

REGULATORY INCREMENTALISM  
AND MORAL CHOICES:  
A COMMENT ON ADLERIAN WELFARISM

DANIEL B. RODRIGUEZ\*

I. INTRODUCTION.....	375
II. ADLER'S WELFARISM.....	376
III. REGULATORY INCREMENTALISM.....	379
IV. THE PROBLEMS WITH COST-BENEFIT WELFARISM.....	386
V. CONCLUSION: WELFARISM AND REGULATORY ADMINISTRATION.....	387

I. INTRODUCTION

Matthew Adler's fine paper on welfarism and regulation tackles ambitiously and elegantly the normative foundations of modern regulation.<sup>1</sup> This most recent paper is part of a nice triptych begun with *Rethinking Cost-Benefit Analysis*<sup>2</sup> and *Incommensurability and Cost-Benefit Analysis*.<sup>3</sup> In these articles, Professor Adler lays out a deeply reflective case for a welfarist theory of regulation.<sup>4</sup> Moreover, he makes the case, albeit more ambivalently, for cost-benefit analysis as a key part of the template for regulatory choice.<sup>5</sup> In the conclusion to *Rethinking Cost-Benefit Analysis*, Professors Adler and Posner maintain that "[a]gencies should use [cost-benefit analysis] to evaluate the welfare effect of large projects,"<sup>6</sup> qualifying, however, their recommendation of its use because of potentially negative distributional consequences. Cost-benefit analysis, therefore, should not be used "where wealth differences between those who gain from the project and those who lose are substantial enough."<sup>7</sup>

---

\* Dean and Professor of Law, University of San Diego.

1. See Matthew D. Adler, *Beyond Efficiency and Procedure: A Welfarist Theory of Regulation*, 28 FLA. ST. U. L. REV. 241 (2000) [hereinafter *Beyond Efficiency*]. Professor Adler states:

My focus will be legal scholarship, since it is legal scholars who, in recent years, have paid the most sustained attention to the problem of justifying regulation—the problem of generating a moral theory of regulation in light of which general regulatory approaches, specific regulatory decisions, the design of regulatory agencies, and all other aspects of regulation can be evaluated as good or bad, right or wrong.

*Id.* at 241-42.

2. Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165 (1999).

3. Matthew D. Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371 (1998) [hereinafter *Incommensurability*].

4. See *Beyond Efficiency*, *supra* note 1; *Incommensurability*, *supra* note 3; Adler & Posner, *supra* note 2.

5. See *Beyond Efficiency*, *supra* note 1; *Incommensurability*, *supra* note 3; Adler & Posner, *supra* note 2.

6. Adler & Posner, *supra* note 2, at 238.

7. *Id.*

The contribution of the rather dense analytical paper for this Florida State University symposium is both to dismantle two of the standard normative accounts for regulation and administrative law, accounts which Professor Adler classifies as neoclassical and proceduralist, and to point the way toward an avowedly welfarist account.<sup>8</sup> The careful, and mostly philosophical, analysis of this paper, like previous work by Professor Adler in this same vein, is a tour de force. Not only is it head and shoulders above much of the rather intuitionist, and often analytically slim, sort of theoretical work in the legal literature on regulation and administrative law, but it also has going for it that it is within a growing body of legal analysis which looks to economic analysis and more scientific methods to provide a richer substantive grounding to prescriptive regulation and regulatory theory.<sup>9</sup> Professor Adler's work shows exactly what sort of value is added by bringing an able philosophical mind and technique to serious public law problems.

The purpose of this Comment is to suggest ways in which more scrupulous attention to the nature and characteristics of modern regulatory decisionmaking and the role of institutions in structuring such decisionmaking might contribute to the omnibus welfarist approach to regulation. My claim is that the essentially incremental character of modern regulatory administration raises doubts about the utility of a welfarist set of criteria, whether cost-benefit analysis or some other technique.

## II. ADLER'S WELFARISM

Professor Adler lays out, in lengthy detail, the case for welfarism as a superior normative talisman for regulatory choice.<sup>10</sup> Sometimes this case is styled as arrestingly new and, therefore, as a significantly different approach to realizing overall well-being through the regulatory system.<sup>11</sup> At other times, he admits that his approach is

---

8. See *Beyond Efficiency*, *supra* note 1, at 243-44.

9. See, e.g., Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981, 1984 (1998) (questioning the "pervasive reliance on [John] Morrall's table in scholarly and political discussion of risk regulation"); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 11 (1995) (evaluating President Clinton's Executive Order 12,866, suggesting "reforms that will simultaneously promote economic and democratic goals"); Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 948 (1999) (stating that his "[a]rticle underscores the extent to which discounting raises analytically distinct issues in the cases of latent harms and harms to future generations, even though these two scenarios have generally been treated as manifestations of the same problem"); Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533, 1536 (1996) (stating that it is his "goal" to "explore the relation between health-health tradeoffs and the law, in an effort to see how governmental judgments . . . might be improved").

10. See *Beyond Efficiency*, *supra* note 1, at 288-336.

11. See *id.* at 241, 245, 335.

merely a form of “refurbished neoclassicism,” that is, a better way of both enhancing the (more perfected) preferences of individuals and increasing utility.<sup>12</sup> In both its modest and immodest versions, this enterprise of solidifying the theoretical case for welfarism as the talisman for regulatory choices strikes me as not only plausible but correct. In any event, it is an entirely defensible (and indeed Adler defends it well) normative framework for assessing the performance of regulatory institutions in a modern state. Moreover, the smaller part of the thesis, that Kaldor-Hicks efficiency is mostly unnecessary and, on occasion, works at cross-purposes with a welfarist account, is completely persuasive on Adler’s account.<sup>13</sup> Also persuasive is Adler’s argument that Pareto-superiority provides one good basis for assessing regulatory options but is, in the end, an entirely too risky account.<sup>14</sup>

The power of welfarist theory vis-à-vis proceduralist frameworks for regulatory choice seems likewise strong. If anything is to be faulted, it is that Professor Adler gives much too much attention to the “Big-P” Proceduralism in mainstream administrative law and regulation scholarship.<sup>15</sup> The proceduralism of the sort described in the paper has few remaining adherents. The heyday of such strong proceduralism was the 1970s, when the work of key administrative law scholars fashioned the case for augmented procedures in regulatory decisionmaking,<sup>16</sup> “hard look” review by federal courts,<sup>17</sup> and a dialogic conception of relationships among agencies, businesses, and interest groups.<sup>18</sup> By the time Richard Stewart wrote his seminal piece on the reformation of administrative law,<sup>19</sup> such proceduralist conceptions were already on the retreat.<sup>20</sup> Significantly, even the hard look doctrine of the 1980s and 1990s was attached much more tightly to normative theories of enhanced regulatory performance

---

12. *Id.* at 244, 289, 319-32.

13. *See id.* at 248-62.

14. *See id.* at 255-57.

15. *See id.* at 267-88.

16. *See, e.g.,* Kenneth Culp Davis, *Revising the Administrative Procedure Act*, 29 ADMIN. L. REV. 35 (1977).

17. *See, e.g.,* Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976); Portland Cement Ass’n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973); Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970).

18. *See, e.g.,* MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 47-49 (1988).

19. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) (“The court should . . . not . . . impose upon the agency its own notion of which procedures are ‘best’ or most likely to further some vague undefined public good.”).

20. *See, e.g.,* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

than to the intrinsic values of due process and procedural justice.<sup>21</sup> It is appropriate to note in a symposium organized by Professor Mark Seidenfeld that Professor Seidenfeld is among a fairly small group of administrative law scholars who are committed to a strong proceduralist vision of administrative agency decisionmaking.<sup>22</sup> There are few Big-P Proceduralists left.

There remain, as Professor Adler acknowledges, strands of normative theory which may stand in the way of welfarism/refurbished neoclassicism.<sup>23</sup> Deontological, perfectionist, and distributive themes are significant aspects of contemporary regulatory theory.<sup>24</sup> Adler describes these criteria as potential "partitions," separating the space between avowedly welfarist theories of regulation and other, nonwelfarist considerations.<sup>25</sup> While the gist of Adler's prescriptive theorizing suggests that these partitions need not stand in the way of welfarist approaches, it is not clear that these exceptions have not swallowed the rule. After all, the attachment among theorists to deontological, rights-based themes in regulatory discourse is found in many different parts of the literature, including in scholarship calling for augmented welfare rights<sup>26</sup> and that championing the environmental justice movement.<sup>27</sup> Significantly, this discourse runs against the grain of welfarist theories by injecting deep considerations of equity and substantive justice into the mix. To be sure, I suspect that in the end Professor Adler and I would agree that these deontological considerations cannot adequately support modern regulatory theory. Yet, the persistence of rights-based theories at least raises the stakes associated with partitioning nonwelfarist considerations. We are left with the theoretical and empirical questions of how efficacious deontological theories of regulation are.

As Professor Adler deploys his ammunition against theoretical targets, the relative attention he gives to largely anachronistic proceduralist theories versus the attention he gives to those raised in his discussion of partitions and partitioning is curious.<sup>28</sup> A caveat which

21. See, e.g., CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 213-64 (1990) (describing role of hard look review as facilitating "sound governance").

22. See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

23. See *Beyond Efficiency*, *supra* note 1, at 288-89.

24. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 34-35 (1990).

25. *Beyond Efficiency*, *supra* note 1, at 313-19.

26. See R. SHEP MELNICK, *BETWEEN THE LINES* 274-83 (1994).

27. See Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992); Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721 (1993).

28. See *Beyond Efficiency*, *supra* note 1, at 313-19, for a discussion of partitioning. See also Adler & Posner, *supra* note 2, at 243-45, for a discussion of these considerations in the context of cost-benefit analysis.

looms large in Professor Adler's welfarist account is this: If one believes that prescriptive regulation ought to be evaluated based upon deontological, perfectionist, or distributive criteria (or presumably some combination of each), then welfarist approaches will predictably ring hollow.<sup>29</sup> While Professor Adler rightly elides this even more fundamental question, it is worth noting that this too is a form of theoretical partitioning. How persuasive ought cost-benefit analysis be to anyone seriously concerned that regulation of a certain form and level is necessary to ensure the protection of certain individual or group rights, for example, the "right" to a clean environment? Is the upshot of Adler's partitioning that cost-benefit analysis has absolutely nothing to say to such a person?

This partitioning is less apparent in connection with distributive criteria, for in *Rethinking Cost-Benefit Analysis*, Professors Adler and Posner contemplate the introduction of certain distributive criteria into their configuration of cost-benefit analysis.<sup>30</sup> In essence, then, they accept the inevitability that some of these other, nonwelfarist criteria will likely creep into an otherwise welfarist account of regulation. Once these criteria have crept in, though, what is to keep nonwelfarist criteria mostly at bay? Why is not the gist of the theory that welfarism is *part* of an overall normative strategy? Of course, Adler has much more in mind. Yet, it is coming to terms with the scope of this partitioning and, more fundamentally, the relationship between welfarist theories and deontological, perfectionist, and distributive considerations that is presumably the next big stage in Professor Adler's ambitious effort to reconceptualize the modern theory of regulation.

### III. REGULATORY INCREMENTALISM

I will assume that Professor Adler has in mind not an idealized, highly abstracted notion of regulatory politics and policymaking, but rather the real world of regulation in the modern administrative state. While eschewing any particular positive account of regulation, he does turn our attention to contemporary administrative regulation. So what do we see when we turn our attention, with Professor Adler, to modern regulatory administration?

Fundamentally, we see that regulatory agencies act incrementally. That is, they act upon the social or economic problem brought before them (frequently in the context of enforcement or litigation), and they craft regulatory strategies to deal with the particular issues

---

29. See *Beyond Efficiency*, *supra* note 1, at 313-19.

30. See Adler & Posner, *supra* note 2, at 238-45. They state, "Agencies should use CBA to evaluate the welfare effect of large projects except where wealth differences between those who gain from the project and those who lose are substantial enough." *Id.* at 238.

raised. Moreover, regulatory policy exists in an environment made up of many institutions, each assigned different functions and each relating to one another in overlapping, cross-cutting, and frequently competitive ways. One of the ways in which regulatory agencies are distinguished from institutions such as the U.S. Congress is that agencies are created rather episodically and with an eye toward responding to categories of regulatory programs. Justice Stephen Breyer echoed the views of other regulation theorists when, a number of years ago, he proposed a large, omnibus regulatory agency which would be better suited to confront a range of social and economic problems.<sup>31</sup> Breyer's proposed agency had the capacity to consider trade-offs and priorities and to develop comprehensive regulatory criteria; thus it would have been able to respond more successfully to these polycentric problems.<sup>32</sup> Whatever the normative force of this injunction, what we are left with at the dawn of a new century in the United States of America is an alphabet soup of agencies and regulatory programs. We are thus left with a basically incremental process of regulatory administration. Moreover, it is a process that is profoundly political and subject to the turbulence of the economy, public opinion, and public choice.

It is not the case, to be sure, that regulatory incrementalism is an inherent and immutable characteristic of administrative behavior and performance. Professor Adler's colleague, Professor Colin Diver, noted many years ago that there are competing paradigms of policy-making and that agencies can and do adopt synoptic, as well as incrementalist, approaches.<sup>33</sup> The choice among these approaches involves not only considerations of optimal regulatory strategy, as best this can be discerned by the agency, but also decidedly political choices by legislatures and affected interest groups. Synoptic strategies presuppose both a sustainable body of information available to the agency and the legal authority and political will to employ this information in order to confront comprehensively important social and economic problems through innovative regulatory strategies. The model of the powerful New Deal agency, represented by the failed experiment of the National Recovery Administration,<sup>34</sup> symbolizes this aspirational vision of the administrative state as the instrument of coherent, technocratic, and apolitical public policy. Synopticism

31. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* 55-81 (1993).

32. See *id.*

33. See Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 *HARV. L. REV.* 393, 394-95 (1981).

34. The National Recovery Act of 1933 gave authorization to the President to bring together a National Recovery Administration to draft codes for more than 500 industries. Each Code was designed both to stabilize labor practices and to avoid destructive competition. See National Industrial Recovery Act of 1933, Pub. L. No. 73-67, § 3, 48 Stat. 196, 196-97.

represents the choice not only to pursue more activist regulation, but also to empower agencies to bite off a rather large chunk of the social and economic problems which call for regulatory intervention. The nature and scope of the strategies available to the agency should reflect this hopeful and very much comprehensive view of regulation's potential.

In addition to the choices agencies, legislators, and interest groups can make about synoptic versus incremental approaches, there are significant influences brought to bear by judicial review. The hard look doctrine was fashioned, after all, as an effort to encourage agencies to act more synoptically.<sup>35</sup> But over the past quarter century, courts have firmly sided with the incrementalist approach; synoptic decisionmaking has been all but abandoned. In its place, the federal courts have substituted a moderate form of hard look review, a review which is tethered to statutory and, less reliably, common law requirements of well-reasoned decisionmaking. The integrity of procedural rules is to be respected by agencies, as are the imperatives of considering properly the factors which Congress and the agencies themselves have spelled out as necessary to pass legal muster. Pushed more deeply in the background, then, is the requirement of truly synoptic decisionmaking, a requirement which would have pushed agency decisionmaking away from incrementalism.

If regulatory incrementalism has persisted, it is not only because of the triumph of this approach in contemporary regulatory strategy and in administrative law, but also because there are elements in the practice of regulatory administration which make agencies tend toward incrementalist strategies. Central to this claim is the basic decisionmaking matrix for agencies in administration. Consider two essential regulatory choices: Agencies make choices not only about what level of regulation is appropriate and what strategies to deploy in implementing their regulatory agenda, but also about whether to pursue one regulatory initiative or another. For simplicity's sake, let us call these basic decisions of whether to regulate at all *regulatory initiation* or "RI" decisions. We can call other decisions, such as whether to use certain command-and-control devices or whether to set the maximum exposure level at .05 or .005, *regulatory strategy* or "RS" decisions.

From one perspective, RI and RS decisions are within the same analytic category in that they both involve regulatory choices. Surely we could apply a welfarist criterion to assessing both RI and RS decisions; and there is nothing in Adler's theoretical account which suggests that such types of decisions would be evaluated differently with respect to this criterion. It bears noting that the practicalities of

---

35. See SHAPIRO, *supra* note 18, at 52-54.

these two types of decisions are different in the typical administrative regulation context. Moreover, there are some significant differences drawn in contemporary administrative law doctrine which, at the very least, make the distinctions between RI and RS decisions salient.

With respect to the practicalities entailed, consider a standard description of a regulatory choice sequence. In their book on automobile safety regulation, Jerry Mashaw and David Harfst give us a wonderful glimpse into the characteristics of both RI and RS decisions.<sup>36</sup> The key strategic dilemma for the early National Highway Transportation Safety Administration (NHTSA) concerned the choice between traditional command-and-control regulation emphasizing design and/or performance-based criteria and more adjudicatory responses such as recalls.<sup>37</sup> Lurking below the surface of these ubiquitous strategic dilemmas, however, were questions concerning whether the agency would intervene at all in certain matters of motor vehicle safety. For example, the NHTSA never seriously pursued strategies of driver behavior modification, even though such strategies were arguably contemplated by Congress when enacting the Motor Vehicle Safety Act of 1965.<sup>38</sup> Nor did NHTSA pursue regulation of school buses and other vehicles, therefore leaving significant risks unregulated.<sup>39</sup> Besides the banal explanation that there is only so much time and money to go around, it remains unexplained why the agency tackled any one regulatory initiative rather than another. Regardless of the positive reasons for activity and passivity with regards to any particular safety-related strategy, it is significant that these choices were, in the end, for the agency and Congress to make.<sup>40</sup>

36. See JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990).

37. See *id.* at 147-71.

38. National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, § 1, 80 Stat. 718, *repealed by* National Highway Traffic Safety Administration Authorization Act, Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (1994); see MASHAW & HARFST, *supra* note 36, at 2, 230-31.

39. See MASHAW & HARFST, *supra* note 36, at 141-46.

40. An example of an instance in which the RI and RS decisions overlap completely is provided by the Supreme Court's decision in the tobacco case, *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000). That case involved the decision by the Food and Drug Administration (FDA), ultimately invalidated by the Supreme Court, to regulate cigarettes as a "nicotine-delivery device" and hence a drug. The RI decision made by the FDA followed nearly a century of regulatory abstinence. In examining the scope of authority for the FDA to regulate cigarettes, the Supreme Court noted that it would be illogical for the FDA to conclude that cigarettes were a drug susceptible to regulation under the Food, Drug, and Cosmetic Act, but then to stop short of imposing a ban. In essence, the Court said that the RS decision followed from the RI decision. Only one of two regulatory outcomes were possible: Either the agency must impose a complete ban, if it were accurate in concluding that Congress vested in the agency the legal authority to regulate; or, in the alternative, the agency must not regulate at all in this area. See *id.* at 1302.

Modern administrative law doctrine has reinforced the distinction between RI and RS decisions. In *Heckler v. Chaney*,<sup>41</sup> for example, the Court considered a decision of the Food and Drug Administration to refrain from enforcing certain administrative regulations regarding the safe use of drugs in connection with lethal injections administered in the State of Texas.<sup>42</sup> The Court upheld the agency's judgment concerning the proper allocation of enforcement resources and hence enforcement discretion, pegging this judgment on the rather amorphous standard of section 701(a)(2) of the Administrative Procedure Act<sup>43</sup> which makes unreviewable by the courts decisions "committed to agency discretion by law."<sup>44</sup> As a piece of black letter law, the *Chaney* case is an example of the Court's willingness to distinguish between agency enforcement decisions, in which choices over resource allocation are especially salient and agency discretion is most valued, and the decisions in which an agency in fact enforces a regulation but does so "unreasonably."<sup>45</sup>

One way to make sense of this distinction is to evaluate the way in which the Court is sorting RI from RS decisions. RI decisions are the products of the quintessentially incremental nature of agency decisionmaking. Agencies are *supposed* to husband their resources and step into policymaking only where the presumption of caution is overcome by the imperative of taking regulatory action. This imperative may, of course, result from legislative command, as in those rare instances in which the legislature truly demands action. Or it may result from the imperatives of social or economic needs, all of which point in the direction of agency action. *Chaney* illustrates the judiciary's unwillingness to enter aggressively into that determination. Some of this reticence may, as Justice Rehnquist notes in *Chaney*, be the result of the fact that there is "no law to apply" and, therefore, that courts have no textual basis for displacing agency reasoning.<sup>46</sup> Additionally, some of this reticence may result from judgments of comparative institutional incompetence. Lurking in the background

---

41. 470 U.S. 821 (1985).

42. *See id.* at 823-25.

43. 5 U.S.C. § 701(a)(2) (1994).

44. *Heckler*, 470 U.S. at 837-38.

45. *See id.* at 831-32 (noting the "general unsuitability" of a decision not to enforce for judicial review and stressing the "complicated balancing" of factors, including resource allocation).

46. *Id.* at 829-33. The Court stated:

Similarly, the Secretary's decision here does not fall within the exception for action "committed to agency discretion." This is a very narrow exception. . . .

The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply."

*Id.* at 830 (quoting an earlier Supreme Court decision and a Senate Report on the APA).

of these judicial judgments, however, is a concern with the essentially incrementalist character of modern regulatory administration.

Regulatory incrementalism looms large in another key administrative law decision, decided only two years before *Chaney, Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*<sup>47</sup> That case involved the Secretary of Transportation's decision to rescind the passive restraint requirement in the early days of the Reagan administration.<sup>48</sup> Before the Court turned squarely to the agency's reasoning process, concluding that the agency acted unreasonably and in violation of the Administrative Procedure Act,<sup>49</sup> it considered whether agency decisions to deregulate would be subject to a different standard of review.<sup>50</sup>

Significantly, the case for a different standard came from both ends of the ideological spectrum. Those concerned that the Reagan administration was threatening to roll back health and safety regulation counseled a standard of strict scrutiny for deregulatory decisions; the proper baseline, in this account, was *regulation* and, therefore, efforts to turn back the regulatory clock should be subject to especially searching review.<sup>51</sup> Others maintained that the baseline was properly *no regulation*, that is, the free market. As a consequence, efforts at deregulation merely restored the status quo ante and were to be subject, then, to more deferential review.<sup>52</sup> The Supreme Court in *State Farm* rejected both of these approaches, instead grounding its review on the same standard as with any other regulatory decision.<sup>53</sup> What was critical in *State Farm* is that the agency had made a *choice*, not that this choice was in the direction of augmenting or decreasing the level of regulation existing before this choice was made.

The Department of Transportation's decision was fundamentally an RS decision. Therefore, the Court was quite willing to subject the

47. 463 U.S. 29 (1983).

48. See *id.* at 34.

49. See *id.* at 57 (holding that the agency "failed to supply the requisite 'reasoned analysis'").

50. See *id.* at 41-44.

51. See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 520-24 (1985) (describing the arguments and setting out reasons why earlier cases rejected this view). In *State Farm* itself, however, *State Farm* did not argue for a heightened standard of review, but it specifically asserted that "arbitrary and capricious" review was proper. See *State Farm*, 463 U.S. at 45. The Court of Appeals, though, had "intensified" the scope of its review" based on Congressional acts prior to the attempted deregulation. *Id.* at 44.

52. See the discussion in U.S. Government's brief. Brief for the Federal Parties at 16, *State Farm* (Nos. 82-354, 82-355, 82-398) (arguing that "[t]he Safety Act . . . embodies a congressional presumption *against* regulation"). See also *State Farm*, 463 U.S. at 41 (rejecting the argument by the Motor Vehicle Manufacturers Association that a less exacting standard than "arbitrary and capricious" would be proper).

53. See *State Farm*, 463 U.S. at 40-46. The Court explicitly stated, "While . . . it may be easier for an agency to justify a deregulatory action, the direction in which an agency chooses to move does not alter the standard of judicial review . . ." *Id.* at 42.

agency's choice among regulatory strategies to a reasonably searching standard of review. By contrast, the RI decision of the Food and Drug Administration in *Chaney*<sup>54</sup> and, for that matter, the RI decisions of the NHTSA in the era described by Mashaw and Harfst are cordoned off from all but a rather pro forma sort of scrutiny.<sup>55</sup> Courts cede much of the discretion to agencies with regard to RI decisions because of the durable belief that agency decisionmaking is incremental, involving a multitude of specific, and not especially transparent, choices. The range of considerations which go into the choice between action and inaction are perhaps no more complex, after all, than the range of considerations which go into the choice among regulatory strategies. But, for better or worse, the action/inaction choice is mostly separated (in Adler's words, *partitioned*) from legal scrutiny.

The response from the perspective of Adlerian welfarism might be that, after all, what is being raised here is merely a question of implementation. Professor Adler might say that while it is difficult to assess RI decisions, it is surely theoretically plausible to do so and, therefore, we might, with suitable hard work, apply properly welfarist criteria to both types of decisions. It remains unclear, however, how a welfarist standard such as cost-benefit analysis might be deployed in the area of RI-type decisions. Supposing that we had a Breyeresque mega-agency which possessed both the legal authority and the resources to make comprehensive regulatory decisions, then we might consider agency decisions to act through the lens of cost-benefit analysis. Are the benefits of regulatory action in a certain area worth the costs associated with such action? Cost-benefit analysis would seem especially appropriate in this context. Yet, we lack such an omnibus agency structure. Instead, each regulatory decision in the modern administrative state represents a choice by one agency to take action and to choose from an admixture of regulatory strategies. If we would subject both elements of this choice to normative evaluation, we would need a fairly complete, and rather complicated, set of welfarist criteria. After all, the problem is not merely one of incommensurability, but one concerning the practicalities of administrative decisionmaking. There may well be in the cost-benefit analysis frameworks of Professors Adler and Posner the elements of a strategy to deal with the incremental quality of regulatory decisionmaking, but suffice it to say that current iterations of cost-benefit analysis almost entirely write off RI-type decisions, leaving this to the supposedly informed discretion of agencies. To partition such de-

---

54. 470 U.S. 821 (1985).

55. See MASHAW & HARFST, *supra* note 36, at 224-31 (discussing the role of "legal culture" in supporting courts' reticence to scrutinize recall decisions).

cisions is to leave out one of the key elements of regulatory policy-making in the modern administrative state.

#### IV. THE PROBLEMS WITH COST-BENEFIT WELFARISM

Let us try to get out from under serious implementation problems and instead concentrate on the theoretical promise of cost-benefit analysis as a valuable welfarist approach. Leave aside whether courts, legislators, or the agencies themselves are going to police the processes of administrative regulation. Is not cost-benefit analysis a superior template for regulatory choice given the deficiencies of other approaches? Maybe yes, maybe no, although the advantages start to disappear when we confront, again, the incrementalist quality of regulatory decisionmaking in the modern administrative state.

Consider the problem of regulatory jurisdiction. There are many different agencies with jurisdiction to regulate certain social and economic problems. Indeed, some agency authorities overlap with one another, for example, in the environmental and health and safety areas. To say that each agency ought to employ cost-benefit analysis in making regulatory choices is to say, in essence, that each agency decision in which the benefits outweigh the costs adds to overall well-being. But to say this is to make the same ordinalist error that Adler describes elsewhere.<sup>56</sup> Decision outcomes may interact with one another; one agency pursuing one strategy may, even if justified by reference to cost-benefit analysis, impede another agency's ambitions to the detriment of overall well-being.

This is, to be sure, not a serious *theoretical* objection. The enterprise of developing welfarist criteria for evaluating regulation can coexist with heterogeneous choices made by many cross-cutting institutions. We can take a look at the aggregate of agency decisions and ask whether the benefits of regulation at Time A outweigh the costs. However, this is a far less pertinent question for the real world of agency decisionmaking. Cost-benefit analysis, or any other sort of actual welfarist methodology, must be helpful in evaluating particular regulatory choices in the real world. And these are, as has been explained, always going to be the choices of specific agencies acting within the scope of specific constraints and acting for distinct reasons. The fact that agency jurisdiction, and hence the range of agency choice, is constrained means that there will surely be instances in which an agency action will yield costs well in excess of the benefits of the particular regulation, but there will be the full expectation that the overall content of regulation will enhance overall well-being. It is hard to understand, for example, elements of contemporary labor or antitrust laws in any other way.

---

56. See *Beyond Efficiency*, *supra* note 1, at 278-79.

Specifically, the result of a decision under section 2 of the Sherman Act,<sup>57</sup> for example, is to impose discernible, and often draconian, costs on a business enterprise. That these costs are borne by an accused "monopolist" does not diminish the fact that this firm faces massive costs. So, where are the benefits? They are the advantages associated with freer competition of course, the sine qua non of the antitrust laws. Yet, how is any welfarist decision metric going to calculate successfully the benefits associated with freer competition (benefits which may be speculative and often reaped in the long term) and therefore assess these benefits against the measurable costs faced by the loser monopolist?

The notion that there are cross-cutting effects as a result of multiple agency choices is elementary. Of course, no agency exists in a regulatory vacuum. The point here is that such cross-cutting effects are the product of regulatory choices, but they are not, in the main, taken into account in the making of such choices by any particular agency. Regulatory incrementalism means that agencies proceed in light of their legal authority, opportunity costs, regulatory philosophies, political pressures, or whatever other criteria is germane to their decisionmaking calculus. While we may wish them to take account of the impact of their decisions on other regulatory choices made by other agencies, it is doubtful as either a practical or a theoretical matter that agencies so calculate. Indeed, it is the essence of proposals to create mega-agencies (such as Justice Breyer's famous proposal in *Breaking the Vicious Circle*<sup>58</sup>) or to more effectively empower oversight agencies such as the Office of Management and Budget to create more effective strategies of monitoring interagency effects. In other words, it is in the face of the incrementalist character of regulatory administration that various strategies for interagency coordination and regulatory centralization are made.

#### V. CONCLUSION: WELFARISM AND REGULATORY ADMINISTRATION

Does this assessment of regulatory incrementalism and moral choice cast into doubt not only Adler's welfarist account of regulation, but all normative theories of regulation? In other words, if you take seriously the nature of regulatory decisionmaking and institutional design, does it follow that you should be impatient with normative theories of regulation of any kind? The answer to this question is no. Furthermore, the modified cost-benefit analysis defended ably by Professors Adler and Posner strikes me as much better than competing alternatives. Insofar as the case they make for its use rests on the judgment that first, welfarist approaches are superior to nonwel-

---

57. 15 U.S.C. § 2 (1994).

58. BREYER, *supra* note 31, at 55-81.

farist accounts and second, alternative accounts which purport to be welfarist are inferior to cost-benefit analysis, the case is an extremely strong argument and deserves careful, sustained attention by scholars on regulation and administrative law. That regulatory incrementalism is a phenomenon worth taking fully into account in creating welfarist theories of perspective regulation is an amendment to, and not really a criticism of, Adlerian welfarism.

First, the incrementalist character of contemporary regulatory decisionmaking is not an intrinsic characteristic. We could, after all, design our regulatory system very differently. For example, we could construct a mega-agency, along the lines suggested by Justice Breyer in his book on regulation.<sup>59</sup> Such an agency, or another sort of oversight mechanism, could serve to assess regulatory administration across agencies and across regulatory programs. It could operate to ensure that each agency decision increases, at the margin, overall well-being and thereby hopes to ensure, in the aggregate run of regulatory decisions and in the long run, that regulation is welfare enhancing. Or it could ensure that overall regulatory administration is welfare enhancing while conceding that certain agency decisions might not increase aggregate welfare. Or, perhaps less plausibly, this agency could perform an expressly distributive role, seeing to it that the costs of regulation are more equitably and efficiently distributed, thereby ensuring that our general system of public policy increases aggregate well-being. While Professor Adler's project thus far does not advance the case for any or all of these centralizing mega-strategies, the gist of the normative theory does seem to point in the direction of a substantially reconfigured, and perhaps less incrementalist, approach to regulatory administration.

Second, certain regulatory theories are, I would suggest, more resilient than others against the incrementalist quality of agency decisionmaking. For example, QUALY-based<sup>60</sup> or health-health<sup>61</sup> approaches seem particularly problematic given the complicated inter-agency dynamics of regulatory administration.<sup>62</sup> Take the simplest dilemma: How can we monitor effectively risk-risk tradeoffs when different agencies measure the cost of a human life in such different ways?<sup>63</sup> Conversely, interagency dynamics do not appear to challenge strongly proceduralist theories of regulation. Each agency process

59. See BREYER, *supra* note 31, at 55-81.

60. "QUALY"—quality-adjusted life years—method is a way to quantify health preferences that attempts to "rank and prioritize health states." Pildes & Sunstein, *supra* note 9, at 84.

61. This approach attempts to address the situation where a regulatory action reduces one health risk while increasing another. See *generally* Sunstein, *supra* note 9.

62. See Adler & Posner, *supra* note 2, at 236-38 (discussing QUALY-based approaches); see also Pildes & Sunstein, *supra* note 9, at 83-85.

63. See Heinzerling, *supra* note 9, at 1984-85.

can be assessed on the basis of trans-agency standards of due process or procedural fairness.<sup>64</sup> Indeed, some versions of proceduralism counsel uniformity as a method not only of improving the reality and appearance of administrative fairness but also of improving the efficiency of regulatory outcomes on the theory that certain procedural forms are more likely correlated with efficient regulation.<sup>65</sup> To the extent that this is correct, regulatory incrementalism jibes nicely with certain proceduralist theories.

Third, theorists of regulation ought not to be able to pass so easily by positive accounts of regulatory administration. While Adler partitions with ease the normative and positive questions, the plausibility of the normative case for welfarism as an evaluative talisman must inevitably be built upon a positive theory of regulation and administration. My preliminary assessment of the project is that it resonates strongly with common moral intuitions about both the nature and the capacity of the modern administrative state. At the same time, though, it sits uneasily within the mainstream of current positive theories of regulatory administration.<sup>66</sup> Although Professor Adler's basic project is normative, it is worth asking this: Is there a positive theory of regulatory administration which can support the very hopeful welfarist view of regulation as a mechanism by which public-regarding officials and hard-working agencies can attempt, through their sensible decisions, to increase overall well-being?

---

64. See, e.g., JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 2 (1985) (emphasizing that his book is "an attempt to specify how we *ought* to think about due process questions in a bureaucratic state dedicated to liberal-democratic ideals").

65. See Seidenfeld, *supra* note 22, at 1534-35 (advocating a larger role for discourse because it "can enlighten participants about potential community norms," leading ultimately to "a supportive role [for government] that can enhance individual feelings and self-worth").

66. See Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1 (1994).