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INSTITUTIONALIZED CONFLICTS BETWEEN LAW AND POLICY

*Joseph P. Tomain**

I have never doubted the truth of signs Adso; they are the only things man has with which to orient himself in the world. What I did not understand was the relation among the signs.¹

I. INTRODUCTION

Law and policy do not mix well. The legal system is a significant force which contributes to the splintering of substantive policies. While this argument is made with specific reference to energy law and policy, it also has a general application to other classes of complex cases. The claims made to demonstrate these assertions are only slightly more immodest than that made by Eco's philosophical hero-sleuth, William of Baskerville.

The "signs" that law and policy do not interact neatly manifest themselves in the form of conflicts of two different categories. In the first category are conflicts *between* the ends and purposes of law and policy. These are addressed in Section II of this article. In the second category are conflicts *within* the system that is charged with the responsibility of making decisions regarding law and policy. Conflicts appear in the structure of the system, in the methodologies the system employs, and in the substantive rules the system produces. These conflicts, addressed in Sections III through V,

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1. U. Eco, *THE NAME OF THE ROSE* 492 (1983).

have been institutionalized by law; they are embedded in the recesses of the legal and policy decisionmaking apparatus.

As a matter of logical deduction, if there are conflicts *between* the ends of law and policy and *within* the means of the decision-making system itself, then the fact that a comprehensive policy has failed to emerge is explicable. What all of this does not explain is why the numerous conflicts do not burst the entire system apart and result in chaos. Here is the immodest portion of the proposal: there is a relation among the signs. Energy policy is not wholly indeterminant. Even though the conflicts fragment comprehensive policy proposals, policy does move along identifiable paths. Two sets of interdependent values, one economic, the other political, help us to orient ourselves in the policymaking world. The economic and political values work together, in a centripetal fashion, to help shape the general direction for law and policy decisionmaking. Their interaction, a normative *pas de deux*, produces the relation among the signs.

II. LAW AND POLICY IN A COMPLEX WORLD

Energy issues are polycentric² and thus are complex when considered alone. In addition, decisions relative to energy issues are further complicated by and must be made within the context of a public law decisionmaking system which is itself complex and contains many uncertainties.³ As a result, either the issues themselves,

2. A "polycentric" decision as described by Lon Fuller:

We may visualize this kind of situation by thinking of a spiderweb. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a 'polycentric' situation because it is 'many centered'—each crossing of strands is a distinct center for distributing tensions.

Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978).

3. On complexity see Fuller, *id.* at 394-404 (discussing the relative incapacity of adjudication to solve 'polycentric' problems); G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* 17-28 (1978) (elaboration of complex problems); M. WESSEL, *SCIENCE AND CONSCIENCE* 4-10 (1980) (discussing the same for socio-scientific disputes); Yellin, *High Technology and the Courts: Nuclear Power and the Need for Institutional Reform*, 94 HARV. L. REV. 489, 494-508 (1981) (same); On uncertainty see, R. Posner, *THE ECONOMICS OF JUSTICE* 8-9 (1981); D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1 (1983); Farago, *Intractable Cases: The Role of Uncertainty in the Concept of Law*, 55 N.Y.U.L. REV. 195, 200-04, 208-39 (1980); and, Trubek, *Allocating the Burden of Environmental Uncertainty: The NRC Interprets NEPA's Substantive Mandate*, 1977 WIS. L. REV. 747.

or the system that translates the issues into law may produce a fragmented policy.

Energy issues typically cause great concern among numerous interest groups, and divisions within those groups, which generate ambiguous policy preferences. Environmentalists, for example, may prefer an anti-nuclear policy and may work to prevent operation of a nuclear power plant. But environmentalists can hardly be expected to support enthusiastically the pro-coal alternative if the cancelled plant requires an expansion of the coal burning facilities in order to produce the requisite amount of electricity converts to coal. Even assuming the resolution of the positive issues, normative conflicts arise as well. Positive economic and scientific issues arise which set forth competing claims of seemingly equal value. Such are the characteristics of a polycentric decision.

Energy issues are imbued with multiple political, social, economic, and hence, philosophic uncertainties. Decisions are increasingly forward-looking and require compromises and accommodations that may have long-term repercussions. Public law decisionmaking no longer fits the dispute resolution model of common law adjudication. Rather than *stare decisis*, numerous competing values and a vast body of statutory law are the chief forces that shape a "public law"⁴ decision. The rise of public law decisionmaking has engendered serious rethinking⁵ of the role of law in society and the place of policy in relation to law.

Within the last two decades agencies have been delegated and have exercised increasing authority to administer public law. As a result, they have either taken or have been delegated more policymaking responsibility.⁶ This rapid growth of the administrative state has been met with considerable suspicion and criticism.⁷ The

4. See G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1-8 (1982). Professor Calabresi calls this development "statutorification" and states that our legal system is "choking on statutes." See also Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4-8 (1982); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281-1304 (1976); D. HOROWITZ, THE COURTS AND SOCIAL POLICY 1-21, 255-98 (1977); Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195 (1982).

5. The basic scholarly re-examination is Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975). Refer also to note 6 *infra*.

6. See, e.g., B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR 42, 42-44 (1981); R. LITWAN & W. NORDHAUS, REFORMING FEDERAL REGULATION Ch. 34-58; J. MASHAW, BUREAUCRATIC JUSTICE 106, 106-25 (1983);

7. In addition to Stewart, *supra* note 4, see AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM (1979); M. BARAM,

desires for a comprehensive understanding of the policymaking process or to forge consistent substantive policies has focused increased attention on the policymaking functions of agencies.⁸

The argument for the integration of law and policy is based on the assumption that law and policy should function together smoothly enough to allow comprehensive policies to emerge. This focus is misplaced and the argument is unsound. Concentration on the interaction of law and policy at the agency level will yield neither an adequate understanding of the policymaking process nor a full and coherent substantive policy. There are several reasons for this failure. First, such a viewpoint is too narrow. The polycentric and public law nature of these issues must be respected and this requires a systemic overview of the legal and policymaking systems rather than a particularistic look at agency actions.⁹ A concentrated look at bureaucratic activities may well miss important larger phenomena. Second, law and policy frequently function separately. Often they operate in counterpoint, rather than in synchronization. Law is often adopted to conform to or counteract existing policy. Therefore, a unified policy will not always result from a policy following law. Both law and policy recognize the need for substantive decisions as well as the need for decisionmaking processes. Yet the recognition of these needs can occur at different times with the consequence that the process employed does not necessarily expedite the substantive directives.¹⁰ Third, law and policy clash because they are guided by different rationales. While law tends to focus on specifically defined issues, a single policy

Alternatives to Regulation (1982); S. Breyer, *Regulation and its Reform* (1982); Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549 (1979); *Proceedings of the National Conference on Federal Regulation: Roads to Reform*; 32 AD. L. REV. 123 (1980); Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1259 (1981); Strauss, *Regulatory Reform in a Time of Transition*, 15 SUFF. L. REV. 9803 (1981); Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258 (1978).

8. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 338-54 (1979); Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).

9. On looking at political interactions systemically rather than particularistically see Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L. J. 1063, 1098-1105 (1981). See generally D. HORSTADTER, GODEL, ESCHER AND BACH 311-65 (1979).

10. J. MASHAW, *supra* note 6, at 103-04 (a well-designed process should recognize values of rationality, efficiency and procedural fairness; to the extent these cannot be reconciled, policy suffers). See also Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L. J. 65, 66-71 (1983) (similar discussion).

framework tends to implicate a multitude of issues of broader social impact.

A closer look at the respective roles of law and policy in society may help to illustrate the law-policy interaction.

A. Law

It can be said law is a simple and elegant device useful for describing the social order. This is certainly true if the law is used to analyze past events. If we limit our view of law in this fashion, however, then the story which is about to unfold is incomplete. The law, we at least like to think, is also forward looking; it has a predictive function.¹¹ Nothing is startling in any of this except in today's world, particularly with the growth of public and statutory law and more so with the increasing power of administrative agencies, the predictive function is seriously eroding.¹²

The simple and elegant device called law which aspires to point the direction for the development of particular substantive rules is not so clear in its pathfinding for the complex policy issues which the legal system seeks to foster or control today. The predictive function may have worked for the common law¹³ which was a relatively limited legal system composed primarily of judges assigned the responsibility of divining the meaning of cases and a manageable amount of statutory and constitutional law. Today's legal culture with its welter of legislation and regulation, proposed and interim regulations, and rules and orders has created a critical mass of law and new institutions foreign to the common law.¹⁴ This critical mass has weakened the predictive function of law by inserting more information than can be assimilated. The primary

11. See B. CARDOZO, *THE GROWTH OF THE LAW* (1924); L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* (K. Winston ed. 1981); O. HOLMES, *THE COMMON LAW* 5 (M. Howe ed. 1963) (descriptive function of law); I. JENKINS, *SOCIAL ORDER FOR THE LIMITS OF LAW* 370-83 (1980); R. POSNER, *THE ECONOMIC ANALYSIS OF LAW* 179-91 (2d ed. 1977); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (on law's predictive function).

12. G. CALABRESI *supra* note 3, at 163-66; Diver, *supra* note 8, at 406-08.

13. But see Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717-23 (1982); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Warren, *Formal and Operative Rules Under Common Law and Code*, 30 UCLA L. REV. 898, 900-21 (1983);

14. See T. KUHN, *THE STRUCTURES OF SCIENTIFIC REVOLUTIONS* 66-91 (2d ed. 1970) (discussing how a critical mass of data and information can transform institutions as well as ideas).

reason for this decline is the legal system¹⁵ assumes too much by trying to integrate law and policy.¹⁶ A forced link between law and policy exacerbates the numerous conflicts inherent in the structures, methodologies, and substantive rules comprising the decisionmaking system. The embedded conflicts in the legal system cause the law to be less predictive; substantive policy is less coherent, and, at times, seems indeterminate.¹⁷ Nevertheless, identifiable sets of values and principles based on political and economic norms do exist which confine the ambit within which decisions must be made, and therefore, affect the character of the decisions.

If the primary reason for the erosion of the predictive function is law's inability to decide complex substantive cases, the primary response is to establish a process for law and policy decisionmaking. Law makers are asked to decide a greater number of issues which contain an increasing number of technological, scientific, and economic uncertainties and complexities. In a world in which there is a strong desire and felt need for decisions based on substantive rather than procedural principles there is, nevertheless, a pull towards procedural decisionmaking.¹⁸ In the face of imponder-

15. The terms "legal system" and "law" are used in this article in their broadest senses to mean the exercise of legal authority by all legal decisionmakers. Further, reference herein to "law" or to the legal or decisionmaking "system" means the substantive rules, legal structures, and methods through which decisions are made. This point will be discussed throughout the article.

16. DeLong, *supra* note 8 at 338-44.

17. On indeterminacy see KAIRYS, *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, (1982); Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 837-38 (1983); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 388-89 (1981); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 567-76 (1983); Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1679-80 (1982). The assertion that law is indeterminate should not be taken to mean "anything goes." Although particular substantive policies may not have a high degree of predictability, the principles that guide the policies are evident as is argued *infra* Part VI.

18. This procedural pull is part of the contemporary jurisprudential dialogue. For example, in B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980), Professor Ackerman sets out a mode of political and philosophical discourse based on a structured dialogue about power. His attempt to move from the process of the dialogue to substantive principles is less than fully satisfying because of the generality of the principles that result. See Dworkin, *What Liberalism Isn't*, N.Y. REV. BOOKS 47 (Jan. 20, 1983) (critical review of B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980)). This tendency towards proceduralism forms the current debate about the concept of equality. See Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L. J. 1136 (1982); Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); D'Amato, *Is Equality a Totally Empty Idea?*, 81 MICH. L. REV. 600 (1983); Westen, *On "Confusing Ideas": A Reply*, 91 YALE L.J. 1153 (1982); Westen, *The Empty Idea of*

ables and irreconcilable differences of fact and opinion it is often better to construct a decisionmaking process rather than impose hard substantive decisions. The decisionmaker, however, can lose sight of the substantive outcome while keeping vigilance on the procedural aspects of decisionmaking. When processes become more important than substance, substantive policy can become incoherent, incomplete, incongruent and internally inconsistent.

This Article illustrates the ways in which policy (or the need for a policy) confronts the legal system and how the legal system prevents the formation of a full substantive policy. Conflicts in law, its processes and its institutions, heighten the incongruity between substance and process to the detriment of formulating a comprehensive policy. This argument is not only a comment on applied or internal administrative law; it has a larger application. In a society in which there are diverse claimants for legal rights, and which claims present hard choices or conflict diametrically, procedural fairness in decisionmaking is stressed over substantive principles upon which decisions will be based.

The issues to be discussed fall within traditional legal categories and are consistent with existing legal rules. However, a study of the traditional legal rules, structures and methodologies does not yield a coherent and comprehensive national energy policy. Rather, contemporary energy policy is diverse and splintered. Perhaps this splintering is endemic to all complex issues such as energy, health, the environment, social services, and education. Perhaps it further reflects the pluralistic nature of our polity, and within this pluralism this phenomenon reflects the ambivalence that society, as a whole, feels toward complex issues.¹⁹ Perhaps it is in the nature of complex problems to preclude comprehensive re-

Equality, 95 HARV. L. REV. 537 (1982); Westen, *The Meaning of Equality in Law, Science, Math and Morals*, 81 MICH. L. REV. 604 (1983). This author favors the intermediate position, that substance and process influence each other. See, e.g., Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981) (book review of J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980)).

19. E.g., T. LAGASSA & T. DANEKE, *The Defunct Energy Dichotomy*, in *ENERGY POLICY AND PUBLIC ADMINISTRATION* 1 (1980):

Energy perhaps more than any other policy domain is a paradigm case of what Theodore Lowi calls 'interest group liberalism,' or a situation in which competing interest groups (although not equally competitive) and fragmented institutional arrangements converge to disaggregate and diffuse the policy making process.

See also J. CHUBB, *INTEREST GROUPS AND THE BUREAUCRACY: THE POLITICS OF ENERGY* 4-8 (1983) (Chubb's book, while recognizing that the complexities of energy may make policy seem indeterminate argues that there are three identifiable policymaking patterns).

sults.²⁰ The tension between substance and process may not be bad. Indeed, this dynamic state may be well suited to the needs of a fast paced, rapidly evolving scientific and technological field such as energy. It may be good for the law to act as a brake on the implementation of full scale substantive policies in the face of such uncertainty. On the other hand, because energy industries comprise such large segments of an ailing economy, quick, forceful decisions may be sorely needed.

We can descriptively illustrate the functions of the legal system relative to policymaking in the context of larger political and economic norms. Public law decisionmaking and law's predictive function suffer because of the complexity of the issues and the tilt toward proceduralism. Courts and agencies, as they are presently structured, are not effective in dealing with complex scientific and technological issues.²¹ The reasons precluding the formation of a comprehensive energy policy are deeper than this, however. The incompatibility between law and policy lies not only in structural design; the incompatibility also resides in the methods used to decide issues, the substantive rules themselves, and in sets of competing values.

B. Policy

Policymaking has assumed an expansive and expanding role in our society. Because most policymaking is done in administrative agencies, they occupy a unique position.

Even though agencies have a certain degree of independence,²²

20. The problems to be discussed may preclude comprehensive policymaking because of their very scale, see J. FISHKIN, *THE LIMITS OF OBLIGATION* 3-9, 46-59, 145-49 (1982); or by virtue of social choice theory, see K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963) and Arrow, *Symposium: The Implications of Social Choice Theory for Legal Decisionmaking*, 9 *HOFSTRA L. REV.* 1373 (1981); or because of the "tragic" nature of the choices themselves, see G. CALABRESI & P. BOBBITT, *supra* note 3 at 17-28; or because comprehensive policymaking is an unwise myth, see Diver, *supra* note 8, at 428-34. The argument made in this article is that the legal system itself precludes comprehensive policy formation.

21. M. WESSEL, *supra* note 3, at 141-83 (scientific consensus-finding); Stewart, *supra* note 5, at 1760-90 (interest representation model of administrative law). Yellin, *supra* note 3, at 555-60 (use of special masters to give appellate courts the opportunity to render "second opinions" of agency action);

22. See, e.g., R. DWORIN, *TAKING RIGHTS SERIOUSLY* (Harvard University Press 1977) ("Policy decisions must therefore be made through the operation of some political process designed to produce an accurate expression of the different interests that should be taken into account." *Id.* at 85; Hays, *Political Choice in Regulatory Administration*, in *REGULATION IN PERSPECTIVE* (McGraw ed. 1981) ("Regulation of the earnings should be viewed as

policy is affected by political variables and reflects contemporary political values. Policy then becomes: "The description and explanation of the causes and consequences of government activity."²³ Therefore, the study of energy policymaking is very much the study of the politics of energy.²⁴

Policy analysis examines different variables and has different objectives than does legal analysis. As a discipline it is relatively new, growing out of a need to understand the failure of attempted solutions to complex problems.²⁵ The methods used by political scientists focus on the operation of political institutions, the function of interest groups in society, and how policy embodies the preferences of governing bodies. Policy analysis attempts to describe what goes into the political system, and what goes on inside that system; it then evaluates the impact of the emergent policy.²⁶ The basic lifecycle of policy is procedural. A policy goes through the stages of goal-setting, planning, implementation, assessment and evaluation, and termination.²⁷ Therefore, the study of policy is an amorphous, open-ended, fundamentally procedural study of the political process.

However, what eventually results from the policy-making process is a substantive policy that has been splintered because of its interaction with the legal system. Thus, the dichotomy between substance and process, which created a tension within the legal system, again reveals itself in the policymaking system.²⁸

The rules and principles of law and the workings and impact of the legal system on policy is left unexamined by most political

an opportunity to analyze political choice which in turn, can be combined with other evidence about choice in many political realms to establish patterns of political structure and change." *Id.* at 125).

23. T. DYE, *POLICY ANALYSIS* 1 (1976).

24. See J. CHUBB, *supra* note 19; B. COMMONER, *THE POLITICS OF ENERGY* (1979); G. DESOUZA, *ENERGY POLICY AND FORECASTING* (1981); *ENERGY POLICY AND PUBLIC ADMINISTRATION* (G. Daneka & G. Lagassa eds. 1980); *ENVIRONMENT, ENERGY, PUBLIC POLICY: TOWARD A RATIONAL FUTURE* (R. Axelrod ed. 1981); W. ROSENBAUM, *ENERGY, POLITICS AND PUBLIC POLICY* (1981); R. STOBAUGH & D. YERGIN, *ENERGY FUTURE* (1979).

25. E. QUADE, *ANALYSIS FOR PUBLIC DECISIONS* 1 (1975).

26. The bifurcation between law and policy is useful in that a study of policy, how it is made, and what its effects are, should aid in the evaluation of the legal system. If, as contended here, the legal system prevents the formation of an effective energy policy, then policy studies should assist in restructuring the legal system to facilitate energy policymaking.

27. W. ROSENBAUM, *supra* note 24, at 7.

28. T. DYE, *UNDERSTANDING POLICY ANALYSIS* (2d ed. 1975); C. LINDBLOM, *POLITICS AND MARKETS* 119-31 (1977); R. LINEBERRY, *AMERICAN PUBLIC POLICY* (1977).

science-oriented policy analysts. This is not to discredit policy analysis as a whole for its failure to incorporate legal analysis.²⁹ They are different disciplines, and each may be somewhat circumscribed by its own boundaries. However, if they are considered together, legal analysis and policy analysis are complementary.³⁰ Policy analysis alone cannot, nor does it aspire to, describe how the tensions within the legal system affect policymaking processes and substantive policy.

The ultimate system political scientists design for more effective policymaking must take into account the ability of the legal system to leave its imprint on policy.³¹ The process of policy analysis tends to describe what exists or suggests a hypothetical structure for better policymaking. It does not examine the glue holding the structure together. The legal system is the glue of the policy making structure. Without the legal system, no policy could be implemented.

Theoretically, legal rules and principles derived from constitutions, statutes, regulations, and cases are applied in a particular fashion within the confines of specifically described legal structures. It is obvious to any lawyer that legal decisions are not as certain and predictable as this description suggests. The significant fact is that positive rules, methods, and distinct structures, however loose, exist which distinguish legal decisionmaking from policymaking.

Policy analysis can be used to clarify the legal system and the legal system can define the legitimizing contours of policy analysis; thus the two interact.³² However, the interaction is not always

29. See T. DYE, *supra* note 28, at 17-38.

30. DeLong, *supra* note 8, at 319-21, 329-54.

31. D. MAZMANIAN & P. SABATIER, *EFFECTIVE POLICY IMPLEMENTATION* (1981). The authors state that the study of public policy implementation, defined as what takes place between the formal enactment of the rule of law and its impact, is the "missing link" in the study of policymaking. This moves us closer to a study of the interaction of law and policy, but not much closer. This article concentrates on those positive elements of the legal system that prevent comprehensive policymaking with respect to complex issues.

32. The study of this interaction may be viewed as a grand form of policy analysis or meta-policy analysis. This more generalized and abstract version of policy "analysis" is the subject of study of economists such as G. STIGLER, *THE ORGANIZATION OF INDUSTRY* (1968); Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971); lawyer-economists such as R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977); lawyer-philosophers such as B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980) and R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); and philosophers such as R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974) and J. RAWLS, *A THEORY OF JUSTICE* (1971).

peaceful.

This article focuses on the ways in which positive legal rules, established legal institutions, and legally adopted methodologies prevent the coalescence of a comprehensive national energy policy. The development of a full, substantive energy policy is thwarted by conflicting imperatives and values. These same values nevertheless give policy its purpose and prevent it from becoming completely incoherent.

The central conflict *between* the ends of law and policy, then, is the tension between substance and process. Both systems need processes and both must make substantive decisions, but not necessarily at the same time or in the same order. Law sets up its structures then decides substantive questions. Policy proposes substantive positions, then implements its decision, through process. At times the systems can work in tandem, but even they confront conflicts *within* the decisionmaking system.

III. STRUCTURAL CONFLICTS

Structural conflicts exist between decisionmaking bodies. These conflicts prevent the fruition of a whole energy policy and they evince a thematic tension between the centralization and the decentralization of decisionmaking power.³³ Conflicts abound in this debate between federal agencies, within federal agencies, between branches of the federal government, between presidential administrations, and most acutely between the exercise of decisionmaking authority between federal and state governments. Although interagency and interbranch competition is more acute at the federal level it also exists at the state level. State-local-regional and interstate³⁴ conflicts of power occur as well.

Some of the conflicts are aptly characterized as political, particularly when one branch attempts to assert its will over another, or when one presidential administration decides upon and implements an energy policy which is opposed by a subsequent administration. Yet these so-called "political" conflicts are bounded and institutionalized by law. The conflicts are bounded in the sense

33. G. CALABRESI & P. BOBBITT, *supra* note 3, at 53-57; and Diver, *supra* note 8, at 394-401, 406-08 (in comparing incrementalist policymaking with comprehensive rationalist policymaking, Diver addresses the question of who should be responsible for policymaking).

34. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Illinois v. General Elec. Co.*, 683 F.2d 206 (7th Cir. 1982).

that the Constitution limits the authority of each branch. They are institutionalized, for example, when one presidential administration is constrained to follow or forced to alter the laws enacted by its predecessor. The legal institutionalization of these conflicts cuts against effective policy formation and implementation.

A. *Presidential Administration Conflicts*

The policy views of the Carter and Reagan Administrations are radically different. This is notably true relative to energy policy. It is also true that by the force of law President Reagan must live to some degree with former President Carter's energy legacy.

President Carter's energy policy emerged in a series of presidential addresses and in the passage of legislation based on those addresses. In his "moral equivalent of war" speech³⁵ President Carter presented the principles of his plan to combat the energy crisis:

- 1) Energy decisionmaking should be centralized;
- 2) Economic growth must be encouraged;
- 3) Protection of the environment must continue;
- 4) Dependence on foreign energy sources should be reduced;
- 5) Energy Policy must be fair and equitable;
- 6) Conservation is the cornerstone;
- 7) Prices should reflect costs;
- 8) Government policies must be predictable and certain;
- 9) Scarce fuels should be conserved while coal consumption is increased; and,
- 10) Unconventional sources of energy must be developed.

To some degree, each of these directives effects and is affected by policy conflicts.

1. *Energy Decisionmaking Should be Centralized.* Carter urged the need for comprehensive and coordinated government regulation in the area of energy resource management. To this end, Congress created the Department of Energy.³⁶ Yet, while complexity may make centralization attractive, it also produces tensions undermining the consistency central decisionmaking seeks to

35. 1 J. CARTER, PUBLIC PAPERS OF THE PRESIDENTS 656-62 (1977); 13 WEEKLY COMP. OF PRES. DOC. 560-65 (1977).

36. Department of Energy Organization Act, 42 U.S.C. § 7101 (1982).

achieve.³⁷

2. *Economic Growth.* Energy industries account for approximately 30% of the G.N.P. of the United States.³⁸ This factor cannot be ignored in a time of sagging national and world economies. Carter's energy policy assumed a direct link between a healthy energy industry and economic prosperity. Although this link can be questioned, it has generally not been doubted by the makers of national policy.³⁹ This issue is particularly germane to the question of the "reindustrialization" of the United States.⁴⁰ Should the United States "reindustrialize" by producing more energy sources or can this be achieved in accordance with a conservation ethic?

3. *Protection of the Environment.* Hard questions exist as to whether new energy policies can co-exist with current environmental standards or whether those standards must be lowered. Will the production of more oil and gas, for example, or the transition to greater use of coal cause too much environmental degradation? Similarly, what are the environmental risks and costs associated with the development of alternative sources such as oil shale and tar sands or even certain renewable sources? If accommodations between energy and environmental concerns can be made what are the economic consequences of those accommodations?

4. *Reduced Dependence on Foreign Sources.* While consensus can be reached on this point for national security reasons, this is a policy plank which is not entirely free from difficulty. Domestic production of oil is limited; the OPEC cartel greatly influenced, if not determined, oil prices for a period; and, world money markets are petrodollar sensitive.⁴¹ The world economy cannot withstand a rapid withdrawal by the United States from foreign oil markets.

5. *Energy Policy Must be Fair and Equitable.* Will the cho-

37. Refer to note 32 *supra*.

38. See, e.g., L. THUROW, *THE ZERO-SUM SOCIETY* 26-40 (1980); UNITED STATES DEPARTMENT OF ENERGY, *INTERRELATIONSHIPS OF ENERGY AND THE ECONOMY* (DOE/PE-0030, July, 1981).

39. Compare R. STobaugh & D. YERGIN, *ENERGY FUTURE* 141-44 (1979) (asserting that the link between the GNP and energy consumption is elastic rather than rigid) with A. LOVINS, *SOFT ENERGY PATHS: TOWARD A DURABLE PEACE* (energy conservation actually promotes economic prosperity) 7-11 (1977).

40. See, e.g., Reich, *Beyond Free Trade*, 61 *FOREIGN AFFAIRS* 773 (Spring 1983); Rosenthal, *Drafting a Democratic Industrial Plan*, *N.Y. Times*, August 28, 1983, § 6 (magazine), at 31.

41. D. YERGIN, *GLOBAL INSECURITY* 33-57 (1982).

sen energy policy be fair to individuals and groups?⁴² Will the resulting distribution of wealth and resources be equitable and efficient? Fairness is often a term of such generality as to be meaningless out of context. To say an energy policy must be fair does not define fairness. More importantly fairness sometimes can, and does, conflict with efficiency.

6. *Conservation is the Cornerstone.* What effect does conservation have on the economy relative to productivity? How will conservation be accomplished? Is conservation a reduction in demand or an increase in energy efficiency or both? The classic way to reduce demand is to raise prices. If prices rise, which income groups will bear the burden of conservation? Should conservation be a major part of our energy policy?⁴³

7. *Prices Should Reflect Costs.* The country can no longer rely on a cheap energy policy, nor is there any hope for one in the foreseeable future. Costs will rise and the distributional questions alluded to above will have to be confronted. Should consumers or producers absorb cost increases? If consumers, then which groups?⁴⁴ Can people on fixed incomes absorb price increases or must some classes of consumers subsidize others?

8. *Government Policies Must Be Predictable and Certain.* Certainty and predictability in policy may sound like desirable goals in theory. They are unrealistic in a society as complex as ours. Because of the complexities and uncertainties involved in the energy area it is often more important a decision be made than it be made correctly. Fair process may often be a more realizable goal than substantive equity or efficiency.

9. *Conservation of Scarce Fuels and Increased Use of Coal.* This more specific point was an attempt by President Carter to put a concrete policy together. If conservation can be limited to certain resources while we expand production of other more abundant resources, economic growth may occur alongside a conservationist policy. Yet, it is by no means certain a pro-coal policy can be achieved without a serious revamping of existent government regulations such as air and water quality laws and surface reclamation regulations.⁴⁵

42. L. THUROW, *supra* note 38.

43. R. STOBAUGH & D. YERGIN, *supra* note 39, at 136-82.

44. See, e.g., Aman & Howard, *Natural Gas and Electric Utility Rate Reform: Taxation Through Ratemaking*, 28 HAST. L.J. 1085 (1977).

45. The byzantine nature of our pro-coal production policies and our pro-clean air

10. *Develop Unconventional Sources of Energy.* We can define conventional energy as oil, gas, coal and nuclear power; all remaining resources are "unconventional." The unconventional sources include both renewable and non-renewable resources. Renewable resources include solar, wind, and biomass, while the non-renewable resources include oil shale, tar sands and geothermal resources.

Congress passed the National Energy Act in October, 1978⁴⁶ which embodied these major features of the Carter plan. President Carter's second major energy message, delivered on April 5, 1979⁴⁷ stressed the need for the increased domestic production of oil and the decontrol of oil prices.⁴⁸ This speech was the basis for the passage of the Crude Oil Windfall Profits Tax.⁴⁹ The President's final energy address was delivered on July 15 and 16, 1979.⁵⁰ Carter returned to his "moral equivalent of war" rhetoric and he argued American's energy policies posed a fundamental threat to American democracy. Congress again responded with major legislation, known as the Energy Security Act,⁵¹ which deals with the estab-

policies may have worked to deter coal production and may have fouled the air. These events demonstrate how competing policy objectives can work to create counterproductive policies. See B. ACKERMAN & W. HASSLER, *CLEAN COAL/DIRTY AIR* 13, 13-25 (1981) (the book is an elaboration of the authors' article *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466 (1980)). See also Ackerman & Hassler, *Beyond the New Deal: Reply*, 90 YALE L.J. 1412 (1981); Smith & Randle, *Comment on Beyond the New Deal*, 90 YALE L.J. 1398 (1981);

46. The National Energy Act is a composite of the following acts: The National Energy Conservation Policy Act, Pub. L. No. 95-619, 92 Stat. 3206, amended by Pub. L. No. 96-294, 94 Stat. 716 (1978); The Power Plant and Industrial Fuel Use Act, Pub. L. No. 95-620, 92 Stat. 3289; The Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117; Energy Security Act Pub. L. No. 96-294, 94 Stat. 611, 770 (1980); The Natural Gas Policy Act, 15 U.S.C. § § 3301-3432 and § 7255 (Supp. II 1978); The Energy Tax Act of 1978, Pub. L. 95-618, 92 Stat. 3174.

47. 1 J. CARTER, *supra* note 35, at 609-14; 15 WEEKLY COMP. OF PRES. DOC. 609-15 (1979).

48. The decontrol was scheduled for October 1, 1981 and was accelerated to January 28, 1981 by President Reagan in Exec. Order No. 12,287, 3 C.F.R. 124-25 (1982); reprinted in 15 U.S.C.S. § 757.

49. Pub. L. No. 96-223, 94 Stat. 229 (codified in scattered sections of 17, 19, 26, 31 and 42 U.S.C. (1982)).

50. 2 J. CARTER, *supra* note 35, at 1235-47; 15 WEEKLY COMP. OF PRES. DOC. 1235-47 (1979).

51. The Energy Security Act is comprised of the Defense Production Act Amendments of 1980, 50 U.S.C. §§ 2061-2166 (Supp. IV.); United States Synthetic Fuels Corporation Act of 1980, 42 U.S.C. §§ 8701-95 (Supp. IV.); Biomass Energy and Alcohol Fuels Act of 1980, 42 U.S.C. § 8803 (Supp. IV); Renewable Energy Resources Act of 1980, 16 U.S.C. § § 2701-08 and 42 U.S.C. § 7371-75 (Supp. IV); Solar Energy and Energy Conservation Act of 1980, 12

lishment of the United States Synthetic Fuels Corporation, the development of synfuels, and with renewables such as biomass, alcohol, and solar energy, together with conservation and geothermal energy.

President Carter's contribution to the formulation of an energy policy was formidable. His administration saw the creation of a massive bureaucracy, the direct and pervasive federal government involvement in the pricing,⁵² allocation⁵³ and distribution⁵⁴ of natural resources, and a federal financial⁵⁵ commitment to the development of new resources.

The conflicts inherent in Carter's program are significant, and tradeoffs and accommodations are necessary. Such phrases as "Bigger is Better," "Less is More," "No Nukes," "Synfuels," "High-Technology," and "Soft Paths" embody basic and fundamental conflicts, yet these slogans were part of our discourse on energy. Economic growth impinges on equity and redistribution issues; increased domestic production confronts severe environmental questions; the examples are many. To the extent policy goals are in conflict the resultant policy will be splintered.

Another, more institutionalized conflict exists, however. Even if President Carter's policy preferences were complete or coherent or both, a fractionalized policy is inevitable given a change in presidential administrations. It is not surprising, nor is it an institutionalized conflict, as that term is used here, that the Reagan administration approaches energy policy differently from its predecessor. That type of conflict is the stuff of presidential politics. The characteristic institutionalized conflict results from the massive amount of positive law implanted by a previous regime,

U.S.C. § §1451-1723 (Supp. IV); Geothermal Energy Act of 1980, 30 U.S.C. § § 1501-42 (Supp. IV); the Acid Precipitation Act of 1980, 42 U.S.C. § § 8901-12 (Supp. IV).

52. See, e.g., Natural Gas Policy Act of 1978, Titles I and II, 15 U.S.C. § § 3301-3432 and 42 U.S.C. § 7255 (Supp. II 1978); Energy Conservation and Production Act, 15 U.S.C. § 757 (i)(1)(A) (1976); 10 C.F.R. § § 210-12, (1981); *Union Oil Co. v. United States Dep't of Energy*, 1688 F.2d 797 (Temp. Emer. Ct. App. 1982). Although oil price controls preceded President Carter, see, e.g., *Pasco, Inc. v. Federal Energy Administration* 525 F.2d 1391 (Temp. Emer. Ct. App. 1975); *Consumers Union, Inc. v. Sawhill*, 525 F.2d 1068 (Temp. Emer. Ct. App. 1975), his administration witnessed their continuance and enforcement, see, e.g., *DOE v. Louisiana*, 690 F.2d 180 (Temp. Emer. Ct. App. 1982).

53. See, e.g., *Marathon Oil Co. v. DOE*, 482 F. Supp. 651 (D.D.C. 1979).

54. See, e.g., *Arizona Elec. Power Coop v. FERC*, 631 F.2d 811 (D.C. Cir. 1980); Natural Gas Policy Act of 1978, Title IV, 15 U.S.C. §§ 3301-3432 (Supp. II 1978).

55. United States Synthetic Fuels Corporation Act of 1980, 42 U.S.C. §§ 8701-95 (Supp. IV).

preventing President Reagan's energy (or economic) policies from being quickly assimilated by the nation.

A fundamental political difference between Carter's and Reagan's energy views, for example, concerns whether the public or private sectors should have primary responsibility for formulating policy. Carter called for government regulation and Reagan's philosophy is based on private sector participation.⁵⁶ The debate concerning the wisdom of government regulation versus the free market is more than a political difference relative to energy policy, because President Reagan's policy views must confront the positive law put in place by the Carter administration. If the Department of Energy burdens Reagan's economic plan then it must be systematically altered or eliminated.⁵⁷ The same applies to the U.S. Synthetic Fuels Corporation.⁵⁸ It was created to promote development

56. The Administration's reformulation of policies affecting energy is part of the President's comprehensive Program for Economic Recovery, which includes elimination of excessive federal spending and taxes, regulatory relief, and a sound monetary policy. When fully implemented, the Economic Recovery Program is supposed to release the strength of the private sector and ensure a vigorous economic climate in which the nation's problems will be solved primarily by the American people themselves: consumers, workers, managers, inventors, and investors. See UNITED STATES DEPARTMENT OF ENERGY, SECURING AMERICA'S ENERGY FUTURE: THE NATIONAL ENERGY POLICY PLAN 3 (DOE/S-0008, July, 1981).

57. More subtle methods of eviscerating established agencies are to cut their budgets, fail to staff them, or staff them with people committed to the idea of dismantling them. See, e.g., R. LITWAN & W. NORDHAUS, *supra* note 6, at 121-32 for methods of defacto deregulation. The controversies surrounding administrators, such as Anne Buford, of the Environmental Protection Agency, James Watt, Secretary of the Department of Interior, and James Edwards of the Department of Energy, is evidence of President Reagan's claim to reduce the federal involvement in the regulation of energy resources. See, e.g., Hearings before the Committee on Energy and Natural Resources: United States Senate on the Proposed Nomination of Governor James B. Edwards to Secretary of Energy, 95th Cong., 1st Sess. 1 (Jan. 12, 1981) ("We need to remove Government management of fuels in what would otherwise be a free market." *Id.*) (remarks of Senator James A. McClure). "[I]t is the private sector that will do that production, not the government; and the free market place that will allocate and reward the enormous capital investments required to support that production." *Id.* at 13 (statement of James B. Edwards). N.Y. Times, June 23, 1981, § 1, at 17, col. 5 (Mr. Dennis Hayes, Director of Energy Department's Solar Energy Research Institute, was fired because of policy differences with Secretary Edwards over budget cutbacks); N.Y. Times, June 21, 1981, § 1, at 36, col. 1 (EPA's Director Anne Gorsuch aligns herself with Reagan's economic philosophy); N.Y. Times, May 27, 1981, § 1, at 16, col. 4 (EPA cutbacks); N.Y. Times, Mar. 12, 1981, § 1 at 19, col. 6 (budget cutbacks in EPA); See also N.Y. Times, Jan. 30, 1981, § 1, at 10, col. 4 (story regarding dismantling DOE); N.Y. Times, Feb. 24, 1981, § IV, at 21, col. 3 (same).

58. See, e.g., N.Y. Times, Aug. 6, 1981, § 4, at 1, col. 6 (U.S. Synfuels Corp. expenditures questioned by then OMB Director David Stockman). See also *Even Under Reagan, Synfuels Corp. Ready With Big Bucks for Private Projects*, Nat. L. J., Feb. 6, 1982, at 228-32. In 1981, 63 projects sought financial assistance from the Synfuels Corporation. See Reed, *Selection of Projects for Financial Assistance by the United States Synthetic Fuels Corpo-*

with government backed financial packages such as loan guarantees, price supports, government participation in projects, and government purchases of products. President Reagan would prefer this type of financial commitment to come from the private sector. For Carter, energy decisionmaking and policymaking were to be centralized in a federal bureaucracy. Reagan, consistent with the "supply-side economics" of his Economic Recovery Program and consistent with his disapproval of "Big Government," would like to distribute these functions among federal and state governments and the private sector. This shift in emphasis fragments energy policy. Much legislation and the creation of two substantial bureaucracies that are charged by law with policy formation, implementation, and decisionmaking run counter to President Reagan's espoused preferences. The passage of the National Energy Act and the Energy Security Act, and the establishment of these bureaucracies has institutionalized the conflict between the policy choices of the Carter and Reagan administrations, thus embedding conflict within and fragmenting energy policies.

The theme pervading the Reagan Administration's policy choices is "economic recovery." The supply-side economics of the President's program moves along two fronts. First, federal involvement in business regulation, including energy industries, must be lessened. Second, private investment must be stimulated. The way the Reagan Administration applies these principles to the energy sector illustrates the tendency of presidential policy to become mired in established conflicts.

Reagan's proposals are motivated by his desire to trim government spending rather than to facilitate decisionmaking. From an economic standpoint the appropriate question is whether the removal of the federal government from energy decisionmaking will result in a less expensive and more effective policy. The answer may well be negative.⁵⁹

The Reagan Administration argues reduced government control will encourage the infusion of private capital into energy pro-

ration, 3 ENERGY L.J. 111-12 (1982). As of January 7, 1983 no projects were funded, one letter of intent was issued, and two more letters of intent were scheduled to be issued. At the conclusion of 1984, 3 projects were funded.

59. UNITED STATES GOVERNMENT ACCOUNTING OFFICE, ANALYSIS OF ENERGY REORGANIZATION SAVINGS ESTIMATES AND PLANS (EMD-82-77). (GAO found that administration costs or savings were not reflected in the 1983 budget, the expenses of reorganization had been wrongly assessed, and current savings estimates were poorly documented and were based on inadequate implementation plans).

duction. This point is troublesome and its wisdom questionable. In the case of nuclear power, for example, President Reagan seems to believe speeding up the regulatory process will make nuclear facilities more attractive to private investors. The administration assumes federal regulatory lag causes an increase in plant costs thereby discouraging private investors from risking their capital. Other authorities, however, indicate regulatory lag does not contribute significantly to increased costs.⁶⁰ Other important factors include: inflation, increased construction costs, increased safety costs, costs for decommissioning powerplants, underestimated clean-up costs, increased cost of capital, and, a decline in demand for electricity. This being the case, a speeding up of the licensing process for nuclear plants, with perhaps an attendant increase in risk to health and safety is a poor trade-off. Moreover, the Administration's belief the states can pick up the ball is wrongheaded. First, in the case of nuclear power the states have only limited authority.⁶¹ Second, state Public Utility Commissions can fragment a national nuclear energy policy simply by treating such issues as the cancellation of a nuclear plant⁶² or a ratemaking element such as "construction-work-in-progress" differently.⁶³ The simple point is

60. The financial fallout from Three-Mile Island (TMI), including increased recognition of safety hazards, increased construction costs, higher interest rates and cost of capital, and reduced demand for electricity all contributed to a slow down in the nuclear power industry and in plant cancellations. See, e.g., Hyman, *Three Mile Island, Two Years Later* in 20 PROCEEDINGS IOWA STATE UNIVERSITY REGULATORY CONFERENCE 92 (1981); LIBERMAN, THE FINANCIAL IMPACT OF THE TMI-2 ACCIDENT 78 (19___); SHANAHAN, TMI: THE FINANCIAL IMPACT 69 (19___); UNITED STATES COMPTROLLER GENERAL, THE EFFECTS OF REGULATION ON THE ELECTRIC UTILITY INDUSTRY (EMD-81-35, Mar. 2, 1981); Flavin, *Nuclear Power: The Market Test* (Worldwatch Paper No. 57, Dec., 1983); Lowenthal, *Nuclear Power's New Peril*, N.Y. Times, Dec. 20, 1982, § 1, at 23, col. 3; McInnis, *Nuclear Utilities Plagued by Costly Equipment Breakdowns*, N.Y. Times, Oct. 10, 1982, § F, at 4, col. 3; Large, *Ills of Nuclear Power Aren't Likely to End With Faster Licensing*, Wall St. J., Aug. 30, 1982, at 1, col. 1;

61. See *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1154 (8th Cir. 1971), *aff'd mem.* 405 U.S. 1035 (1972). Refer also to note 223 *infra*.

62. See Massachusetts Dep't of Public Utilities, No. D.P.U. 906 (Apr. 30, 1982), UTILITIES LAW REPORTS. ¶ 23,690 (CCH). How costs of a plant cancellation should be carried presents federalism problems as well. See *South Dakota Public Utilities Comm. v. FERC*, 690 F.2d 674 (8th Cir. 1982); *A Survey of Regulatory Treatment of Plant Cancellation Costs*, PUB. UTIL. FORT. 52 (Mar. 31, 1983).

63. See, e.g., *Office of Consumers' Counsel v. Public Util. Comm'n.*, 67 Ohio St. 2d 153 (1981); *Citizens for a Better Env't v. Ill. Commerce Comm'n.*, 430 N.E.2d 684 (1981); *Pa. Pub. Util. Comm'n v. Philadelphia Elec. Co.*, UTIL. L. REP. (State) § 23,552 (CCH) PUL Nos. R-80061225-R 80061225C028 (Apr. 24, 1981); UNITED STATES GENERAL ACCOUNTING OFFICE, FEDERAL ENERGY REGULATORY COMM. NEEDS TO ACT ON THE CONSTITUTION-WORK-IN-PROGRESS ISSUE (EMD-81-123, Sept. 23, 1981); Hahne, *Why CWIP Should Be in Rate Base in*

President Reagan's "energy policy" conflicts with his economic program and the result is a less cohesive energy policy. Additionally, Reagan's more specific plans for energy must confront institutionalized agency conflicts.

President Reagan also proposes to dismantle the Department of Energy.⁶⁴ The DOE was created precisely to centralize, coordinate and streamline decisionmaking by the federal government.⁶⁵ Presumably, this centralization was cost efficient in that decisions could be made with a minimum of duplication and delay, and the benefits of centralization would outweigh administrative costs. Dismantling the DOE would restore the plethora of interagency fragmentation which characterized earlier energy policy. Actually, President Carter's vision of centralization was only partially accomplished. Although the DOE assumed power from other existing agencies, significant⁶⁶ interagency fragmentation continued to exist.⁶⁷

Another serious question posed by the dismantling of the centralized energy bureaucracies of DOE and the U.S. Synfuels Corporation is the effect will be had on research and development of alternative technologies. Assuming alternative technologies are needed for a well balanced energy program, will their development and initial entry into the marketplace be possible without federal

19 PROCEEDINGS IOWA STATE REGULATORY CONFERENCE 445 (1980).

64. President Reagan proposed a bill to dismantle the DOE entitled, the Federal Energy Reorganization Act of 1982, at a news conference on May 24, 1982. See Remarks of the President at Signing Ceremony for Legislative Proposal Concerning the Department of Energy (May 24, 1982).

65. Department of Energy Organization Act, 42 U.S.C. § 7111(4) (Supp. V 1981): [R]esponsibility for energy policy regulation, and research, development and demonstration is fragmented in many departments and agencies and thus does not allow for the comprehensive, centralized focus necessary for effective coordination of energy supply and conservation programs; . . .

66. The DOE, for example, was the recipient of all functions transferred from the Federal Energy Administration, the precursor to the DOE, and the Energy Research and Development Administration. 42 U.S.C. § 7151 (Supp. V 1981) There were partial transfers from the Department of the Interior, 42 U.S.C. § 7152 (Supp. V 1981), the Department of Housing and Urban Development, 42 U.S.C. § 7154 (Supp. V 1981), the Interstate Commerce Commission, 42 U.S.C. § 7155 (Supp. V 1981), and the Department of Transportation, 42 U.S.C. § 7159 (Supp. V 1981), among others. See generally, H. GREEN, ENERGY L. GUIDE, ch. 2 (1978); Aman, *Institutionalizing the Energy Crisis: Some Structural and Procedural Lessons*, 65 CORNELL L. REV. 491 (1980) (insert e.p.); Byse, *The Department of Energy Organization Act: Structure and Procedure* 30 AD. L. REV. 193 (1978). The legislative history of the Department of Energy Organization Act is contained in 1977 U.S. CODE CONG. AND AD. NEWS 854.

67. Aman, *Id.* at 516 n. 77.

involvement? Can the energy produced by the so-called alternative technologies stay price competitive with the energy produced by major energy companies?⁶⁸

The overarching issue is whether the Reagan Administration's Economic Recovery Program is compatible with a sound energy policy. Is the move to eliminate DOE and slow down or stop the United States Synthetic Fuels Corporation being done in a way compatible with energy policy, or is it just another reed in an economic wish? President Reagan's National Energy Plan is written more as a support for his Economic Recovery Program than as a policy which stands by itself. Thus, policy decisions are based on economic principles which override social concerns. This emphasis is shortsighted; it may provide temporary relief, but it must be replaced with something more satisfying.

Should Reagan's desire to eliminate or emasculate the DOE come true then what will happen to the Carter legislation passed under the National Energy Act and the Energy Security Act? Will the Departments of Commerce and Interior adequately administer these programs? The involvement of two agencies instead of one will almost certainly lead to a return to "balkanization" and fragmentation in policymaking.

Two points should be noted. First, although less importantly the energy policy proposals of Presidents Carter and Reagan are internally inconsistent; this is understandable given the range and complexity of the subject. Second, the conflicts between the Carter and Reagan administrations is more significant than a mere difference in presidential preference or politics. The Carter and Reagan policies not only differ on centralization or decentralization of decisionmaking power as a matter of presidential political preference, they differ as a matter of law. Reagan's political preferences must confront Carter's institutionalized policies.

B. Inter and Intra Agency Conflict

Policy can easily become fragmented because of direct conflicts between or within agencies or because shared agency responsibilities do not work out as smoothly as envisioned.⁶⁹ These are

68. Refer to note 56 *supra*. See also *Report of the Committee on Synthetic Fuels*, 3 ENERGY L.J. 381 (1982).

69. Transportation of nuclear materials, for example pose such a conflict. Transportation occurs at the front and back ends of the fuel cycle. Both the Department of Transport-

quintessentially bureaucratic power plays that break down substantive policy.

An example of an interagency conflict occurred in the litigation culminating in *Watt v. Energy Action Educational Foundation*.⁷⁰ Under the Outer Continental Shelflands Act Amendments of 1978⁷¹ the Secretary of DOE and the Secretary of the Interior both have responsibility for leasing tracts of the Outer Continental Shelf (OCS) for the exploration and development of mineral resources, including oil and gas. Congress passed the amendments intending to encourage domestic production of oil and gas in order to reduce dependence on foreign oil. At the same time, environmentally conscious individuals and groups wanted to protect the fragile shoreline. The bidding system for OCS tracts had its inadequacies; in particular, the heavy dependence on front end cash bonus-fixed royalty bidding was anti-competitive. Through the amendments, Congress added alternative bidding systems in order to promote competition in this market. The Secretary of the Interior has certain discretion in selecting a bidding system.⁷² Although Interior conducts all lease sales, the Secretary of the DOE, in consultation with Interior, must promulgate regulations governing the use of each new bidding system.⁷³ As a result of the Interior Secretary's continued use of the cash bonus-fixed royalty bidding system suit was filed. The complaint sought a mandatory injunction against the Secretary of the DOE to promulgate regulations for all alternative bidding systems authorized under the amendments.⁷⁴ The court found delay caused by a jurisdictional squabble between Departments,⁷⁵ and refused to grant an injunction. About a year, later the plaintiffs in the original action were back in court pressing their claim for injunctive relief. Their petition was granted on

tation and the Nuclear Regulatory Commission have jurisdiction over nuclear materials. Although a Memorandum of Understanding was signed in 1973 between the DOT and the Atomic Energy Commission (NRC's predecessor) large regulatory gaps remain. See generally Trosten & Ancarrow, *Federal-State-Local Relationships in Transporting Radioactive Materials: Rules of the Nuclear Road*, 68 Ky. L. J. 251 (1979-80); Comment, *Transportation of Nuclear Material: The Public Challenge*, 11 RUT.-CAM. L.J. 63 (1979).

70. 454 U.S. 151 (1981).

71. 43 U.S.C. § 1331(b) (Supp. V 1981).

72. 43 U.S.C. § 1337(a)(1) (Supp. V 1981).

73. 42 U.S.C. § 7152(b)(2) (Supp. II 1978) (Repealed by Act of Dec. 23, 1981, Pub. L. No. 97-100, title II, § 201, 95 Stat. 1407).

74. *Energy Action Educ. Found. v. Andrus*, 479 F. Supp. 62 (D.D.C.) *aff'd*, 631 F.2d 751 (D.C. Cir. 1979).

75. *Id.* 631 F.2d at 755, 758.

the ground that continued delay by the Interior Department in using alternative bidding systems frustrated the essential purposes of the act.⁷⁶ Whether the conflict between Interior and the DOE is real or apparent is consequentially beside the point. Litigation was necessary before a long-delayed Congressional directive could be put into effect.⁷⁷

Not only is the DOE an amalgam of other agencies its own structure contains a fragmentation of power.⁷⁸ The DOE is an executive agency and significant powers are delegated to the cabinet level office of the Secretary and to executive departments under its control. At the same time, DOE has under its umbrella an independent regulatory agency the Federal Energy Regulatory Commission (FERC).⁷⁹ FERC has been granted the bulk of the powers of the former Federal Power Commission together with powers assigned to it under the National Energy Act. This split of authority and consequently, decisionmaking power, means cohesive energy policy is less likely to evolve. FERC, for example, has ratemaking authority over wellhead and pipeline rates for natural gas⁸⁰ but the Secretary exercises control over wellhead oil prices and over the allocation of oil;⁸¹ moreover, FERC has authority to develop natural gas curtailment plans⁸² but the Secretary sets curtailment priorities.⁸³

In *City of Fulton v. United States*⁸⁴ the Secretary of the Department of Energy took it upon himself to grant an interim rate increase which affected purchasers of power from the Southwestern Power Administration (SWPA). Formerly, the Department of Interior had jurisdiction over the SWPA but this was transferred

76. *Energy Action Educ. Found. v. Andrus*, 654 F.2d 735, 750 (D.C. Cir. 1980), *rev'd sub nom*, *Watt v. Energy Action Educ. Found.*, 454 U.S. 151 (1981).

77. *Arkla Exploration Co. v. Watt*, 548 F. Supp. 466, 468-69 (W.D. Ark. 1982) (Department of Interior conflict with Department of Energy). Although such conflicts are not the norm, and cooperation is possible, see *Natural Resources Defense Council, Inc. v. Zeller*, 688 F.2d 706 (11th Cir. 1982) (DOE and Environmental Protection Agency cooperation), the fact that policy-making authority resides in competing bureaus contributes to fragmentation.

78. *Aman*, *supra* note 66 at 516-26.

79. 42 U.S.C. § 7171-77 (Supp. V 1981). *See also*, Clark & Grenier, *The Relationship Between DOE and FERC: Innovative Government or Inevitable Headache*, 1 *ENERGY L. J.* 325 (1980).

80. 42 U.S.C. § 7172(a)(1)(C) (Supp. V 1981).

81. 42 U.S.C. § 7151 (Supp. V 1981).

82. 42 U.S.C. § 7172(a)(1)(E) (Supp. V 1981).

83. 42 U.S.C. § 7151, 7172(a)(1)(E) (Supp. V 1981).

84. 680 F.2d 115 (Ct. Cl. 1982). *See also* cases cited at 680 F.2d at 122 n. 28.

to the DOE. Ratemaking authority, previously within the jurisdiction of the Federal Power Commission was later transferred to FERC which was held to have ratemaking jurisdiction over this matter after a jurisdictional squabble with FERC's titular head the Secretary of DOE.

Even more curious is the power the FERC has over some decisions of the Secretary. FERC's own decisions are final, and though reviewable by the courts, they are not reviewable by the Secretary.⁸⁵ Not only does FERC retain its independent status in this fashion, but it also has a veto power over actions taken by the Secretary which may significantly affect any function within the jurisdiction of the FERC.⁸⁶ Further, FERC has authority to review certain decisions of the Secretary.⁸⁷ The point made here is a simple one: by its very structure the DOE has a built in, or institutionalized, conflict between decisionmakers within the same agency. This conflict has the potential to fragment energy policy and, following Murphy's law, will most likely do so when the need for a cohesive policy is most needed.

Inter and intra agency conflicts resemble the tension between presidential administrations concerning centralization and decentralization; both are struggles for power and authority. It is the realization that political power struggles are aligned with decision-making structures that helps us understand the relation between law and policy.

C. *Interbranch Conflicts*

Conflicts among the judicial, legislative, and executive branches are traditional political conflicts, and are not the focus of this article.⁸⁸ Rather, the emphasis here is on legal conflicts between each constitutional branch and the fourth branch—administrative agencies. Agencies have been delegated

85. 42 U.S.C. § § 7172(g), 7192 (Supp. V 1981).

86. 42 U.S.C. § 7174 (Supp. V 1981). *See also*, *United States v. Tex-La Elec. Co-op., Inc.*, 693 F.2d 392 (5th Cir. 1982).

87. 42 U.S.C. § 7194(b) (Supp. 1979).

88. Among these conflicts, the most serious is the current attempt by Congress to limit the jurisdiction of the federal courts. Since the federal court system is one of limited jurisdiction and since Article IV of the Constitution directs Congress to regulate the federal courts, some limitation can be done. The serious questions arise when Congress attempts to tamper with federal court jurisdiction of constitutional claims. *See Sager, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

more policymaking responsibilities and, through rulemaking, they have exercised more policymaking authority. The discord between three primary branches on the one hand and agencies on the other is one which centers on the use and exercise of lawmaking and policymaking power which is jealously guarded by all actors within the legal-policymaking system. As the agencies' policymaking power continues to grow attempts will continue to be made by other branches to curtail that power.

1. *Executive v. Agency.* Much of the criticism⁸⁹ of administrative law has been that agencies are given too much responsibility to decide increasingly complex and equivocal issues. This trend is coupled with a strong policy of judicial deference to administrative agencies with the result agencies have considerable policymaking authority.⁹⁰ One check on the spread of administrative power is the executive veto.⁹¹

The Constitution⁹² and numerous statutes⁹³ circumscribe the limits of Presidential power. Although restrained in many respects, the President does have significant decisionmaking authority.⁹⁴ The Executive can appoint and remove officials; the Office of Management and Budget influences, if not dominates, the purse strings of most agencies; "executive agencies" are under the office of the President; and, the very political nature of the President's position influences the regulatory atmosphere for decisionmaking through moral suasion and political rhetoric. Still, there is a belief that the rise of policymaking in agencies must be checked through Presi-

89. Refer to note 7 *supra*.

90. The movement of agencies away from adjudication, which is basically a retrospective dispute resolution mechanism, to rulemaking, a forward-looking, legislative-like device, is causing this policymaking function to increase. See, Ackerman & Hassler, *supra* note 43, at 13-58; DeLong, *supra* note 7 at 257-60; Diver, *supra* note 8 at 401-410; Stewart & Sunstein, *supra* note 4 at 1232-39.

91. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L. J. 451 (1979). The executive veto is one of many devices the President can use to influence agency action. The Executive's powers over the purse and appointments clearly thrust the executive into agency policy.

92. U.S. CONST. art. II.

93. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 14-18 (1982).

94. The President is given express authority to establish production goals for synthetic fuel to meet national defense needs, 50 U.S.C. § 2095(a) (Supp. IV 1980); ration motor fuel, Emergency Energy Conservation Act of 1979, 42 U.S.C. § 6261 (Supp. V 1981); make appointments to the U.S. Synthetic Fuels Corporation, 42 U.S.C. § 8712(a)(2) (Supp. V 1981); and set energy targets, 42 U.S.C. § 7361(a) (Supp. V 1981).

dential initiatives.⁹⁵

When agencies exercise their rulemaking function, they are promulgating policy as well as enacting law. These policy decisions may not comport with Executive policy preferences, particularly following a change in Administration as dramatic as the transition from President Carter to President Reagan. Agencies can easily make decisions which affect national policy and which are contrary to a president's philosophy before the president can legitimately act to align agency action with presidential preference. One mechanism which is proposed to allow the president a stronger hand in agency rulemaking is the executive veto.⁹⁶ Much talk of regulatory reform is grounded in the belief that most of our current economic woes are due to the massive and costly bureaucratic and regulatory delays industries face before they can provide goods and services.⁹⁷ Thus, the veto device is proposed in the hope that agency actions can be coordinated with presidential policy and be made more efficient.⁹⁸

The drawback of the executive veto is it upsets the balance of power in the branches of government. Even if economic efficiency is promoted through the use of the veto, and is not guaranteed,⁹⁹ the President will have exercised a power over policy that is denied the other branches. Lawmaking is a function of both houses of Congress with Presidential consent or with Congressional override. The executive veto applied to agency action circumvents this process in derogation of the inner structure of the Constitution.

95. See, e.g., Bruff, *supra* note 91 at 453-56.

96. See generally, Note, *Delegation and Regulatory Reform: Letting the President Change the Rules*, 89 YALE L. J. 561 (1980)

97. See, e.g., AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND THE ECONOMY, *FEDERAL REGULATION: ROADS TO REFORM* 79 (1978). See also 127 CONG. REC. S4228-31, 97th Cong., 1st Sess. (April 30, 1981).

98. Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L. J. 1395, 1410-11 (1975); Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79, 105-11 (1982) (state and federal models); Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193 (1981); Symposium: *Presidential Intervention in Administrative Rulemaking*, 56 TUL. L. REV. 811 (1982).

99. Should the President exercise the veto power, then at least it means that the time and resources consumed by the agency and other participants in the rulemaking process have been substantially wasted. If affected parties want to challenge the veto, then litigation expenses will be incurred.

2. *Legislature v. Agency.* Agencies are creatures of the Legislature yet tension between the two bodies is commonplace. Congress wants to restrain agency action for the same reasons the executive does. One way of doing this is the legislative veto.¹⁰⁰

The study of energy legislation is a case in point. The Carter Administration pushed hard for the passage of a comprehensive national energy package. After only eighteen months of debates and politicking the National Energy Act was passed. This was truly crisis legislation. The "Energy Crisis" precipitated several major bills¹⁰¹ and the Congress responded relatively quickly given the magnitude and complexity of the issues. Congress formulated a new bureaucracy and delegated a great amount and array of powers. In its hurry, however, the Legislature may have delegated too much responsibility with inadequate policy guidelines. One way to check abuse of those powers was the legislative veto. Through the veto one or both houses of Congress could invalidate some aspect of administrative action. The United States Supreme Court heard argument and reargument on the constitutionality of the one-house legislative veto and has held the device invalid.¹⁰² In the context of the Natural Gas Policy Act¹⁰³ the Court of Appeals for the District of Columbia Circuit declared this device unconstitutional.¹⁰⁴

The Natural Gas Policy Act of 1978 (NGPA) is a major part of the National Energy Act. NGPA attempted to do several significant things. First, by exercising pricing controls over intrastate gas sales the dual natural gas markets (interstate and intrastate) were unified and prices were brought into line. Second, NGPA planned a scheduled deregulation of natural gas prices. This deregulation was and continues to be a very controversial aspect of our national energy policy.¹⁰⁵ Much of the controversy stems from the fear that residential consumers will suffer unfair and disproportionate price

100. See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Levinson, *supra* note 98, at 79-105.

101. Refer to notes 46 and 51 *supra*.

102. *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, (1983) (energy legislation containing legislative vetoes that were invalidated is cited in an appendix to the opinion).

103. 15 U.S.C. § § 3301-3432 (Supp. V 1981).

104. *Consumer Energy Council of Am. V. FERC*, 673 F.2d 425, 448 (D.C. Cir. 1982).

105. See, e.g., Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 VA. L. REV. 63, 72-74 (1982).

increases. To remedy this problem NGPA proposed incremental pricing of natural gas.¹⁰⁶ These provisions limited the extent to which increased fuel costs could be passed on to residential consumers in such a way as to pass those costs instead to industrial consumers. Congress, then, through NGPA directed FERC to issue a rule on incremental pricing covering boiler fuel users.¹⁰⁷ In Phase II, FERC was directed to prescribe an amendment extending incremental pricing to other industrial users.¹⁰⁸ The Phase II rule was to take effect after thirty legislative days, "unless, during such 30 day period of continuous session of Congress, either House of the Congress [were to adopt] a resolution of disapproval."¹⁰⁹ This is a one-house veto provision.

If we accept the characterization that the energy legislation was passed hurriedly, and that the incremental pricing provisions were controversial as well as complex, then the reason for the legislative veto is apparent. Congress, though undecided as to a definitive policy, wanted to maintain some control. While agencies expanded their use of rulemaking and concomitant policymaking powers, Congress, following a call for regulatory reform, attempted to abort abuses of these expanded powers through the use of the veto. The device seems harmless enough; it even seems to be good policy management. Congress, in passing legislation, is delegating a good deal of authority to an agency and through the legislative veto it sought to retain some measure of control. Nevertheless, the veto is unconstitutional.¹¹⁰ The United States Supreme Court in the *Immigration and Naturalization Service v. Chadha*¹¹¹ held that the one house veto provision of law dealing with deportation of aliens violated the bicameralism and presentment provisions of the United States Constitution.¹¹² For similar reasons the D.C. Circuit previously held that the one house veto provision of the NGPA was invalid.¹¹³

The one-house veto runs afoul of the separation of powers doctrine by allowing Congress to control rulemaking and poli-

106. See, Hollis, *Title I and Related Producer Matters Under the NGPA*, 2 ENERGY L. SERV. MONO 4D (1981).

107. 15 U.S.C. § 3341(a) (Supp. V 1981).

108. 15 U.S.C. 3342(a) (Supp. V 1981).

109. 15 U.S.C. § 3342(c)(1) (Supp. V 1981).

110. *Immigration and Naturalization Serv. v. Chadha*, 462 US 919 (1983).

111. *Id.*

112. *Id.* at 342-3, 350.

113. *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 461-72 (D.C. Cir. 1982).

cymaking processes after it has delegated authority. Congressional oversight of agency action should take place before delegation not afterwards. Further, the one-house veto bypasses the President's signature on a bill and it effectively avoids judicial review. The legislative veto process disrupts the delicate system of constitutional checks and balances by giving Congress, and in the case of a one house veto, only one house, a second look at agency action when no other branch is afforded a similar opportunity. One response, which has surface appeal, is Congress is the most "democratic" of the branches so the second look is politically acceptable. In practice that has not been the case; decisions to veto or not have been made primarily in committee as the result of agency-committee negotiations rather than in floor debate.¹¹⁴ Therefore, it is appropriate that the courts have ruled that Congress may retain control over agency actions which are within the realm of authority granted to the agency only by conventional legislation.

In a penetrating case study of legislative vetoes Professors Bruff and Gellhorn conclude this mechanism: does not effectuate better policy choices; it impedes public participation while fostering some interest group influence; it imposes unfavorable time constraints, delays and impasses; and, it is not politically accountable.¹¹⁵ Thus, while the device purports a theory of efficient delegation, in reality it is another layer of red tape.

There is a subtle but deep theme in this short story. Policymaking is a hazardous business. One branch cannot do it alone and the struggle over the exercise of power is governed by two important considerations. First, there is the question of efficiency. In the one-house veto scenario of NGPA Congress was too busy or lacked the resources to delve deeply into the vagaries of incremental pricing, so it gave FERC permission to make the necessary rules; nevertheless, Congress reserved the right to invalidate what it did not like. That appears to be a fairly smooth way to proceed. While it is true that FERC's efforts proved to be unnecessary, it can be argued they were not wasted. FERC performed an investigative task for Congress. The second issue, important to the legislative policymaking scenario, is one of political expedience. Interest groups, and other branches of the government, have claims on the policymaking process and these groups should not be denied

114. *Id.* at 478.

115. Bruff & Gellhorn, *supra* note 100 at 1412-23.

their right to have input in the veto process or input into rulemaking. The use of the veto invalidates these powers and policymaking is further subjected to the vagaries of the winds of politics.

3. *Judiciary v. Agency.* Interactions between the executive and legislative branches and agencies present checks and balances as well as separation of powers problems. A review of efforts to recapture some control over agency decisionmaking and policymaking reveals the difficult position in which these branches find themselves. Agencies as designated bodies, supposedly with expertise, are delegated responsibility for overseeing problems that Congress and the executive cannot. If either of these branches delegates too little authority then the problems assigned to the agency for resolution may not be adequately addressed. If the agencies are delegated¹¹⁶ a great deal of power and authority, the other branches lose control over national policy.¹¹⁷

The conflict created by the interaction between agencies and the judiciary is of a different sort. The judiciary is thought to be less politically accountable and thought to lack the democratic character of the other branches. Even in the face of "legislative failure"¹¹⁸ (where Congress fails to act or acts improperly) courts

116. Before 1937 the Supreme Court often invalidated Congressional delegations of authority to agencies as violating the Constitution on the ground that too much power passed to agencies. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 591-42 (1935). Although there is some talk of reviving that doctrine, such a move seems unlikely. See, *American Textile Mfr. Inst. Inc. v. Donovan*, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, (1980) (Rehnquist, J., concurring);

117. One solution to this impasse is for Congress to exercise more control by giving agencies more pointed direction in which way substantive policy ought to go. See, B. ACKERMAN & W. HASSLER, *supra* note 45 at 116-128; Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 *TEX. L. REV.* 1175, 1220-22 (1981). Because of the "crisis" atmosphere in which energy legislation was passed, such deliberate policy choices were not made. Another solution is more Executive control. See Cutler, *The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch*, 56 *TUL. L. REV.* 830, 838-43 (1982). But see Morrison, *Presidential Interference in Informal Rulemaking: Striking the Proper Balance*, 56 *TUL. L. REV.* 879, 897-902 (1982).

118. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* ch. 12-24 (1980); see also Pierce & Shapiro, *supra* note 117 at 1200-03. Congress fails not because its final decisions turn out to be wrong, but because of inefficiency or unfairness. Congress also fails when it does not function in its representative capacity because access to Congress is shared unequally by interest groups. See, e.g., Farney & Pasztor, *In the House, the Jockeying Grows Intense For Coveted Seats on Energy Committee*, *Wall St. J.*, Jan. 3, 1983, at 25, col. 3:

When word got out that the 43-year old Democrat, a former lieutenant governor of Nevada, sought a seat on the powerful committee, he was besieged by lobbyists.

are seen as an undemocratic and an antimajoritarian branch of government.¹¹⁹ Yet, the judiciary's function is to review agency actions as needs arises.

Most energy decisions are made by an administrative agency with judicial review available in most instances. Less frequently, courts review decisions of the Congressional¹²⁰ and Executive branch.¹²¹ Courts operate as a stabilizing force by deciding disputes and acting as a check on the other arms of government. This judicial checking function has been greatly expanded by the increase in public law, the increase in decisions by rulemaking rather than adjudication,¹²² and the consequent increase in policymaking. Courts are given express limitations¹²³ and set standards for review by the Administrative Procedures Act and enabling legislation.¹²⁴ Within these guidelines the standards for judicial review have some flexibility.¹²⁵ Courts have broadened their reviewing discretion,¹²⁶ sometimes to the point of being chastized by higher appel-

Even some of his fellow lawmakers tried to twist his arm. They all pledged, in advance, to vote their way on clean-air legislation, natural-gas price decontrol, and other intensely controversial issues.

119. CHOPER, *supra* note 118 at 25-45; J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4-7 *passim* (1980); A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

120. Refer to notes 98-107 *supra* and accompanying text.

121. *Independent Gasoline Marketers Council v. Duncan*, 492 F. Supp. 614, 618 (D.D.C. 1980) (review of President Carter's imposition of a 10% conservation fee).

122. See, Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111 (1972); Pierce, *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 HASTINGS L. J. 1 (1979).

123. 5 U.S.C. § 706 (1976).

124. The Department of Energy Organization Act, for example, establishes a slightly different set of administrative procedures in some instances, 42 U.S.C. § 7192 (Supp. V 1981).

125. See, Comment, Davis, *Judicial Review of Rulemaking: New Patterns and New Problems*, 1981 DUKE L. J. 279; Gellhorn & Robinson, *Rulemaking "Due Process": An Inconclusive Dialogue*, 48 U. CHI. L. REV. 201, 201-15 (1981); Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418 (1981); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974); *Developments in the Law: Judicial Review of Agency Rulemaking and Adjudication*, 1982 DUKE L. J. 393; Note, *Regulatory Analysis and Judicial Review of Informal Rulemaking*, 91 YALE L. J. 739, 743-46 (1982) (argues that perhaps the best that courts can do to curb abuse of agency policymaking is to insist that agencies maintain proper forms of internal management).

126. See, DeLong, *supra* note 8 at 262-84; Rodgers, *Benefits, Costs and Risks: Oversight of Health and Environmental Decisionmaking*, 4 HARV. ENVTL. L. REV. 191 (1980); Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1811 (1978); Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975).

late bodies.¹²⁷

Courts are not reluctant to create remedies and thus, fashion rights, for parties involved in administrative proceedings. If an agency fails to act, a court will force action. If rights are not vindicated by an agency, courts will provide a forum. If an agency exercises unwarranted authority, a court can offer protection from the improper use of agency power. And, if a person is denied something to which he or she is properly entitled, a hearing procedure may be available. Each of these judicial responses is a reaction to inadequate administrative processes. Courts, generally, have not been reluctant to correct agency deficiencies if, in the view of the court, the agency has not followed its charge. Most of these corrective actions have been taken to protect individual liberty or property interests rather than to further or to articulate collective policy goals.¹²⁸ Nevertheless, this judicial attitude toward public law litigation necessarily affects policymaking.¹²⁹

The judiciary tends to avoid interfering with public policymaking by deferring to agency action.¹³⁰ As administrative

127. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). (In this case the Supreme Court held that the D.C. Circuit Court of Appeals abused its reviewing authority by telling the NRC to employ rulemaking rules in excess of those required by the APA). The issue was again before that body, and the NRC was affirmed, see *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983). See generally, Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978); Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny*, 67 GEO. L. J. 699 (1979); Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court*, SUP. CT. REV. 345 (1978).

128. Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Stewart & Sunstein, *supra* note 4 at 1202-20 and 1246-1316.

129. In *A COMMON LAW FOR THE AGE OF STATUTES* (1982) Professor Calabresi chronicles the ways courts can undercut, avoid, and otherwise get around statutes thought to be useless or obsolete. In this regard courts make policy. The legitimacy of how courts go about making policy is of fundamental Constitutional importance. See *A COMMON LAW FOR THE AGE OF STATUTES* ch. IX.

130. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965); Stewart, *supra* note 7 at 1671-88; Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 260-79 (1978).

The cases citing the principle of deference are legion. Recent energy cases in which courts defer to agency "policy" include: *Seacoast Anti-Pollution League of N. H. v. NRC*, 690 F.2d 1025, 1030-33 (D.C. Cir. 1982); *West Virginia. Pub. Serv. Comm. v. DOE*, 681 F.2d 847, 852 (D.C. Cir. 1982); *East Tennessee Natural Gas Co. v. FERC*, 677 F.2d 531, 535 (6th Cir. 1982); *Ethyl Corp. v. EPA*, 541 F.2d 1, 33-37 (D.C. Cir. 1976). These cases, as well as the run-of-the-mill "deference" cases are somewhat incoherent about exactly when courts trigger the deference rule and about exactly what the subject matter is to which courts

agency politics change and as the social and economic problems facing them change, courts must redefine their place in the policymaking structure. They have tended to step into the policymaking network in ever increasing instance. Through procedural and jurisdictional devices courts can subvert agency policy by delay or can order reconsideration and reevaluation by remand.

When an agency promulgates a rule under informal rulemaking procedures, courts may call for closer scrutiny.¹³¹ Where the rules address complex technical, economic, and social issues such as those that characterize energy problems, there is more room for varying interpretations of law, of facts, or of policy. An agency exhibits biases which build up during its lifetime of regulating broad areas of the economic system.¹³² Consequently, courts have been willing to scrutinize this type of far-reaching agency decisionmaking more closely.

Although courts display a willingness to give agency rules a "hard look"¹³³ they are aware that the issues they are called on to review may be polycentric and open to varying interpretations. The expert agency is generally in a better position to evaluate the issues,¹³⁴ and therefore, agency decisions may be handled with a "kid glove."¹³⁵ Courts do not have the resources to gather scientific

defer. The "rule of deference" then, because of the mass of cases, can be seen as a series of rules and meta-rules. This subject, however, deserves further explication in another article.

Courts are reluctant to substitute their judgment for the substantive decisions agencies make. They are more deferential towards the choice of methods agencies use to make decisions. See *infra* § III; see also *New York v. E.P.A.*, 716 F.2d 440, 444 (7th Cir. 1983); *City of New York v. Dept. of Transp.* 715 F.2d 732, 754 (2nd Cir. 1983); *California v. Watt*, 712 F.2d 584, 596 (D.C. Cir.), *cert. granted*, ____ U.S. ____, (1983) ("The Secretary was therefore free to choose any methodology 'so long as it is not irrational.'"); *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1147-51 (D. Alaska 1983).

131. In informal rulemaking cases courts have held that the "arbitrary and capricious" standard and the "substantial evidence" test may converge. See, *National Small Shipments Traffic Conference, Inc. v. CAB*, 618 F.2d 819, 826-27 (D.C. Cir. 1980); *ECEE, Inc. v. FERC*, 611 F.2d 554, 565 n.22 (5th Cir. 1980).

132. See, e.g., S. BREYER, *REGULATION AND ITS REFORM* 10 (1982); B. OWEN & R. BRAEUTIGAM, *THE REGULATION GAME* (1981); Note, *Regulatory Analyses and Judicial Review of Informal Rulemaking*, 91 YALE L. J. 739, 740-41 (1982).

133. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-53 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

134. The court does not inquire into the wisdom of the regulation that the agency promulgates. "[It] inquire[s] into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported." *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972).

135. *Rodgers*, *supra* note 126 at 216-18. See also, *Shell Oil Co. v. FPC*, 520 F.2d 1061, 1070-71 (5th Cir. 1975).

data and perform the sophisticated scientific, technological and economic analyses agencies are established to undertake in furtherance of Congressional mandates.¹³⁶ Courts are caught in a dilemma between the desire to closely oversee agency decisionmaking and the desire to defer to agency expertise.¹³⁷

Energy decisions rarely involve two-sided disputes over simple matter such as property damage, or the extent of an individual's entitlement or the resolution of a past dispute. Rather, energy decisions are multi-layered, many-partied, future-looking bundles of positive and normative issues. Because energy decisions frequently affect such fundamental social institutions such as the economy, and the extent of government intervention in society, the decisionmaker is frequently put into a position of having to weigh the issues. The type of judicial review and the weighing and ordering that a court chooses can be determinative. There are no precise rules which exist to guide courts in making these choices. Different judges have developed different judicial philosophies with regard to court review of an expert agency's decision in cases with scientific, technical, economic or social complexities. Judge Harold Leventhal the author of the opinion first enunciating the "hard look" standard¹³⁸ wrote courts, "would be the first to agree, indeed proclaim, that they are not technicians and cannot themselves either decide technological disputes, or draw on their own knowledge for a ruling on whether an agency's determination is proper."¹³⁹ While it is true courts (especially appellate courts) are neither designed nor equipped to do basic scientific and technical fact-finding necessary to test or evaluate hypotheses, it is also true agencies are not *necessarily* in vastly superior positions. The more scientifically complex the case, the more subject to the vagaries of proof it is. Although courts cannot conduct initial scientific or technical inquiries they do have special expertise in methods of proof and about the processes by which matters are proven. Thus, Judge Leventhal states, no matter how narrowly one may wish to define the scope of judicial review:

136. Yellin, *supra* note 3 at 494-508.

137. Pierce & Shapiro, *supra* note 118 at 1192-94, prefer to let courts defer to agency expertise. *See also*, Pierce, *supra* note 122 at 27-30.

138. Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

139. Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 532 (1974).

[T]he court will not be confined to bare formalities but will probe the entire record to identify the choices made by the agency, to determine whether there has been a disregard of ascertainable legislative intent to assure itself that the parties were offered a reasonable opportunity to present their position, and to find whether there has been a reasonable assessment of the interrelated policy and legal questions.¹⁴⁰

Scientific or technical decisions "involve painful value choices, and pose difficult policy problems,"¹⁴¹ which is further complicated by the intervention of government regulation. While scientists may be in the best position to conduct basic research and assess costs and benefits of an individual innovation, they are not necessarily the best evaluators of how innovation should be applied to society. Rather, Congress, in the law authorizing the delegation, may have signaled the path that an agency should follow, and courts can ensure that agencies follow this established path. Judge David Bazelon outlines the proper role for courts and judges:

What courts and judges can do, however—and do well when conscious of their role and limitations—is scrutinize and monitor the decisionmaking process to make sure that it is thorough, complete, and rational; that all relevant information has been considered; and that insofar as possible, those will be affected by a decision have had an opportunity to participate in it.¹⁴²

Judges Leventhal and Bazelon exemplify an emerging phenomenon—the expanded role of the judge in public law controversies.¹⁴³

The expansion of agency policymaking, a corollary increase in areas of potential error, increased judicial activism, and the Supreme Court's attitude of restraint as evidenced in *Vermont Yan-*

140. *Id.* at 541.

141. Bazelon, *Coping With Technology Through The Legal Process*, 62 CORNELL L. REV. 817, 819 (1977).

142. *Id.* at 823.

143. Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 376-80, 386-414 (1982) (emphasizing pre-trial case management as a "new form of judicial activism"). See also, CALABRESI, *supra* note 4 at 52:

What I shall do is to try to compare the institutional capacities of administrative agencies with those that courts and legislators can bring to these tasks. In this way I hope to indicate why agencies cannot legitimately solve the problem of legislative obsolescence - why, in other words, there is an important common law, judicial function in the updating of outmoded laws. This function requires courts to make use of the particular skills that administrative agencies have, but it cannot rely on those skills.

kee,¹⁴⁴ have prompted numerous proposals for reform.¹⁴⁵

These reform efforts highlight the basic conflict between agencies and courts in the area of public law decisionmaking. The judiciary should not be overly deferential when reviewing agency actions. If courts are to take their role seriously they then become part of the policymaking process. Yet, as they do, the policy decisions of agencies are subjected to being second guessed, overturned, delayed, drastically altered by a jealous judiciary or rubber stamped by a passive one. The question as to when to use a rubber stamp or when to intervene remains unsettled and the finality of substantive policy is ambiguous.

The theme emerging from a review of these structural conflicts is that as agencies or constitutional branches attempt to define their roles and exercise their power and authority policy is splintered. The smooth interaction of law and policy is a myth. Too many forces combine to preclude the coalescence of a coherent, let alone complete, national policy in a field such as energy. The structural framework within which decisions are made is but one facet

144. 435 U.S. 519 (1978). Refer to notes 118-120 *supra* and accompanying text.

145. A proposal in Congress entitled the Regulatory Reform Act, S. 1080, 97th Cong., 1st Sess.; 127 CONG. REC. at 7938 (daily ed. Apr. 30, 1981); 97th Cong., 2d Sess., 128 CONG. REC. H. 519 (daily ed. Feb. 25, 1982), amends the judicial review section of the APA by changing the circumstances under which an agency's actions may be set aside by a reviewing court. This new section recognizes the distinction between fact and policy and leaves the agency its discretionary authority in making policy choices. It requires, however, the reviewing court to take an independent look at the factual bases for the agency rule. *Id.* Thus, where a finding of fact is necessary to support a rule the court must analyze the factual predicate for the rule. Where the agency's policy choice would fail to satisfy the "arbitrary, capricious, and abuse of discretion" standard absent such a factual finding, or where the "finding of fact" is an asserted basis of the rule, the factual findings must meet the "substantial support" standard clause of the regulatory reform legislation. Courts are given more discretion under the proposed Bumpers Amendment to the APA.

Other reform efforts would alter the institutional structure of energy decisionmaking by creating specialized courts such as a Science Court. See Caspar, *Technology Policy and Democracy: Is the Proposed Science Court What We Need*, 194 SCIENCE 29 (1976); Kantrowitz, *The Science Court Experiment: Criticisms and Responses*, 33 BULL. ATOM. SCI. 44 (1977); Kantrowitz *Controlling Technology Democratically*, 63 AM. SCIENTIST 505, 506-07 (1975); Martin, *The Proposed "Science Court,"* 75 MICH. L. REV. 1058 (1977); *Science Court: High Officials Back Test of Controversial Concept*, 194 SCIENCE 167, 169 (1976); *Task Force of the Presidential Advisory Group on Anticipated Advances in Science and Technology, the Science Court Experiment: An Interim Report*, 193 SCIENCE 653-59 (1976); Another option might involve special "consensus-finding" forums where issues, such as energy questions and other complex matters are examined, M. WESSEL, *SCIENCE AND CONSCIENCE* (1980). It has also been suggested that there be expanded use of masters in order to give a reviewing court the opportunity to render a "second opinion" on agency actions. Yellin, *supra* note 3 at 555-60.

of this splintering process. The system of checks and balances between legal structures means there is a constant interplay between actors competing for power. No actor, no agency, no branch can accumulate too much power without being stopped. The structures of decisionmaking guarantee this. While it is true policy formation is impeded because of jurisdictional jealousies, policy choices are not completely ad hoc and chaotic. The choices are narrowed by political norms which tolerate some degree of authority grabbing. This political element is the first of two parts which constitute the matrix in which law and policy operate.

Other reasons exist which also prevent the development of a comprehensive substantive energy policy. Next, this Article addresses the methodologies used in decisionmaking. Although the methodologies contain conflicts which interfere with substantive policymaking, those conflicts are held together by the second element, the economic branch, of the policymaking complex.

IV. METHODOLOGICAL CONFLICTS

Where issues consist of political, scientific, economic, social and normative uncertainties that span generations in some instances, decisionmakers are thrust into a paradoxical situation.¹⁴⁶ In the face of vast uncertainties, methods are needed to make the mass of data intelligible. The paradox is that, as the issues become more open-ended and amorphous, and the need for certainty and substantive decisions is greatest, decisionmakers are forced to use methods that are reductionist for the purpose of winnowing and marshalling empirical data. The direction in which the methods are reductionist therefore colors the outcome. This is not a grand insidious plot by corporate interests or elite groups to dominate a political culture. Rather, the choice of effective, understandable methods is borne from a need for certainty, which is approximately achieved through the use of identifiable and understandable criteria. This is a normal institutional, even personal, response to complex disputes.

The two dominant methods of energy decisionmaking are

146. The operative language is that "decisions are required to be made." See, e.g., McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 Geo. L. J. 729, 781-83 (1979) (these uncertainties do not preclude decisions being made and the decisions that are made turn on political criteria rather than scientific or empirical criteria).

ratemaking and cost-benefit analysis. These are inherently complex and difficult methods. The risk is that decisionmakers can place too much reliance on them as the principle means of decisionmaking. These methods are biased too heavily in favor of quantification and they are not and, indeed cannot be, uniformly applied. Both ratemaking and cost-benefit analysis (CBA) are based on simple mathematical formulae. In fact as stated, the final calculation for both are basic mathematical statements—but so is $E=MC^2$. While neither methodology is as revolutionary as the theory of relativity, in the hands of bureaucrats both approach its complexity.

A. *Ratemaking*

The accepted formula for ratemaking is: $R = O + (B) r$.¹⁴⁷ Once the variables are defined it is child's play to find the revenue requirement R by adding operating expenses O to the rate base B multiplied by the rate of return r . The trick is in finding universally accepted or satisfactory definitions for each of the variables. What constitutes O is comparatively non-controversial compared with the other variables. Even so, there are occasionally grey areas. Costs incurred in operating and maintaining a business must be recouped if the business is to continue to operate. Yet are all of these costs to be attributed to the ratepayers, or are some to be absorbed by the shareholders? Generally, only those costs associated with the prudent management of the firm, such as executive salaries, are considered operating expenses which are passed through to the ratepayers.¹⁴⁸ Occasionally, public service commissions or legislatures step in to settle questions concerning operating expenses. The New York Public Service Commission, for example, promulgated an order prohibiting electric utilities from using bill inserts to argue its position on controversial issues, such as its pro-nuclear policy. This was struck down by the Supreme Court as violative of the First Amendment.¹⁴⁹ Yet, the issue of who should

147. C. PHILLIPS, *THE ECONOMICS OF REGULATION* 130 (1965). See also J. BONBRIGHT, *PRINCIPLES OF PUBLIC UTILITY RATES* (1961); R. PIERCE, G. ALLISON & P. MARTIN, *ECONOMIC REGULATION: ENERGY, TRANSPORTATION AND UTILITIES* 130 (1976); A. PRIEST, *PRINCIPLES OF PUBLIC UTILITY REGULATIONS* 45-139 (1969).

148. See, *West Ohio Gas Co. v. Public Util. Comm'n of Ohio*, 294 U.S. 63, 72-76 (1935); *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Serv. Comm'n*, 262 U.S. 276, 289 (1923).

149. *Consolidated Edison Co. v. Public Serv. Comm'n. of New York*, 447 U.S. 530,

bear these expenses is not settled. The Public Utility Regulatory Policy Act of 1978 favors collecting these expenses from shareholders rather than ratepayers.¹⁵⁰ This position is not based on efficiency criteria; rather, a political value choice is being made that owners, not ratepayers, should bear the cost.

The more controversial variables are B and r . What goes into the rate base and what constitutes a reasonable rate of return are issues that consume the bulk of the time of utility commissions. Of the two, r is relatively easy to calculate insofar as it reflects the current cost of money in the marketplace.¹⁵¹ Rate base, however, presents vastly more difficult issues and choices. An example of current controversy is how to handle what is known as construction-work-in-progress (CWIP). Basically, B is comprised of the capital investment or assets "used by and useful to" the firm in producing its products or services. Thus, the depreciated value of plant and equipment currently in use easily falls into the rate base.¹⁵² A harder issue concerns capital invested in plants under construction or capital expended in plants that have been cancelled due to adverse economic conditions. This confusion is acutely felt in the nuclear power industry where regulatory lag can last over a decade. Should the firm be allowed a return on investment for money used for plants not on line and may never be on line?¹⁵³ If so, ratepayers are paying for utility service they are not currently receiving. The pressure on electric utilities to attract capital has caused several state commissions to allow some CWIP expenses in the rate base. The General Accounting Office has also recommended that FERC establish a rulemaking procedure to allow CWIP in the rate base on a case by case basis and the FERC has complied.¹⁵⁴ As a methodology, the formula as presented is

533-35 (1980).

150. 16 U.S.C. § 2623(b)(5) (Supp. V 1981); 15 U.S.C. § 3203(b)(2) (Supp. V 1981).

151. See, e.g., *Louisiana Pub. Serv. Comm'n. v. FERC*, 688 F.2d 357 361-62 (5th Cir. 1982); *East Tenn. Natural Gas Co. v. FERC*, 686 F.2d 430 435-39 (6th Cir. 1982).

152. See, e.g., *Union Elec. Co. v. FERC*, 668 F.2d 389, 396 (8th Cir. 1981); *City of Charlottesville, Va. v. FERC*, 661 F.2d 945, 951-54 (D.C. Cir. 1981).

153. This delay, together with rising construction costs, high interest rates, and softening projections of electric power demand, is forcing the cancellation of nuclear power plants. See Large, "NRC Sees Utilities Canceling or Delaying 19 Nuclear Plants Currently Being Built," *Wall St. J.*, Mar. 15, 1982 at 13, col. 1; and note 60 *supra*. In *Jaco*, no new nuclear power plant has been ordered since 1978, and approximately 100 plants, many under construction have been cancelled. See generally, Pierce, *The Regulatory Treatment of Mistakes in Retrospect: Cancelled Plants and Excess Capacity*, 132 U. PA. L. REV. 497 (1984).

154. General Accounting Office, *Federal Energy Regulatory Commission Needs to Act*

facially simple, but is inherently complex in application.

Utility decisions also have a political dimension. While the handling of CWIP and cancellation costs might seem to be an accounting problem, it is fundamentally political. If CWIP is included in the rate base then ratepayers bear the cost; if it is excluded, shareholders bear the cost. The utility commissions are responsible for deciding who shall pay.¹⁵⁵

Commissions gravitate toward quantification and positive issues rather than full expositions of normative, political and value issues. In ratemaking, issues of rate design and rate structure¹⁵⁶ directly affect non-economic concerns such as redistribution of wealth, subsidization of classes of consumers, subsidization within classes,¹⁵⁷ cross-subsidization,¹⁵⁸ environmental protection, and conservation.¹⁵⁹ Even then, many assumptions are left unexamined or are accepted by default. Once a utility commission moves ahead with a ratemaking case questions concerning the need for the utility itself, the adequacy of existing plants, reliability of service, excess capacity, decreasing demand, and alternative sources of energy are only superficially examined at best. Most of the commission's energy is devoted to coming up with a quantifiable *R*.

The choice of a decisionmaking methodology can obscure deeper value issues. The institutions using traditional rulemaking readily rely on the above formula because it appears understandable and it simplifies what is at heart a polycentric decision comprising normative as well as positive issues. But in order to make effective decisions the assumptions and limitations inherent in the use of such a formula must be recognized and evaluated.

Given most ratemaking is done at the state level, and several federal agencies also exercise this function, ratemaking standards are not uniformly applied. Different public service commissions

on the *Construction-Work-In-Progress Issue*, EMD-81-123, (Sept. 23, 1981). See also, 19 Proceedings, Iowa State Regulatory Conference on Public Utility Valuation and the Rate-Making Process 445-69 (1980).

155. See *El Paso Elec. Co. v. FERC*, 667 F.2d 462, 468 (5th Cir. 1982).

156. See generally *Second Taxing Dist. of Norwalk v. FERC*, 683 F.2d 477 (D.C. Cir. 1982).

157. *Public Serv. Co. of New Mexico v. FERC*, 653 F.2d 681 (D.C. Cir. 1981).

158. See *Arizona Elec. Power Co-op., Inc. v. ICC*, 675 F. 2d 303 (D.C. Cir. 1982); *San Antonio v. United States*, 631 F.2d 831 (D.C. Cir. 1980); *Houston Lighting & Power Co. v. United States*, 606 F.2d 1131 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

159. L. THUROW, *THE ZERO-SUM SOCIETY* 191-92 (1980); Aman & Howard, *Natural Gas and Electric Utility Rate Reform: Taxation Through Ratemaking?* 28 *HASTINGS L.J.* 1085, 1109-10 (1977).

utilize different accounting standards and different depreciation methods, treat factors such as CWIP differently, and compute the rate of return differently as well. The manipulation of formulae has various economic effects. The way commissions choose to handle these effects is essentially political. Although ratemaking purports to be an economic calculus and is written in the language of economics it is not solely an economic problem. The issues raised in a ratemaking hearing by parties or interested persons are not only economic questions. They are political issues¹⁶⁰ of the first order. It is not that public utility commissions and public utilities are involved in a cabal against consumers. Rather, their familiarity with the decisionmaking procedure and their choice of a quantifiable, positive calculus weighted in favor of efficiency criteria channels the decisionmaking into an economic structure, even though these decisions must be rendered in a highly political environment.

B. Cost-Benefit Analysis

Cost-benefit analysis is a methodology used to decide which, among competing public projects, will maximize social benefits and minimize social costs.¹⁶¹ Like ratemaking it is capable of a simple formulation: "Is the benefit greater than the cost?" Also, like ratemaking, the simple statement of the formula obscures the complexity of its application and, more importantly, can mask hidden assumptions inherent in its use.

Cost-benefit analysis can be divided into four problematic stages. First, costs, benefits, and risks must be identified. Although risks can be translated into costs it is unwise to do so uncritically. In assessing the wisdom of locating a nuclear waste disposal facility at geographic point A or B, for example, a calculation which translates risks into costs may yield a result which indicates point A is less costly than point B. The decision is made, then, on the basis of the relative costs and benefits of locating the disposal site at point A or B and does not directly address the question of whether the risk itself is socially acceptable. A political issue is obscured by economic analysis.¹⁶² Translating risks to costs assumes risks at ei-

160. See, *FERC v. Mississippi*, 456 U.S. 742 (1982) (Public Utility Regulatory Policies Act of 1978 upheld against federalism challenges). Refer to Part IV *infra*.

161. L. ANDERSON & R. SETTLE, *BENEFIT-COST ANALYSIS: A PRACTICAL GUIDE* (1977); E. MISHAN, *COST-BENEFIT ANALYSIS* (rev. ed. 1976).

162. Starr & Whipple, *Risks of Risk Decisions*, 208 SCIENCE 1114 at 19 (June 1980):
The usefulness of these methods in making assumptions and values explicit justi-

ther point are acceptable.¹⁶³ It also assumes that the risks are quantifiable and that the method of quantification is comparatively and internally consistent.

The three remaining stages of cost-benefit analysis present similar difficulties. It is no easy task to classify an event as a benefit or a cost.¹⁶⁴ Moreover, many variables are impossible to quantify. Who, for example, can confidently quantify the value of a human life?¹⁶⁵ The final major stage is the presentation of information. This entails outlining the assumptions on which the presentation is being made and the implications of those assumptions. Present in this stage are both problems of interpretation and of selection of data which will differ depending on who is doing the interpreting and why the presentation is being made.

fies their application. But a necessary condition for applying their results to specific decisions is a social consensus on the relative benefits and costs of the proposed actions. For specific types of risk, in which intuitive evaluations of risk and benefit contradict analytic evaluations, the necessary consensus may not develop, but rather a conflict requiring political resolution is likely to result.

163. An important and often neglected variable in cost-benefit analysis is that risk taking has at least two distinct and conflicting forms. As individuals, we make private choices about risks every day. Some people voluntarily risk their lives in hazardous occupations, for example. The amount of risk that is privately and voluntarily taken, however, is distinct from the amount of risk that we would tolerate as citizens when those risks are imposed by the state. Individual homeowners have little power or voice as to where a nuclear power plant is located. Thus, large scale decisions often impose transaction costs that individuals simply cannot absorb. See, Huber, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025, 1054-58 (1983); Sagoff, *We Have Met the Enemy and He is Us*, or, *Conflict and Contradiction in Environmental Law*, 12 ENV'T'L. L. 283, 286-88 (1982); Starr & Whipple, *supra* note 162 at 1116-17;

164. See Lovins, *Cost-Risk-Benefit Assessment in Energy Policy*, 45 GEO. WASH. L. REV. 911 (1977). In deciding whether to require a coal gasification plant to install scrubbers, for example, how should the cost of the scrubber be weighed? Direct benefits might include the contribution to the GNP of the value of the domestic production of a natural gas substitute. If the decision is made to enforce the requirement, some plants will never be built because the cost of installation is so high. We should assume that because coal gas is thought to be a useful commodity, somewhere in the industry research money and time will be spent looking for cleaner ways to process coal gas. How is the money to be used in anti-pollution research and development in the industry to be carried in the cost-benefit equation? Is it really a cost of the decision because the money would not have been spent otherwise? Or, is it truly a benefit in that a new industry is created, i.e., coal gasification anti-pollution research and development, and if successful, there will be cleaner air and more coal gasification plants, which may be more competitive as industry concentration is lessened, so the price of the product should be down and consumers will be satisfied. The extrapolation of costs and benefits can be carried out indefinitely. It is a non-economic decision to stop the extrapolation at any point.

165. For example, the "cost per life saved" in various federal government programs ranges from \$35,550 to \$624,976,000. LITWAN & NORDHAUS, *supra* note 6 at 11; Crovitz, *Costs in a Regulated Society*, Wall St. J., Aug. 7, 1981, at 18, col. 4.

This methodology has not been without critics.¹⁶⁶ The criticisms center not so much around what the analysis can do, i.e., gather data and information and highlight sensitive normative and positive issues, as much as on its application and the importance given in decisionmaking.¹⁶⁷ Advocates of cost-benefit analysis see it as a way to deal with large masses of complex and often conflicting data.¹⁶⁸ The method should not be used, however, to obscure the equally, if not more delicate, moral and social issues that occur within the context of the allocation of scarce resources. A political and philosophical question underlies the criticism of cost-benefit analysis: Is this method, which places emphasis on hard, idealized objective data, desirable (or even workable) in a pluralistic democracy?¹⁶⁹ Do we want, can we afford, a society, or for that matter a legal regime, favoring "scientific" facts derived from quantified calculations and favors positive economic data over "softer" normative choices? The degree to which this method is used by decision makers also poses as important power and authority question: Where will decision making power settle? Will it move away from democratic assemblies, like legislatures, toward scientific and technological communities, or toward specialized elite bureaucratic institutions?

The question of the proper role for cost-benefit analysis in the law¹⁷⁰ was presented to the Supreme Court in *American Textile*

166. See Rodgers, *Benefits, Costs and Risks: Oversight of Health and Environmental Decisionmaking*, 4 HARV. ENV'T'L L. REV. 191 (1980); Sagoff, *At the Shrine of Our Lady of Fatima or Why Political Questions Are Not All Economic*, 23 ARIZ. L. REV. 1283 (1981); Williams, *Benefit-Cost Analysis in Natural Resources Decisionmaking: An Economic and Legal Overview*, 11 NAT. RES. LAW 761 (1979).

167. See, e.g., J. FISHKIN, *TYRANNY AND LEGITIMACY: A CRITIQUE OF POLITICAL THEORIES*, 91-96 (1979) (Too much reliance on such a method can lead to tyranny, such as a governmental policy choice which imposes severe deprivations on anyone); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 413, 422-44 (1981). (Professor Kennedy argues that much cost-benefit analysis is "indeterminate").

168. Agencies are being called upon to make decisions which are becoming increasingly complex. The complexity stems from technical problems which include an expanding but inconclusive data base, disagreement among experts on methods of using data, and lack of a consensus regarding findings and their interpretation. Regulators must also compute low probabilities and high cost events while assessing diverse and changing values in a pluralistic society. In energy regulation these problems are exacerbated by a feeling of crisis management. All of these factors pull agencies toward using cost-benefit analysis and ratemaking. Baram, *Cost-Benefit Analysis: An Inadequate Basis for Health, Safety, and Environmental Regulatory Decisionmaking*, 8 ECOLOGY L.Q. 473, 479-81 (1980).

169. Green, *Cost-Risk-Benefit Assessment and the Law: Introduction and Perspective*, 45 GEO. WASH. L. REV. 901 (1977).

170. Cost-Benefit Analysis, curiously, has become a major methodology in environ-

Manufacturers Institute, Inc. v. Donovan.¹⁷¹ Representatives of the cotton industry challenged the "cotton dust standard" arguing that OSHA required the standard to reflect a reasonable relationship between costs and benefits and, if the proposed standard were enforced, the costs imposed on industry would greatly outweigh any health benefits accrued by workers. The government and two labor organizations claimed OSHA mandated that the Secretary of Labor to set the most protective standard feasible to eliminate a significant risk of material health impairment. The majority opinion, relying on Justice Marshall's dissent in an earlier case,¹⁷² held cost-benefit analysis could not be used to override the express purpose of legislation. Congress, when it promulgated OSHA, defined the basic relationship between costs and benefits by placing the benefit of workers' health above all other considerations. The Court reasoned if Congress intends an agency to engage in cost-benefit analysis the statute will so state.¹⁷³

American Textile does not preclude the use of cost-benefit

mental decisionmaking. Although the National Environmental Policy Act, 42 U.S.C. §§ 4374 (Supp. V 1981), does not explicitly allow this method, see W. ROGERS, ENVIRONMENTAL LAW 745-47 (1977), other statutes do. See, e.g., Clean Air Act, 42 U.S.C. § 7545(c)(2)(B) (Supp. V 1981), and the Toxic Substances Control Act, 15 U.S.C. § 2605(a) (1982).

171. 452 U.S. 490 (1981); see also, *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 93, 319-29 (1981).

172. *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607 (1980).

173. See, e.g., Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1347(b) (Supp. V 1981); Energy Policy and Conservation Act of 1975, 42 U.S.C. § 6295(c) (Supp. V 1981). Sometimes this appears in regulations, see, e.g., 10 C.F.R. § 51.23(c) (1982). LITWAN & NORDHAUS, *supra* note 6 at 93 make the following argument against statutes which set a standard other than one based on cost-benefit analysis:

Such language elevates the chosen regulatory objective to an absolute—a goal to be attained regardless of the costs imposed or of the effects that may be imparted to other objectives. In some cases, of course, society has decided to do precisely that or, in Arthur Okun's words, to put certain institutions outside the "domain of dollars." There are sound reasons, for example, not to allow economic costs to compromise our abhorrence of slavery, our commitment to freedom of speech, or the prohibition of a market in votes. But to impose an absolute imperative against carcinogenic food additives, health risks to workers, or unhealthful environmental exposure to ozone? Such an idea mocks serious political discourse. If we will not allow any risks on ozone, how can we allow smoking in public? Why is our health budget limited but our regulatory budget limitless? How can we reconcile a zero-risk philosophy when there are no safe levels of exposure? And, to be realistic, how can we hold such a position when the implication may be that *our entire national income* should be spent on pursuing absolute safety?

The authors answer their own questions. There are certain things society will not tolerate no matter how costly. There are others it will tolerate even if that toleration is inefficient.

analysis, but it does prohibit its use to subvert other express standards of a statute. This position reaches the heart of the criticism concerning cost-benefit analysis. Cost-benefit analysis is ultimately dependent on quantification that will promote "efficiency." The method is reductive in that it, like the ratemaking formula, obscures or ignores political issues.

Cost-benefit analysis is a useful tool. It is capable of pointing out and highlighting positive and empirical data that are useful for formulating policy and making policy decisions. Nevertheless, the method is also capable of distortion, particularly the distortion of normative and political issues. The method cannot be the sole decisionmaking method because public policy decisions must also account for normative and broader social issues, the variables of which are difficult if not impossible to quantify. The *American Textile* case wisely recognizes that decisionmaking may be too complex to be left to the dictates of a mathematical equation. Some administrative reform efforts¹⁷⁴ have attempted to increase dependence on cost-benefit analysis. This evidences a narrow-mindedness that places mathematical efficiency above all other considerations. Quantitative methods appeal to our need for certainty and our need for decisions by providing hard, positive data; they yield answers when asked.¹⁷⁵ Nevertheless, they also deemphasize normative issues.¹⁷⁶ They eschew individual value choices in favor of an equation by assuming that everyone's value choices are entitled to equal weight. This assumes too much and it obviously ignores the fact that certain values are better than others. Finally, quantitative formulas reduce everything—even the non-re-

174. Executive Order 12,291, 46 Fed. Reg. 13193-98 (Feb. 19, 1981). See also, Symposium, *Cost-Benefit Analysis and Agency Decision-Making: An Analysis of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1195 (1981); S. 1080, 97th Cong., 1st Sess. 127 CONG. REC. at S.4228.

175. See Kelman, *Cost-Benefit Analysis—An Ethical Critique*, 5 REGULATION 33 (Jan/Feb. 1981); Kennedy, *supra* note 167; Lovins, *supra* note 162; Sagoff, *supra* note 166. Williams, *supra* note 166; Rodgers, *supra* note 166; The methods can be consequentialist, relativistic, deterministic and reductionist. They contain a technological and economic bias in which society trades off individuality in favor of compromise for the collectivity. It is consequentialist because it favors ends, not means. The bottom line of the equation is more important than how the figure was reached. It is deterministic because an assumption has been made that all net quantified benefits are good per se. As demonstrated by *American Textile*, unquantifiable worker safety, as a matter of principle and as a societal value, may be more important than the costs to the industry.

176. Worker safety decisions, for example, involve essentially political allocations of costs. See generally Kelman, *supra* note 175; Rogers, *supra* note 166.

ducible—to dollars, and policy decisions are made on that basis.¹⁷⁷ In E.F. Schumacher's words, money then becomes the "highest of all values."¹⁷⁸

The central conflict that characterizes decisionmaking methodologies is that essentially positive economic efficiency tools are applied by essentially normative political actors in a world where economics and politics often clash.¹⁷⁹ It is not that the methods themselves are worthless; they are useful tools to gather information, but they should not be given too much weight. Each of these methods accepts problematical economic assumptions about the nature of man and the nature of a good society.¹⁸⁰ These assumptions can be carried through the decisionmaking process without question. For policymaking, too much reliance on these methods suppresses normative issues and therefore distorts the result. In the same way that decisionmaking structures are aligned with political values, decisionmaking methodologies are joined with economic values. Even assuming that energy policy is overwhelmingly an economic matter, crucial social and political issues remain central to its formation. These subtler issues must not be suppressed by methodology.

V. SUBSTANTIVE RULES CONFLICTS

It has been argued here that the decisionmaking structures which exist to formulate and implement energy policy are so mired in conflicts that comprehensive substantive policymaking is unrealistic. It is also argued that conflicts and contradictions are present in the methodologies used and that these contribute to a splintering of policy as well. The structures have a political orientation while the methods are economic. In addition to these structures and methodologies, substantive legal rules themselves are a force

177. Tolchin, *Regulation and the Economist*, N.Y. Times, Nov. 20, 1983, § 3 at 4, col. 3.

178. E.F. SCHUMACHER, *SMALL IS BEAUTIFUL* 44 (1973).

179. See Sagoff, *supra* note 163, at 286-88; Sagoff, *supra* note 166, at 1285.

180. See C. FRIED, *RIGHT AND WRONG* ch. 4 (1978); Kennedy, *supra* note 167, at 410-11; Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1020-24 (1978); Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 713-14 (1980); Kennedy, *Distribution and Paternalistic Motives in Contract and Tort Law, With Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1402-18 (1981); Schwartz, *Economics, Wealth Distribution, and Justice*, 1979 WIS. L. REV. 799, 801-02.

that prevents the emergence of a whole energy policy. Substantive rules are often stated at a level of generality that allows the reconciliation of competing economic and political interests. This section examines some legal rules that are broad enough to allow an interplay of economic and political norms.

A. The Commerce Clause and State Taxation of Natural Resources

Recently, the Supreme Court issued three opinions on state taxation of natural resources.¹⁸¹ Each case is consistent with established constitutional law principles, but they are not consistent with a national energy policy. An argument can be made that the "energy crisis" requires a concerted national effort to promote domestic production, to move away from dependence on foreign sources, and to price resources efficiently and reasonably in international markets.¹⁸² Thus, the role of the states in formulating and carrying out a national energy policy should be subservient to national interests. The three severance tax cases as a whole do not further that national energy policy picture. They could not be true to that portrayal of an energy policy and be faithful to constitutional law at the same time.

Commerce Clause¹⁸³ analysis in this area is fairly straightforward. In order to avoid the commercial balkanization of the states, the Constitution gives precedence to national commercial interests. If a state's commercial policy or practice can be shown to interfere with interstate commerce, the parochial state interest must give way. States cannot discriminate in favor of their citizens over citizens of other states.¹⁸⁴

In *Complete Auto Transit, Inc. v. Brady*,¹⁸⁵ the Supreme Court established a functional four part test to assess the constitutionality of state taxes that affect interstate commerce. The Court

181. *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

182. See, e.g., *Natural Gas Policy Act of 1978*, 15 U.S.C. §§ 3301-42 (Supp. IV 1980).

183. U.S. CONST. art I, § 8, cl. 3. Supremacy Clause arguments are also made in these cases. U.S. CONST. art. VI, cl. 2.

184. See *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980). See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 239-44, 344-47 (1978).

185. 430 U.S. 274 (1977).

considers:

[N]ot the formal language of the tax statute but rather its practical effect, and [sustains] a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.¹⁸⁶

Louisiana's "First Use Tax" violated this test while Montana's severance tax and the severance tax imposed by the Jicarilla Apache Tribe did not. In the Louisiana case the state imposed a tax of seven cents per thousand cubic feet of natural gas on the "first use" of any gas imported into Louisiana which was not previously taxed by any other state or the federal government. This was equal to the state severance tax on Louisiana gas producers. The purposes of the tax were: (1) to reimburse the people of Louisiana for damages to the state's coastal areas and waters due to oil and gas exploration in the Outer Continental Shelf; (2) to compensate the state for costs incurred in protecting these resources; and, (3) to equalize competition between gas produced in Louisiana which was subject to the seven cents severance tax and gas produced elsewhere and not subject to the severance tax. The effect of the tax was that Louisiana consumers were not burdened by the tax, but out-of-state purchasers were. The Court held that the "First Use Tax" unquestionably discriminated against interstate commerce. As a matter of constitutional law the case is rightly decided. The tax gave local interests a competitive advantage; thus, it violated the anti-discrimination aspects of the Commerce Clause.¹⁸⁷ As a matter of energy policy the case also satisfies the espoused need for a national market.

Montana's severance tax fared better. The tax is imposed on each ton of coal mined within the state. There are various rates of taxation depending on the value, energy content, and method of extraction of the coal, and may equal at a maximum 30% of the contract price of the coal.¹⁸⁸ Out-of-state purchasers argued that Montana's severance tax discriminated against interstate commerce because 90% of the coal mined in Montana is shipped out of

186. *Id.* at 279.

187. See O'Fallon, *The Commerce Clause: A Theoretical Comment*, 61 OR. L. REV. 395, 408-14 (1982).

188. 453 U.S. at 609.

the state, and with the coal, so goes the tax burden. The Court noted that unlike *Maryland v. Louisiana*, all coal producers in Montana were taxed similarly and the tax was held to be constitutional. The Montana decision comports with constitutional law, as does the Louisiana case, yet clearly, the two cases are unlike in the effect each has on energy policy. The invalidation of the Louisiana tax fosters a national energy market by eliminating discrimination between local and out-of-state producers. Yet Montana's tax structure burdens the national energy market by shifting the tax bite out of the state and by discouraging the development of Montana's coal resources. This effect is one of the profound paradoxes of the anti-discrimination principle in Commerce Clause analysis; the rule allows state taxation to affect interstate commerce as long as the locals are equally burdened. Louisiana could also burden out-of-state gas producers as long as local gas producers were subjected to the same taxes.

The substantive rule, dealing with the limits of a state's ability to tax, is applied consistently as a matter of law and has conflicting consequences as a matter of policy. In part this is true because policy options are, themselves, in conflict. Another reason is that substantive law may not, and in these cases does not, comport with a national energy policy. Part of the reasoning behind the Commerce Clause is to promote national markets. A conflicting reason is more overtly political:¹⁸⁹ the commerce clause also reserves and promotes, at least partially, the sovereignty of the states.¹⁹⁰

The political nature of these severance tax cases is expressed in *Merrion v. Jicarilla Apache Tribe*.¹⁹¹ The tribe imposed a severance tax on any oil and natural gas severed or removed from tribal lands situated in New Mexico. Long-term lessees challenged that tax as contrary to the Commerce Clause. The Supreme Court held

189. See, McGrath & Hellerstein, *Reflections on Commonwealth Edison Co. v. Montana*, 43 MONT. L. REV. 165, 177 (1982) (the authors note the political nature of the decision and its institutional ramification that courts will not scrutinize the state's rationale for its tax: the tax will stand if it is "fairly related" to the legislative purpose). See also, *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 91, 102-112 (1981); O'Fallon, *supra* note 187 at 414-20.

190. A state's right to reserve the economic benefit for itself will not be given too much weight as the Supreme Court held in *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982). In this case New Hampshire restricted the exportation of hydroelectric energy produced in the state. This electricity was produced by federally licensed producers plugged into a power grid that connected six states. The Court said that this violated the Commerce Clause.

191. 455 U.S. 130 (1982).

that the taxing power was an inherent attribute of tribal sovereignty and that the tax satisfied the *Complete Auto Transit* test. In deciding the case the Court's primary and natural concern centered around the discussion of the unique status of Indian tribes in this country and of the need to protect their attributes of sovereignty. So viewed, the power to tax is an "essential instrument of self-government and territorial management."¹⁹² The Court also sustained the tax in the face of challenges that the tax violated the negative implications of the Commerce Clause because "it takes an activity that is an integral part of the flow of commerce, discriminates against interstate commerce, and imposes a multiple burden on interstate commerce."¹⁹³

There is a recurring theme throughout the sections of this article. It is as if two separate and distinct languages vie for our attention.¹⁹⁴ One is the language of economics. There is a need for efficient and fair markets. In the severance tax cases that language appears in the context of interstate commerce. As a matter of energy policy it is a question of a national energy market that is united with a vision of domestic production and supply. The other is the language of politics. In the severance tax cases that language focuses on the concept of sovereignty, which speaks to the use, distribution and allocation of wealth. This "linguistic" conflict is pronounced when we speak about issues of federalism and energy policy.

B. *The Supremacy Clause and the Energy Crisis*

Any chosen energy policy must confront the political tension which exists between the states and the federal government for the simple reason that natural resources are located within the states as well as federal boundaries. Federalism in this area is less a doctrine or abstract rule of law than it is a geophysical reality. Federalism describes the allocation of power between the states and the central government.¹⁹⁵ Since *Gibbons v. Ogden*¹⁹⁶ the expansive

192. *Id.* at 139.

193. *Id.* at 152-53. See also, Williams, *Severance Taxes and Federalism: The Role of the Supreme Court in Preserving a National Common Market for Energy Supplies*, 53 U. COLO. L. REV. 281 (1982).

194. Sagoff, *supra* notes 163, 166 and 180; refer to *infra* Part V.

195. U.S. CONST. amend. X; L. TRIBE, *supra* note 185 at § 5-20. Jurisdiction over legal disputes is also apportioned between federal and state governments. See, *Springfield v. McCarren*, 549 F. Supp. 1134 (D. Vt. 1982); *Utah v. FERC*, 691 F.2d 444 (10th Cir. 1982).

growth of the federal government has been legitimized. Much of this growth can be attributed to the reduction of competition between the states so that national commerce and national markets can participate effectively in the world market. As technology shrinks the size of the globe, and as economic and political interests become more interdependent, national participation in the world community is more of a necessity. A curious domestic development is that for the last decade or more, congressional and presidential initiatives have argued that the federal government was too big and that the states should share responsibility for governance.¹⁹⁷ Although the movement toward greater global participation by nations is not necessarily contradictory to our domestic talk about increasing the power of the states, it does illustrate the ambiguity of policy.

Historically, energy and natural resources initiatives were relegated to state control.¹⁹⁸ The first federal forays into this area were limited to interstate sales of resources.¹⁹⁹ That situation changed upon the passage of the National Energy Act²⁰⁰ and the Energy Security Act.²⁰¹ Now the federal government has interjected itself into areas previously governed by the states. The crisis in energy was perceived as requiring a national response. Where federalist principles have clashed with national energy legislation, the national legislation has prevailed.²⁰² The tension between state and national power is addressed in the Constitution, under the

196. 22 U.S. (9 Wheat.) 1 (1824).

197. There are numerous recent examples of federal abdication or concession of governmental responsibility in favor of the states. *See*, National League of Cities v. Usery, 426 U.S. 833 (1976); Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir.), *cert. denied* 434 U.S. 902 (1977); Sierra Club v. EPA, 540 F.2d 1114 (D.C. Cir. 1976), *cert. denied*, 430 U.S. 959 (1977); Clean Air Act 42 U.S.C. §§ 7401-42 (1976); Clean Water Act, 33 U.S.C. §§ 1251 — 65 (1978). *See also*, Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977).

198. The first legal regime used by states for the allocation and distribution of natural resources were common law rules. As the competition for resources increased, states passed legislation. *See, e.g.*, W. RODGERS, ENERGY AND NATURAL RESOURCES LAW 24-64; 345-364 (1979); F. TRELEASE, H. BLOOMENTHAL & J. GERAUD, NATURAL RESOURCES (1965). H. WILLIAMS, R. MAXWELL, C. MEYERS, OIL AND GAS 212-322; 330-879 (4th ed. 1979).

199. *See e.g.*, Federal Power Act, 16 U.S.C. §§ 791-828 (1976); Natural Gas Act, 15 U.S.C. § 717 (1976).

200. Refer to note 46 *supra*.

201. Refer to note 49 *supra*.

202. *See, e.g.*, FERC v. Mississippi, 456 U.S. 742 (1982) (sustaining the constitutionality of Public Utilities Regulatory Powers Act); *see also*, *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 186-96 (1982).

Supremacy Clause.²⁰³ Supremacy Clause litigation normally is an inquiry about the authority by which a specific federal action is undertaken. The Commerce Clause, of course, is broad enough to justify a wide range of governmental activity. Next, the issue is whether state and federal regulations can co-exist or whether federal regulation has supplanted and excluded state regulation.²⁰⁴ Like any generally worded provision, the Supremacy Clause is open to interpretation and the basic point in dispute is whether certain powers should reside in the states or in the federal government.

The federal courts, generally, have been consistent in sustaining federal energy legislation against constitutional attacks. Once the federal government demonstrates a national need for regulation of energy resources it is a short step to legitimizing federal intervention. Congress need only show that the means of regulation selected are reasonably related to the goal of regulating interstate commerce,²⁰⁵ in which case state law is pre-empted. In *Hodel v. Virginia Surface Mining and Reclamation Association*²⁰⁶ and *Hodel v. Indiana*²⁰⁷ the Supreme Court sustained the validity of the 1977 Surface Mining Control and Reclamation Act against various constitutional challenges, including arguments by the states that the tenth amendment protected their right to regulate private land use.²⁰⁸ Other recent energy legislation which has withstood challenge on constitutional grounds includes the Powerplant and Industrial Fuel Use Act,²⁰⁹ and the Natural Gas Policy Act of

203. U.S. CONST. art VI.

204. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

205. *Fry v. United States*, 421 U.S. 542 (1975).

206. 452 U.S. 264 (1981).

207. 452 U.S. 314 (1981).

208. Although such Congressional enactments obviously curtail or prohibit the states' prerogatives to make legislative choices respecting subjects the states may consider important, the Supremacy Clause permits no other result.

The Surface Mining and Reclamation Act shared powers in this area if the state chose to do so. Nevertheless, "... Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role." *Hodel v. Virginia*, 452 U.S. at 290.

209. 42 U.S.C. §§ 8301-8484 (Supp. IV 1980). In *Atlanta Gas Light Co. v. DOE*, 666 F.2d 1359 (11th Cir. 1982), the court of appeals upheld the Fuel Use Act which was intended to conserve oil and natural gas by prohibiting the use of these resources in certain installations and by encouraging the use of coal. In *Atlanta Gas*, the plaintiffs argued that a prohibition on the use of natural gas for lighting purposes was beyond federal control because of the inherently local nature of their business. Even conceding the local nature of this

1978.²¹⁰

Nuclear energy issues are the most controversial in the entire range of energy regulation.²¹¹ As fears concerning reactor inci-

industry, the fact that it affects interstate commerce (here the national concern with the shortage of natural gas) means that it is no longer immune from the central government. The court added:

More importantly, the relatively small gas savings resulting from the Fuel Use Act must be considered as an integral part of a much broader federal regulatory program aimed at shifting our nation's energy consumption toward fuels that are more plentiful and accessible than natural gas.

Id. at 1367.

210. 15 U.S.C. §§ 3301-42 (Supp. IV 1980) and in scattered sections of 15, 16, 30, 42 and 43 U.S.C. (Supp. IV 1980). Since 1938 federal regulation of natural gas sales had been limited to interstate sales. Intrastate sales were left to be regulated by the states. These dual markets created price disparities and market dislocation. One purpose of the NGPA was to unify these two markets. This attempt at unification was attacked by Texas, Oklahoma and Louisiana as interfering with each state's control. Following *Hodel* both the court of appeals and the district court, rejected these arguments and sustained the Act. The Public Utilities Regulatory Powers Act (PURPA), a statute which interjected the federal government into state utility ratemaking at the retail level, was also held to be constitutional by the Supreme Court. Refer to note 202 *supra*. The preemption of state authority by this legislation supports a united national energy policy for the purpose of giving the country a stronger voice in the political economy.

211. Litigation in the nuclear power area has been anything but quiescent. Often courts are the only forum for public interest groups. See *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978) (upholding the constitutionality of the Price-Anderson Act which limits liability of nuclear power plants for damages); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (limits U.S. courts of appeal's jurisdiction to review NRC activities); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, (1983) (state may place moratorium on construction of nuclear plants for financial reasons); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 103 S. Ct. 1556 (1983) (NEPA does not require NRC to assess psychological injury for perception of risk in environmental impact statement); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983) (NRC's generic rule directing licensing boards to assume waste can be stored on site upheld). In the lower courts the cases include *Lorion v. NRC*, 712 F.2d 1472 (D.C. Cir. 1983) (NRC failure to entertain private suit requesting licensing review upheld); *Union of Concerned Scientists v. NRC*, 711 F.2d 370 (D.C. Cir. 1983) (NRC ordered to review rulemaking which indefinitely suspended deadline for "environmental qualification" of safety equipment); *McKay v. United States*, 703 F.2d 464 (10th Cir. 1983) (landowners entitled to sue for damages caused by contamination); *Rockford League of Women Voters v. NRC*, 679 F.2d 1218 (7th Cir. 1982) (petition to review NRC's refusal to revoke construction permit denied); *Illinois v. General Elec. Co.*, 683 F.2d 206 (7th Cir. 1982), *cert. denied*, 461 U.S. 913, 103 S. Ct. 1891 (1983) (Illinois Spent Fuel Act preempted by federal statutes); *Potomac Alliance v. NRC*, 682 F.2d 1030 (D.C. Cir. 1982) (NRC ordered to review decision authorizing company to increase on-site nuclear waste storage capacity); *Township of Lower Alloways Creek v. Public Serv. Elec. & Gas Co.*, 687 F.2d 732 (3d Cir. 1982) (review of NRC order expanding on-site storage of waste denied); *Seacoast Anti-Pollution League v. NRC*, 690 F.2d 1025 (D.C. Cir. 1982) (NRC's refusal to order hearing on Seabrook evacuation plan upheld); *County of Suffolk v. Long Island Lighting Co.*, 554 F. Supp. 399 (E.D.N.Y. 1983) (County's suit as ratepayer against nuclear plant for cost overruns dismissed); *County of*

dents,²¹² transportation,²¹³ waste management,²¹⁴ and siting²¹⁵ increase, many citizens are troubled by the role of the federal government. To remedy perceived inadequacies in federal regulation, state legislatures have attempted to pass a variety of laws only to have the bulk of this legislation declared invalid.²¹⁶ A recent and controversial exception is *Pacific Legal Foundation v. State En-*

Rockland v. NRC, 709 F.2d 766 (2d Cir. 1983) (NRC order deciding against taking enforcement against utility for deficiencies in offsite emergency preparedness upheld); Pennsylvania v. General Pub. Util. Corp., 710 F.2d 117 (3d Cir. 1983) (private damages actions as a result of Three Mile Island denied); City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983) (NRC order allowing on-site storage of contaminated waste upheld).

212. See generally *Report of the President's Commission on the Accident at Three Mile Island* (October 1979) (Kemeny Commission Report).

213. See e.g., Comment, *Transportation of Nuclear Material: The Public Challenge*, 11 RUT-CAM. L.J. 63 (1979); Trosten & Ancarrow, *Federal-State-Local Relationships in Transporting Radioactive Materials: Rules of the Nuclear Road*, 68 KY. L.J. 251 (1979-80).

214. See Ausness, *High-Level Radioactive Waste Management: The Nuclear Dilemma*, 1979 WIS. L. REV. 707; Bromberg, *Nuclear Power Wastes: Tomorrow's Problem Faces Us Today*, 17 DUQ. L. REV. 99 (1979); Jaksetic, *Legal Aspects of Radioactive High-Level Waste Management*, 9 ENVTL. L. 347 (1979); Lash, *A Comment on Nuclear Waste Disposal*, 4 J. CONTEMP. L. 267 (1978); Linker, Beers & Lash, *Radioactive Waste Gaps in the Regulatory System*, 56 DEN. L.J. 1 (1979); Seiberling, *Radioactive Waste Disposal: The Emerging Issue of State's Rights*, 13 AKRON L. REV. 261 (1979); Shea, *New Nuclear Policy Under the National Energy Plan*, 29 BAYLOR L. REV. 689 (1977); Comment, *Disposal of High-Level Nuclear Waste: An Abdication of Responsibility?* 1979 U. ILL. L. F. 915; Comment, *Nuclear Waste Disposal: A Federal and State Problem*, 65 KY. L.J. 917 (1977); Note, *Radioactive Waste: A Failure in Governmental Regulation*, 37 ALB. L. REV. 97 (1972); Symposium on *Nuclear Waste Management*, 21 NAT. RESOURCES J. 693 (1980); see also, Illinois v. General Elec. Co., 683 F.2d 206 (7th Cir. 1982); Potomac Alliance v. NRC, 682 F.2d 1030 (D.C. Cir. 1982); Township of Lower Alloways Creek v. Public Serv. Elec. & Gas Co., 687 F.2d 732 (3d Cir. 1982) These three cases are discussed *infra* at note 239 and accompanying text.

215. See *New England Coalition v. NRC*, 582 F.2d 87 (1st Cir. 1978); *Public Serv. Co. v. NRC*, 582 F.2d 77 (1st Cir. 1978); *Application of Portland Gen. Elec. Co.*, 277 Or. 447, 561 P.2d 154 (1977); *PIRG v. Department of Env'tl. Protection*, 152 N.J. Super 191, 377 A.2d 915, cert. denied, 754 N.J. 538, 384 A.2d 517 (1977); Cronin & Turner, *Article VIII of the Public Service Law—The Brave New World of Power Plant Siting in New York: A Critique and Suggestion for an Alternative Approach*, 42 ALB. L. REV. 537 (1978); Comment, *California's Nuclear Power Plant Siting Legislation: A Preemption Analysis*, 52 S. CAL. L. REV. 1189 (1979).

216. See, e.g., Meek, *Nuclear Power and State Radiation Protection Measures: The Impotence of Preemption*, 10 ENVTL. L. 1 (1979); *Nuclear Power and Preemption: Opportunities for State Regulation*, 27 CLEV. ST. L. REV. 117 (1978); *Federalism and Energy*, 18 ARIZ. L. REV. 283 (1976); Note, *Pre-emption Under the Atomic Energy Act of 1954: Permissible State Regulation of Nuclear Facilities' Location, Transportation of Radioactive Materials and Radioactive Waste Disposal*, 11 TULSA L.J. 397 (1976); Annot., 82 A.L.R.3d 751 (1978); Note, *Redefining the Role of the States in the Nuclear Licensing Process: The Nuclear Siting and Licensing Act of 1978*, 58 B.U.L. REV. 649 (1978). Preemption of local regulations is discussed in *United States v. City of New York*, 463 F. Supp. 604 (S.D.N.Y. 1978).

ergy Resources Conservation & Development Commission.²¹⁷ The Supreme Court held that a California statute, that imposed a moratorium on the construction of new nuclear plants until a state agency found a satisfactory method of waste disposal, was not preempted because the law was motivated by fiscal rather than safety concerns.²¹⁸ *Pacific Legal Foundation* cuts against the formation of a national nuclear policy by allowing states to prevent the construction of nuclear plants. At the same time, the case honors the goals of the Supremacy Clause by reconciling the allocations of power in a federal system.

Like the severance tax cases, cases which deal with issues of federalism (Tenth Amendment, Supremacy Clause and pre-emption) are consistent with substantive rules of law. Yet even though the legal concept of federalism allows concurrent federal and state involvement in policymaking, a tension between centralized and decentralized decisionmaking remains.²¹⁹ While centralization promotes a national policy, decentralization fosters fragmentation. Substantive legal rules and principles, in general, fragment energy policy because the law attempts to reconcile the competing claims and values of politics and economics.

VI. VALUES

The preceding sections on structures, methods, and substantive rules demonstrate how comprehensive policy formation breaks down under the weight of institutionalized and embedded conflicts in the decisionmaking system. Further analysis suggests a more profound and thematic conflict: a conflict in values. This conflict pits economics against politics. This is not the only "values" con-

217. 461 U.S. 190 (1983).

218. The case is controversial because most judicial opinions and scholarly works indicate that federal regulation in this field is pervasive if not exclusive. Refer to note 60 *supra*. *County of Suffolk v. Long Island Lighting Co.*, 554 F. Supp. 399 (E.D.N.Y. 1983) (private cause of action by county for construction cost overruns pre-empted); *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220 (D.R.I. 1982) (state statute which required bond for nuclear waste disposal pre-empted); *but see*, *Silkwood v. Kerr-McGee Corp.*, 52 U.S.L.W. 4043 (U.S., Jan. 11, 1984) (federal preemption does not extend to preclude award of punitive damages against the state whose employee was contaminated by plutonium).

219. See, e.g., Fischer, *Allocating Decisionmaking in the Field of Energy Resource Development: Some Questions and Suggestions*, 22 ARIZ. L. REV. 785 (1981); Watson, *Measuring and Mitigating Socio-Economic Environmental Impacts of Constructing Energy Projects: An Emerging Regulatory Issue*, 10 NAT. RESOURCES L. 393 (1977); Dept. of Justice Memorandum, *Constitutionality of the Energy Mobilization Board Proposal*, 125 Cong. Rec. S.13884-87 (daily ed. Oct. 2, 1979).

flict that exists,²²⁰ but it is pervasive. Economics and politics are broad enough both to address a wide range of issues and to serve as the bases of predictive theory building.²²¹ Both economic and political norms operate in the decisionmaking system and both should be honored. Proponents of one theory understandably downplay the significance of the other. To the extent that there exists a tendency to favor economic principles today, political values have become obfuscated or lost. A balance between the two is required for the formulation of stronger policies. Striking a better balance may require nothing more, nor less, radical than an explicit recognition of the political significance of policy decisions and an explicit articulation of the accommodations that must be made between economics and politics.²²²

Economics and politics are like two cultures, each with a language of its own.²²³ The language of economics is imbued with "efficiency,"²²⁴ or wealth maximization,²²⁵ and bespeaks an allegiance

220. See, e.g., J. TOMAIN & S. HOLLIS, *ENERGY DECISION MAKING: THE INTERACTION OF LAW AND POLICY* ch. 9 (1983) (discussing some similarities and differences between the scientific method and the legal method and suggesting that this poses a major values conflict).

221. There are three current theories of government regulation. Some writers apply their particular theory to internal administrative law; that is, the theory is used to explain how bureaucracies function. Others apply the theory more broadly to why governments regulate. Proponents of the usefulness or organizational theory include: J. MASHAW, *BUREAUCRATIC JUSTICE* (1983); Mashaw, *Mirrored Ambivalence: A Sometimes Curmudgeonly Comment on the Relationship Between Organization Theory and Administrative Law*, 33 J. LEGAL EDUC. 24 (1983); Schuck, *Organization Theory and the Teaching of Administrative Law*, 33 J. LEGAL EDUC. 13 (1983). Political theorists include C. LINDBLOM, *POLITICS AND MARKETS* (1977); T. LOWI, *THE END OF LIBERALISM* (2d ed. 1979); and J. WILSON, *THE POLITICS OF REGULATIONS* (1980). Finally, the economists are best exemplified by STIGLER, *supra* note 32 and Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974). These are not discrete theories, see, e.g., LITWAN & NORDHAUS *supra* note 6 at 34-44 and 95-99. The economic theory is only slightly distinguishable from the political theory. Regulatory benefits go where demand is greatest according to the economic view or where power is greatest according to the political view. It may be that the supply/demand motif both describes economic regulation and has predictive power to ascertain where the benefits of economic regulation will go in the future. This theory less successfully describes or predicts where the benefits of social regulation go. It is argued here that energy policy is complex enough to be characterized as both economic and social regulation and that both theories have application.

222. See J. COHEN & J. ROGERS, *ON DEMOCRACY: TOWARD A TRANSFORMATION OF AMERICAN SOCIETY* chs. 3, 6 (1983); LINDBLOM, *supra* note 28 *passim*; R. REICH, *THE NEXT AMERICAN FRONTIERS* 3-21, 255-82 (1983).

223. See LINDBLOM, *supra* note 27.

224. See, e.g., R. POSNER, *THE ECONOMIC ANALYSIS OF LAW* § 1.2 (2d ed. 1977); Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591 (1980); Tullock, *Two Kinds of Legal Efficiency*, 8 HOFSTRA L. REV. 659 (1980).

225. See, e.g., R. POSNER, *THE ECONOMICS OF JUSTICE* 88-115 (1981); Coleman, *Effi-*

to utilitarianism.²²⁶ Although not without its critics, particularly when economic sciences are drafted to do legal analysis,²²⁷ the appeal of economics is a powerful one.²²⁸ The economics culture emphasizes profitability, productivity, and economic growth through reliance on the free market, private participation for private gain, and when helpful, a less intrusive government. Quantified analysis and results are attractive because they make complicated issues simple. Quantified data produces something that staff members can show to supervisors and something on which decisionmakers can rely when decisions must be made public. Economically-based methodologies also produce results which can be evaluated in the short term. By contrast, the vocabulary of politics is more amorphous, open-ended, idealistic and qualitative. Politics is concerned with power and where power resides in the state. In a democracy power is diffused, so the political language of democracy concerns itself with such issues as individual autonomy,²²⁹ community-regarding goals,²³⁰ equality,²³¹ due process²³² and interest representation.²³³ The government may be expected to correct market defects and to promote social policies that may be economically inefficient, but inefficiency is a result the free market will not accept. If eco-

ciency, Utility, and Wealth Maximization, 8 HOFSTRA L. REV. 509 (1980).

226. See, ETHICS, ECONOMICS AND LAW chs. 5-10 (J. Pennock & J. Chapman eds. 1982); but see R. POSNER, THE ECONOMICS OF JUSTICE, 48-87 (1981).

227. See, e.g., C. FRIED, RIGHT AND WRONG ch. 4 (1978); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); Markovits, *Legal Analysis and the Economic Analysis of Allocative Efficiency*, 8 HOFSTRA L. REV. 811 (1980); Michelman, *supra* note 180; Schwartz, *supra* note 180; see also, CALABRESI & BOBBITT, *supra* note 3 at 15-28 and 81-127 (discussing why economic markets can fail to make fair decisions).

228. Aside from the prodigious work of Judge Richard Posner, the literature of law and economics is vast. Emory University School of Law holds an annual seminar for law teachers to learn to do economic analysis under the direction of Professor Henry Manne. See also THE ECONOMICS OF LEGAL RELATIONSHIPS (H. Manne ed. 1975); B. ACKERMAN & W. HASSLER, CLEAN/DIRTY AIR (1981). Economic materials now constitute regular fare in the most recent case books. Economic analysis of law now constitutes "normal science" to use Thomas Kuhn's phrase. Some basic works include: R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977); R. POSNER, THE ECONOMICS OF JUSTICE (1981); *Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980); *A Response to the Efficiency Symposium*, 8 HOFSTRA L. REV. 811 (1980); *The Place of Economics in Legal Education*, 33 J. LEGAL EDUC. 183 (1983). A thorough bibliography is contained in C. GOETZ, LAW AND ECONOMICS 505-44 (1984).

229. See, e.g., C. FRIED, CONTRACT AS PROMISE 1-14 (1981); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713-24 (1976).

230. See B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 374-78 (1980).

231. Refer to note 17 *supra*.

232. See, e.g., FISS, *Foreward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

233. Refer to Stewart, *supra* note 5, J. ELY, *supra* note 119.

nomic analysis can be categorized as a search for efficient outcomes, political analysis is a search for fair or equitable outcomes.²³⁴ Similarly, while the culture of economics relies on short-term results, the culture of politics depends on long-term commitment. Naturally, these are not discrete areas of analysis. Things economic are often political and vice versa. The government is not the savior of the social needs of the underclass to such an extent that it is totally unresponsive to economic pressures. Nevertheless, the languages and methods that are used to analyze issues and reach results often pit economics against politics in such a way as to have them compete for the attention of decisionmakers.²³⁵ A government decisionmaker, political by nature, is often confronted with extremely complex issues. This, coupled with a bias in favor of hard data, creates a decisionmaking schizophrenia which is embedded throughout the system.

Although the structures of decisionmaking can be described as more politically than economically motivated, the methods the decisionmakers use are clearly biased in favor of economics; hence, the schizophrenia.²³⁶ The hallmark of the structural conflicts, which were described above, was the struggle for political power. The most visible characteristic of the economic methodologies waws economic efficiency. The substantive rules recognize and accept both sets of values. Indeed, the vitality of a substantive rule lies in its ability to reconcile political and economic claims in areas of public law decisionmaking. Even though the methodologies tend toward an economic calculus, political choices affect their application. Similarly, even though the structural conflicts are fundamentally political, often the more efficient structure will prevail. These cross-overs between economics and politics are not signs of confusion and indeterminacy. They signify the existence of a relation between the two sets of values. This is the "relation among the signs."²³⁷ It is this reciprocal relationship between economic and political values that prevents policy from becoming chaotic.

234. Refer to Michelman, *supra* note 180, Schwartz, *supra* note 180, Sagoff, *supra* notes 163, 166, and 180.

235. Refer to Sagoff, *supra* note 163; Sagoff, *On Markets for Risk*, 41 Md. L. Rev. 755, 761-69 (1982).

236. It is important that these two ideas do not collapse into one another. Proponents of economic analysis, in their more grandiose moments, would argue that the efficient or wealth maximization decision is the fair one. This is a claim that cannot be supported. See, e.g., Rizzo, *The Mirage of Efficiency*, 8 Hofstra L. Rev. 641 (1980).

237. *Id.*

Energy law and policy interact in a way which accepts, if not encourages, the interplay between economics and politics. A reading of energy legislation and cases makes clear that economics plays a significant, but not exclusive, role in policymaking. Nevertheless, the politics of energy is also a potent force.²³⁸ It would be wrong, then, to characterize energy law and policy as either social or economic regulation.²³⁹ An area as complex as this is both.²⁴⁰

238. See, e.g., *supra* notes 18 and 22; Pierce, *Natural Gas Regulation, Deregulation and Contracts*, 68 VA. L. REV. 63 (1982).

239. Earlier, in Part IV A, the point was made that the Commerce Clause is motivated by political as well as economic considerations. How one characterizes a legal issue is outcome determinative. If a decisionmaker prefers one set of values over another, then an outcome can be determined. In *Illinois v. General Elec. Co.*, 683 F.2d 206 (7th Cir. 1982) Judge Posner, writing for the court, struck down an Illinois statute that barred nuclear wastes generated out of state from being stored in Illinois with this language, at 213-14:

The efficient disposal of wastes is as much a part of economic activity as the production that yields the wastes as a byproduct, and to impede the interstate movement of those wastes is as inconsistent with the efficient allocation of resources as to impede the interstate movement of the product that yields them . . . Nuclear wastes have to be stored somewhere, and the place of storage should be chosen without regard to the parochial interests of the states.

While this Commerce Clause analysis speaks to the interest of a national market, it overshadows the "sovereignty" interest of the type that was upheld in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). One consequence of such embeddedness is that the nature of the decision being made is often misperceived because the issues are couched in rhetoric.

Each mode of speaking about energy policy can define the debate. Because the two often conflict, the way we talk about a particular issue, and the way we characterize a problem can prefigure the outcome. An argument which favors efficiency can overcome political claims and bias the outcome.

The choice between expanding the on-site storage facilities for nuclear waste and denying a permit turns as much on how the issue is presented to the court as it does on the law. If the proponents of expansion argue that expansion is efficient and economical, and the argument is carried on in essentially economic terms, e.g., positive cost benefit analysis or favorable cost of service implications, then the outcome is literally predetermined: the expansion will be granted.

Similarly, if the opponents succeed in characterizing the issue as one which involves complex and uncertain scientific problems, and issues of democratic representation and participation in decisionmaking about the fate of future nuclear generations, then, clearly, the opposite outcome is likely.

Compare *Township of Lower Alloways Creek v. Public Serv. Elec. & Gas Co.*, 687 F.2d 732 (3d Cir. 1982) with *Potomac Alliance v. NRC*, 682 F.2d 1030 (D.C. Cir. 1982). The court in *Lower Alloways* took pains to note how the petitioners failed to meet their burden of proof in arguing that the expansion permit would significantly affect the quality of the human environment. In contrast, the D.C. Circuit emphasized that the burden on the Environmental Impact Statement issue lies with the NRC. See also *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979). These cases can be reconciled, but they emphasize the major point that courts are influenced by different rhetoric. In *Lower Alloways* a power plant shutdown was not seen as an attractive alternative, and the court used the burden of proof to prevent that result. The *Potomac Alliance* case was more of an inter-branch jurisdictional fight. See, e.g.,

The interaction of law and policy thus constitutes a matrix:

	Positive Criteria	Normative Criteria
Politics	Decisionmaking Structures	Equity and Fairness
Economics	Decisionmaking Methodologies	Efficiency and Wealth Maximization

Neither law nor policy is exclusively positive or normative, economic or political. Both cultures pervade the ultimate rules, regulations, final orders and decisions which wind their way through the decisionmaking corridors. The fragmentation and splintering of a comprehensive substantive policy is a consequence of this matrix. Yet, the matrix does demonstrate an interdependence between the system and the norms.

Decisionmaking structures are aligned more closely with politics than economics because the structures are founded on the essentially politically-oriented positive laws of the Constitution and enabling legislation. These laws are the major influences on the allocation of decisionmaking power, and they represent compromises of power and policy between and within branches of the federal government and between federal and state governments. Some, if not many, of the laws concentrate on things economic, and most are at least influenced by economic thought and variables. Nevertheless, the deeper principles are political as power is divided and shared among various groups and interests.

The methodologies are more closely aligned with economics

682 F.2d at 1035:

Whether the benefits of expanding the North Anna spent-fuel pool outweigh the costs is a question we are ill-equipped and unauthorized to answer. Our limited objective, therefore, is to determine what procedures NEPA requires and whether the NRC has followed them. (Bazelon, J., concurring.)

240. See, e.g., 42 U.S.C. § 7112 (Supp. I 1972), which is the statement of purpose for the Department of Energy. Among the purposes are to centralize, § 7112(1)-(3) and decentralize decisionmaking § 7112(11); to protect consumers § 7112(a) and foster competition § 7112(12); to promote energy development § 7112(5)(c) and protect the environment § 7112(13); and, foster private sector involvement § 7112(14) and public participation § 7112(15). These are some of the goals that easily conflict and which indicate a concern both for economic and social planning.

because of the need, addressed earlier, for tools to make decisions in light of a mass of difficult and oftentimes conflicting data. The methods can yield hard information with which decisions can be made. An economic theory of policymaking has several attractive features. First, the economic view lends itself to decisionmaking because of its required quantification. Second, decisions based on economic criteria are valuable because they are short term,²⁴¹ which means that specific decisions can be made as needed. Third, these two elements combine to give the appearance of reduced uncertainty.²⁴² Economics, therefore, simplifies complex decisions. The primary problem with the economic approach is that it is too segmented. It operates in the short term and fails to take a macroscopic view of the policymaking process.²⁴³

The tension between economics and politics has been recognized in discussions of internal administrative law where the lack of cohesive policies is frequently noted.²⁴⁴ Not so curiously, the elements that operate to make internal administrative law difficult to reconcile²⁴⁵ recur throughout the system. Conflicts between efficiency and fairness, and between economics and politics, can be reconciled by explicating the political nature of many of these decisions and then accommodating the political variables.²⁴⁶ Equity issues must also be determined alongside efficiency issues. Instead of an economic Darwinism where policy is supplied to whichever interest group makes the strongest demand,²⁴⁷ decisionmaking should also foster participation, collaboration, and collective adaptation.²⁴⁸

241. See COHEN & ROGERS, *supra* note 222 at 51-62. These authors argue that one of the deep constraints in a "capitalist democracy" is that society is structured to satisfy short-term material demands. Indeed, central to an economic analysis is the concept that decisions must be made currently. Short-term decisions are visible, and planning is facilitated. After all, as Lord Keynes said, in the long-term we are all dead anyway.

242. Refer to R. POSNER, *supra* note 225.

243. R. LITWAN & W. NORDHAUS, *supra* note 6 at 90-91 write: "Efficiency requires at each point that the overall benefits from the effort be compared with the costs, regulation should occur therefore, only when the total benefits outweigh the total costs." At what point in time? Start up costs of a regulatory program will surely outweigh initial benefits. Are we now talking about marginal costs once a program is operating? If so, how long should the program operate? Moreover, there are values that are not quantifiable and values that will tolerate inefficiencies. Refer to note 169 *supra*.

244. Refer to note 7, *supra*.

245. See, e.g., I. MASHAW, *supra* note 6 at 103-04.

246. R. REICH, *supra* note 222; J. COHEN & I. ROGERS, *supra* note 222.

247. Refer to G. STIGLER, *supra* note 32; R. POSNER, *supra* note 226.

248. R. REICH, *supra* note 222; J. COHEN & J. ROGERS, *supra* note 222.

That politics and economics both influence our society is inescapable. The fact that political decisions often concern or affect economic regulation is likewise true. The law, then, and the institutions that it legitimizes is a reflection of these larger phenomena. Policy disarray occurs as a result of the interaction of structures, methods, and rules of law, and because of the overwhelming nature of the problems. It can be seen, then, that the tension between economics and politics, which is most acute when a decisionmaker is faced with choosing between an efficient but unfair decision or a fair but inefficient one, is embedded not only in the structures of the law but also in methodologies and substantive rules. It is futile to expect a full and detailed substantive policy to wind its way unscathed through this decisionmaking system. Nevertheless, economic and political values provide a direction for policymaking. In this very important respect economics and politics are linked together in a common purpose. The stronger the link the more coherent the policy. Economic productivity and social justice are dependent norms.²⁴⁹

VII. CONCLUSION

Before a comprehensive substantive policy is formed it must work its way through a complex of structures that are influenced by normative political considerations, methodologies that are aligned with positive economic criteria, and a set of substantive rules that reflect an ambivalence between politics and economics. Characteristic of the interaction between law and policy, and at the center of the failure of energy policy to coalesce, is a purported conflict in values. The tension is one that is played out between the norms of politics and economics. The reciprocal relationship between politics and economics shapes policymaking. Decisionmakers should be sensitive to the interplay between the two sets of values, and they should articulate the bases of their decisions in a way that embraces both the economic vision and the political vision of policy choices.

It is proposed here that the legal system plays a significant part in policymaking. Undoubtedly there are numerous influences exogenous to the legal system that also operate in policy forma-

249. R. REICH, *supra* note 222 at 21: "The central theme of this book is that in the emerging era of productivity, social justice is not incompatible with economic growth, but essential to it."

tion. Social psychology, shifts in ideology, and cultural norms altered by economic realities, each affect the policies that are ultimately given life. They also affect a legal system which is not a sterile embodiment of some abstract and disassociated sense of justice; the legal system incorporates the values that exist in society. The greater the incorporation of these values the more legitimate the system.

