY (1965). For a fuller analysis and contextualization of Adams' work, see Sagy, *supra* note 19, ch. 5. On Progressivism and muckrakers, see, for example, ROBERT H. WIEBE, BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT (1962); MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1920 (2003).

25. See *infra* Section IV.A.

26. Charles Francis Adams, *The Railroad System*, 104 N. AM. REV. 476, 484 (April, 1867) [hereinafter Adams, *Railroad System*].

27. Adams championed combinations among railroads. He thought that "[c]ombinations of capital and labor which amount to monopolies can alone satisfy the present enormous requirements of modern society." *Id.* at 502.

failure. This principle applies as well to the labors of commissioners as to the material efforts of individuals.”<sup>28</sup>

Adams’s works instantly reveal that, in his eyes, he was engaged in a missionary cause. Adams the Progressive was sorrowed and driven to action by “the deep decay which has eaten into our social edifice.”<sup>29</sup> It is for this reason that he did not put much stock on legislative remedies offered in vacuo, that is, on measures not backed by a committed public.<sup>30</sup> Adams’s various publications aimed to bring about public awakening. He labored for a credible exposure of the far-ranging repercussions of, and interests involved in, the spread of railways around the globe, holding that before any form of action could be taken, “the first preliminary [was] to induce the community to realize the true magnitude of the question involved.”<sup>31</sup>

The vehicles to be employed for that end were “[c]ommissions— advisory bureaus”; they “might scientifically study and disclose to an astonished community . . . the remedies no less than the causes of obstructions.”<sup>32</sup> The advantages that might follow from this course of action would be enormous and sweeping. It “might go far to remedy an especial inherent defect in all representative governments,” and put an end to useless rant of Legislatures and various public committees, thus “introduc[ing] order into . . . chaos.”<sup>33</sup>

The proposal is to supplant an erratic and centrifugal regime based on biased and fragmented data with a centripetal order run by a reliable, competent, and permanent body, backed by a concentration of social forces.<sup>34</sup> This body would yield scientific, i.e., objective and indisputable, data, which would serve as a platform for an informed “open discussion” about pending social problems impeding prosperity.<sup>35</sup> Such a discussion, in turn, is projected to bring about much-needed solutions to these problems. This problem-tackling procedures’ potential emanates from Adams’s conviction that, while the public may

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28. Charles Francis Adams, *Boston*, 106 N. AM. REV. 1, 19 (1868) [hereinafter Adams, *Boston I*].

29. Adams, *Chapter of Erie*, *supra* note 24, at 94.

30. *See id.* at 98.

31. Adams, *Railroad System*, *supra* note 26, at 480.

32. Adams, *Boston I*, *supra* note 28, at 16.

33. *Id.*

34. *See* Charles Francis Adams, *Boston II*, 106 N. AM. REV. 557, 558 (April, 1868) (“Wielding all the influence of a community, having every source of information thrown open to them, such officials [i.e., commission members] become the recipients of light from all quarters, and can, if they be competent, concentrate the scattered rays into a powerful focus.”).

35. Adams, *Boston I*, *supra* note 28, at 18, 25.

seem fragmented or even torn apart, upon reflection and under the Facilitator's direction, it turns out that the public interest is unified. It is this single interest that is identified in the regulatory process.

These are, then, the essentials of the theory of regulation with which Adams was most associated, a theory that bespeaks the Facilitator prototype. First, information is key to success: "When such a bureau [of railroads statistics] exists, and not till then, may some intelligent railroad legislation be hoped for."<sup>36</sup> Second, Adams-style regulation was indeed in the style of "weak," non-intrusive regulation. A staunch believer in the "the eventual supremacy of an enlightened public opinion," Adams was certain that once such a commission was established, "all else might safely be left to take its own course."<sup>37</sup>

Finally, Adams insisted that the Massachusetts Railroad Board members would be left "[w]ithout remedial or corrective power[s]"<sup>38</sup> for yet another reason. He thought it would create the condition necessary for them to win the confidence of all sides of a controversy, railroads, of course, included. Adams, who would call for the legalization of "regulated combination,"<sup>39</sup> took pride in the fact that "the railroad corporations have never appeared in opposition to [the Massachusetts Railroads Board] as a body."<sup>40</sup> This user-friendly attitude goes hand in hand with the Facilitator type, which is premised on a joint-venture *modus operandi*. It also falls in line with Adams's general *negative* disposition to government intervention in the private sphere, as he declared in 1867: "It is rapidly becoming throughout the world—and the more rapidly the better—a cardinal principle of polity, that the more the functions of government can be reduced, the better."<sup>41</sup>

## B. *The Guardian*

### 1. Synopsis

In many respects, things are clearer with the Guardian archetype as compared to the Facilitator. The division of labor between regulatory bodies and the public under this scheme is simpler and leaves little room for public hesitation. The Guardian introduces regulation after a sufficiently large part of the public has decided that (a) something needs

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36. Adams, *Railroad System*, *supra* note 26, at 498 n.\*.

37. CHARLES FRANCIS ADAMS, RAILROADS: THEIR ORIGIN AND PROBLEMS 140, 215 (1878).

38. *Id.* at 143.

39. *Id.* at 187. *See also supra* note 27.

40. ADAMS, *supra* note 37, at 143.

41. Adams, *Railroad System*, *supra* note 26, at 508.

to be done about a certain problem (b) by the government. In other words, the model assumes, if not takes for granted, the high probability of public intervention in the private sphere. With that view in mind, the regulator's discretion is sketched in broad strokes; she is often granted inquisitorial, executory, and enforcement powers. It is as if once the public regards a problem as worthy of state intervention, the Guardian is asked to "deal with it," or simply "make it go away."

The Guardian is a leader. She should explicate the problem to be addressed to the public, but even more so she details what must be done in response to that problem. It is she, rather than the public—either directly or through its representative—who draws the roadmap for a distressed field. To that end, she should be bold and not shy away from "administrative experimentation and reorganization" if the situation so requires.<sup>42</sup> In so doing, this guardian of the public interest is to rise above petty rivalries and see the big picture. Correspondingly, regulators are expected to be fully committed to the policy embedded in the regulatory scheme entrusted to their hands. They should have "a proper bias toward [their agency's] point of view."<sup>43</sup>

## 2. Public General Manager

Like the Facilitator, the Guardian has deep roots in Progressive-Era thinking. However, whereas the former had already found its definitive advocate in Charles Francis Adams by the end of the nineteenth century, the latter had to wait a bit longer. The Guardian emerged in the early-twentieth-century work of scholars like Herbert Croly, the leading Progressive political thinker, and James Landis, one of the New Deal's most influential lawyer-regulators.<sup>44</sup> As we shall see, the influence of

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42. Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Administrative Law*, 54 *LAW & CONTEMP. PROBS.* 311, 359 (1991).

43. LANDIS, *supra* note 21, at 103-04. See also Don K. Price, *1984 and Beyond: Social Engineering or Political Values?*, in *AMERICAN PUBLIC ADMINISTRATION: PAST, PRESENT, FUTURE* 247 (Frederick C. Mosher ed., 1975).

44. Landis is a legendary figure in the history of American administrative law. As Thomas McCraw puts it, "[i]n the history of regulation in America, few names loom larger than that of James M. Landis." MCCRAW, *supra* note 24, at 153. Landis has acquired a mythological stature thanks to his prominence as a scholar, his extensive experience as a regulator, and the role he played in the design of regulation in the post-1929 era. He was a stellar student, clerked for Justice Brandeis, was appointed as the youngest dean in Harvard Law School's history, and "[w]hile still a young man, Landis emerged as the outstanding theoretician of American regulation." *Id.* For Landis' biography, see, for example, MCCRAW, *supra* note 24, at 153-221; DONALD A. RITCHIE, *JAMES M. LANDIS: DEAN OF REGULATORS* (1980).

these early prophets of regulation is very much still present today, notably, in the work of Justice Stephen Breyer.

The image of the person-regulator as a (public) leader,<sup>45</sup> a vibrant entrepreneur,<sup>46</sup> exuding charisma and a sense of optimism and confidence, is the center of the Guardian prototype.<sup>47</sup> Befittingly, the jurisdiction of regulator and agency is widely, even lavishly, charted—so much so that it seems Guardians’ authorizations are particularly prone to charges of nondelegation-doctrine infringements.<sup>48</sup> Translated into the parlance of constitutional discourse, her actions “combine aspects of all three branches” of government.<sup>49</sup> Or, as Landis put it, with the Guardian, the regulatory agency is granted with “an assemblage of rights normally exercisable by government as a whole.”<sup>50</sup>

To analytically evaluate it, it may be useful to think of the Guardian type as the embodiment of a *public general manager*.

To begin with, as a *general manager* she has a decisive role in continuously molding the administrative organization’s character, inter alia, by setting its hiring policy. Generally, the Guardian is “in the best position to experiment, learn, and innovate.”<sup>51</sup> Put in the terms advanced by Ian Ayers and John Braithwaite, the Guardian is the master of her agency’s enforcement pyramid.<sup>52</sup> She is the one controlling the agency’s strategy within the pyramid; indeed, she may be the one laying out the *shape and content* of the pyramid, under the constraints of the pertinent legislative mandate.<sup>53</sup> Hence, because of her close affiliation

45. Ordway Tead, *Amateurs Versus Experts in Administration*, 189 ANNALS AM. ACAD. POL. & SOC. SCI. 42 (1937).

46. See DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY* 14-36 (2001). Put in Carpenter’s terminology, my description of the Guardian shares several traits of Carpenter’s “mezzo level” regulators. *Id.* at 18.

47. Cf. MAGALI SAFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 2-12 (1977).

48. See, e.g., *Whitman v. Am. Trucking Ass’n.*, 531 U.S. 457 (2001). See generally Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999).

49. Joseph B. Eastman, *The Place of the Independent Commission*, 12 CONST. REV. 95, 95 (1928).

50. LANDIS, *supra* note 21, at 15.

51. CARPENTER, *supra* note 46, at 21.

52. See AYERS & BRAITHWAITE, *supra* note 12, at 35-41. Likewise, regulators’ dilemmas presented in Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC’Y REV. 691 (2003), would usually be in the purview of the Guardian. See similarly Stephen D. Sugarman, *Performance-Based Regulation: Enterprise Responsibility for Reducing Death, Injury, and Disease Caused by Consumer Products*, 34 J. HEALTH POL. POL’Y & L. 1035 (2009).

53. To complete the Ayers and Braithwaite discussion (see AYERS & BRAITHWAITE, *supra* note 12), typically the Facilitator is in charge of activity taking place at the base of the same enforcement pyramid (i.e., persuasion and self-regulation). Furthermore, the Technician is charged

with the agency and position of guardianship, this administrator readily comes to personify the agency as well as the goals and ideals for which it stands; she may even come to stand for the state itself.<sup>54</sup>

As a *general manager*, she is neither a mere “office-holder”<sup>55</sup> nor a “specialist” regular.<sup>56</sup> Rather, if anything, she is a “specialist[] in generalization . . . .”<sup>57</sup> In fact, it is stipulated that she should be “freed from responsibility for the details of routine administration . . . .”<sup>58</sup> This remark captures another trait of the type, namely, its lack of concern for organizational dimensions in the practice of regulation. Simply put, scant attention, if any, is given to the institutional structure within which the Guardian operates. It is as if the Guardian is projected to run a one-man show.<sup>59</sup>

As she is typically not expected to be intimately acquainted with the details of the regulated industry, the Guardian's forte lies rather in her ability to obtain an overarching, all-encompassing outlook.<sup>60</sup> This allows her to “provid[e] unified direction . . . for . . . the industry as a whole . . . .”<sup>61</sup> By the same token, her unique sphere of knowledge is extensive and not restricted to one particular subject matter. Interdisciplinarity is her leitmotif. This allows the regulator to benefit from the input of sundry scientific and not-strictly-scientific fields of

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with monitoring the regulatee's response to the regulator's most recent strategy/sanction; she may be thus responsible to triggering an escalation in the Guardian's punitiveness vis-à-vis a recalcitrant firm or industry. For the interplay between the types within given pyramids in the area of occupational health and safety in various jurisdictions, see, e.g., Richard Brown, *Theory and Practice of Regulatory Enforcement: Occupational Health and Safety Regulation in British Columbia*, 16 LAW & POL'Y 63 (1994); Sidney A. Shapiro & Randy S. Rabinowitz, *Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA*, 49 ADMIN. L. REV. 713, 735-45 (1997); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 651-53 (2000).

54. See HERBERT CROLY, *PROGRESSIVE DEMOCRACY* 364 (1998) (“The state, in the person of its . . . commissioners . . .”).

55. CROLY, *supra* note 54, at 375.

56. See 2 WEBER, *supra* note 19, at 1001.

57. Tead, *supra* note 45, at 47.

58. Carl I. Wheat, *The Regulation of the Interstate Telephone Rates*, 51 HARV. L. REV. 846, 883 (1938).

59. Cf. David D. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 234-35 (2001). I will return to this theme below. See *infra* Section III.E.

60. See, e.g., Joseph B. Eastman, *A Twelve Point Primer on the Subject of Administrative Tribunals*, in *SELECTED PAPERS AND ADDRESSES OF JOSEPH EASTMAN, 1942-1944*, at 375, 376 (G. Lloyd Wilson ed., 1948).

61. Harvey Pinney, *The Case for Independence of Administrative Agencies*, 221 ANNALS OF AM. ACAD. POL. & SOC. SCI. 40, 41 (1942). See also Strauss, *supra* note 22, at 1268 (“[W]e expect an agency to try to understand and apply the whole body of statutes committed to its administration as a coherent consistent whole—in a programmatic way.”).

inquiry, which, taken together, produce “a special body of public administration.”<sup>62</sup> Accordingly, as Justice Breyer explains, capable regulators should “understand[] science, some economics, administration, [and] possibly law . . . .”<sup>63</sup> Indeed, according to Dean Price from the Kennedy School of Government at Harvard, they should “draw[] on the reserves of [the] university as a whole . . . .”<sup>64</sup>

As a *manager*,<sup>65</sup> the regulator commands and controls, naturally relying mainly on the command system. She directs her energies to the execution and enforcement of desirable goals in the most rational, pragmatic way. She is the one who sees the execution process through to its actual materialization and completion. And according to Carl Wheat, she is responsible for “giv[ing] effectiveness to . . . scheme[s] of regulation . . . .”<sup>66</sup> Towards that end, the regulator has to “adapt a rule to a situation, . . . to envisage a program or a law in its actual operations among men and women . . . .”<sup>67</sup> The Guardian is thus required “to plan, to promote, and to police,”<sup>68</sup> as well as to be able to successfully tackle unforeseeable contingencies, “to meet practical emergencies,” and, just as important, “to deal with men.”<sup>69</sup> Leadership and social skills are indeed of the utmost importance for the regulator, who must excel in coordinating people and production units, and who “needs physique, nervous energy, . . . tact, strength to say ‘no,’ and ability to inspire others and to create confidence in employees and the public.”<sup>70</sup>

The Guardian-manager’s distinctive cognitive abilities, broadly defined,<sup>71</sup> are expansive and not easily concretized. It is said that she “can analyze and deduce, combine and infer,” but more important, that she is “gifted with instinct and sagacity no less than reason.”<sup>72</sup> In short, as Kenneth Culp Davis put it, the regulator is, perhaps above all, a “practical [person].”<sup>73</sup>

As a *public* general manager, this regulator never loses sight of the public interest while taking care of the industry entrusted to her. She

62. Wheat, *supra* note 58, at 883.

63. BREYER, *supra* note 21, at 61.

64. Price, *supra* note 43, at 243.

65. See LANDIS, *supra* note 21, at 13; see also DWIGHT WALDO, *THE ADMINISTRATIVE STATE* 91-92 (1984).

66. Wheat, *supra* note 58, at 883.

67. CROLY, *supra* note 54, at 375.

68. LANDIS, *supra* note 21, at 15.

69. CROLY, *supra* note 54, at 375.

70. MARSHALL E. DIMOCK, *MODERN POLITICS AND ADMINISTRATION* 293 (1937).

71. See LARSON, *supra* note 47, at 15-39.

72. Adams, *Boston I*, *supra* note 28, at 19. See also WALDO, *supra* note 65, at 96-97.

73. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW* 10 (1951).

“build[s] coalitions behind new ideas,” and may even “change the agendas and preferences of politicians and the organized public.”<sup>74</sup> In order to do so, the Guardian may have to demonstrate shrewd political skills, as well as the “moral courage to resist public opinion when it is wrong . . . .”<sup>75</sup> The last remark brings forward the important issue of the relationships between the regulator and the public. It is interesting to note that various metaphors provide a useful picture of the regulator’s role vis-à-vis the public. Richard Lazarus, referring to the EPA, uses doctor-patient imagery: “[The] EPA cannot effectively manage public risk without the confidence of the public any more than a doctor could treat a patient without that patient’s trust.”<sup>76</sup> Taking a similar approach, one of Adams’s few excursions into this prototype used a teacher-student metaphor. He urged his fellow Bostonians, “For once, let reflection precede action . . . . The community must go back to school, and it only remains to find the schoolmaster.”<sup>77</sup>

The fact that the schoolmaster-like regulator is expected not only to be fair “in utterance and act,” but also to have the “moral courage to resist public opinion when it is wrong”<sup>78</sup> is significant for at least two reasons. Notice, first, that this emphasis is in tension with the Facilitator prototype. The Facilitator does not envisage such a discord between the public and regulators. Adopting a contrary approach, Adolph Berle states, “[T]he popular will does not discover a method.”<sup>79</sup>

Second, in allowing that regulators may—indeed, they are expected to—face opposition from some segments of society, one might say that

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74. CARPENTER, *supra* note 46, at 22, 15 (emphasis omitted).

75. Samuel O. Dunn, *Regulation by Commission*, 199 N. AM. REV. 205, 206 (1914). *See similarly* MARC K. LANDY ET AL., *THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS FROM NIXON TO CLINTON* 80-81 (1994).

76. Lazarus, *supra* note 42, at 351. Others similarly referred to the regulator as a doctor. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1678 (1975) [hereinafter Stewart, *Reformation*], and BREYER, *supra* note 21, at 62.

77. Adams, *Boston I*, *supra* note 28, at 18. Herbert Croly had a more demanding, even grandiose, vision of regulators. Croly stipulates that the organization and operation of agencies “should be adapted to the making of men rather than of office-holders.” CROLY, *supra* note 54, at 375. Later on he adds, “The administration of a progressive democracy will need and must foreshadow a completer [*sic*] kind of democratic manhood.” *Id.* at 376.

78. Dunn, *supra* note 75, at 206.

79. Adolph A. Berle, Jr., *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 439 (1917). As we can see, the public administration literature is peppered with the theme of regulators’ expertise. *See also, e.g., infra* text accompanying notes 82-86. Indeed, I have argued elsewhere that most of the literature reviewed in this Article could be reorganized around this theme. *See* Sagy, *supra* note 19. While there is an overlap between the present study, which reviews competing types of regulators in the literature, and an inquiry tracing the different concepts of administrative expertise informing the same literature, the latter inquiry cannot be pursued here, for it relies more heavily on a wider historical analysis than that offered here.



the Guardian type takes on a more realistic view of the administrative process than that of the Facilitator prototype. But this realism necessarily raises the vexing issue of the appropriate relationship between politics—the arena where contentious public sentiments are openly aired and popular demands asserted—and public regulation. This issue is particularly relevant in the context of the Guardian prototype since, as we shall see, more than in the case of the other two types, the political nature of this public regulator is (nearly) candidly acknowledged.<sup>80</sup>

### C. *The Technician*

#### 1. Synopsis

In a way, the Technician is the simplest of the three prototypes. It refers to “the civil servant,” the bureaucrats of the agency, those core officials who are the backbone of any organization. It is about the people who make the organizational beast tick, the workers on the assembly line. It is best understood in comparison to the other two types.

The Technician shares with the Facilitator type the emphasis on information-gathering capabilities; yet, the Technician might very well be required to actually implement regulatory schemes, and in that sense, resembles the Guardian. However, unlike the Guardian, the Technician's sphere of action is always limited, well demarcated, and specific. She is plainly a “specialist.”<sup>81</sup> This trait should not be taken as a sign of weakness, for unlike the other two she is a certified expert, a *professional*.<sup>82</sup> The Technician's authority is entirely dependent on her acknowledged, formal training, which prepares her for a *career* of public service. Indeed, noticeably more so than in the case of the two other prototypes, the Technician is often engaged in a long-term commitment to the regulatory endeavor.<sup>83</sup>

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80. See *infra* Section III.B.2.

81. CROLY, *supra* note 54, at 375.

82. James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 379-82 (James Q. Wilson ed., 1980). This may be the appropriate time to note that although my Technician shares some of the traits of James Wilson's Professional, mine is a fuller, more rounded description (the disparity has to do with our different motivations in typifying regulators). Incidentally, under Wilson's terminology, the Facilitator and the Guardian would normally be either careerists or politicians. See *id.* at 372-97.

83. See, e.g., James Landis, *Significance of Administrative Commissions in the Growth of the Law*, 12 *IND. L.J.* 471, 477 (1937) (successful regulation could be had by “men ready to devote their lives to the task.”).

## 2. A Specialist

First, there is the issue of the regulator's skills, which are much more specialized than those of the Guardian. Having this type of regulator in mind, commentators speak of "technical expert[ise]" and "technocratic" skills.<sup>84</sup> Thus, for example, the famous Acheson Committee, the Attorney General's Committee on Administrative Procedure, whose final report was released in the beginning of 1941,<sup>85</sup> reasoned, "In many cases a principal reason for establishing an agency has been the need to bring to bear upon particular problems technical or professional skills."<sup>86</sup> Half a century later, Lazarus spoke similarly of the agency's "technical employees."<sup>87</sup>

Second, although, unlike the Facilitator, the Technician might also have executorial duties, they are strictly limited in three ways: these duties are specific, partial, and have to be carried out in accordance with a preordained protocol.<sup>88</sup> They are so limited because, generally, the Technician administrators' skills are rooted in "single-mindedness of devotion to a specific problem,"<sup>89</sup> which in time produces area-specific "experience."<sup>90</sup> Moreover, these regulators are normally responsible for carrying out tasks of lower order than those of Guardian-style commissioners. Namely, Technicians are typically called upon to carry out routine tasks that do not encompass the administrative process in its entirety and do not call for "high level" policymaking. Some commentators even go so far as to posit that Technicians conduct "simplistic analysis," which leaves little room for intuition.<sup>91</sup> Reflecting this approach, it has been argued that the Technician-regulator is in the business of the "making of detailed regulations in highly specialized fields such as the technical operation of radio stations or the importation of honey bees or the shipment of insects . . . ."<sup>92</sup> Therefore, it has been

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84. Eastman, *supra* note 60, at 376; Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1085 (1990).

85. On the Attorney General's Committee, see George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1594-98, 1632-42 (1996).

86. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 19-20 (1941).

87. Lazarus, *supra* note 42, at 353.

88. See *infra* text accompanying notes 98-99.

89. LANDIS, *supra* note 21, at 35. See also *e.g., id.*, at 27, 30, 87.

90. See, *e.g.*, Gillette & Krier, *supra* note 84, at 1089.

91. *Id.*

92. See Louis G. Caldwell, *A Federal Administrative Court*, 84 U. PA. L. REV. 966, 968 (1936).

maintained that this regulator must have the “ability and desire to devote fifty-two weeks a year, year after a year, to a particular problem.”<sup>93</sup>

As we can see, when the Technician is described, there is no place for the kind of almost greater-than-life portrayal of the regulator one finds in the Guardian literature. Thus, we find even Landis writing at some point, “In the business of governing a nation . . . we must take into account the fact that government will be operated by men of average talent and average ability and we must therefore devise our administrative processes with that in mind.”<sup>94</sup> In light of all this, it is obvious that whereas the command system is the Guardian's natural, but not exclusive, weapon, the more-limited-in-scope permit and voucher are the Technician's.<sup>95</sup>

Third, the world of the Technician is a world of hierarchies and of mass production. It is a Durkheimian world of specialization<sup>96</sup> in which regulators are clearly a part of “hierarchically structured organizations.”<sup>97</sup> Correspondingly, it is held that Technician-regulators should be “confine[d] . . . to a formal procedure.”<sup>98</sup> Such procedures, Gerald Henderson noted in his 1924 study of the Federal Trade Commission, “may indeed at times clip the wings of genius, but . . . will serve to create conditions under which average men are more likely to arrive at just results.”<sup>99</sup>

The Technician is thus projected to be a professional, a career regulator, whose ken of responsibility is relatively limited. Yet, although an expert, this regulator who is neatly situated within a bureaucratic organization may very well be under a variety of “external” (i.e., non-professional, possibly “political”) sources of influence: notably by politically-appointed Guardian-commissioners, if not directly

93. LANDIS, *supra* note 21, at 23.

94. *Id.* at 57. See also George Nebolsine, *Review*, 48 YALE L.J. 929, 930 (1939) (reviewing LANDIS, *THE ADMINISTRATIVE PROCESS*, *supra* note 21) (“[O]ur administrative agencies, in the long run, will be operated by people of average ability.”).

95. See *infra* Section IV.C., where I provide examples of Technician-managed permit-granting authority.

96. See EMIL DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (W.D. Halls trans., 1984); ALFRED D. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 377-454 (1977).

97. Barron & Kagan, *supra* note 59, at 234-35. See also THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* 179 (1991).

98. GERARD C. HENDERSON, *THE FEDERAL TRADE COMMISSION* 328 (1924). No wonder, then, that when discussing this prototype, scholars often refer to administrators as “employees” or “staff.” See, e.g., *supra* text accompanying note 87.

99. HENDERSON, *supra* note 98, at 328.

by the President.<sup>100</sup> Even so, tension between different levels of the organization may be common—inter alia, due to professionalism of (or assertions thereof by) mid/low-level regulators.<sup>101</sup> “Career agency staff,” one account notes, “as a rule, are [*sic*] (proudly) resistant to broad political influence . . . .”<sup>102</sup> Under these circumstances, the potential for explosion is evident. We shall return to this subject below.<sup>103</sup>

### III. AXES OF ANALYSIS: INFORMATION, LEGITIMACY, POWER

This Part will critically examine several features of the types that their exposés in Part II bring to the fore. The first section questions regulators’ ability to process *information*, given the foundational role information has in any decision-making setting. The second section touches upon the sensitive issue of regulation’s affinity to *politics*. The following consideration, *power*, introduces to the discussion a Foucauldian perspective on public regulation, which is often missing in the legal literature. The third section goes after a perennial concern in the American literature on regulation, *legitimacy*. Finally, I briefly mention the *institutional framework* within which regulation is conducted according to each type in order to emphasize a prevalent, unfortunate lacuna in the legal literature that has been generally turning a cold shoulder to a positive examination of the realities of actual administration.<sup>104</sup>

I single out these axes of analysis because the literature has identified them as major reasons for concern in the operation of agencies. By including literature that grapples with these subjects I deliberately turn “problems” associated with the prototypes into an integral part of their definitions. Moreover, as the following discussion will demonstrate, these axes cut to the core of—and work out differently

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100. According to advocates of the “presidential control” model of legitimacy of administrative agencies, their submission to the control of the President—that is, the democratically elected official most responsive to the people (as the President is *nationally* accountable)—renders their operation legitimate. See Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985). Note that according to the presidential control model of regulation, the President is *encouraged* to “politically” direct non-independent agencies to ensure political accountability. For an analysis of the literature detailing this model, see Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 485-515 (2003). For other models of legitimacy, see *id.* at 469-91; see generally Stewart, *Reformation*, *supra* note 76, and Frug, *supra* note 19.

101. See *infra* text accompanying notes 204-208 & 295-298 (discussing professionalism’s tendency to stand in the way of organizational integration).

102. Barron & Kagan, *supra* note 59, at 242.

103. See *infra* Section III.E.

104. See *supra* note 22.

for—each type. They therefore showcase the diversity of the types (see *Table 2*, below).<sup>105</sup>

#### A. *The Problem of Information*

Information has always been key to the success of the regulatory enterprise. However, it has also become evident that processes of gathering, processing, and disseminating information are costly, and therefore often incomplete, and prone to biases and other mishandlings.<sup>106</sup> Hence, information, once thought to be a blessing, has become a problem to be reckoned with, especially when an information-intensive operation such as public regulation is involved.

Regulation requires information—a great deal of information—to be rational and have an impact.<sup>107</sup> However, information is always limited and expensive. For that reason alone, Herbert Simon reasoned in 1957 that as individuals we cannot reach “any high degree of rationality.”<sup>108</sup> Taking a similar approach, Charles Lindblom made the influential distinction between the “Root” (i.e., synoptic) and “Branch” (i.e., partial and incremental) analyses of possible policies.<sup>109</sup> Lindblom argues that the former methodology is utterly impractical, holding that regulatory bodies can (and actually do) only operate under the precepts of the incremental methodology.<sup>110</sup> Reverting to Adams’s and Landis’s

105. Note further that these theoretical considerations cover key items in the syllabi of three central “schools” of regulation studies: Idealist, Positive, and Critical. See Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, 6 J.L. ECON. & ORG. 267 (1990).

106. See generally Cass Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 626-29 (1999).

107. See Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 254 (1987) (“[D]ecisions depend on the information that underpins them and on the means for relating that information to decisions that are permissible according to the strictures of administrative law.”). See generally Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 299 (1983).

108. HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION* 79 (2d ed. 1957). See also, e.g., Gifford, *supra* note 107, at 316; Richard B. Stewart, *Organizational Jurisprudence*, 101 HARV. L. REV. 371, 376, 379 (1987) [hereinafter Stewart, *Organizational Jurisprudence*] (reviewing MEIR DAN-COHEN, *RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY* (1986); BREYER, *supra* note 21, at 9 (“In carrying out [risk assessment] activities, . . . regulators often find that they simply lack critically important scientific or empirical data . . .”), 42-48.

109. See Charles E. Lindblom, *The Science of ‘Muddling Through,’* 19 PUB. ADMIN. REV. 79, 80 (1959) [hereinafter Lindblom, *Muddling Through*]; Charles E. Lindblom, *Still Muddling, Not Yet Through*, 39 PUB. ADMIN. REV. 517 (1979). For an application of Lindblom’s concepts in the analysis of administrative law, see Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).

110. Lindblom, *Muddling Through,’* *supra* note 109, at 80.

precepts, it seems that somehow the Facilitator is to make possible public synoptic discussion and that the Guardian's is also the synoptic method; the Technician's is the incremental methodology.

But scarcity is only one problem associated with information. For it turns out that even where information *is* readily available, processes of decisionmaking that depend on it are in peril. At least partially spurred by the path-breaking work of Amos Tversky and Daniel Kahneman, scholars have begun to question the dicta that abundant information is always good and public deliberation even more so.<sup>111</sup> In Tversky and Kahneman, "the imperfections of human perception and decision" occupy central stage.<sup>112</sup> They, along with other behavioral social scientists, point at common human cognitive fallacies bearing on our understanding of information, notably that "[w]e simplify radically."<sup>113</sup> To be sure, human cognitive limitations, which are limits on human rationality, naturally apply to regulators along with their clientele.<sup>114</sup>

Particularly troubling from Adams's point-of-view is behavioral social scientists' finding that deliberators are easily manipulated, by, for example, careful framing of problems.<sup>115</sup> Moreover, abundant information may even be counter-productive because the more information one gets, the harder it is to filter out what really matters. "With respect to information," notes Cass Sunstein, "less may be more."<sup>116</sup> Various studies have also argued that quite often the public shows no interest in and/or cannot understand available technical information.<sup>117</sup>

While detrimental to all types of regulators (Technician included), findings such as these are particularly damaging to any Adams-style

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111. See, e.g., Cass Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000).

112. Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 453 (1981).

113. BREYER, *supra* note 21, at 35.

114. Such limitations, as they affected organizational behavior, have been noted already half a century ago by leading political scientists. See notably the classic JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* (1958), e.g., at pages 190 and 203 *ff.*

115. See generally the helpful survey offered in Carol A. Heimer, *Social Structure, Psychology, and the Estimation of Risk*, 14 ANN. REV. SOC. 491 (1988); Cass Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962 (2005).

116. Sunstein, *Informational Regulation*, *supra* note 106, at 627.

117. See *id.* ("People have a limited ability to process information."). See also Joel Yellin, *Science, Technology, and Administrative Government: Institutional Designs for Environmental Decisionmaking*, 92 YALE L.J. 1300, 1305 (1983). Cf. Henry R. Seager, *The New Anti-Trust Acts*, 30 POL. SCI. Q. 448, 461-62 (1915).

deliberative model of regulation (e.g., civic republicanism), since they imply that constructive public deliberation is quite hard to come by.<sup>118</sup>

## B. *Administration and Politics*

### 1. The Public Interest (and the Public Choice)

As a prelude to the issue of politics and regulation, I would like now to address a closely related question that cuts across the tripartite typology. At issue is the chronic question of whose interests regulation actually serves (and/or should serve): those of potent interest groups, ad hoc stakeholders' coalitions, *or* those interests that are deemed to guarantee a generalized "public good."<sup>119</sup>

To illustrate, according to civic republican ideas,<sup>120</sup> agency-orchestrated administrative processes have the potential to transform members of the community through a deliberative public discourse where parties' opinions are freely expressed. Under such theories, relevant interest groups' participation is a must; regulation *is* the coordination of contentious public sentiments, as with any political

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118. See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1514 (1992) (stating under the civic republican model "government's primary responsibility is to enable the citizenry to deliberate about altering preferences and to reach consensus on the common good."). See generally Croley, *supra* note 22, at 76-86. For a critical assessments of the utility in participation and open deliberation in administrative processes, see Sunstein, *Group Judgments*, *supra* note 115, at 993 (noting, inter alia, "with group discussion, individual [cognitive] errors are usually propagated, not eliminated . . ."); BREYER, *supra* note 21, at 33-39, 80. More directly on the morality of participation, see Allen Buchanan, *Political Legitimacy and Democracy*, 112 ETHICS 689 (2002); compare Stewart, *Organizational Jurisprudence*, *supra* note 108, at 381 ("Participation in group deliberation and decisionmaking can have a constitutive function . . . [but it] can also serve as a good in itself.") with Adler, *Beyond Efficiency*, *supra* note 14, at 267-89.

119. The "public good" may be formulated in terms of economic efficiency. See Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 GEO. L.J. 2167, 2173 (2000) ("[R]isk regulation today has increasingly assumed the form of risk-benefit optimization."). As rightly noted by Howard Latin, various commentators use "efficiency" quite differently in the context of environmental regulation. See Latin, *supra* note 1, at 1271 n.19, 1291-92. For a historical analysis of the various meanings of the concept of the "common good/the public interest" acquired since the turn of the twentieth century, see DANIEL T. RODGERS, *CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE* 176-211 (1987).

120. See *supra* note 118.

process,<sup>121</sup> and the public interest is that of the *participating* public. This position is standard in the more recent Facilitator literature.<sup>122</sup>

On the other hand, according to the Guardian prototype, the regulator should approximate the overall interest of the general public—as she herself defines it—rather than simply the interests of those few groups participating in the administrative process. This position falls in line with Progressive-Era understanding of the term “public interest,” which symbolized an idealized, synergetic, and unified political community.<sup>123</sup> This seems to be the right place to note that the public choice literature has been particularly influential in challenging this benign perception of the public regulator laboring for *the* public interest. Diverse as they are, public choice theorists generally proceed under the understanding that, while conducting public affairs, bureaucrats—and other public officials—normally focus on the maximization of their own welfare.<sup>124</sup> Viewed through this theoretical prism, the Guardian prototype is premised on a “romantic” perception of public regulation.<sup>125</sup>

## 2. On Politics- and Policy-Making

The starting point for the investigation of the relationship between regulation and politics is the Progressive Era’s suspicion of state and national politics. Progressives fulminated against what they thought was the dire state of American politics.<sup>126</sup> To many of them, politics was a

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121. See Patricia Wald, *Negotiation of Environmental Disputes: A New Role for Courts?*, 10 COLUM. J. ENVTL. L. 1, 23 (1985) (stating interest group models of the administrative process “views the regulatory process in essentially political terms . . .”).

122. This approach is compatible with Daniel Rodgers’s observation that during the first decades of the twentieth century, scholars began to think of society as a collection of fragments and shards, an arena where conflicting interests vie for dominance. DANIEL RODGERS, *supra* note 119, at 209-11. By the mid-1930s, he reports, “[t]he integrative abstractions of the nineteenth century were stuffed into the closet. What endured was Interests [*sic*].” *Id.* at 211.

123. See *id.* at 179-187. *Cf.* note 120. Finally, I should note that the Technician is agnostic with regard to the question at issue. She is typically expected to serve the interests identified by the socially-authorized decisionmakers, whoever they may be.

124. For general surveys on the public choice literature, see, for example, DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991); Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary Administrative State*, 96 MICH. L. REV. 1746 (1998); André Blais & Stéphane Dion, *Are Bureaucrats Budget Maximizers? The Niskanen Model & Its Critics*, 22 POLITY 655 (1990). *But see also* James Wilson, *supra* note 82, at 361-63, 387-94; Croley, *supra* note 22, at 41-56.

125. JAMES M. BUCHANAN, *PUBLIC CHOICE: THE ORIGINS AND DEVELOPMENT OF A RESEARCH PROGRAM—WORKING PAPER 8* (2003), available at <http://www.gmu.edu/centers/publicchoice/pdf%20links/Booklet.pdf>. (“Public choice may be summarized by the three-word description ‘politics without romance.’”).

126. For the Progressive “movement,” see sources cited *supra* note 24.



source of evil and the political process erratic and irrational, even whimsical.<sup>127</sup> They did not heed, and even denied, politics' generative role in the American state.<sup>128</sup> As many Progressives saw it, American politics was steeped in all sorts of biases that marred public affairs. Their mission was to purge the American government from the evils of politics.<sup>129</sup> Part of the solution was the introduction of a non-political administrative regulation to define and attend to the "true" public interest.<sup>130</sup> As the Supreme Court put it in 1910, administrative agencies were accordingly required to exercise their powers "in the coldest neutrality."<sup>131</sup>

These convictions are not turn-of-the-twentieth-century peculiarities. For example, Justice Stephen Breyer has recently reasoned that "not every risk-related matter need become a public issue. A depoliticized regulatory process might produce better results . . . ." <sup>132</sup> True, an underlying apolitical ethos colors past and present pronouncements of the Guardian in particular. For that reason, and due to its corresponding concept of the public interest and position of leadership, the Guardian type, in particular, has been exposed to repeated attacks on that score.<sup>133</sup>

It is surely difficult to accept a straightforward refusal to acknowledge the role played by politics in the shaping of public policies.<sup>134</sup> As we shall now see, Progressives who advance the

127. See, e.g., MARTIN J. SCHIESL, *THE POLITICS OF EFFICIENCY* (1977) 73-76.

128. For this, Progressives incurred harsh criticism. See notably JANE ADDAMS, *DEMOCRACY AND SOCIAL ETHICS* (1902).

129. See generally STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920* 1-162 (1982).

130. Thus, for example, according to Joseph Eastman, "[A]part from statutory direction, [the ICC] must be as removed from influence by the President, Congress, or any political agency as the Supreme Court itself." BERNSTEIN, *supra* note 21, at 62 (quoting FEDERAL COORDINATOR OF TRANSPORTATION, SECOND REPORT, S. DOC. NO. 152, at 37 (1934)). Eastman was a legendary ICC Commissioner in the first half of the twentieth century. See, e.g., Carl B. Swisher, *Joseph B. Eastman—Public Servant*, 5 PUB. ADMIN. REV. 34 (1945).

131. *ICC v. Chicago, R.I. & P. Ry. Co.*, 218 U.S. 88, 102 (1910).

132. BREYER, *supra* note 21, at 55-56. Sharing this view, Landis had noted half a century before Breyer, "In seeking to make [administrative commissions] different to a degree from the ordinary political agency, the hope seems to have been that the policies that they have been authorized to pursue will survive the ordinary vicissitudes of politics." Landis, *supra* note 83, at 475-76. Tellingly, according to Landis, policies are distant from politics only "to a degree." *Id.* Similarly, Justice Breyer opined that regulators "must have a degree of political insulation . . . ." BREYER, *supra* note 21, at 60 (emphasis omitted).

133. The just-mentioned public-choice literature obviously shares some of the assumptions informing such attacks. See sources mentioned *supra* note 1.

134. See, e.g., Louis L. Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U. L. REV. 1273, 1283 (1955) [hereinafter Jaffe, *Basic Issues*] ("Most rule-making involves the weighing of a complex of

Guardian prototype give a particular, quite minimalist definition to “politics,” attempting to eschew the issue: for example, Herbert Croly, who holds that the Guardian administrator is “a promoter and propagandist”<sup>135</sup> of social policies, argues that due to her steadfast commitment to the public interest, the regulator is “lifted out of the realm of partisan and factious political controversy” while putting to force a certain social policy.<sup>136</sup> This outlook displays a restricted grasp of “politics” and an idealized view of the public interest. According to this approach, the category of “the political” seems to be merely a manifest commitment to one’s particular *party* views, rather than, say, “the exercise of discretion in channeling the coercive powers of the state in one direction rather than another.”<sup>137</sup>

Complementing the Progressive description, it is maintained that *Congress* should be the arena in which “party policies” are debated.<sup>138</sup> Thus, for example, according to Landis, the Legislature’s function is to process “those postulates [that] have . . . enlisted the loyalties and faiths of classes of people. . . .”<sup>139</sup> It should first intercept the popular will and then synthesize and transform it into a coherent legislative edict, having purged it from residues of politics. By so doing, Congress confers on the ensuing administrative action “that finality and moral sanction necessary for enforcement. . . .”<sup>140</sup> This remark alludes to the belief that keeping politics at arm’s length would render regulation legitimate. Concerns of the lack of legitimacy clearly dominate the whole politics-regulation debate. (Shortly I will address directly the issue of legitimacy.)

To conclude, Progressive thinkers and their sympathizers argue that administrative discretion could be exercised objectively, that is,

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considerations, many of them of the kind we call political . . . .”); Charles A. Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1235 (1966).

135. CROLY, *supra* note 54, at 361.

136. *Id.* See *similarly* Eastman, *supra* note 49, at 101 (stating commissions “are clearly nonpartisan in their makeup, and party policies do not enter into their activities. . . .”).

137. Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 861 (2001). Progressives’ view of the political resembles “positive scholars” use of the term, as identified by Professor Friedman in the context discussed in Friedman, *supra* note 22, at 271. Michel Foucault has expanded our horizons in speaking of political technology, bio-power, and governmentality. See Michel Foucault, *Governmentality*, in THE FOUCAULT EFFECT 87-104 (Graham Burchell et al. eds., 1991) [hereinafter Foucault, *Governmentality*]. See generally HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 133-42 (2d. ed. 1983), and SARA MILLS, DISCOURSE 26-29, 71 (2d ed. 2004).

138. See *supra* note 136.

139. LANDIS, *supra* note 21, at 59.

140. *Id.* at 60.

apolitically. Robert Cooper, for example, warned in 1937 against “confusing partiality and bias with the exercise of administrative discretion.”<sup>141</sup> The distinction made in this literature is between processes whereby social power-struggles are played out—politics—and the meticulous systematic process of materializing social goals—policy.

Such ambiguous positions, which hold that the regulator is inescapably involved in the making of divisive public policies, but not in “politics,” are most prominently encoded in the design of the Guardian.<sup>142</sup> Yet, many reject the suggestion that policymaking is not “politics,” even holding the whole administrative process, from top to bottom, to be political.<sup>143</sup> Critics submit, particularly in connection with the Guardian, “Regulation is and always will be an intensely political process.”<sup>144</sup>

Detractors go further and point out that the political players—above all, the President and members of Congress—may leave clear fingerprints of political intervention in commission-made regulation.<sup>145</sup> It is noted, for example, that the President might try to impact the agency, not only by direct means, such as appointing favorable commissioners,<sup>146</sup> but also through an array of other formal and informal ways. Those ways include strategically approving or disapproving commissions’ appropriation requests, recommending the commission to implement a particular policy, and issuing Executive Orders.<sup>147</sup>

141. Robert M. Cooper, *The Proposed United States Administrative Court, Part II*, 35 MICH. L. REV. 565, 574 (1937).

142. See *supra* text accompanying note 132.

143. See, e.g., Caldwell, *supra* note 92, at 971 (stating Agencies are “*de facto* political entities.”); E. P. HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST 138 (1936) (“Administrators cannot be given the responsibilities of statesmen without incurring likewise the tribulations of politicians.”); and Louis Jaffe, *The Federal Regulatory Agencies in Perspective: Administrative Limitations in Political Setting*, 11 B.C. INDUS. & COMMISSION. L. REV. 565 (1970).

144. BERNSTEIN, *supra* note 21, at 183. See also *id.* at 161 (“Only in a totalitarian society is the general welfare a matter of private, non political concern.”). These propositions are naturally at variance with idea of independent agencies (i.e., federal agencies, such as the EPA and the FTC, whose heads the President could remove only for a cause). See, e.g., Sunstein, *supra* note 22, at 426 (“[T]he fact is that independent agencies are not independent at all. Indeed, such agencies are highly responsive to shifts in political opinion . . .”).

145. See, e.g., McCubbins et al., *supra* note 107, at 274 (stating, “Thus, in the end, the politics of the bureaucracy will mirror the politics surrounding Congress and the president.”).

146. This is not a novel revelation, of course. See, e.g., BERNSTEIN, *supra* note 21, at 106-07. See similarly Report of the Special Committee of Administrative Law, 57 Annual Report of the ABA 539, 546 (1934) (“[A]ppointments to administrative tribunals are all too generally classed as patronage . . .”).

147. For these and other avenues of presidential influence on commissions, see BERNSTEIN, *supra* note 21, at 106, 131-34, and Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

Congress, too, may wield considerable power on commissions through legislation, the appropriation process, Congressional investigation, and informal contacts between members of Congress and commissioners.<sup>148</sup>

The last chapter in the saga is not reassuring. Regulators' dependencies on the political branches may put them in the mercy of the regulated industry, for, as Samuel Huntington explains, "[i]f an agency is to be viable," it has to "maintain a net preponderance of political support over political opposition."<sup>149</sup> Such support could come either directly from the political branches or through the agency clientele, whether that be the regulated industry or a public interest group. This dynamic brings up, of course, the loaded topic of "capture."<sup>150</sup> In any event, "[w]e may take it as the key feature of any constituency that it can cripple or kill an agency."<sup>151</sup> Many find the emerging picture very disconcerting. Important for our purpose, this picture surely raises a series of challenges for the Guardian type in particular.

Lastly, maybe the Technician, with her limited scope of discretion, could fare better in the regulation-politics debate? Indeed, several leading proponents of the Technician type have argued that "public administration is capable of becoming a 'value-free' science in its own right . . . ."<sup>152</sup> They strongly believed that such a science holds the possibility of "enthroning intelligence where hatred, prejudice and passion now hold sway[.]"<sup>153</sup> The "science of administration," a late-

148. BERNSTEIN, *supra* note 21, at 131-37, 151. For a concrete analysis, see ROBERT A. KATZMANN, *REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY* 181-87 (1980).

149. Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 *YALE L.J.* 467, 470 (1952).

150. Theories of agency "capture" were put forward early on by political scientists. See, e.g., *id.*; BERNSTEIN, *supra* note 21. For a survey on the (up-to-1975) literature devoted to capture, see Thomas K. McCraw, *Regulation in America: A Review Article*, 49 *BUS. HIST. REV.* 159 (1975). Even defenders of the administrative branch had to concede to some of these condemnations. Agency defenders would retort, however, that agencies were "ossified" because of excessive review of their decisions by courts, Congress, and the Executive branch, and because of debilitating inadequate funding and staffing. See generally MCGARITY, *supra* note 97. The EPA is regularly given as a prime example of such predicaments. See William Ruckelshaus, *Stopping the Pendulum*, in *LAW AND THE ENVIRONMENT: A MULTIDISCIPLINARY READER* 397 (Robert V. Percival & Dorothy C. Alevizanos eds., 1997) (a reprint from *ENVTL. FORUM* 25 (Nov./Dec. 1995) (the author served twice as the EPA Administrator)); Lazarus, *supra* note 42, at 328-58. See Richard J. Pierce, Jr., *Unruly Judicial Review of Rulemaking*, 5 *NAT. RESOURCES & ENV'T* 23 (1990) (with respect to judicial review).

151. MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 54 (1985).

152. Nicholas Henry, *The Emergence of Public Administration as a Field of Study*, A CENTENNIAL HISTORY OF THE AMERICAN ADMINISTRATIVE STATE 37, 41-42 (Ralph C. Chandler ed., 1987) [hereinafter CENTENNIAL HISTORY].

153. Charles E. Merriam, *Political Research*, 16 *AM. POL. SCI. REV.* 315, 321 (1922).

nineteenth-century political science discipline dedicated to a scientific study of the modern phenomenon of public administrations, was founded on these postulates.<sup>154</sup> This school held that there was, and there should have been, regulatory activity that was strictly not political.

Hence we find Professor Woodrow Wilson, who is regarded “the Founding Father of public administration as a discipline,”<sup>155</sup> insisting, “[A]dministration lies outside the proper sphere of *politics* . . . . Although politics sets the tasks for administration, it should not be suffered to manipulate its offices.”<sup>156</sup> As is often the case, description and prescription are frequently wedded in the Technician literature, which holds that popular will, values, interests, politics, or any comparable term (should) remain outside the administrative machinery. Subjective desires are thus kept away from the administrative process, which, in turn, is allowed to run its objective course.<sup>157</sup> This train of thought leads to a sharply bifurcated, or even multi-layered, conception of the administrative process, where politics is made at the outer rim of the organization (normally by Guardians or their elected superiors) while Technicians handle essentially mechanical tasks at the lowest rungs of the hierarchy.<sup>158</sup> As we shall now see, it is doubtful whether this presentation accurately conveys the Technicians’ contribution to

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154. See PAPERS ON THE SCIENCE OF ADMINISTRATION (Luther Gulick & L. Urwick eds., 1937). See also, e.g., Ernest Freund, *The Law of the Administration in America*, 9 POL. SCI. Q. 403 (1894); FRANK J. GOODNOW, POLITICS AND ADMINISTRATION (1900) [hereinafter GOODNOW, POLITICS AND ADMINISTRATION]; FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES (1905). For the history of the science of administration, see, for example, Wallace S. Sayre, *Premises of Public Administration: Past and Emerging*, 18 PUB. ADMIN. REV. 102, (1958); Paul P. Van Riper, *The American Administrative State: Wilson and the Founders*, in CENTENNIAL HISTORY, *supra* note 152, at 3.

155. DWIGHT WALDO, THE STUDY OF PUBLIC ADMINISTRATION 20 (1955).

156. Woodrow Wilson, *supra* note 21, at 210. See also GOODNOW, POLITICS AND ADMINISTRATION, *supra* note 154, at 85 (“The fact is, then, that there is a large part of administration which is unconnected with politics, which should therefore be relieved very largely, if not altogether, from the control of political bodies.”). The politics-administration dichotomy was widely challenged by political scientists after the Second World War. See generally Henry, CENTENNIAL HISTORY, *supra* note 149, at 40-48; Dwight Waldo, *Politics and Administration: On Thinking about a Complex Relationship*, in CENTENNIAL HISTORY, *supra* note 152, at 89, 92-94. Finally, the alleged dichotomy is helpful in enhancing agencies’ (at least sociological) legitimacy. Cf. John C. Yoo, *In Defense of the Court’s Legitimacy*, 68 U. CHI. L. REV. 775, 782 (2001).

157. This approach is not a thing of the past. Lazarus argued in 1991, as part of his attempt to “dispel[] the myth of agency capture,” Lazarus, *supra* note 42, at 364, “The extent to which an agency employee’s ideology affects her behavior within the agency is also far from clear.” Lazarus, *supra* note 42, at 366 n.345. But see Frug, *supra* note 19, at 1312-17.

158. See, e.g., JAMES LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 11 (1960) (lamenting the “deterioration in the quality of . . . personnel, . . . both at the top level and throughout the staff.”). See also Jaffe, *supra* note 134, at 1283.

processes of regulation. One thing surely missing from the picture is power, a concept not easily ignored when public regulation is at issue.

### C. *Enters Power*

Indeed, at first blush the Technician bureaucrat-regulator seems to exert the least coercive power out of the three types: she has the least discretion—she “simply” executes the letter of the law—and hers is only “technical,” strictly professional knowledge.<sup>159</sup> Furthermore, the bureaucratic structure within which she operates and without which her function is meaningless also constrains this regulator’s sphere of operation.<sup>160</sup> Power, it seems, is a non-issue when in the hands of a Technician.

Yet, as Max Weber, the great theoretician and critic of modern bureaucracy, noted, “Bureaucratic administration means fundamentally domination through knowledge.”<sup>161</sup> One form of such domination was explored by Michel Foucault’s original concept of “disciplinary power”:<sup>162</sup> a form of finely-cut, yet potent power, which is diffused throughout the body politic, inter alia, by mechanisms of surveillance and supervision.<sup>163</sup> A central theme running through Foucault’s manifold work is the intimate relationship between expanding practices of knowledge-acquisition and the entrenchment and likewise capillary

159. As we shall see, these considerations bear heavily on the Technician’s main sources of legitimacy. *See infra* note 195.

160. The abovementioned issue of the “public interest” supports this impression. Unlike the other two types, this archetype brackets off the question of who should command the administrative organization. *Cf. supra* text accompanying notes 122-123 (The Guardian’s and Facilitator’s perception of the public interest). The Technician’s usefulness emanates from her skillful execution of other people’s policies, whatever they may be and whoever may make them: the public, an elected assembly, or the President.

161. 1 WEBER, *supra* note 19, at 225.

162. I mention Foucault at this point not to provide a detailed account of his conception of power—I most certainly do not—but because, to my mind, the extant legal literature on administrative regulation is not attentive enough to regulation’s dimensions of “power,” which are crucial for full understanding of the realities of regulation. My discussion may suggest the potential in attending to these dimensions. For a short introduction to Foucault “in the law,” see Hugh Baxter, *Bringing Foucault into Law and Law into Foucault*, 449 STAN. L. REV. 449 (1996). On Foucault’s concept of “power,” see generally Dany Lacombe, *Reforming Foucault, A Critique of the Social Control Thesis*, 47 BRIT. J. SOC. 332, 337-348 (1996); DREYFUS & RABINOW, *supra* note 137, at 184-204; DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 168-75 (1990). For a critique of Foucault’s concept of power, see LUKES, *supra* note 20, at 88-107.

163. See Michel Foucault, *The Subject and Power*, in DREYFUS & RABINOW, *supra* note 137, at 208-26, where Foucault explains that a key characteristic of disciplinary power is its double (objectifying and subjectifying) movement enveloping the individual, treated consequently as a type.

expansion of power in the West.<sup>164</sup> Foucault explored processes whereby information concerning members of society is collected, aggregated, and statistically processed to produce a generic profile of a type, e.g., the lunatic or the criminal, to be treated in a “professional” manner.<sup>165</sup>

There is no gainsay, certainly after Foucault, that specialized knowledge, which is the pride and joy of Technicians both in and outside the bureaucracy, has a troubling, even violent genealogy.<sup>166</sup> This violence is reenacted, even reinforced, whenever such power is put to use. Add to all that common biases in the handling of information—even by professionals<sup>167</sup>—and mere “technical” power no longer appears innocent at all.

Regulation, as a form of social control, is bound to raise acute problems of power also with regard to the other types of regulators. What other Foucauldian concepts of power best capture the essence of these other types?

The concept of “security,” as used in the Foucauldian terminology, is the modality of power best suited to the Facilitator. Mechanisms of “security” relate to the modern, liberal state’s growing interest in the governed as an aggregate of people composing a *population*; such mechanisms are added to, rather than replace, techniques of discipline.<sup>168</sup> According to Foucault, these are “mechanisms or modes of state intervention whose function is to assure the security of those natural phenomena, economic processes and the intrinsic processes of population . . . .”<sup>169</sup> The state’s focus on population and the individuals as part of a species is a corner stone in the emergence of “governmentality,” a neologism coined by Foucault to describe various,

164. For a classic formulation, see, for example, MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 27 (Alan Sheridan trans., 1977) (“[P]ower and knowledge directly imply one another . . . there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.”). On power/knowledge, see, for example, DREYFUS & RABINOW, *supra* note 137, at 188-97.

165. See Robert Castel, *From Dangerousness to Risk*, in *THE FOUCAULT EFFECT*, *supra* note 135, at 281-96.

166. See, e.g., Baxter, *supra* note 162, at 454-55.

167. See *supra* text accompanying note 112.

168. See Foucault, *Governmentality*, *supra* note 137, at 102-04.

169. Colin Gordon, *Governmental Rationality: An Introduction*, in *THE FOUCAULT EFFECT*, *supra* note 137, at 19 (quoting from an unpublished lecture of Foucault, delivered in the Collège de France on April 5, 1978).

interlocking strategies of (what, to Foucault's chagrin, might be called "private" and "public") government.<sup>170</sup>

"Security," as Foucault uses the term, may be understood as the delegation of regulatory authority to private organizations so that they may discipline their clientele in the direction desirable to the state. Properly understood, this move is best exemplified with *laissez faire*. As Foucauldians see it, a regime of *laissez faire* should not be regarded as a state's abdication of interest in its population. Quite the contrary, the modern liberal state is distinguished for advancing particularly sophisticated techniques for the alignment of individuals' wants with the state's interest.<sup>171</sup> This is achieved, for example, when the state contracts out—delegates—regulatory powers to dominant economic actors, such as factory owners, with the expectation that they will not only be in charge of their employees' work, but also their social ethics.<sup>172</sup> As we have seen, this is a staple strategy of the Facilitator prototype.

To complete the discussion, I turn to the Guardian type, which, put in Foucauldian terms, is typified by "pastoral power."<sup>173</sup> A distinct figure of a pastor stands at the center of this form of power: the shepherd who, *qua* pastor, takes care of his flock as a whole while paying heed to "each and every" member of the flock.<sup>174</sup> For "[n]ot only must he know where good pastures are, the seasons' laws and the order of things; he must know each one's particular needs."<sup>175</sup> The other side of the coin is sheep's "permanent[]" submission to the pastor.<sup>176</sup> This submission runs deep as the shepherd's individual treatment entails the shepherd's penetrating, intimate knowledge of each sheep.

There is a direct line stretching from early Christian theories of pastoral governance and seventeenth century doctrine of "police."<sup>177</sup> Notice, first, that "police" stands here for something quite different from our common understanding of the term today. It is not about a specific

170. See Foucault, *Governmentality*, *supra* note 137; David Garland, *Governmentality and the Problem of Crime: Foucault, Criminology, Sociology*, 1 THEORETICAL CRIMINOLOGY 173 (1997).

171. Garland, *supra* note 170, at 175 ("Government is not . . . the suppression of individual subjectivity, but rather the cultivation of that subjectivity in specific forms, aligned to specific governmental aims.").

172. See Gordon, *supra* note 169, at 26 ("Rather than seek to enforce order by encyclopaedic decree, the French government confers the *de facto* force of public law on the private jurisdiction of the entrepreneur.").

173. See generally Gordon, *supra* note 165.

174. Michel Foucault, *Politics and Reason*, in MICHEL FOUCAULT: POLITICS, PHILOSOPHY, CULTURE 57, 67 (Lawrence D. Krizman ed., 1988) [hereinafter Foucault, *Politics and Reason*].

175. *Id.* at 62.

176. *Id.* at 69.

177. Gordon, *supra* note 169, at 8-12.



state mechanism or institution but rather a pervasive form of state operation which is informed by a particular disposition towards “men and things.”<sup>178</sup> Foucault explains that the aim of this power is to ensure and promote the survival and prosperity of the state by fostering the well-being of its citizens. It “foster[s] working and trading relations between men,” for example, but it does much more than that.<sup>179</sup> Because “life is the object of the police,”<sup>180</sup> it “sees to everything.”<sup>181</sup> Simply put, pastoral (and police) power is about command and control. According to Foucault in *The History of Sexuality*, it necessarily involves “comprehensive regulations.”<sup>182</sup> For that reason, pastoral power is most readily associated with—but not limited to—the Guardian type.

#### D. *Questions of Legitimacy*

Be their corresponding powers as they may, the undeniable fact that *all* regulators exercise some kind of power frequently looms large in public debates in the United States. After all, suspicion of state power is a big deal in this country. “In contrast to most of the rest of the world (including most democracies),” wrote Peter Schuck in *Foundations of Administrative Law* in 2004, “Americans have never been comfortable with the administrative state and have therefore always demanded that it be justified afresh.”<sup>183</sup>

Americans have been grappling with the question of the legitimacy of administrative commissions at least since the Progressive Era.<sup>184</sup>

178. *Id.* at 10-14.

179. Foucault, *Politics and Reason*, *supra* note 174, at 79.

180. *Id.* at 81.

181. *Id.* at 80. Elsewhere Foucault speaks of “Bio-Power,” which concerns the regulation of the human body for social ends (“*the discipline: an anatomo-politics of the human body*”), and of the “species body” (“*regulatory control: a bio-politics of the population*”). See 1 MICHEL FOUCAULT, *HISTORY OF SEXUALITY* 139-45 (1990) [hereinafter FOUCAULT, *HISTORY OF SEXUALITY*]. As pointed out by David Garland, “police” seems to include elements of both types of regulation. Garland, *supra* note 170, at 206 n.5. I believe that the same holds for disciplinary power.

182. 1 FOUCAULT, *HISTORY OF SEXUALITY*, *supra* note 181, at 137.

183. PETER H. SCHUCK, *FOUNDATIONS OF ADMINISTRATIVE LAW* 7 (2d ed. 2004).

184. See Freeman, *supra* note 53, at 546 (“[A]dministrative law scholarship has organized itself largely around the need to defend the administrative state against accusations of illegitimacy . . . .”). See similarly Bressman, *supra* note 100, at 461-62; Sidney Shapiro, *Pragmatic Administrative Law*, *ISSUES IN LEGAL SCHOLARSHIP*, The Reformation of American Administrative Law (2005): Article 1, available at <http://www.bepress.com/ils/iss6/art1>, and Adler, *Justification, Legitimacy, and Administrative Governance*, *ISSUES IN LEGAL SCHOLARSHIP*, The Reformation of Administrative Law (2005): Article 3, available at <http://www.bepress.com/ils/iss6/art3> [hereinafter Adler, *Justification*].

Specifically, it is the exercise of discretion by “politically unresponsive administrators”<sup>185</sup> that requires legitimacy. Conceptual clarity is obviously important when issues of legitimacy are discussed. Yet, it is often missing, since “[w]e often speak of legitimacy as if it were a single, undifferentiated phenomenon, goal, or ideal,” Richard Fallon observed recently; he then went on to conclude, “It is not.”<sup>186</sup> This is remarkable, given the fact that legal scholars have written relentlessly about the legitimacy of the administrative agency/state/government.<sup>187</sup>

Useful in this respect is the tripartite division into legal, sociological, and moral legitimacy.<sup>188</sup> Briefly, legal legitimacy is concerned with the *lawfulness* of an administrative action.<sup>189</sup> Sociological legitimacy is rooted in constituents’ actual, potentially empirically-verified, *acceptance* of the action, which is motivated by neither self-interest nor habit nor tradition.<sup>190</sup> Moral legitimacy is dependent on its *moral credentials*, or “*respect worthiness*.”<sup>191</sup>

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185. *Indus. Union Dep’t v. Am. Petrol Inst.*, 448 U.S. 607, 686-87 (1980) (Rehnquist, J., concurring).

186. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1851 (2005). See also Yoo, *supra* note 156, at 776. (“Legitimacy is a word often used in our political debate, but seldom defined precisely.”).

187. For an influential critical survey, see Frug, *supra* note 19. See also Buchanan, *supra* note 118, at 691 (discussing the relations between the denominations “state” and “government” in the context of political legitimacy).

188. See Fallon, *supra* note 179, especially at 1790-1802, 1828. See generally Adler, *Justification*, *supra* note 184. To be sure, the three are “complexly interrelated in some cases.” Fallon, *supra* note 186, at 1791; see also Jack M. Balkin, *Legitimacy and the 2000 Election*, in BUSH V. GORE: THE QUESTION OF LEGITIMACY 214-18 (Bruce Ackerman ed., 2002).

189. Fallon, *supra* note 186, at 1794-95.

190. Max Weber is particularly responsible for the development of this category of *de facto*, or descriptive (sociological) legitimacy. See, e.g., 1 WEBER, *supra* note 19, at 212-15. For a critical analysis of Weber’s perception of various types of sociological legitimacy, see Craig Matheson, *Weber and the Classification of Forms of Legitimacy*, 38 BRIT. J. SOC. 199 (1987), and Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379.

191. Fallon, *supra* note 186, at 1796-1802, and Frank Michelman, *Ida’s Way: Constructing the Respect-Worthy Governmental System*, 72 FORDHAM L. REV. 345 (2003). It seems that administrative law scholars base their analysis of moral legitimacy on consent theory, which holds that political authority is legitimate if supported by the consent of those subject to its powers. See, e.g., Richard Stewart, *Reformation*, *supra* note 76, at 1672 (mentioning, in the context of administrative law, “contractarian political theory . . . under which consent is the only legitimate basis for the exercise of the coercive power of government.”). However, this view has been, and still is, under attack for various reasons. See Tom Christiano, *Authority*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2004), available at <http://plato.stanford.edu/entries/authority/>, which concludes that “neither consent nor tacit consent can stand alone as bases of political legitimacy.” This is not an esoteric view. See also, e.g., Adler, *Beyond Efficiency*, *supra* note 14, at 256-57; A. JOHN SIMMONS, *Justification and Legitimacy*, in JUSTIFICATION AND LEGITIMACY 122-49 (2001).

The Guardian provides a good illustration of this typology. This prototype envisages the regulator commanding an unruly industry, potentially—even paradigmatically—opposed to regulation. As a result, sociological legitimacy is typically not meant to be the foundational source of legitimacy for regulation by the Guardian prototype.<sup>192</sup> Rather, the moral and other (i.e., morally-neutral but potentially useful) merits of the Guardian's actions are thought to guarantee her legitimacy.<sup>193</sup> The Guardian's *raison d'être* is to bring about a positive outcome in the name of (her view of) the public interest. However, critics of the Guardian type argue that lack of constituents' consent to a state action in itself deprives the regulator of moral legitimacy,<sup>194</sup> even more so when such action is said to disproportionately benefit the regulatees/regulators/ruling political party. The question of *moral* legitimacy, put in terms of democratic deficit or otherwise, is therefore a real challenge in the case of the Guardian, whereas—to take a contrary example—a Facilitator who is not backed by *sociological* legitimacy is inconceivable. Indeed, sociological legitimacy is central in the latter case, as active, good-will participation of, and acceptance by, interested parties, are the Facilitators' primary sources of legitimacy.<sup>195</sup>

#### E. Institutional Framework

As we have repeatedly seen, regulators' leadership has a foundational role in the construction of the Guardian type. This trait

192. Still, it is certainly conducive to the success of the Guardian. But see SIMMONS, *supra* note 191, at 131-35, for a cogent argument for the validity of the division between moral and sociological legitimacy.

193. *See generally id.*

194. For sources on consent theories of legitimacy, *supra* note 191.

195. *See, e.g.*, Jody Freeman & Laura Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000). Lastly, it should be noted that the role of the Technician is dependent on sociological and legal legitimacy. First, the Technicians' authority oftentimes rests on acceptance of officeholders' reputed expertise or professionalism. In that sense, Technicians' legitimacy may be influenced by American society's shifting attitudes towards the natural sciences and the recognized professions—and the two are obviously connected. On public administration and professionalism, see, for example, WALDO, *supra* note 65, e.g., at 12, 20; and on professionalization in the United States, see PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* 47-60 (1988), and DANIEL W. ROSSIDES, *PROFESSIONS AND DISCIPLINES: FUNCTIONAL AND CONFLICT PERSPECTIVE* (1998). Second, as for legal legitimacy: the concept of legal legitimacy is associated with formalism. *See* Fallon, *supra* note 186, at 1801-02. There is an obvious connection between these two sources of legitimacy, as some versions of formalism are committed to the view of law as science and have strong affinity to perceptions of (legal) expertise and professionalism. *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 225 (1992).

raises a problem. It papers over the nitty-gritty operational aspects of administrative-processes and inculcates a bizarre image of a regulatory endeavor without an administrative apparatus. To take one example, Herbert Croly did not see the paradox in championing a robust model of the Guardian,<sup>196</sup> while unequivocally maintaining, “If the political experience of mankind has established anything, it has established the undesirability of ordinary bureaucratic government.”<sup>197</sup>

The image of public regulation without regulatory bureaucracy—a key theme in the Guardian and Facilitator types—panders to an entrenched aversion to bureaucracy that transcends party lines in the United States.<sup>198</sup> Faced with such negative sentiments towards bureaucracy, possibly even sharing them, progressive reformers had every interest in downplaying institutional aspects of regulation, at least when they were aware of them, if they were interested in advancing its legitimacy. However, as regulation continued, many observers<sup>199</sup> came to realize that portraying the regulator as a self-sufficient figure keeps major setbacks plaguing regulatory enterprises out of sight—to wit, as the aforementioned information problem. It also pushes aside the fact that even the Guardian regulator, like all other regulators, is dependant not only on external, often political, constituency for her survival<sup>200</sup> but also on *internal* cooperation.

Well over fifty years ago, commentators had already come to perceive organizations as in a constant struggle between various internal, centrifugal and centripetal forces. Abundant examples of divisive forces within organizations were recorded. It was generally observed that employees’ personal preferences might get in the way of the process of administration—often, as devised by the Guardian<sup>201</sup> (as noted, public-

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196. See *supra* text accompanying note 135.

197. See CROLY, *supra* note 54, at 351.

198. See, e.g., Ernest Freund, *Historical Survey*, in THE GROWTH OF AMERICAN ADMINISTRATIVE LAW 9, 17-18 (1923); Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 617 (1927); ROSCOE POUND, ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE, AND SIGNIFICANCE 35 (1942) (“Once established an absolute bureaucracy will not be easy to dethrone.”). See generally Ellis W. Hawley, *The New Deal State and the Anti-Bureaucratic Tradition*, in THE NEW DEAL AND ITS LEGACY: CRITIQUE AND REAPPRAISAL 77 (Robert Eden ed., 1989).

199. Including several former die-hard New Dealers. See Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105 (1954); Jaffe, *supra* note 2; LANDIS, *supra* note 158.

200. See *supra* text accompanying notes 145-50.

201. See SIMON, *supra* note 108, at 58 (“[The administrator] may (and usually will) have his own very definite set of personal values that he would like to see implemented by his administrative organization . . .”).

choice theorists in particular have taken this insight to heart). In 1958 James March and Herbert Simon stipulated that “individual members of an organization come to it with a prior structure of preferences—a personality, if you like—on the basis of which they make decisions while in the organization.”<sup>202</sup> March, Simon, and others also studied conflicts among individuals in the organization and among organizational units—each keenly fighting for its turf—that may impact employees’ output and their motivation to abide by their superior’s directives.<sup>203</sup>

Also noted were the disruptive tendencies of professionalization in the present context. “Professionalization implies specific formal training and thus substantial homogeneity of background. It implies formal regulation of job performance . . . [Therefore,] [t]o the extent that a job is professionalized, techniques and standards of performance are defined by the other members of the profession,” rather than by the organization in which the employee (regularly, a Technician) works.<sup>204</sup>

As the foregoing discussion suggests, at least in some cases, disciplining the Technician may prove more difficult than it seems. To begin with, from an organizational point of view, the Technician is often the Guardian’s unequal counterpart.<sup>205</sup> Tensions between the two may abound. Whereas the latter’s position of leadership would push her to strive for integration, the former’s intolerance for outside intrusion on her turf may push for a Balkanization of the organization. Professionalism and the attendant asymmetric information between the bureaucracy’s different echelons may play a large hand in this dynamic.<sup>206</sup> “There is, in fact, no expert group,” Harold Laski wrote in

202. MARCH & SIMON, *supra* note 114, at 65.

203. See, e.g., WILSON, *supra* note 82, at 173 (noting the “institutionalized conflict” between the FTC’s lawyers’ unit (the Bureau of Competition) and the Bureau of Economics, but concluding that it “probably resulted in more enlightened decisions.”). See also KATZMANN, *supra* note 148, at 180-87; Larry B. Parker et al., *Clean Air Act Allowance Trading*, 21 ENVTL. L. 2021, 2065-67 (1991) (noting inter-agency tensions on the federal level as well as tensions between federal and state comparable environmental regulation agencies). See also Louis De Alessi, *An Economic Analysis of Government Ownership and Regulation: Theory and Evidence from the Electric Power Industry*, 19 PUBLIC CHOICE 1 (1974).

204. MARCH & SIMON, *supra* note 112, at 70, 161; LARSON, *supra* note 47, at 211-12; KATZMANN, *supra* note 148, at 179. Some speak in this context of regulators’ (international and national) “epistemic communities.” See Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1 (1992); Eleanor D. Kinney, *The Emerging Field of International Administrative Law: Its Content and Potential*, 54 ADMIN. L. REV. 415, 425 (2002) (“Scholars have described how transgovernmental networks of regulators have developed and now exercise considerable regulatory power.”).

205. The Technician may also be the Facilitator’s counterpart, of course.

206. See *supra* text accompanying note 204-08, 295-98.

1930, “which does not tend to deny that truth may possibly be found outside the boundary of its private Pyrenees.”<sup>207</sup> Of course, this in itself does not bode well for inter-agency collaboration.

In sum, due to growing professionalization and specialization of agents within most administrative organizations, principals (regularly, Guardians) are not always able to effectively direct their agents (usually Technicians).<sup>208</sup> Add to this dynamic administrators’ necessary reliance on the backing of external, political and other, elements and the emerging picture is of a precarious, fragmented administrative process. This picture stands in stark contrast to the image of regulation created by the Facilitator and Guardian types.

Having concluded a detailed description of the three prototypes of regulators, revealing their more and less benign characteristics (see *Table 2*), I now demonstrate their handiwork mainly in contemporary schemes of environmental regulation. As noted, I focus on environmental regulation, since it has long become a fertile grazing ground for regulatory novelties in the United States.<sup>209</sup>

Table 2: Axes of Analysis

	<i>Facilitator</i>	<i>Guardian</i>	<i>Technician</i>
Method of Handling of Information	Collaborative	Self-sufficient	“Externally” structured
Who defines the <i>Public Interest</i> (& for Whom)?	Participating parties (themselves)	The regulator (the “general public”)	The profession and regulators’ supervisors (as directed)

207. Laski, *supra* note 2, at 103. See similarly *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 346 (D. Mass. 1953).

208. On the principal-agent relationship and the role of asymmetrical information in that relationship, see generally, for example, John F. Padgett, *Hierarchy and Ecological Control in Federal Budgetary Decision Making*, 87 AM. J. SOC.75 (1981); Croley, *supra* note 22, at 23-25; McCubbins et al., *supra* note 107. As these sources clarify, the principal-agent problem applies in all levels of the regulatory process (for example, constituents-legislator; legislator-regulator; etc.).

209. See, e.g., Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159, 171 (“At present, there is a remarkable burst of interest in ‘rethinking’ or ‘reinventing’ the next generation of environmental regulations.”); Daniel A. Farber, *Triangulating the Future of Reinvention: Three Emerging Models of Environmental Protection*, 2000 U. ILL. L. REV. 61, 61-62 (2000) (declaring that “[r]einvention is all the rage today,” and that it “is here to stay”); BILL CLINTON & AL GORE, REINVENTING ENVIRONMENTAL REGULATION (1995), available at <http://purl.access.gpo.gov/GPO/LPS30367>.

Mode of <i>Power</i>	Security	Pastoral	Disciplinary
Leading Source of <i>Legitimacy</i>	Sociological (Acceptance/cooperation)	Moral (Leadership)	Legal (Professionalism)
Institutional Setting	“Town hall”	“One-man show”	Hierarchical

#### IV. THE TYPES IN ACTION

##### A. *Reflexive Markets: Facilitator*

Adams’s tenets have shown great persistency and can be traced in contemporary analyses of regulation. In fact, it appears that the last generation of administrative law scholarship and practice saw a full-blown renaissance of the Facilitator archetype—with some modifications, of course, one of which is worth noting at the outset: whereas Adams focused on transportation, the prototype is currently more associated with environmental law. The fact that the field of environmental regulation shares foundational elements with the work of an end-of-the-nineteenth-century reformer is revealing. It certainly sheds a new light on some of the contemporary theoretical and practical “innovations” in that field.<sup>210</sup>

A clear example of the Facilitator paradigm in the new wave of environmental regulation is given by “reflexive law.”<sup>211</sup> Briefly, reflexive law focuses on attaining a fit between social and private goals through voluntary means and keeps one degree of separation from directly mandating specific environmentally-responsible conduct.<sup>212</sup> It seeks to enlist what might be called, borrowing Foucault’s terminology, “disciplinary” mechanisms<sup>213</sup> in the service of “privatized,” or one might say democratic, regulation.

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210. See, e.g., Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 36 (2001) [hereinafter Stewart, *New Generation*] (“[M]any of the notable innovations in administrative law over the past three decades have occurred in environmental cases.”); Gillette & Krier, *supra* note 84, at 1042 (“Many of the public risks that figure so prominently in the ongoing debate are simply the most recent generation of environmental problems.”).

211. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 346 (2004) [hereinafter *The Renew Deal*].

212. See generally Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC’Y REV. 239 (1983); Orts, *supra* note 7.

213. See *supra* text accompanying note 163.

Noting the growing, even potentially constitutive, role played by various organizations in the lives of many in the West,<sup>214</sup> and recognizing the need to “promote the internalization of environmental norms by firms and other organizational actors as opposed to directly controlling their external conduct,” reflexive law reaches out to institutions outside the legal system with a view to enhancing their “self-referential capacities.”<sup>215</sup>

The means to achieve reflexive law’s objectives is primarily through the deployment of an array of incentives designed to induce organizations and those running them to internalize desirable environment-protecting norms as the norms and goals of the organization itself. Of note is the fact that such schemes of self-regulation may rely not only on third-party monitoring—a technique that may be implicated in different styles of regulation<sup>216</sup>—but even on various processes of (firm or industry) *self-policing*.<sup>217</sup>

The EPA’s longstanding “Audit Policy,” incorporated in its notice *Incentives for Self-Policing*, provides an excellent example of reflexive environmental regulation. This policy seeks to “encourag[e] regulated entities to voluntarily discover, promptly disclose and expeditiously correct violations of Federal environmental requirements.”<sup>218</sup> The nub of the program is leniency in penalty in return for voluntary disclosure of violations. Needless to say, certain restrictions apply and prerequisites must be met: notably, violations are expected to be traced through an internal monitoring system, which could be part of regulatees’ EMSs<sup>219</sup>—to which I now turn.

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214. See generally Stewart, *Organizational Jurisprudence*, *supra* note 108.

215. Orts, *supra* note 7, at 1232. See generally Stewart, *New Generation*, *supra* note 210, at 127-51. See also Orts, *supra*, at 1231-32, 1252-68. As we have seen, Foucault spoke of the rise of the power of “security” with reference to similar developments in the liberal state. See *supra* notes 168-172 and accompanying text.

216. See Freeman, *supra* note 53, at 648-51; Coglianese & Lazer, *supra* note 52, at 717-18.

217. See, e.g., Richard E. Schwartz et al., *Encouraging Self-Auditing Within the Pork Industry: The Nationwide Clean Water Act Enforcement Agreement for Agriculture’s First Industry-Wide Environmental Auditing Program*, 29 ENVTL. L. REP. 10395 (1999).

218. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations 65, Fed. Reg. 19618, 19618 (U.S. Env’tl. Protection Agency, Apr. 11, 2000) [hereinafter EPA Incentives for Self-Policing]. On environmental auditing, see Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audits and Enforcement Policy*, 16 HARV. ENVTL. L. REV. 365-75 (1992); Keith M. Casto, *Environmental Audits: Barriers, Opportunities and a Recommendation*, 5 HASTINGS W. N. J. ENVTL. L. & POL’Y 233 (1999); Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307 (2004).

219. EPA Incentives for Self-Policing, *supra* note 218, at 19625. This EPA’s Statement of Policy stipulates (*id.* § D.) that it applies when “[t]he violation was discovered” in one of two ways:



Indeed, EMSs are another case of reflexive law in environmental regulation. An EMS, as defined in one of the growing number of publications dedicated to the subject, is a “continual cycle of planning, implementing, reviewing, and improving the processes and actions that an organization undertakes to meet its environmental obligations.”<sup>220</sup> It has a more comprehensive structure than that of environmental audits. An EMS seeks to instill environmentally-conscious thinking in the organization’s every-day business.<sup>221</sup> Although directed to the management level, it is meant to encompass all organization members, at all levels of production. Expectedly, the EPA had developed EMSs for many of its facilities.<sup>222</sup> In fact, President Clinton issued a special Executive Order, *Greening the Government Through Leadership in Environmental Management*, requiring all government agencies to follow suit.<sup>223</sup> In a *Position Statement* released at the end of 2005, Stephen Johnson, the previous EPA Administrator, declared that the “EPA will promote voluntary adoption of EMSs. To encourage voluntary adoption of EMSs, EPA will rely on public education and voluntary programs.”<sup>224</sup> This statement—a quintessential exemplar of reflexive law in action—assigns the role of the Facilitator to the EPA.

Information-generating strategies, much in vogue of late, are also at the forefront of reflexive law.<sup>225</sup> These strategies include non-

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first, through “[a]n environmental audit,” that is “a systematic, documented, periodic and objective review by regulated entities of facility operations . . .”; second, through a “compliance management system.” *Id.* The essentials of the latter system are covered by the discussion about EMSs. *See supra* note 7 and accompanying text; *see infra* notes 220-24 and accompanying text (to recall, EMSs are Environmental Management Systems). By all indications, the EPA is fully committed to the advancement of this program. *See Memorandum, Issuance of “Audit Policy”: Frequently Asked Questions* (Apr. 30, 2007), *available at* <http://www.epa.gov/Compliance/incentives/auditing/2007-faqs.pdf>.

220. STAPLETON & GLOVER, *supra* note 7, at 8. Similarly, the EPA offers, among other things, a web-based course that “provides an overview of environmental management systems (EMS) and how [the program] can support environmental improvements at facilities that are subject to environmental regulations.” *See Waste – Information Resources*, EPA (last updated May 1, 2010), <http://www.epa.gov/osw/inforesources/ems/ems-101>.

221. *See* Orts, *supra* note 7, at 1275-87. *See also* Christine Todd Whitman, EPA’s Environmental Management System Implementation Policy, (May 17, 2002), *available at* [http://www.fedcenter.gov/\\_kd/Items/actions.cfm?action=Show&item\\_id=601&destination=ShowItem](http://www.fedcenter.gov/_kd/Items/actions.cfm?action=Show&item_id=601&destination=ShowItem).

222. *See* Position Statement on Environmental Management Systems, 71 Fed. Reg. 5664-65 (U.S. Envtl. Protection Agency, Dec. 13, 2005) [hereinafter EPA Position Statement].

223. Exec. Order No. 13,148, 65 Fed. Reg. 24595 (Apr. 21, 2000), *revoked by* Exec. Order No. 13,423, 72 Fed. Reg. 3919 (Jan. 24, 2007).

224. EPA Position Statement, *supra* note 222, at 5665.

225. *See* Sunstein, *supra* note 106, at 617-18. *See also* Bradley C. Karkkainen, *Information-Forcing Regulation and Environmental Governance*, in *LAW AND NEW GOVERNANCE IN THE EU*

governmental labeling programs, which identify environmentally-friendly products (e.g., “Green Seal”),<sup>226</sup> and government-imposed disclosure duties of harmful characteristics of products and business activities (e.g., labels on cigarettes).<sup>227</sup> The basic idea behind these programs is that information is likely to advance internal and external transparency,<sup>228</sup> “allow consumers to make informed choices,”<sup>229</sup> and generate self-reflexive processes both inside and outside of organizations.<sup>230</sup> For example, it may lead to (independent or reactive) business self-disciplining once externalities are made apparent.<sup>231</sup>

This cursory excursion should suffice to convey a sense of the Facilitator-like role which reflexive law assigns to the regulator.<sup>232</sup> It

AND THE US 293-321(G. de Búrca & J. Scott eds., 2006) [hereinafter LAW AND NEW GOVERNANCE]; David Weil et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POLICY ANALYSIS AND MANAGEMENT 155 (2006).

226. See Orts, *supra* note 7, at 1248-50.

227. See, e.g., Clifford Rechtschaffen, *How to Reduce Lead Exposure with One Simple Statute: The Experience of Proposition 65*, 29 ENVTL. L. REP. 10581 (1999).

228. See Weil et al., *supra* note 225, at 155-56.

229. Waxman, *supra* note 12, at 1803. This comment was made by Representative Henry A. Waxman while introducing the CAA’s 1990 Amendments, which included a labeling program. See *id.* at 1803-04, and 42 U.S.C. § 7671j (2006).

230. But see *infra* Section III.A. (detailing contemporary behavioral theorists’ conclusions about human cognitive biases in analyzing information).

231. See generally Sunstein, *supra* note 106, at 613-26. Related to this development is the parallel imposition of disclosure duties on governmental bodies. See, e.g., The Freedom of Information Act, 5 U.S.C. § 552 (2000). See generally McCubbins et al., *supra* note 107, at 259-60, 264-66. Under the National Environmental Policy Act (NEPA), government organs (and recipients of governmental funding or regulatory approval) are required to issue Environmental Impact Statements (42 U.S.C. § 4321 (1994)). See Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1680-84 (1993).

232. In addition to reflexive law, another notable natural habitat of modern Facilitators is found in the contemporary cottage industry of participatory/pluralist models of the administrative process, commonly grouped under the heading of “new governance.” See generally Lobel, *The Renew Deal*, *supra* note 211; Louise G. Trubek, *New Governance Practices in US Health Care*, in LAW AND NEW GOVERNANCE, *supra* note 225. Jody Freeman is a leading voice in this strand of literature. See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997). Freeman’s description of a “collaborative model” draws on EPA’s past experience, inter alia, with negotiated rulemaking. On this and similar techniques of regulation, see Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982); Philip J. Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 DUKE L.J. 1389 (1997). Of note is the fact that the Negotiated Rulemaking Act actually specifically authorized agencies to employ a “facilitator,” that is, “a person who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule” (5 U.S.C. §§ 562, 568 (1994)). As these sources demonstrate, examples of Facilitator-style regulation are amply found also outside of the area of environmental regulation. See also MALCOLM K. SPARROW, *THE REGULATORY CRAFT: CONTROLLING RISKS, SOLVING PROBLEMS, AND MANAGING COMPLIANCE* 103-07 (2000). Thus, as further examples of Facilitators in action, consider the following: (1) key aspects in the regulation of training and career services provided under the Workforce Investment Act (WIA) of 1998 (29

appears that Charles Francis Adams's model of weak regulation has, posthumously, found its matching concept of law.

*B. Back to the New Deal: Guardian*

To this day, it seems lawyers in particular persist in their attachment to the Guardian. For instance, in their *Clean Coal/Dirty Air*,<sup>233</sup> Bruce Ackerman and William Hassler canvass what seems to them as a colossal debacle on the part of the federal government to satisfactorily regulate sulfur dioxide (SO<sub>2</sub>) discharge from coal-burning power plants. In putting forward a remedial measure the authors revert to the “New Deal ideal”<sup>234</sup> of “an independent and expert administrative agency creatively regulating a complex social problem in the public interest.”<sup>235</sup> Isolated from politics and “unencumbered by abstract legalisms”<sup>236</sup> it would “promise[] to craft a policy responsive to the complexities of environmental relationships.”<sup>237</sup>

Justice Breyer also harks back to the “traditional New Deal notion of delegating broad, general legal authority to administrative bodies. . . .”<sup>238</sup> He advocates the establishment of a “central bureaucratic group,”<sup>239</sup> granted with inter-agency jurisdiction and ample authority, whose mission would be “building an improved, coherent risk-regulating system . . . .”<sup>240</sup> Reverting to Lindblom’s terminology,<sup>241</sup> it can be said that according to Breyer’s recipe, this “central group” would be well positioned to take a synoptic outlook, thanks to its centralized position and wide database, “which automatically extends beyond a single program . . . .”<sup>242</sup>

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U.S.C. § 2801 (2000)). See, e.g., Lobel, *The Renew Deal*, *supra* note 211, at 410-13; (2) Various “outreach activities” of the U.S. Occupational Safety and Health Administration, such as the Strategic Partnership Program, which is “designed to assist firms in integrating lessons from multiple worksites by creating partnerships of groups of employers, employees, employee representatives, as well as educational institutions.” Orly Lobel, *Governing Occupational Safety in the United States*, in *LAW AND NEW GOVERNANCE*, *supra* note 225, at 277.

233. BRUCE ACKERMAN & WILLIAM HASSLER, *CLEAN COAL/DIRTY AIR* (1981).

234. *Id.* at 12.

235. *Id.* at 1.

236. *Id.* at 12.

237. *Id.* For a critique of this prescription, see Latin, *supra* note 1, at 1284-86, 1297-1301.

238. BREYER, *supra* note 21, at 80.

239. *Id.* at 63.

240. *Id.* at 60. Latin characterizes Breyer’s analysis as “idealized” for not fully considering how the current administrative system actually works and what real-life implementation constraints are associated with environmental regulation. Latin, *supra* note 1, at 1301-04.

241. See *supra* text accompanying note 109.

242. BREYER, *supra* note 21, at 75. See also JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* 226-27 (1983) (advising the formation of a “superbureau” in the Social Security Administration).

Completing a staple description of the Guardian, Breyer admits to his skepticism of the desirability of public participation in the dealings of this central group. He holds that “the group must have a degree of *political insulation* to withstand various political pressures, particularly in respect to individual substances, that emanate from the public directly or through Congress and other political sources.”<sup>243</sup>

As these analyses suggest, the allure of the Guardian is still strong and is likely to figure in any future configuration of public regulation. Indeed, it is hard to imagine the Guardian being completely removed from the administrative state.

As noted, a prime example of the Guardian type in the current administrative state is to be found in the epicenter of environmental regulation, the NAAQS, which lies at the heart of the CAA. Although it was radically revised in 1990,<sup>244</sup> the amended Act still designated to the Agency the management of the NAAQS.<sup>245</sup> “These standards,” noted Representative Henry Waxman<sup>246</sup> shortly after the 1990 Amendments were made into law, “are the cornerstone of the CAA’s pollution control programs.”<sup>247</sup>

So wide was the authority granted the EPA by this law, the D.C. Circuit held it unconstitutional. It found the relevant provision did not provide any “intelligible principle” to guide the EPA in the determination of air quality standards, as required by the nondelegation doctrine.<sup>248</sup> Although the Supreme Court demurred and reversed, it did note that the authority to “set[] air standards . . . affect[s] the entire national economy,” and characterized it as a “sweeping regulatory scheme[.]”<sup>249</sup> Particularly illustrative is the Court’s summation of the “intelligible principle” contained in the Act. The Court did not give a

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Breyer posits further along the same lines that conditions should be arranged and the right staff recruited so the group does not become “overly ‘proceduralist’ or ‘lawyer-like.’” BREYER, *supra* note 21, at 74. See *similarly* LANDIS, *supra* note 21, at 75.

243. BREYER, *supra* note 21, at 60-61 (emphasis in original). Here, too, Breyer is walking in the footsteps of Landis. See LANDIS, *supra* note 21, at 99.

244. The CAA was then amended, *inter alia*, pursuant to a growing frustration in Congress with the EPA’s languor in implementing the CAA. See Waxman, *supra* note 12, at 1746, 1757, 1774.

245. For the NAAQS, see also sources mentioned *supra* note 6.

246. See *supra* note 12.

247. Waxman, *supra* note 12, at 1756.

248. *Trucking Ass’n. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir 1999), *rev’d*, *Whitman v. Am. Trucking Ass’n.*, 531 U.S. 457 (2001). This part of the D.C. Circuit’s decision pertains to § 109(b)(1), which instructs the EPA to set “ambient air quality standards . . . the attainment and maintenance of which in the judgment of the [EPA] Administrator, based on [the] criteria [documents of § 108] and allowing an adequate margin of safety, are requisite to protect the public health.” 42 U.S.C. § 7409(b)(1) (2006). See also *Am. Trucking Ass’n.*, 175 F.3d at 1057.

249. *Whitman v. American Trucking Ass’n.*, 531 U.S. 457, 475 (2001).

positive definition of an intelligible principle; all the Court could say was that the EPA should not consider the cost of achieving air quality standards “at the level that is ‘requisite’ [–] that is, not lower or higher than is necessary [–] to protect the public health with an adequate margin of safety . . . .”<sup>250</sup> This open-ended formulation, describing a nationwide scheme of regulation entrusting an issue as crucial as public health to the hands of a regulator, bespeaks of the Guardian. At the same time, in light of this formulation it is understandable why the specter of unbridled discretion, essentially of illegitimacy, often haunts Guardian-led regulation.

The EPA’s leading role in the direction of enforcement of federal environmental law goes beyond the CAA, of course, and applies to all major environmental legislation.<sup>251</sup> Generally, the EPA has wide discretion to decide whether violations of this legislation should be treated administratively, criminally, or through civil penalties.<sup>252</sup> The EPA likewise sets the policy for the settlement of civil judicial and administrative actions that fall in its jurisdiction.<sup>253</sup>

Before we move on, it is important to note that one domain particularly reserved for Guardian-style regulation is the business of regulators regulating (other) regulators. At issue here are several

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250. *Id.* at 475-76.

251. Additional interesting examples of less sweeping policies advanced in a Guardian-style regulation by the EPA are provided by Richard Stewart. *See* Stewart, *New Generation*, *supra* note 210, at 54-60, 68-73. These include the numerous instances of “adaptive implementation” of environmental legislation (also known as “slippage”), and policies relating to Brownfields redevelopments. *See id.* Management-based regulation, in which regulators assume the mantle of “meta-manager[s],” characteristically also follows the lines of Guardian-style regulation. *See* Coglianese & Lazer, *supra* note 52, at 713. As demonstrated by Cary Coglianese and David Lazer, this type of regulation furnishes examples of Guardian regulation in such varied fields as food and industrial safety as well as pollution prevention. *See generally id.* For comparable examples of Guardian-style, management-based regulation in the field of education, see James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1703-49 (2003), and James Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 932-89 (2004). For possible Guardian-run regulation in fields of health- and consumer-protection, see Sugarman, *supra* note 52.

252. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 931-73 (2003).

253. *See, e.g.*, Interim Clean Water Act Settlement Penalty Policy (March 1, 1995), available at <http://www.epa.gov/compliance/resources/policies/civil/cwa/cwapol.pdf>; RICHARD REVESZ, ENVIRONMENTAL LAW AND POLICY 1036-37 (2008). The EPA is not alone of course in enforcing federal environmental legislation. The Department of Justice obviously has a foundational role in this, *see, e.g.*, William Tucker, *The Manacled Octopus: The Unitary Executive and EPA Enforcement Policy Involving Federal Agencies*, 16 VILL. ENVTL. L.J. 149 (2005), as do other branches of the federal government. *See, e.g.*, 29 C.F.R. § 24.100 (2007) (setting forth the Secretary of Labor’s whistle-blower regulations in the area of environmental law).

important measures adopted by the Executive and Congress in an effort to reign in the various federal agencies by requiring them to demonstrate that their proposed policies pass the test of (economic or environmental) rationality.<sup>254</sup> The supervisory power granted to the President's Office of Management and Budget (OMB), particularly since President Reagan's administration, is a leading example for the imposition of cost-effective and cost-benefit principles on new regulations throughout the federal government. OMB requirements apply to all major regulation, environmental and other.<sup>255</sup> Focusing again on environmental regulation, Environmental Impact Statements that the EPA (and others) are required to issue under NEPA provide a comparative example, this one passed by Congress, of a measure designed to direct regulators' discretion.<sup>256</sup>

The addition of OMB and similar meta-regulation to the regulatory scene reveals that the EPA Administrator (for example) is, at least in some circumstances, Janus-faced: a Technician when facing the OMB<sup>257</sup> and a Guardian when facing the industry and the rest of the Agency.<sup>258</sup>

### C. *Bookkeeping Chores: Technician*

The sine qua non of successful enforcement is effective monitoring and detection of violations. Generally, this often-tricky task falls in the hands of Technicians.<sup>259</sup> Less trivial contemporary elaboration of the Technician prototype can be found within the burgeoning field of market-based regulatory measures. This category includes a host of regulatory instruments presented as more cost-effective and cost-conscious than the extant command system. These instruments are generally said to allow for more flexibility, encourage the development of beneficial innovations, and ultimately induce better performance of environmental regulatory systems.<sup>260</sup>

Endorsing the latter approach, Terry Anderson and Donald Leal advocate "free market environmentalism," which relies on the allocation

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254. See generally Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 745-77 (1996).

255. See generally Lazarus, *supra* note 42, at 328-58.

256. See Stewart, *New Generation*, *supra* note 210, at 40-42. See generally *id.* at 38-54.

257. In that case, the OMB is the Guardian.

258. For similar duality in the enforcement of environmental legislation when the EPA and other federal agencies are involved, see Tucker, *supra* note 253.

259. See generally PERCIVAL ET AL., *supra* note 252, at 932-35.

260. See Stewart, *New Generation*, *supra* note 210, at 94 *ff.*

of property rights—by legislation—in environmentally sensitive areas in the hope that rights’ owners would protect these rights in the most effective manner.<sup>261</sup> Now, in order for the proposed regime to be effective a central recording system would have to be put in place.<sup>262</sup> The routine maintenance of such a system is normally in the purview of the Technician.

Other programs may assume that Technician regulators have more leeway than under free market environmentalism. As noted, a regulatory regime relying on permits, such as the Clean Water Act’s NPDES,<sup>263</sup> may naturally be managed by Technicians, even though the granting of permits is not necessarily a mechanical operation. In any event, several reasons support the argument that under the NPDES the Technician is the appropriate type of administrator to issue permits. One, once the system is put in place by the Administrator, including setting guidelines and addressing overall policy questions,<sup>264</sup> the scope of discretion a permit-issuer is expected to exercise is relatively limited and her task likewise quite technical.<sup>265</sup> Additionally, it is clear that the statute envisages this operation taking place within a bureaucratic structure. Finally, as noted, the Technician’s most natural regulatory tool is a permit.<sup>266</sup>

The Technician type seems to be in full bloom nowadays and is likely to prosper further in the area of environmental protection in the future. The reason for this is clear enough. Congress’ frustration with what it regards as the EPA’s failures to meet statutory benchmarks<sup>267</sup> has led to “a general trend in environmental statutes . . . toward ever-greater

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261. See Terry L. Anderson & Donald R. Leal, *Free Market Versus Political Environmentalism*, 15 HARV. J. L. & PUB. POL’Y 297 (1992). For powerful critique and endorsement of Free Market Environmentalism, see Edward Brunet, *Debunking Wholesale Private Enforcement of Environmental Rights*, 15 HARV. J. L. & PUB. POL’Y 311 (1992) and James L. Huffman, *Protecting the Environment from Orthodox Environmentalism*, 15 HARV. J. L. & PUB. POL’Y 349 (1992), respectively. In any event, as of 1995 at least it was “the hottest growth industry in environmental law.” Orts, *supra* note 7, at 1241.

262. See Stewart, *New Generation*, *supra* note 210, at 103-04. Under such scheme, courts would play a central role in a regime dependant on private enforcement. See Brunet, *supra* note 261.

263. See *supra* notes 9-11 and accompanying text.

264. See CWA § 304 (b), 33 U.S.C. § 1314 (b) (2006); CWA § 402, 33 U.S.C. § 1342 (2006); E.I. Du Pont de Nemours & Co. v. Train, Administrator, EPA, 430 U.S. 112, 130-32 (1977); and WILLIAM RODGERS, *supra* note 11, at 406-11. Development of effluent limitations has proven to be much longer and much more arduous than anticipated by Congress. In fact, it is doubtful whether EPA has completed this duty to this day. See PERCIVAL ET AL., *supra* note 252, at 620-24, 630-31.

265. For the EPA’s process of permit review, see *supra* notes 10-11.

266. See *supra* text accompanying note 95.

267. See *supra* note 244.

specificity.” Consequently, Michael Herz goes on to note in his study of NEPA,<sup>268</sup> the EPA “in particular . . . [is] left less and less discretion in their regulatory capacity . . . .”<sup>269</sup> In such a restrictive environment, Technicians and their technical skills are in high demand.<sup>270</sup>

## V. BRINGING THE TYPES TO BOOK

The analysis in the previous two Parts aimed not only to chart the contours of the three types, but also to point out, or at least allude to, a few characteristics liable to hamper the types’ ability to function well and/or prevent them from maintaining an acceptable level of fairness.<sup>271</sup> To be sure, many of these factors are not new. Still, it is useful to put them in the context of prototypes, which outline a comprehensive framework within which the regulator operates, for such contextualization renders them more concrete and clarifies the difficulties they pose.

Although not exhaustive, the resulting list of thorny issues that are part and parcel of every regulatory scheme (for example, common failures in information handling) may be helpful in the evaluation of administrative actions in general, even outside of the context of the types. One does not have to treat the ideal types as “ideal” in order to appreciate the perspective offered by the ideal-type analysis conducted in the present study.

The following discussion will therefore take each prototype of regulator on its own terms.<sup>272</sup> Following the previous discussion, I will

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268. On NEPA, see *supra* note 231.

269. Herz, *supra* note 231, at 1734. On the likely tightening of executive control of agencies in the future, see Stewart, *Twenty-First Century*, *supra* note 1, at 453.

270. Examples of Technician-style regulation outside of the field of environmental regulation include the following: (1) Regulators’ duties in the maintenance of various voucher programs, for example, under the WIA (see *supra* note 211; Nan Ellis, *Individual Training Accounts Under the Workforce Investment Act of 1998: Is Choice a Good Thing?*, 8 GEO. J. ON POVERTY L. & POL’Y 235 (2001)) and in several states’ school systems (e.g., Henry M. Levin & Clive R. Belfield, *The Marketplace in Education*, 27 REV. RES. EDUC. 183 (2003)) (2) Regulators’ inspection duties under various schemes of management-based regulation, for example, under the U.S. Food and Drug Administration’s regulatory strategy entitled “Hazard Analysis and Critical Control Points.” Coglianesse & Lazer, *supra* note 52, at 717.

271. See Ruckelshaus, *supra* note 148, at 399 (outlining the goals that should guide a reform in environmental regulation: effectiveness, efficiency, maintenance of “essential democratic values of our society,” and fairness).

272. Put differently, the analysis to follow brackets off “external” considerations—for example, whether the specific prototype is the right answer to a pending problem—in reviewing how to prevent proverbial sources of concern from becoming malignant.



focus on information, power, legitimacy, and institutional considerations throughout the following concluding survey.

### 1. Facilitator

As noted, sociological legitimacy is the central concern in this case.<sup>273</sup> The first line of attack should be, therefore, guaranteeing genuine participation in administrative processes conducted under the auspices of a Facilitator.<sup>274</sup> This entails, among other things, conducting a critical examination of whom the participating stakeholders are and whether steps are being taken to render their participation meaningful.<sup>275</sup> Relevant questions, among others, include: “*Are shareholders treated equally?*” and just as crucial, “*Who is left out?*”

A Facilitator’s consensus building efforts might not deter an outsider—indeed, they might encourage her—to question their outcomes, notably on the ground they are not warranted by the Facilitator’s enabling legislation.<sup>276</sup> It is not difficult to imagine how the free-flow nature of reinvented processes might produce creative, yet illegal, compromises, and why agencies that have labored to reach a consensus would be reluctant to then blow the whistle.<sup>277</sup>

Information is the Facilitator’s best friend. Without the collection and dissemination of information her impact is moot. However, contrary to what Charles Francis Adams thought in the later nineteenth century, one *could* have too much information, and therein lies the rub.<sup>278</sup> As we have seen, this is just one item on a long list of counter-intuitive ways in which humans process information (within and without deliberative settings) that has come to light in the past few decades.<sup>279</sup>

273. See *supra* Section III.D.

274. If the Facilitator’s sole role is to provide information to the public—as prescribed by Charles Francis Adams—“participation” denotes the opportunity to present information to the agency. See *supra* Section II.A.

275. See Wald, *supra* note 121; Philip J. Harter, *The Role of Courts in Regulatory Negotiations—A Response to Judge Wald*, 11 COLUM. J. ENVTL. L. 51 (1986).

276. William Funk provides a concrete example. See William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiations and the Public Interest—EPA’s Woodstove Standards*, 18 ENVTL. L. 55 (1987).

277. See Freeman, *supra* note 232, at 83 (“Some critics worry that collaborative processes might be vehicles through which agencies, industry, and powerful public interest groups can collude to undermine the public interest.”). Former EPA Administrator Ruckelshaus, *supra* note 150, at 400, makes it clear that as he sees it, “the only way to make [a consensus process] work, is that all participants have to understand that the process is the entire and exclusive theatre for decisions . . . . There will be no appeal, and no way to weasel out of the deal.”

278. See Sunstein, *supra* note 22, at 424-25.

279. See *supra* Section III.A.

This information problem is a consideration worth keeping in mind in reviewing the Facilitator's handiwork.

Finally, power: viewed through a Foucauldian prism, Adams's intentions notwithstanding, the Facilitator is certainly not a "weak" regulator. As illustrated by reflexive law, disciplinary power may be exerted by the Facilitator in abundance in her efforts to advance environmental-friendly *self-regulation*.<sup>280</sup> Reflexive law illustrates further that *disciplinary* power is often involved in Facilitator-run regulation; but it also demonstrates that other forms of power may concurrently be at work, notably, what Foucault called "security."<sup>281</sup> Thinking of Facilitator-run projects in Foucauldian terms thus exposes otherwise less visible coercive mechanisms involved even in the type's seemingly most hands-off regulatory schemes.

## 2. Guardian

Fundamentally, the reign of the Guardian does not rely on its consensual acceptance,<sup>282</sup> and, as our short excursion into the nondelegation doctrine in the context of the NAAQS<sup>283</sup> revealed, nor does it rely on adherence to traditional rule-of-law precepts.<sup>284</sup> That in itself is alarming under liberal political philosophy, for it raises acute concerns of boundless discretion and arbitrary power that is sure to come in its wake. Still, as noted, on its own terms when it comes to the Guardian, the leading concern is moral legitimacy.<sup>285</sup>

As we have seen, the Guardian is expected to be active in most stages of the administrative process, including the gathering and analyzing of information. In her search for information the Guardian is less restrained than the other types; she is neither as reliant on stakeholders' submissions of data as the Facilitator, nor as narrow in the scope of her interest in regulatory issues as the Technician. Unlike with the other two types, the logic of the Guardian's design allows her to self-sufficiently devise policy and "spin[] out of [her] *own* guts a continuing

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280. Think here of the EPA's EMSs "management kits" offered to businesses to advance their environmental-conscious behavior. See *supra* text accompanying notes 7, 212-17.

281. See *supra* text accompanying notes 168-72.

282. See *supra* text accompanying note 192.

283. See *supra* text accompanying note 248-50.

284. As evidenced in the convoluted nondelegation doctrine. See, e.g., sources cited *supra* note 48.

285. See *supra* text accompanying note 194. It goes beyond the scope of this study, of course, to investigate what principles should guide us in evaluating regulatory goals' moral credentials. For an example of such investigation, see Adler, *supra* note 14.

series of miraculous solutions.”<sup>286</sup> Hence, the Guardian archetype may be troubling to those who think the scheme raises serious problems of democratic legitimacy,<sup>287</sup> are fearful of unchecked administrative discretion,<sup>288</sup> and take seriously cognitive errors in information processing. Others may also resent this prototype’s obliviousness to the Guardian’s institutional working environment for they know that regulation can never be a one man show: the Guardian is reliant on politicians, interest groups, judges, other administrators both inside and outside of her own organization, her colleagues, and a host of Technicians.<sup>289</sup>

### 3. Technician

Disciplinary power is fully implicated in Technician regulation, even when it is “merely” directed to bookkeeping and other small-scale, technical chores. This modality of power is first exerted on the regulated industry and doubly on the Technician-regulator herself. As already so often emphasized, the Technician is a professional on the condition that she is authoritatively recognized as such by her peers. Moreover, as an administrator she is always a part of a hierarchical structure, laboring in the bowels of a bureaucracy.

The resultant matrix creates ample opportunities for “regulating the regulators,”<sup>290</sup> but also for diminution of professionalism in government.<sup>291</sup> Surprisingly, although visibly powerful and highly consequential, OMB review along with other comparable measures of executive or congressional supervision<sup>292</sup> does not appear to comply with rule-of-law norms of transparency and accountability, especially as many of them are in practice immune from judicial review.<sup>293</sup>

Lastly, I turn again to professionalization, this time from a more skeptical perspective. We have noted that several observers point at professionalization’s tendency to hamper inter- and intra-agency

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286. This remark was made critically by Jaffe in *Agencies in Perspective*, *supra* note 143, at 567 (emphasis added). Jaffe thought “absurd and a-historical” the “notion so sedulously cultivated by many of us during New Deal days that agencies, because they were expert, could go on spinning out of their own guts a continuing series of miraculous solutions.”

287. *See supra* text accompanying notes 183-85.

288. *See* Stewart, *Reformation*, *supra* note 76, at 1671-88.

289. *See supra* Section III.B.2.

290. *See* W. Kip Viscusi, *Regulating the Regulators*, 63 U. CHI. L. REV. 1423 (1996).

291. *See* Waxman, *supra* note 12, at 1744-45.

292. *See supra* text accompanying notes 145-48, 255.

293. *See* Stewart, *New Generation*, *supra* note 210, at 39-63.

collaboration.<sup>294</sup> But this is not all: it is further pointed out that the professionalization of the administrative process has the additional negative side effect of breeding disciplinary parochialism and thus “the perspective of totality is lost.”<sup>295</sup> In making this claim, scholars, such as Marver Bernstein,<sup>296</sup> March, Simon,<sup>297</sup> and Louis Jaffe,<sup>298</sup> surface a consideration worth keeping in mind when evaluating a Technician-run regulation. As they conceive it, professionalism, or specialized expertise, is based on a focus on only *one* aspect of phenomenal reality, rather than on a balanced, panoramic outlook—which is often a prerequisite for regulation.

## VI. CONCLUSION

This Article exposed and explored three inclusive prototypes of public regulators embedded in past and present literature on federal regulation in the United States. The discussion in the Article aimed not only to chart the contours of the types, but also to point out a few characteristics liable to hamper their ability to function well and/or prevent them from maintaining an acceptable level of fairness. To be sure, many of these factors are not new. Still, it is useful to order them under a comprehensive framework—as the one offered by the types—that allows for insightful evaluation of regulators’ manifold actions.

As illustrated throughout, there are noticeable overlaps between the Guardian, Facilitator, and Technician types. For one thing, the Guardian and the Technician are both execution-oriented. For another, a substantial part of the work of both the Technician and the Facilitator is to furnish the ultimate decisionmaker (the President, the community, a commissioner, etc.) with credible information. Above all, the three types are encumbered by human errors in processing information, subjected to bureaucratic constraints, and called to justify their (coercive) actions.

Still, each type presents a different calibration and manifestation of these and other considerations. For, bleed into each other as they do, each prototype imports a discrepant vision of agencies’ operational design; reflects dissimilar visions of the “public good”; envisages

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294. See *supra* text accompanying notes 101-02, 204-07.

295. Laski, *supra* note 2, at 106.

296. See BERNSTEIN, *supra* note 21, at 119.

297. See MARCH & SIMON, *supra* note 114, at 185 (“Daily routine drives out planning.”).

298. Louis Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 275 (1955) (“The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law . . .”).

divergent roles for stakeholders in the administrative process; and tends to revert to different enforcement tools. Further, each of the three types of regulators responds to a different social need in a complex, industrial society. Faced with a socio-economic difficulty, the Facilitator is a vehicle that facilitates public understanding of the situation at hand, but might stop short of actively resolving the difficulty. The Guardian is asked to do more. She should tell the public what should be done in the face of a social dilemma and outline programs for meeting objectives, which she sets. The Technician is a lower-case executor. She actually does the job on the ground, often dealing with the nuts and bolts of the program charted by the Guardian.

The Article singled out and canvassed the three prototypes from a corpus produced by numerous students of public regulation, whose work spans most of the history of federal regulation. The types' very persistence and prevalence in theory and practice of regulation suggests that the types are fundamental in the American way of thinking on public administration. It is therefore unlikely that the types will disappear in the foreseeable future. Indeed, the analysis conducted in the Article gives us every reason to think they are here to stay.

