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LEGITIMATING BUREAUCRATIC DECISIONMAKING:
A COMPARATIVE INVESTIGATION OF AIR POLLUTION CONTROL POLICIES

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I thank Professors Daintith, Meny, and Stewart for their patience, encouragement, and advice.
When we came, they were like a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars. But we turned away from those altars, and found the mind's opportunity in the heart's revenge.


The role of legal institutions in assuring the sort of democratic decisionmaking processes so necessary to sound decisions about environmental quality is of great importance.

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Bureaucracy and air pollution are two facts of modern life, and it is the application of bureaucracy to air pollution control that forms the basis of this work.

A. Air pollution is complex

Air pollution is and will remain a pressing problem because of increasing industrialization, changing patterns of energy use, and increased mobility associated with economic growth. It is a complex problem because it involves not only considerable technological intricacy, but also difficult questions of social judgment.

The technical knowledge necessary to identify the cause of air pollution and to reduce the pollution caused by particular activities is one source of the complexity of air pollution. Another source is the tight relation of air pollution to many other difficult social issues. For example, to reduce oil consumption in response to the energy crisis, recourse can be had to coal, a relatively dirty fuel, or to nuclear power, which does not involve emission of conventional air pollutants. To make this decision intelligently, the appropriate assessment of the economic
consequences, reliability, and risks involved requires social judgment just as much as technical knowledge.

The acid rain problem illustrates an extreme case of another aspect of the complexity of air pollution control. Both the sources and the impacts of the problem are widely diffused. In Norway, Sweden, Switzerland, Austria, the Netherlands, Eastern Canada, West Germany, Belgium, and Denmark, at least half of the sulfur deposition originates in other countries. In these circumstances, the incidence of the burdens of control obviously does not coincide with the benefits of control. Deciding who is responsible and what they should do is difficult not only because of the political questions involved, but also because of the need for knowledge and for sustained action to manage the problem. The existence of an international convention on acid rain is a recognition of the geographically diffuse character of the sources and effects of air pollution.

Although the international character of acid rain may be unique, the acid rain example is typical in that it simultaneously raises complex political, cognitive, and management problems. The complexity of the cognitive and management problems associated with air pollution has made bureaucracy a natural and necessary instrument for confronting them. It is the simultaneous existence of complex political issues which raises the issue of bureaucratic legitimacy investigated in this work.
B. A comparative perspective deepens the study of bureaucracy and air pollution

The empirical reference of the investigation is United States, French, Italian, and European Community law relevant to bureaucratic management of air pollution control. Each of these systems faces problems of air pollution control, and an investigation of any one of them would not be wasted effort. Investigation of the air pollution law of each of the four systems would also have some inherent interest. France and Italy are both members of the European Community. Accordingly, understanding of their air pollution law would aid in the implementation of Community law and vice versa. The American federal experience might also by simple analogy yield useful reflections for the supranational Community, or even for Italian regionalism or for the just begun French decentralization.

The promise of the comparative investigation is, however, much greater. It is to discover techniques and functional structures which, with due respect for the identity of the importing system, could be borrowed or could serve as a reference for reform efforts.

The present discussion is deliberately abstract because the fruits of the comparative investigation can be appreciated only after really understanding just how different the four systems studied are. The United States is a two party, common law, federal system. France and Italy are both civil law countries,
but Italy is a regional state with many political parties, including one major party seemingly permanently excluded from leading a government, whereas France has a tradition of centralization and a stronger bipolarity in its politics. The European Community is not a state at all, but a unique and young supranational organization.

Finer differences than these macroscopic ones also distinguish the systems. For example, in continental Europe, bureaucrats are much more likely to have a legal background than in the United States. American law graduates practice law rather than enter the public administration as bureaucrats. American bureaucrats resemble politicians in terms of their open willingness to seek interest group support to a much greater degree than European bureaucrats. The greater mobility in and out of the American public administration and the importance to each bureaucratic division of maintaining legislative support for its activities contribute to this difference. By the same token the committee/subcommittee oversight system in the United States Congress provides for greater technical expertise on the part of individual legislators, and hence a greater willingness on the part of American legislators to enter into the merits of technical discussions.

Even between France and Italy there are important differences of administrative culture. France, for example has the tradition of elite administrative corps, which Italy does not.

This sampling of differences in the four systems could be greatly extended. It is however long enough to illustrate the
point that making a list of changes to be adopted by each system would have little sense at this point. However, in the context of a close, comparative examination of each system, a list of reforms worthy of serious reflection will emerge.

C. Understanding legitimacy anchors the study

The promise of comparative investigation can only be fulfilled if its purpose is well defined. The present purpose is generally to study ways of reconciling the need for bureaucracy because of the cognitive and management complexities of air pollution with the illegitimacy of bureaucratic decision of political questions. This definition of the problem, although it does indicate the general subject matter of the investigation, is insufficiently clear to serve as the foundation of a comparative inquiry. The difficulty is the ambiguity of the notion of legitimacy.

Because air pollution control decisions all have some degree of political content, acceptance of the notion that it is illegitimate for bureaucracy to make political decisions would seem to imply that bureaucracy ought not to make decisions about air pollution control. The unacceptability of this proposition, both as a logical and as a practical matter, suggests the need for a closer examination of the notion of legitimacy. The next chapter will undertake such an examination and will show that this unacceptable proposition results from a logical flaw in liberal reasoning.
To escape the dilemma of the simultaneous necessity and illegitimacy of bureaucratic decisionmaking to control air pollution, a post liberal framework of political theory will be adopted. In this critical framework of political theory the question becomes how legitimate can bureaucratic decisionmaking be made, rather than whether bureaucratic decisionmaking is or is not legitimate.

This perspective permits a comparative investigation into the use of three legitimating techniques. They are public participation in bureaucratic decisionmaking, legalistic means of constraining bureaucratic discretion to limits established by legislative rules, and decentralization of political control of bureaucratic decisionmaking. The legitimacy provided by these techniques springs from the fact that they render political control more effective. Specifically, public participation is an effort to ensure that diverse political views are at least considered in making bureaucratic decisions. Legalism involves the attempt to ensure that rules established in democratic representative forums are complied with. Decentralization is an effort to make the population immediately affected by bureaucratic decisions responsible for directing them. Each of the four systems uses these techniques, but in ways which in some cases are quite different. They are accordingly useful paths of investigation.
D. The plan

To begin this investigation, an idealized liberal conception of the problem of legitimacy and bureaucracy will be developed and then rejected in favor of an alternative, post liberal conception more favorable to the comparative policy perspective adopted here. Having established the post liberal political theory of legitimacy, the social characteristics of the air pollution problem will be discussed with particular attention to the reasons why even in the post liberal conception of legitimacy bureaucratic decision of certain air pollution control issues remains particularly undesirable, i.e. illegitimate. Notwithstanding this reservation, in the post liberal perspective of relative, rather than absolute legitimacy, it will be possible to conceive the three legitimating techniques of participation, legalism, and decentralization and to consider how they are used with particular reference to air pollution control in the four systems under study.

Following this review of the administrative law of the four legal systems, the legitimating technique of decentralization in the context of air pollution control will be the subject of an especially in depth comparative analysis. The priority given to the study of this particular legitimating technique is justified by its structural importance. That is, in each of the four systems the question of decentralization, i.e. of the relations between central and peripheral levels of government, is at the
center of current political debate. Moreover, in the specific context of air pollution control, each system has its own way of organizing central and peripheral level relations. To understand the organization of these relations, it will be necessary to enter more into the detail of each system's air pollution law than previously. The spectrum presented by Community supranationalism, American federalism, Italian regionalism, and French centralization as expressed in air pollution control policies constitutes a rich empirical sample on which to explore the ramifications of different ways of undertaking decentralization. Testing each system's present application of decentralization to air pollution control against a hypothesis of how central/peripheral governmental relations ought to be structured will yield policy recommendations of interest for each system. The hypothesis advanced will be that decentralization achieves a maximum of political legitimacy and substantive soundness when undertaken in a way that provides for central stimulus of local level action, but nonetheless allows significant local autonomy.

E. Boundaries of the investigation

Before embarking on the course of investigation just charted, two important subjects related to the present topic, but not strictly speaking part of it, must be mentioned. They are the role of democratic politics in the social decisionmaking process and the elaboration of rational criteria of social choice. These
issues serve to better define the boundaries of the present endeavor.

With regard to the role of democratic politics, the political landscape of a society very definitely influences the way of making decisions and the substantive outcomes. To take but one example, as between a two party system such as the United States and a multiparty system such as Italy, there are obvious differences. To mention just one, the influence of political parties on the public bureaucracy is qualitatively different. In the United States at the federal level it is exercised by the political parties through the president and in particular through the legislative committees and subcommittees with responsibility for passing on agency appropriations. The president represents only one political party, and ordinarily one party is dominant in the legislature. The electoral fortunes of the two parties may change, but one or the other is always dominant. In Italy coalition governments of essentially the same four or five parties are the rule. As coalition governments rise and fall, many ministries remain consistently in the hands of particular parties within the governing coalitions.(10) One of the many consequences of this difference in party and governmental structures is that reorganization of the public bureaucracy in Italy will be much harder to accomplish than in the United States because of the greater stake of the political parties in the status quo.(11)

This kind of comparative political investigation is not the subject of the present investigation. Instead the present investigation focuses specifically on the problem of structuring
bureaucratic decisions. Although these kinds of political, sociological, and anthropological differences have an important effect on this problem and are eminently worthy of study, they are beyond the relatively narrow scope of the present investigation. The present perspective is the limited one of how to increase the legitimacy of bureaucratic decisionmaking by use of a limited number of techniques. The larger question of how to increase the legitimacy of the political system as a whole is not reached.

Second, with respect to the elaboration of rational criteria for social choice, there is no question that economic analysis is central to issues of air pollution control in particular and to social policy in general. However, economic analysis is treated here only insofar as useful to the arguments advanced for legitimizing bureaucratic decisionmaking. The focus is on how the characteristics of economic analysis affect its use in bureaucratic decisionmaking. Important issues such as how much air pollution control should be undertaken, who should pay for it, the choice between traditional regulation and economic incentive systems, and so on are not within the present subject matter.

Because this thesis is a comparative investigation of air pollution control policy, it might seem appropriate to present an objective measure to compare the relative success of the systems studied. There is undoubtedly a temptation to look for some absolute standard of comparison between the various systems. Potential variables, all of which are seriously flawed as measures of success, are ambient air quality, total emissions, absolute stringency of air quality standards or of emission controls, and
level of expenditure on air pollution control. The varying meteorological conditions and different mix and level of economic activity in the systems under study would make any comparison using these criteria highly problematical. Differences in the reliability of measurements and the selection of monitoring sites are additional factors making comparison of air quality problematical. How to introduce cost-effectiveness concerns into the comparison and to evaluate different social preferences as to the priority to be accorded to air pollution control would further complicate any such comparison. Fortunately, this kind of comparison is not central to the present investigation.(12)

Because the purpose of this thesis is to study decisionmaking structures with the goal of understanding how they ought to be organized to produce the soundest and most legitimate decisions possible, the absolute success of the systems in controlling air pollution is only of peripheral interest. To provide useful reflections for the establishment of air pollution control policies, it is enough to study the functioning of decision structures at an impressionistic level without undertaking the difficult and problematic inquiry into the absolute level of the results they produce.
Chapter II - The theory of bureaucratic legitimacy must be purposive(1)

A. Legitimacy will be understood in a normative, not descriptive, sense

A normative theory of legitimacy takes a position on the relation between individual rights and the collective good. The potential power of a theory constructed from a premise about this relation is its ability to judge the political justice of collective decisionmaking processes.

The notion of legitimacy is frequently used in a purely descriptive, rather than a normative, sense in legal, political, and sociological discussions of collective decisionmaking. This use of legitimacy may lead to greater understanding of political processes, but it lacks the normative power desirable for the present comparative study of ways of legitimizing bureaucratic decisionmaking.

For example, Max Weber distinguished three pure types of legitimate domination - legal, traditional, and charismatic, which in his view correspond very approximately to democratic, oligarchic, and monarchic, respectively, forms of government.(2) These types of legitimacy are descriptions of rationales for accepting authority. Reference to charismatic legitimation is not an assertion that monarchical or dictatorial government is normatively desirable. It is only a description of the rational under which individuals might accept that government.
Weber, of course, had an ambitious theory of the relation between bureaucracy and form of government. He feared that the advance of bureaucracy in modern society jeopardized liberty and creativity. To avoid total stagnation by bureaucracy, he felt that democratic societies need occasional charismatic leaders to stir things up. This sociological theory of the role of bureaucracy and the associated concepts of legitimacy are not directly relevant to the present study of legitimating bureaucracy. Like Weber's thought, this study is undertaken with recognition of the increasing importance of bureaucracy in modern society. Unlike Weber's thought, it does not attempt to theorize about the optimum form of government to adopt in light of that recognition. Instead, it is limited to investigating techniques of increasing the legitimacy of bureaucratic decisionmaking, with legitimacy understood in a normative sense.

The normative task of defining legitimacy and consequently of having to give content to the notions of the right and the good is not an easy one. Nonetheless, it is essential because of the contradiction between the need to make collective decisions, and our reluctance to surrender unbounded discretion to the collectivity.

The empirical reference of this thesis is air pollution control policy in France, Italy, the United States, and the European Communities. These four systems spring from a common tradition of liberal political theory, and, as the empirical accounts of this thesis will show, they all rely heavily on bureaucratic decisionmaking in confronting the problem of air
pollution. Of course, they each have their own interpretations of liberal theory. For instance, the American emphasis on individualism and on fear of state violation of the individual's sphere of autonomy contrasts with the continental view of the state as an instrument for shaping society. The discussion of the administrative law of the four systems will illustrate some of the variation in their understanding of liberal theory. Nonetheless, to come to grips with the legitimacy problem, there is sufficient commonality to justify constructing a liberal paradigm of legitimating bureaucratic decisionmaking, identifying its problems, and then proposing a post liberal paradigm which overcomes the problems of the liberal paradigm.

B. Organization by role characterizes bureaucracy

Bureaucracy as a form of social institution can be distinguished in a number of ways. Its organization of power is hierarchical; it is characterized by a particular culture; it advances a psychology of dependence among its members; it narrows the social interaction of its members towards recipients of its action to a limited professional framework; and its reliance on rules limits the scope of dialog with and among its members.

In its essence, bureaucracy can be defined as a decisionmaking process in which individuals participate by roles. They are assigned roles by some presumptively objective criteria concerning their merit. The criteria could be intelligence, score on a test, academic degrees, age, etc. These ostensibly objective
criteria are in fact ultimately subjective because any assessment of how well they correlate with performance depends on a subjective assessment of what performance ought to be.

This broad definition of bureaucracy includes the common use of the term to refer to the public administration. It also includes the judiciary and, although not relevant for the present investigation, the corporate form of doing business. It contrasts to democracy, which in its purest form is a decisionmaking process in which all participate equally without respect to who they are.

C. Modern society needs bureaucracy

Bureaucracy is used to administer government programs, limit monopoly power, limit economic rents, internalize externalities, correct inadequate information, and control excess competition. In addition to general administration and enforcement activities, bureaucracy engages in cost of service ratemaking, price regulation, allocation of scarce resources, award of individual benefits, and individualized screening and permitting. These activities all require methodical investigation, evaluation of multiple variables, and systematic attention over time. Bureaucracy is necessary to accomplish these kinds of activities because individuals lack the resources and expertise to gather and evaluate the necessary facts and because the community as a decentralized, nonhierarchical entity cannot muster the sustained concentration required. Moreover, if the deciding population is
too large and the problem too complex or too diffuse, unstructured decisionmaking becomes impractical.

D. The liberal theory of delegation founders

Liberal discourse attempts to legitimize bureaucracy by distinguishing implementation and determination of policy. The political process determines policy; to the extent that state action is required, public bureaucracy implements it in a politically neutral way. The premise is that bureaucracy merely acts on a delegation of democratic political power. The restriction of bureaucracy to the neutral implementation of policy is what legitimates bureaucratic activity in liberal thought.

1. Implementation is not a simple matter

This classic liberal model of democratic delegation may have had some plausibility when government bureaucracy consisted largely of the post office; however, with respect to the present need for far more sophisticated bureaucratic action, as is the case for air pollution, it is wholly inadequate.

One practical investigation of the validity of this model clearly demonstrates its inadequacy as an empirical matter.(8) A straightforward federal grant of $23 million to develop airport, port, industrial park, and road facilities with the goal of increasing minority employment was made to the city of Oakland, California. The authors of this study detail the complex
relations between local and central governments, between numerous competing local and central bureaucracies, and between governmental authorities and local citizen groups. These interactions delayed the completion of a seemingly simple public works project for at least five years.

Another example drawn from the air pollution control field emphasizes the point that the making of policy is far from the stereotypic liberal model of simple legislative enactment of a law. The American policy on prevention of significant deterioration was formulated by a complex interaction of environmental activists, the federal courts, the federal Environmental Protection Agency, and Congress. The policy was initially developed by the federal courts and the Environmental Protection Agency in the mid 1970s and subsequently ratified by Congress in 1977. (9) Legislative history to the 1977 Clean Air Act amendment on prevention of significant deterioration succinctly recounts the story. It states:

In 1972, the Supreme Court by a 4-4 vote upheld a lower court decision which ruled that the Clean Air Act required "prevention of significant deterioration" of air quality in clean air areas of the country. The Court did not define what constituted "significant deterioration" or require specific measures to prevent it |although the district court did enjoin the EPA from approving State Implementation Plans that did not make provision for prevention of significant

In response to the Court's order, the Administrator has promulgated regulations which are now in effect to "prevent significant deterioration." These regulations have been affirmed by the U.S. court of appeals. (10)

The intended purposes of this provision are: (1) to affirm the decision that the act requires a policy of prevention of significant deterioration; (2) to provide additional congressional guidance to specify what "significant deterioration" is and how it must be prevented; (3) to delete the current EPA regulations and to substitute a system which gives a greater role to the States and local governments and which restricts the Federal Government . . . (11)

The legal action leading to the promulgation of prevention of significant deterioration regulations was brought by an environmental group, the Sierra Club, which sought a declaratory judgment that the Clean Air Act required prevention of significant deterioration. (12) By its action the Sierra Club triggered a bureaucratic process in which the federal courts and the Environmental Protection Agency took bureaucratic action ultimately ratified by an important legislative amendment of the Clean Air Act.

A similar case is the American regulation of the price at which natural gas was sold to pipelines. In this case a judicial
decision was also at the root of a new regulatory program. The regulation of pipeline natural gas prices started when the Supreme Court held in 1954, to the Federal Power Commission's surprise, that the Commission had such authority.(13) Shortly thereafter the Federal Power Commission began to exercise its authority when proposed legislation to reverse the decision failed to be enacted.(14)

These examples illustrate the point that the liberal theory of bureaucratic legitimacy just does not correspond to reality. However, the bankruptcy of the liberal theory of legitimacy can be demonstrated on a logical as well as an empirical level.

2. Liberalism must resolve the issue of subjectivism

By dividing policymaking from policy implementation, the liberal problem of bureaucracy becomes how to find a way to neutrally give content to a rule through its implementation. Liberalism's separation of policymaking and policy implementation expresses the theory of legal justice. In this theory laws are not directly instrumental, but rather prescriptive. Only after formulation is the problem of their application addressed. Such a theory reflects a morality of reason, i.e., it presupposes that rules arise from some underlying rationale, which for present purposes can be accepted as the democratic decision.

Some responsible theorists can accept this state of affairs.(15) For them, there exists a reasonably well defined concept of public interest, to be sure a normative statement, but
one objectively definable by reference to community values. They do not consider the public interest to be the summation of individual interests, nor do they consider it some sort of abstractly definable Platonic essence. They assert that the public interest can be ascertained by a process of utilitarian reasoning within the context of generally accepted moral bounds. The objectionable premise of this position is the assumption that individuals can discover objective criteria to guide them in the application of rules.

Indeed, for a theory of legal justice to be operative, there must be some means of applying the prescriptive rules without relying on the subjective values of the person or entity applying or implementing the rule. To rely on subjective values in the implementation of policy would be to adopt a morality of desire. The prescriptive rules would then have little practical meaning because resolution of particular problems would become the means of imposing the individual's subjective values on society. Such rationality is instrumental in the sense of actuating the individual's subjective desires. In this kind of a system there is no distinction between policymaking and policy implementation, between legislation and adjudication. Instead there is only a continual political struggle to impose subjective views on society by manipulating empty formal rules that receive substantive content in application. Moreover, there are no nonsubjective criteria for evaluating the merits of the competing subjective views.
This antinomy of rules and values in liberal political theory parallels the antinomy of reason and desire in liberal psychological theory, the other branch of liberal thought. In liberal psychology, desire is the motor of the mind. The role of reason is limited to carrying out the mind's arbitrary desires. The antinomy of reason and desire is expressed in the dilemma of having to choose between, on one hand, an abstract morality of reason in which rules and rights exist such that judgment is not subjective, and, on the other hand, a concrete morality of desire in which the satisfaction of subjective desire is the only good. The difficulty with the latter morality is that hedonism can neither be justified nor fully satisfied. The various possible ways of resolving this antinomy in effect do no more than highlight it.(16)

One attempt, formalism, posits that there is only one possible outcome for each application of a policy. Such a proposition offends common sense. To be tenable, it would require that there exist either intelligible essences or widely shared values. The existence of intelligible essences, i.e. knowledge which is uniquely and ultimately true, is not accepted by modern epistomologic thought, which instead depends on notions of classification, relativism, and falsifiability. As for widely shared values in the liberal sense, they are an analytical trick. Individuals are posited to have identical values for purposes of aggregating indifference or utility functions. There is no evidence for any significant broad coincidence of such values.
Purposivism is another effort to reconcile the liberal distinction of policymaking and policy implementation with legal justice. Under a purposivist approach the one who applies a rule does so in light of the policy underlying it. However, as anyone familiar with the workings of a legislative body knows, rules are determined through political compromise, principled or otherwise. The result of such compromise is that the policies underlying a rule may be conflicting and obscure. Moreover, each individual's assessment of the underlying policy necessarily depends on the individual's subjective values. No neutral, rational choice is possible.

In extreme cases, the purposivist attempt reduces to a third attempt, the theory of substantive justice. In pure substantive justice, the individual applying a rule looks only to personal, subjective values to reach a decision. This avoids the problem of identifying the purpose underlying a rule, but it does not escape the individual tyranny abhorrent to liberal thought. Reliance on an individual's subjective values is a problem precisely because everyone cannot be presumed to share those values.

These approaches of formalism, purposivism, and substantive justice are all attempts to legitimize bureaucratic decisionmaking. The problem of the good is at the root of their failure. All three require defining the good in terms of either subjective or objective values. However, subjective definition of the good involves judgment of individual values, which liberal thought cannot do because of the fundamental place it accords the individual's right to pursue his or her own definition of the
good. And, objective definition of the good requires belief in revealed moral truth, which liberal thought also properly rejects as inconsistent with modern relativism.

3. Both utilitarian and contractarian liberal thought stumble on the subjectivism issue

Liberalism's inability to confront the issue of subjectivism is not by any means limited to the problem of bureaucratic legitimacy. The failure of liberal thought as a whole to resolve the subjectivism question will suggest the need for an alternative critical theory on which to base the study of techniques of increasing the legitimacy of bureaucratic decisionmaking.

For expository purposes, it will be useful to first sketch the logical steps in the deduction of a post liberal notion of legitimacy. Then the full argument for deducing it will be spelled out.

An illegitimate decision has already been defined as one involving the unconscended imposition of subjective values. Reflection on the problem of subjectivism and the closely related problem of desire will reveal why liberalism is unable to come to grips with legitimacy. Liberalism mistakenly attempts to legitimize bureaucratic decisionmaking by considering it to be confined to the neutral implementation of policy. The mistaken effort of liberalism to legitimize this integral form of decisionmaking and the ultimate failure of the attempt are important because they obscure the problem of improving the
structures of bureaucratic decisionmaking. It will be argued that the only possible conclusion about bureaucratic decisionmaking when reasoning from liberal premises is that it necessarily involves the unconsented imposition of subjective values. This conclusion constitutes an antinomy because the neutral implementation of policy cannot consist in the imposition of subjective values.

The liberal psychological premise of a dichotomy of reason and desire is the reason for the logical incoherence of the liberal attempt to legitimize bureaucratic decisionmaking. More precisely, it is the acceptance of desire as an exogenous, uncontrollable force which precludes appreciation of how the techniques of legalization, participation, and decentralization may serve to increase the legitimacy of bureaucratic decisionmaking. Rejecting liberal psychology as well as liberal political theory turns out to be necessary to construct a realistic framework for legitimizing bureaucratic decisionmaking and to appreciate its relevance to sound decisionmaking.

Once it is accepted that desires can be changed, some criteria to direct in what sense they should be oriented need to be sought. Two plausible sets of criteria will be advanced. They are Unger's goal of simultaneously striving to maximize personal autonomy and community values and Ackerman's goal of working towards establishing the social conditions to permit truly liberal political discourse. Lest it be thought that this assessment of desires is too adventurous, it can be noted that even traditional liberal theorists who pretend to accept desires as exogenous are
choosy about which desires they presuppose. Thus, for example, Rawls' method of reflective equilibrium, that is of adjusting the conditions of the original position in such a way that the kind of society eventually established is consistent with his intuitive notions of justice, is not all that different from that of outright rejection of desire as exogenous.

By choosing a fundamental social goal in light of which desires can be measured, it will be possible to view bureaucratic decisionmaking as part of a general social effort to achieve that goal. Bureaucratic decisionmaking which through its procedural conduct and substantive outcome works toward that goal can be positively valued. This represents progress over the liberal perspective in which bureaucratic decisionmaking could be judged only according to how well it served as an instrument for carrying out a particular political decision. In the post liberal perspective, the bureaucratic decisionmaking process itself assumes a qualitatively new kind of importance. How bureaucratic decisions are made comes to have importance in its own right. This allows the conception of efforts to increase the legitimacy of bureaucratic decisionmaking other than confining bureaucracy to neutral execution of political decisions. Namely, it becomes conceivable to examine how techniques of legalism, participation, and decentralization are employed in light of the effort to achieve greater political responsibility.

Although liberalism is far from being a monolithic body of thought, for present purposes two principal historic strands of
liberal thought can be identified. They are utilitarianism and deontologicalism.

Utilitarianism holds that the good is achieved by maximizing the satisfaction of individual desires. The fundamental counter argument to utilitarianism is that it fails to take individualism seriously enough. As a minimum it requires assertion of some way to aggregate individual desires. The notions of comparing and adding together individual desires would seem to necessarily involve subjective and therefore arbitrary judgment.

The deontological strain of liberalism erects the right as prior to the good and hence makes its respect prior to the utilitarian calculus of maximizing individual desires. How to define the right without resorting to a subjective judgment or to some form of divine revelation, which for secular thinkers amounts to the same thing as subjectivism, is a delicate question. Rawls attempts to resolve the subjectivism problem by elaborating a social contract theory, under which those who decide the structure of society operate through a veil of ignorance. By not knowing their eventual positions in society, these individuals in Rawls' hypothesis will undertake to structure a society consistent with the right. Rawls denominates such a society a just society.

The deontological strain of liberalism as restated by Rawls' social contract theory seems more promising than the utilitarian approach for confronting the legitimacy problem. A pure utilitarian perspective is poorly adapted to address concerns of legitimacy because it necessarily relies on some exogenous conception of the good to permit comparison and addition of
individual desires. By accepting the premises of Rawls' social contract theory, it is possible to make some judgments about whether a society respects the right. Most importantly, Rawls is able to deduce the so called difference principle from his premises. It holds that differences in equality are tolerable only in so far as they benefit the most disadvantaged person. He also deduces the principle of equal opportunity, i.e. that all members of society should have equal access to the various social positions. Although these principles are extremely general, they might yield some useful conclusions for confronting the problem of bureaucratic legitimacy. For example, it might be argued that from the perspective of legitimacy the powers associated with a bureaucratic position ought to be limited to those necessary to permit the bureaucratic system to maximize the welfare of the least disadvantaged and that assignment of bureaucratic positions should reflect the equal opportunity principle.

However, Rawls' social contract approach ultimately shares with utilitarianism the problem of subjectivism. Rawls openly describes how he manipulates the conditions of the original position to reach conclusions consistent with his intuitive notions of justice. Although there are those who argue that this initial manipulatory process should simply be ignored once it has been accomplished,(19) the existence of the manipulation, whether or not expressly acknowledged, is widely recognized as a fundamental weakness of the social contract approach.(20)
E. The critical solution is ceaseless struggle

Because both of the principal historic currents of liberal thought founder on the subjectivism problem, resort to an alternative, critical theory which overcomes the subjectivism problem will prove useful. The term critical theory was adopted by the Frankfurt school of political philosophy to describe their effort to restore judgmental power to philosophy, a power which they felt the triumph of rationalism had caused it to lose. (21) Their intellectual activity was devoted to criticizing existing theory and reality with the ultimate goal of provoking social change.

To respond to the present need for a critical theory in which to set the study of legitimizing bureaucratic activity, two alternative, but potentially compatible, theories will be presented. Although one theory is professedly in the liberal tradition and the other is not, both escape the antinomy of traditional liberal thought. Ackerman's critical perspective is progress towards achievement of a liberal society; whereas, Unger's is progress towards a society providing for a simultaneous maximization of personal autonomy and community values.

In a way, the critical theories drawn from Unger and Ackerman represent a form of purposivism, but unlike pure substantive purposivism their purpose derives from the underlying agenda of social evolution, not from the individual's subjective agenda nor from the conflicting political considerations involved in setting
policy. Much as Ely would focus on the achievement of procedural fairness in the sense of equal access for minorities as a guiding aim for constitutional adjudication,(22) for Unger and Ackerman progress towards their goals provides a tool for assessing structures of social decisionmaking.

An example serves to illustrate the intellectual coherence provided by adopting one or another of these theories. To wit, Chayes(23) is willing to condemn the Lochner(24) era during which the Supreme Court used the doctrine of substantive due process to block reform efforts, and to applaud Marbury v. Madison,(25) by which the Supreme Court established American constitutional judicial review, as a courageous judicial innovation. He judges these decisions according to their "qualities of wisdom, viability, |and|| responsiveness to human needs . . ."(26) Chayes' determination to condemn the Lochner era's subjectivism and to applaud Marbury v. Madison is undoubtedly laudable; however, to condemn the Lochner era jurisprudence as lacking wisdom and responsiveness to human needs without greater specification of what human needs consist of seems just as subjective a determination as the jurisprudence itself. By adopting a framework of social development through increasing community and autonomy or of progress towards a liberal society, the decision to applaud Marbury v. Madison as a fundamental step in constructing a new constitutional system and to condemn the Lochner era as reactionary becomes much more logically defensible.
1. Ackerman departs from a liberal position

Ackerman's recent work attempts to develop a model of liberal society based on a technique of conversational justification. He posits that an exercise of power is legitimate only if it can be rationally justified by a conversation that does not contradict other arguments advanced by the individual seeking to assert power and only if the conversational argument involves no subjective assessment of others' claims to the power. Unlike utilitarianism and social contract approaches, Ackerman directly confronts the problem of subjectivism. Through his premise of conversational justification he is able to reach some important results, e.g. that equal distribution of resources is one result consistent with liberalism and that majority rule and responsive lotteries are both decision procedures consistent with the liberal requirement that each citizen receive equal respect.

Although Ackerman formulates a theory of legitimacy which, unlike utilitarianism and social contract theories, manages to confront directly the problem of subjectivism, he himself recognizes that the development of a real world society in which the application of his theory of conversational justification is possible raises the problem of subjectivism all over again. Transactions costs are not the only impediment to realization of his model of conversational justification. The problem of raising the ethical level of individuals to the point where all can and will engage in such a process is an equally, if not more
important, impediment to successful employment of his mode. He asserts that "a ceaseless struggle is required if the conditions for liberal dialogue are to be remotely approximated."(30)

Ackerman's recognition that not everyone is yet capable of participating in liberal society is not a novelty. After all, John Stuart Mill writing over a century ago asserted that "Despotism is a legitimate mode of government in dealing with barbarians, provided that the end be their improvement and the means justified by actually affecting that end. Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion."(31) What is new is Ackerman's recognition that no present society has fully reached the status of a liberal society and that no one elite has a monopoly on the knowledge of how to achieve a liberal society. Education is not a matter just for children and "barbarians," but rather a matter for all. Ackerman's answer to the subjectivity problem involved in what kind of education is that whatever kind of education is provided, it should move the individual closer to being able to participate in liberal society.

This perspective changes the problem of bureaucratic legitimacy from the liberal conception of bureaucratic action as either legitimate or illegitimate. From Ackerman's perspective two questions can be asked to ascertain the legitimacy of bureaucratic decisionmaking processes: (1) How closely does the process resemble the model of conversational justification? and (2) How much does the process foster the elevation of the ethical
level of individual citizens? If the answers to these questions are inadequate, the search for a better process ought to be undertaken.

The congeniality of this perspective to the investigation of the bureaucratic legitimating techniques of participation, legalism, and decentralization derives from its critical power. It recognizes that bureaucracy is not in fact confined to the neutral implementation of policy. In this perspective the legitimacy inquiry shifts from whether bureaucrats are subject to democratic political control to an inquiry into the degree of legitimacy provided by a particular decision process.

2. Unger does not, but reaches a similar result

Unger proposes to avoid the liberal dilemma of subjective and objective ideas of value by proposing an alternative twofold conception of the good which is not based on the unqualified maximization of individual desires. First, the good consists in maximizing development of individual human potential. Second, this maximization occurs through a spiral of increasing community and diminishing domination. As this spiral progresses, community values can be considered to be more truly shared in the sense of resulting from freer choice of individuals. For Unger the purpose of politics should be to develop a society in which human nature can be more perfectly expressed, i.e. one in which community and personal autonomy are simultaneously maximized. He recognizes the tensions between these two attributes and the
consequence that their simultaneous perfection may be a utopian goal. That, however, is no reason to avoid attempting to approximate them.

Unger's goal of working toward simultaneous community and autonomy provides a means of avoiding the subjectivism trap created by liberalism. It does so in two ways.

First, under this goal, not all desires should be accepted, in contrast to what liberalism would plausit. Instead, those contrary to the ultimate goal of community and personal autonomy should be discouraged. Hence, some kinds of decisions and decisionmaking processes can be condemned. At this level, Unger's goal yields results of a generality comparable to Rawls' principles derived through the veil of ignorance. They both permit general statements about the structure of societies.

Unger's approach, however, is useful on another level. Its focus on simultaneous promotion and accommodation of community and personal autonomy values renders the way in which decisions are made important independent of their particular substantive content. To be legitimate, the procedures for making bureaucratic decisions must respect and promote community and personal values.

It can be noted that Unger is not the only figure to accept the search for a balance of community and autonomy as a fundamental social goal. Cover, for example, feels that social leaders in general and judges in particular have a responsibility for positively redefining society in such a way that insular groups might maintain their autonomy, but at the same time
encouraging all groups to accept certain fundamental principles of community, e.g. the immorality of racism.(33)

Viewing bureaucratic decisionmaking in this way gives content to the notion of legitimacy, something which traditional liberal theory did not satisfactorily do. Because bureaucracy is both so pervasive and a source of domination limiting personal autonomy, it represents a particular impediment to realizing simultaneous community and autonomy. Increasing its legitimacy without compromising its soundness therefore merits special attention. With respect to the legitimacy of bureaucratic decisionmaking, which is the core of this thesis, this perspective brings to center stage the study of the techniques of political responsibility, participation, legalism, and decentralization.

F. Perspective has been achieved

Neither of the two critical theories considered here provides a definitive indication of the place of bureaucracy in the context of social decisionmaking in general. Both an increasingly liberal society and a society characterized by increasing community and personal autonomy ought to be characterized by democratic decisionmaking in one form or another. In either case it would seem that the role of bureaucracy in structuring social decisions and in their implementation would be recognized, but that ultimate goals would be set democratically. In democracy, any form of bureaucracy ought to be a political choice, not an a priori given.
Prudential judgment is required for the determination of which issues are for democratic decision and which are for bureaucratic specialists. In the case of air pollution, institutionalization of the issue through bureaucracy has been a necessary part of awakening public understanding of a complex technical issue and of forcing democratic decision on key questions which would otherwise be left to the realm of private interest. The political context of bureaucratic decisionmaking on air pollution control illustrates the inadequacy of the liberal view that the exclusive function of bureaucratic decisionmaking is to act on democratic delegation. However, it is equally true that bureaucracy cannot make all decisions. As a general rule, no notion of efficiency should determine the limits of democratic power. This fact is well illustrated in the air pollution context. Although a superficial understanding of air pollution as an engineering problem might indicate that its regulation should be completely technocratic, a more realistic understanding of the distributional, moral, and risk issues concludes that the prudential judgment required for allocation of issues to democratic and bureaucratic decisionmaking cannot depend solely on efficiency. Indeed, as will be seen in the next chapter there are some air pollution control decisions for which bureaucracy is a particularly ill suited forum.

The soundness advantages of bureaucratic decisionmaking derive from the fact that responsibility for decisionmaking is assigned by role. Roles are in turn assigned to individuals by some criteria of merit. The techniques to be comparatively
studied here to increase the legitimacy of this kind of decisionmaking all involve some interference with the concept of assigning decisionmaking power by role. They all work by introducing additional actors from outside the bureaucratic hierarchy into the decisionmaking process. If carried to extremes, these techniques would effectively negate the possibility of bureaucratic decisionmaking. If improperly employed, they might result in a perversion of the decisionmaking process.

For example, to obtain the permit necessary to operate, new industrial facilities in the United States must show that they will not unduly worsen air quality and reduce visibility. To the extent that the permitting procedure is made complex to obscure a political assessment that the risks of air pollution warrant additional control despite lack of firm scientific evidence of the consequences of particular emissions, there is a perversion of the political process. It may be better to reduce emissions on the pretext that modeling of exposures and knowledge of health effects is sufficiently precise rather than not to reduce emissions at all. But, because of failure to base what may be the right outcome on the honest merits, there remains the substantial deadweight loss of monitoring, modeling, and the attendant disputes and delay. The perversion of political debate is in itself a cost to society. Another obvious example of perverted political debate, which may nonetheless yield the right result, albeit at a cost, are the procedural impediments to licensing of nuclear reactors.(34)
To sum up, the problem of subjective value has been shown to render the liberal fiction of neutral bureaucratic implementation to be untenable and to be an impediment to the study of legitimating techniques. Critical theories adequate for more constructively confronting the legitimacy of bureaucratic decisionmaking have been proposed. The enterprise is now to apply this consideration of how to understand the problem of legitimating bureaucratic decisionmaking to a real problem of social decisionmaking, namely air pollution. The goal is to study air pollution policy as an example of a problem requiring complex bureaucratic action and to illustrate the practical benefits of applying the kinds of critical theories presented here.
Chapter III - Moral issues of air pollution control show limits to bureaucratic legitimacy even with a purposive theory

Bureaucracy is well suited to assessing material costs and benefits because their assessment depends on objective, or at least relatively explicit, criteria. In contrast, decisions requiring the weighing of individual and collective rights are much better suited to democratic determination. Because the essence of democratic decisionmaking is influencing subjective values, it is consequently possible for it to more greatly respect individual and collective integrity than bureaucracy, which finds aggregation of subjective values a satisfactory procedure for resolving their divergences. Thus, democracy is not only more legitimate because by its very definition it allows all to participate equally. It is also more legitimate because through the process of mutual influencing of subjective values, it can resolve problems of conflicting moral rights without the bureaucracy's necessary resort to a common metric.

Reconciling democratic determination of basic social choices with the need for concerted application of a high level of technical expertise is essential to respecting human rights in the joint sense of abstract universal entities and of concrete, particular material results. That is, decisionmaking must be structured so as to maximize both legitimacy and soundness. To put it bluntly, if we all choke to death because of inability to control air pollution democratically, we are no better off than if a bureaucrat were to decide to sacrifice asthmatics as the result
of a cost benefit calculation indicating that their worth to society was less than the cost of preventing them from having respiratory attacks. Thus, with recognition of the essentiality of bureaucratic decisionmaking, the fundamental purpose of this thesis is to examine the ways in which bureaucracy's legitimacy can be increased without compromising its inherent advantage of soundness.

Many social decisions require judgments about how to weigh conflicting individual and collective moral rights. The paradigm of such a conflict is that between an individual's rights to health and the collective right to establish social priorities. There are those who would argue that the individual's right to health can never be compromised in any way. Such a position is unrealistic when questions of risk and long term exposure to risk are involved. In one way or another individual and collective rights must be weighed.

Although bureaucracy may appropriately be assigned the task of insuring maintenance or achievement of moral rights, it cannot legitimately resolve such conflicts. Because bureaucracy by definition works on the assumption of objective decision criteria, it can make decisions only by reducing all factors to a common metric. Moral rights are by their nature not reducible to a common metric. Legitimate resolution of conflicts between moral rights is possible only in a democratic forum where all participate equally and in which reciprocal persuasion is possible. The issue of geographically varying air quality
standards illustrates the practical and moral difficulty of resolving these kinds of conflicts.

The moral issue is how to adequately respect individual and collective preferences in deciding whether to vary the stringency of pollution control norms according to the population at risk. A simple quantitative cost benefit analysis would argue that varying air quality norms is the best policy. Because this kind of cost benefit analysis reduces all considerations to a common measure, it is the analysis that bureaucracy is best suited to make. Such an analysis runs as follows.

From a given exposure to pollution an individual suffers a given harm. Proponents of this simplistic analysis at least implicitly argue that it is permissible to aggregate the harm suffered by each individual to arrive at a total harm suffered in a given geographical area. Accordingly, the harm suffered from exposure to a given pollution concentration in a heavily populated area will be greater than the harm suffered in a less populated area. Therefore, less stringent control norms are justified in less populated areas.

This analysis assumes the validity of utilitarianism as a decisionmaking criterion. The form of utilitarianism assumed is that it suffices to maximize the sum total of societal material welfare, i.e. to minimize total harm incurred. The failure of utilitarianism to resolve the problem of subjectivism has already been analyzed and used as a reason for rejecting it as part of an acceptable theory of bureaucratic legitimacy. Its adoption as a decision criteria by bureaucracy raises a similar subjectivism.
problem. Although many economists would at least implicitly accept utilitarianism as a decision criterion for this problem, moral philosophers and lawyers as a minimum reject it in favor of deontological ethics, which accepts prima facie the moral validity of certain duties and rights. In the context of geographically varying air quality standards the fundamental moral value is respect for human life and health.

For a bureaucrat to suggest that someone in a low population area should suffer greater health damage than someone in a high population area merely in order to reduce monetary compliance costs with air pollution control norms is to reject this fundamental moral value. It is to be immoral.

It is legitimate to democratically balance the risks of health damage against other social priorities. Rawls, for instance, would accept a balancing approach insofar as the welfare of every individual was greater as a result of the balancing. Ackerman in his strictly liberal framework would require an acceptable conversational justification for exercise of the power to force an individual to accept inferior air quality. Because no such justification would seem possible, geographically varying standards would be legitimate only by voluntary agreement of the individuals affected. In both Rawls' and Ackerman's liberal perspectives, a bureaucrat cannot legitimately do the balancing. For any individual to determine the social interest according to subjective values is tyranny. Only through democratic consensus can conflicting moral rights be legitimately accommodated.
The purposivist theories drawn from Unger and Ackerman do not provide useful guidance for the resolution of a specific issue such as this one. The effect of varying air quality standards on progress towards a truly liberal society or towards simultaneously maximized community and autonomy is indeterminate. They thus fail to address the legitimacy of bureaucratic resolution of this kind of issue. Accordingly, it is necessary to retreat to their premises of autonomy and individual right as expressed for example by Rawls and Ackerman.

Even within the morally deficient framework of utilitarianism, the aggregation of individual suffering poses serious logical difficulties. Assuming that the value of human health and life can be morally quantified for purposes of collective decisionmaking, it could be argued that relaxation of pollution control norms in low pollution areas is justifiable if residents can be adequately compensated for the injury. Further assuming that there are no transaction costs, there remains the impractibility of assigning a monetary value to the suffering inflicted by increased respiratory infections or a lung cancer. Economists have devised ingenious means of attempting through regression studies to estimate what such nonmarket goods as clean air and health are worth to people. Beyond the doubts about how well these studies control for other variables and how representative the populations used are, in the perspective of deontological ethics, even the attempt to value such goods as human life and clean air demeans their value.
Proponents of utilitarianism might argue that life and health are routinely valued for compensatory purposes in accident litigation. Accepting the morality of such calculations, they are nonetheless substantially different from the evaluation of human life for collective decisions. In the compensatory calculations, the purpose is to reimburse a victim for damages already suffered. In the case of collective decisionmaking, the purpose of calculating the value of health and life would be to determine what priority to give them as against other social goods. The accident compensation is in relation to a particular historical event. Valuation of life in the context of collective decisionmaking serves an entirely different instrumental function. Making a political judgment as to how much to impose on an individual's right to health is fundamentally different from determining how much to compensate an individual after the fact of an injury to the individual.

Apart from these issues of valuing health effects, the questions of the appropriate level of control are far from clearly determined by purely technical criteria. Cost benefit analysis on an abstract theoretical level would suggest that the optimum control of air pollution is the level at which the marginal costs of further control equal the marginal benefits.(4) Such a theoretical concept is of limited relevance because of the substantial uncertainties associated with both the costs and benefits of air pollution control.(5)

The benefits of air pollution control cannot be accurately assessed because the health, economic, biological, and materials
impacts of air pollution are not known in great detail. Even the problem of predicting the ambient concentrations associated with emissions from particular sources is not easily resolved. Modeling in particular air pollution control decisions has turned out to be a complex value laden matter rather than a neutral scientific process. (6) What is known is that there is cause for serious concern. (7)

The costs of air pollution control are extremely difficult to assess because changes in lifestyles, industrial processes, and energy sources are just as much means of control as add on control devices. Only in the case of evaluating the control options of a specific existing source is it at all possible to achieve a precise idea of the costs of pollution control.

Those attempts which have been made at estimating ratios of benefits to costs vary significantly. One survey of the literature indicated a 20% improvement in air quality yielded from 1.8 to 14.1 billion 1978 dollars in United States health benefits. (8) Despite the uncertainty in precisely quantifying benefits, a "most reasonable point estimate" for air and water pollution control benefits implies that "where state of the art analysis of environmental benefits has been undertaken . . . they strongly suggest that environmental protection is good economics." (9)

In arguing that costs and benefits be quantified and that only the most cost effective reductions should be undertaken, the proponents of this view implicitly assume that only a certain quantity of social capital is available to spend on pollution
control. Social decisions are not in fact made this way. Standards are usually formulated in terms of air quality levels, emission levels, or technological control levels. There are no express decisions to designate a certain amount of money for pollution control and then allocate that sum in the most effective way possible. As a practical matter to modify the most extreme consequences of this disregard of cost in the fundamental social decisions of control levels, bureaucrats are reluctant to require controls that will have drastic economic consequences, such as termination of an entire industry, unless very expressly directed to do so. Rather, in determining what kinds of controls to require, they will ordinarily consider an industry's ability to afford them.(10)

This philosophy of requiring as much control as the sources can afford somewhat compromises the original social control decision; however, if in fact industry is pushed hard, it has the merit of avoiding the harshest consequences of the social disregard of cost without completely negating the social decision. In this perspective moving to a control strategy based on cost-effectiveness in risk reduction rather than industry ability to pay represents a nonneutral political choice. Bureaucratic judgments are involved in the assessment of cost-effectiveness. In some cases these assessments may result in stricter control than the affordability approach because closing some plants may be indicated whereas the affordability approach would have left them off the hook. However, by and large, using the risk reduction cost-effectiveness approach will result in less stringent levels
of control. This is because controls with only marginal risk reductions will not be implemented.

Two intensely political questions are embedded in any risk reduction approach. How much risk is acceptable is one. A second one is whether individuals may be exposed to unequal risks. Because application of the risk reduction approach to different kinds of air pollution control problems depends largely on differences in the size of the exposed populations, the equal protection argument is very real. It is therefore especially important that this kind of decision be subjected to democratic rather than bureaucratic choice.

A pragmatic environmentalist might prefer the risk reduction approach to the absolutist approach of many air pollution standards because the consequence of application of the absolutist standards would be so severe that no action at all would be taken by the responsible bureaucrats. This pragmatic interest ought not however to obscure the fundamental political issue underlying the control approach.

Despite the practical and the moral problems in bureaucratically making decisions according to cost benefit analysis, bureaucratic decisionmaking is essential to resolving complex social problems. In the case of air pollution, the practical complexity of undertaking a cost benefit analysis illustrates the difficulty if not impossibility of rational democratic choice in the absence of bureaucratic assistance. Nonetheless, to the extent possible the moral problems of conflicting individual and social rights ought to be left to
democratic political forums. On these problems the kind of decision called for is not a pseudo-scientific cost benefit analysis with pretentions of algebraic precision, but rather a carefully considered deliberative judgment that weighs fully the disparate interests involved.\(^{(12)}\) In such a judgment the real impacts of pollution are important just as are the costs of control. One might go so far as to say that this deliberative judgment, if undertaken bureaucratically, amounts to a cost benefit analysis with high valuation of the benefits of control. But, such is not the case. In the deliberative judgment proposed here benefits and costs are not converted into a common metric. Although after a decision has been made it is possible to identify how much money is being spent to reduce given amounts of harm, such a ratio is not the deciding factor. The decision is made based on weighing the prima facie moral duties of protecting human life, health, and the environment together with the costs of various control options.

To suggest that, say, the California electorate conduct this kind of debate to determine whether to ban diesel cars in Los Angeles\(^{(13)}\) is likely to provoke a snicker. Although the nature of the democratic deliberative decision which ought to occur is clear, the manifest inability of the electorate to spontaneously conduct informed discussion of so particular and complex an issue leaves to bureaucracy the task of actually making the decision. The reason for default to the bureaucracy is that consideration of the moral question requires a grasp of objective information which the public cannot readily develop. Recognizing the unlikelihood
of democratic decision on such questions, there remains the task of legitimizing to the greatest extent possible the bureaucratic decision. Participation of the particularly affected individuals is one option. Making locally controlled bureaucracies responsible for the decision is another. The best alternative is to provide for bureaucratic structuring of the decision and its subsequent presentation to a democratic forum for decision. This of course is not always easy to do. As one author has lamented in the American context,

There is need to force environmental issues into partisan politics at every level of government. There is, unfortunately, a trend in the opposite direction, with both parties adopting pious statements, but leaving the solution of any controversial issues to administrative agencies that are not subject to citizen pressures.(14)

When conflicting social values must be reconciled, a political forum is best qualified to make a deliberative judgment that is democratically legitimate. If a deliberative democratic judgment is not possible, then the legitimating techniques examined in the following chapter ought to be relied on as much as possible.
Chapter IV - What legalism, participation, and decentralization do for bureaucratic legitimacy in __________

A. Introduction

Consistent with their common liberal background, all four systems rely on political control over the bureaucracy as the fundamental legitimating device. Their theories of political control differ substantially and effect the application of the three legitimating techniques of legalism, participation, and decentralization.

In the United States, federal bureaucratic agencies are to act according to laws establishing their responsibilities. In addition to the legalistic control through judicial review of compliance with statutory directions, the presidential power, subject to Senate approval, to nominate the highest federal bureaucratic officials and the joint presidential and congressional power over the federal budget limit the independence of bureaucratic action. Similar kinds of control over bureaucratic agencies by the executive and legislative branches exist at the state level.

In France, the political control of the bureaucracy is much more centralized. The French constitution gives great discretion to the bureaucracy and its chief, the President of the Republic. It limits legislative activity to certain relatively narrowly defined categories.
Italy, as a formal matter, still relies on the theory of ministerial responsibility; that is, the theory that the minister is personally responsible to the parliament for the acts of the ministry he or she directs. This theory has for practical purposes become indefensible with the growth of the size of government and with the development of pluralist party politics. Direct political control by political parties is now more important than parliamentary direction as such.

Finally, in the European Communities, the election of the European Parliament notwithstanding, political control is exercised neither through elected officials nor through political parties. Instead it is exercised by governments acting either directly or through the Council of Ministers. The Luxembourg compromise which gives any one government the power to veto any Community legislation of importance leads to elaborate compromise or consensus solutions, or alternatively to impasses. Although the Commission is formally isolated from member state political influences, the member state grip through the Council on Community legislative activity effectively precludes any truly independent Commission activity.

1. Legalism

Legalism can be defined for present purposes as the effort to regulate behavior by rules. The rules may be directed to regulating the conduct of bureaucratic decisionmakers or to the conduct of citizens at large. In the United States and France the
Public bureaucracy has been active. Legalism in these countries has accordingly been expressed largely through the judicial setting of outer bounds on administrative discretion. The judicial limits are determined through application of statutory and constitutional rules. To a lesser, but significant extent in the United States, private parties have invoked the aid of the courts to mandate affirmative bureaucratic action as required by statutory rules. In Italy the phenomenon of legalism has been manifested in a way very different from that in the United States and France. Legalism in Italy has led to judicial substitution of the public administration because of the public administration's frequent inability to act. That is, rather than attempt to limit bureaucratic discretion to statutory limits, the judiciary has become involved in applying rules directly to private parties in lieu of action by the public bureaucracy. In the Community the most significant manifestation of legalism has been the Court of Justice's activity as the sole authentic interpreter of Community law. Through this role the Court has attempted to establish the supremacy of Community law and to thereby ensure its uniform application.

2. Participation

In the United States the interest representation model developed through judicial decisions and statutes makes public participation an important part of bureaucratic decisionmaking. Judicial remand of bureaucratic decisions to the responsible
agency for further consideration or outright annulment of bureaucratic decisions are important tools in assuring that bureaucratic decisionmakers take public participation requirements seriously. In France, the new law on the enquête publique provides for participation by associations in bureaucratic decisionmaking. Although it, like the American system, provides for judicial invalidation of decisions in which public participation was frustrated, the French administrative judge is much less likely to disagree with the public administration than an American federal judge. In Italy, participation is achieved through political party influence and through reliance on collegial decisionmaking. The patronage arrangements associated with the political parties have distracted attention from substantive problems, and the reliance on collegial decisionmaking has compromised the soundness advantages of bureaucratic decisionmaking. The success of efforts to establish an interest representation model in the American style through judicial review have been mixed at best. In the Community, direct public participation in bureaucratic decisionmaking is extremely limited. Community decisions are essentially the result of negotiations between member states. To the extent that there is public participation, it is through political influence exercised on individual member state positions.
3. Decentralization

Decentralization is the assignment of decisionmaking power to component governmental units. It is a legitimating technique of bureaucratic decisionmaking because it moves control over bureaucratic decisions closer to the population affected by them.

This chapter discusses Italian regionalism and the French decentralization policy in some depth. It suggests how decentralization might be conceived in terms of the European Community, and it very briefly touches on the nature of American federalism. For all four systems, treatment of air pollution and decentralization is reserved to Chapter V's detailed discussion. The present chapter's limited treatment of decentralization will serve as background to the more detailed discussion to come.

The United States as a federal state has the most extensively developed scheme of decentralization. France, in contrast, is a highly centralized state which is only beginning to experiment with decentralization. Italy is a more complex case because of its ongoing experiment with regionalization. Its regional and local governments are far less autonomous than American states, but are much better and more firmly established than the recent French efforts at decentralization represented by the regionally and departmentally elected officials. The Community as a supranational organization still in the process of emergence has the problem of how to best develop its powers over its component states. It therefore faces the difficult task of determining what
powers it must reserve to itself to ensure sound implementation of Community powers while respecting the legitimate demands of its member states for autonomy. An important source of the legitimacy of these demands for national level autonomy is the lack of direct Community level democratic political control.

B. United States

1. Decentralization

The American experience with decentralization has deep historical roots. The responsibility of elected state and local governments for education and municipal services is a characteristic American tradition. State and local government powers of taxation have ensured their continued autonomy. Although each state has its own constitution, they are all characterized by the same notions of separation of powers embraced by the federal constitution. Hence, they all have coequal legislatures, governors, and court systems. Their independent revenue raising powers have aided in maintaining a substantial measure of autonomy even in the face of broad judicial and political interpretations of the interstate commerce and the necessary and proper clauses of the constitution and in the face of growing federal grants to state and local governments. State and local governments support bureaucracies comparable in size to the federal bureaucracy. The continued importance of state and local control over large segments of public policy in general and
of bureaucratic decisionmaking in particular contributes to its legitimacy by ensuring closer democratic control over it by the groups must closely affected.

2. Political control of the bureaucracy

Political control of the bureaucracy is achieved by making it subordinate to the executive. At the federal level, the President has the power, subject to Senate approval, to name the heads of the various administrative agencies. In the case of the independent agencies, such as the Securities Exchange Commission, this is the only direct political control. Another important means of political control is the federal budget process, controlled by Congress and the President. Within the Congress there are appropriation subcommittees organized in parallel to the structure of the executive branch. These committees make recommendations to the full houses of Congress on whether to accept or on how to modify the President's budget proposals. Accordingly, views of committee members may have an important impact on bureaucratic action. Finally, there is the legislative power to organize the federal bureaucracy and to assign it substantive responsibilities. At the state level, political control over the bureaucracy follows a similar model. Notwithstanding the political nomination of the highest bureaucratic officials, their subordination to particular substantive federal laws, and their dependence on annual appropriations, federal agencies have considerable independence.
from elected officials. It is relatively unlikely that legislation would pass both houses of Congress to undo particular agency decisions. One technique attempted in order to assert greater authority over agencies was to insert provisions into agency authorizing statutes which would permit one house of Congress to veto specific agency decisions. This so called legislative veto technique was declared unconstitutional by the Supreme Court. (3) In the face of this bureaucratic independence from the legislature, it is not surprising that judicial review has become a highly elaborated legitimating technique in American administrative law.

3. Participation and legalism: the interest representation model

Through the time of the new deal, an effort was made to rely on the liberal theory of bureaucratic legitimation. That is, the approach to legitimating bureaucratic decisionmaking was to justify it as a democratic delegation of defined decisionmaking power to bureaucrats. Within the bounds of the delegated authority and according to the decision criteria enumerated by the statutory delegation, the bureaucracy was to apply its expertise to render a decision.

This theory proved unworkable because the legislature has always been unwilling or unable to define precise limits and meaningful decision criteria. Meaningful legislative limitations on agency decisionmaking powers are impractical. First, the legislature may be politically unable to agree on any specific
criteria. Accordingly, it leaves the question open for the bureaucracy. Second, the legislature lacks adequate knowledge and expertise in the subject matter to anticipate the practical problems requiring action. (4) Third, through the time of the new deal the assumption was that there existed an intelligible essence -- the public interest. On reflection, the public interest is not a uniquely determinable entity, but rather a concept varying according to circumstance and the perspective of the interest concerned. In fact, only twice have entire congressional legislative delegations of power been judicially struck down for lack of limits and criteria. (5)

In practice the idea of legitimating bureaucratic decisionmaking through direct legislative setting of bounds on bureaucratic decisionmaking failed because it was theoretically unsound and because the arbiter of the American constitutional system, the federal judiciary, refused to act on it. In response to this failure, American courts have attempted to compensate for the illegitimacy of bureaucratic decisionmaking by other techniques of judicial review.

a. Judicial review and the interest representation model

Courts have applied a variety of tests to review agency discretion. (6) They have asked whether there was substantial evidence in the record before the bureaucracy to support the decision; whether the bureaucratic decisions were reasonable or arbitrary and capricious; whether the agency adequately considered
all the relevant facts; and if the agency decision was consistent with other agency action or stated congressional intent. Under all of these tests, the courts have dodged directly reviewing the merits of bureaucratic decisionmaking, which is not to say that they have not been creative or even adventurous. Their level of action depends on the subject matter at issue. For example, in the area of desegregation, the federal judiciary has acted with particular vigor to compensate for state bureaucratic and democratic failure to respect the constitution. The courts' extension into the environmental area has also been substantial, although less dramatic.

Essentially what the courts have done is to develop a kind of public law litigation with a character different from that of traditional private law litigation. Traditionally, American private litigation was bipolar, retrospective, a self contained episode, controlled by the parties, and characterized by the dependence of the right and the remedy. One model describes public law litigation as having become characterized by a sprawling and amorphous party structure, fact inquiry that is predictive and legislative rather than historical and adjudicative, prospective relief, a negotiated rather than imposed remedy, continuing judicial involvement in administration of the remedy, an active judge, and subject matter dealing with the operation of public policy rather than private rights.

By enforcing requirements of public participation in bureaucratic decisionmaking, the courts have advanced an "interest representation" model of bureaucratic decisionmaking. This
model sets aside the traditional American view that administrative law should serve the limited function of minimizing state intrusions. According to the interest representation model, "the function of administrative law is not the protection of private autonomy but the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision."(11) Although the decision remains in the hands of the bureaucracy, particular interests participate in developing the record on which the decision is made. Particular interests are given the right to comment on preliminary bureaucratic conclusions and to introduce evidence to support their contentions. If they seek judicial review of the final decision, the decision is subject to invalidation if the court finds that there was insufficient bureaucratic response to the particular interest's contentions. Although federal courts are unwilling to probe the actual mental processes of the decisionmaker,(12) they will examine the record to determine whether it justifies the decision. The decisionmaker bears some responsibility for seeing that the record is organized in such a fashion that it provides a coherent justification.(13)

The interest representation model has been developed through judicial decisions relying on the common law, specialized federal statutes, and the federal Administrative Procedure Act. The National Environmental Policy Act of 1969's requirement of preparation of environmental impact statements prior to major federal decisions significantly affecting the environment has also
contributed to establishing the documentary basis on which the interest representation model functions.\(^{(14)}\)

The statutory provisions governing judicial powers in response to bureaucratic decisions on air pollution control are generous. Although federal administrative decisions are ordinarily subject to the Administrative Procedure Act,\(^{(15)}\) most of the important decisions under the Clean Air Act are exempted from the Administrative Procedure Act\(^{(16)}\) and instead are subject to the Clean Air Act's own requirements. Similar to the Administrative Procedure Act, the Clean Air Act requires a notice and comment procedure which establishes a written record on which judicial review is ultimately based. Grounds for judicially overturning an EPA decision on air pollution include arbitrariness, unconstitutionality, exceeding statutory authority, and disrespect of procedure.\(^{(17)}\) In addition to judicial review of EPA decisions on these standard administrative law grounds, a federal court can become involved in air pollution decisionmaking as the result of a civil action, which under the Act may be brought by any person, including legal persons, to correct a violation of the Act.\(^{(18)}\) Such suits may be brought to require compliance with an emission limitation imposed under the Act or to require EPA to fulfill nondiscretionary duties imposed by the Act. Standing is granted to persons who can show "injury in fact" from an agency decision and to associations with at least one injured member.\(^{(19)}\) The approach of state courts to administrative law issues has developed on similar bases. Although the federal courts have claimed the power to review the constitutionality of
laws since *Marbury v. Madison*, they have by and large not relied on constitutional grounds in their efforts to review bureaucratic decisionmaking.

b. Hesitations in the adoption of the interest representation model

The development of the interest representation model has not been without certain hesitations and steps backward. Two examples of the Supreme Court's unwillingness to open the courthouse doors too widely can be mentioned here. They are its limitation on inference of implied rights of action and its treatment of class actions. Its jurisprudence on standing(20) and on attorney fees(21) might arguably be included in this list; however, the Court's jurisprudence on these topics has probably constituted less of an impediment than its jurisprudence on the two topics discussed here.

i. Implied rights of action

The willingness of federal courts to imply private rights of action together with express statutory provision of private rights of action has given the courts ample opportunity to review agency inaction as well as agency action. However, although the common law tradition was to routinely find implied private rights of action,(22) the Supreme Court has recently been less willing than previously to find such rights.
In 1964 the Court found that a private right of action should be implied under s 14(a) of the Securities Exchange Act of 1934. The Court said, "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose |of a statute||." The Court did not question whether Congress intended there to be a private right of action; rather, it focused on whether a private right of action would further the statute's purpose. Presently, the Court seems to focus on the question of whether Congress intended to create a private right of action, although such intent can be inferred either from the express language of the statute or from legislative history. The jurisprudence is inconsistent because some implied rights of action continue to be recognized despite lack of any indication that Congress contemplated them.

For example, 17 U.S.C. s 10(b) provides criminal liability for securities fraud. The SEC's rule 10b-5 was first used to support a private cause of action by a victim of securities fraud in 1946. The existence of the private cause of action was widely recognized by courts, and in 1976 the Supreme Court stated:

Although section 10(b) does not by its terms create an express civil remedy for its violation, and there is no indication that Congress, or the Commission when it adopted Rule 10b-5, contemplated such a remedy, the existence of a private cause of action for violations of the statute and rule is now well established.
Other cases have recognized that congressional inaction in the face of routine and consistent recognition by federal courts of an implied right of action is evidence that Congress intended to preserve the implied remedy. (29)

Consistent with the Supreme Court's disfavor towards nonstatutory rights of action is its finding that federal pollution control statutes have precluded a federal common law concerning interstate pollution. States are thus effectively precluded from suing each other in federal courts for pollution. (30)

ii. Class actions

Another example of the Supreme Court's hesitance to unqualifiedly accept the full implications of the interest representation model is its 1973 decision limiting class actions. (31) Class actions are a procedural device in which a small number of claimants with individually small claims may bring an action in the name of a much larger group of claimants, who do not necessarily need to become active parties. The Court held that each plaintiff in the class had to meet the federal jurisdictional requirement of having a claim greater than $10,000. For practical purposes, this decision eliminated the class action in federal courts as a standard public interest litigation tool. Of course, states continue to have their own rules on class actions, as well as on other procedural topics such as standing. (32)
c. Effects of the interest representation model

Examples of the positive effects of judicial review are not hard to find in the air pollution context. For example, the National Resources Defense Council in the early and middle 1970s challenged with some success the strictness of state implementation plans as approved by EPA in nine states. (33) Also, litigation initiated by the Sierra Club was instrumental in the adoption of the Clean Air Act provisions aimed at preventing deterioration of air quality in areas presently meeting air quality standards. (34) The case study which follows this section provides another example of how the interest representation model may work to improve bureaucratic decisionmaking.

In broader terms, the accessibility of the courts ensures compliance with the legislative decisions establishing the air pollution control program and is accordingly an important legitimating technique. Permitting private parties to act against the bureaucracy and against pollution sources not complying with the law constitutes an important prod to overcoming governmental inertia. In addition to providing a means of combatting governmental inertia, the possibility of public interest litigation may serve the important role of defusing social tension. A study of 366 United States environmental disputes in the chemical process industry and 226 cases outside the United States found that government and private legal actions were present in almost twice as many of the United States conflicts. (35) The authors note that: "violence has been three
times, and mass demonstrations four times, as frequent abroad. .
. . The tactics of opponents in Western Europe, particularly of
antinuclear activists, have often been quite flamboyant and/or
violent . . . These kinds of tactics perhaps reflect high levels
of frustration resulting from exclusionary political and corporate
decision making processes, as well as the relative absence of
means to redress grievances effectively."(36)

d. Difficulties of the interest representation model

The interest representation model's attempt to replicate a
pluralist democratic decisionmaking process by attempting to
constrain the final bureaucratic decisionmaking within the bounds
of the record developed by interested parties is a good effort,
but it is plagued by the problem of formalism inherent to liberal
thought. Although in theory all interests are equally free to
participate, those most directly affected generally have the most
interest and means to participate. Accordingly, those less
directly affected and those affected in a diffuse way will not
participate unless organized and subsidized.

The problem of allocating resources for such an effort and
selecting which groups will benefit is a pandora's box for a
formalist. Although a satisfactory theoretical solution of this
problem may not be possible, judicial application of procedural
participation rights to bureaucratic decisionmaking has increased
its legitimacy.

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The need to promote creation and organization of communities of interest is a general one not peculiar to the problem of participation in bureaucratic decisionmaking. Liberalism's view of society is static in the sense of asserting that social structure is not a focus of political debate. In the present perspective social structure is the prime focus of political debate. As part of the spiral of decreasing domination and increasing community, or alternatively as part of creating the conditions of a truly liberal society, the inability to generally identify and promote unrepresented interests is not reason to exclude those existing organized interests like the Sierra Club or the Pacific Legal Foundation. Moreover, it is not inconsistent to trust decisionmakers not to completely neglect unrepresented interests while believing that they need additional organized input.(37)

Another difficulty of the interest representation model is that it does not recognize the importance of not compromising the potential soundness advantages of bureaucratic decisionmaking. As an example of the residual liberal formalism remaining in the conventional wisdom on bureaucratic decisionmaking, it has been asserted that "The ultimate problem is to control and validate the exercise of essentially legislative powers by administrative agencies that do not enjoy the formal legitimation of one-person, one-vote election."(38) The assertion is correct, but its emphasis on control and validation neglects the soundness problem.

By focusing on procedural and participation rights, the interest representation model diverts attention from the merits.
The resulting procedural battles have resulted in substantial delay in decisionmaking. In the face of prolonged litigation battles, the bureaucratic advantages of methodical investigation, evaluation of multiple variables, and systematic attention are lost. Moreover, commentators have come to question whether increased procedural requirements in fact have any long run impact on outcomes apart from delay. (39) Citizen participation in decisionmaking via public hearings is criticized because such input generally occurs after the decision has already been made. Others have noted that despite procedural participation requirements, an agency can generally have its own way. (40) Two factors work to save participation requirements from futility. First, if an agency cannot justify its action to the satisfaction of a reviewing court in light of the record compiled through public participation, it ought to be reversed. Second, public participation stimulates the democratic process and may provoke a legislative or electoral result if sufficiently frustrated by bureaucratic non responsiveness. Nonetheless, the problem of delay and distraction is a real one. With the current emphasis on deregulation, it may be that courts will give more emphasis to the respect of legislative intent that bureaucratic programs be dismantled and less to the procedural values of the interest representation model. (41) In the long run solutions to the delay problem of the interest representation model will have to come in part from the courts, in part from legislative reform of the process, and in part from agreement of the combattants on process values.
Contemporary American thought on administrative law has already moved beyond exclusive reliance on the interest representation model as the vehicle for reform. Concern is now expressed for whether the bureaucratic tools suit the purpose for which they are employed and whether the purposes themselves are wise. Examples are the widespread consensus that classical regulation with the purpose of controlling "excess competition" was inappropriate for the airline and trucking industries and that it was also inappropriate for limiting the economic rents of natural gas producers. (42) This concern for the substance of policies is well placed; however, it is both subsidiary to and illustrative of the deeper problem of the relationship of bureaucratic and democratic decisionmaking. The harms caused by inappropriate tools and purposes in the airline, trucking, and natural gas areas reflect joint bureaucratic and democratic failure. Future legislative reform efforts ought to treat not only the substance of administrative decisionmaking, but also the framework in which decisions are made. Moving beyond the focus on the economic and administrative tools adopted for particular purposes to a concern for the best ways to make decisions will result in sounder and more legitimate decisionmaking.

4. NSPS: an example

Determination of the American New Source Performance Standard (NSPS) for coal burning power plants is an example of a bureaucratic decision made relatively legitimate through the
techniques of participation and legalism. In this rulemaking the interest representation model functioned to promote a sound decision based on significant input by a variety of interests. The establishment of the New Source Performance Standard is also an example of how to make decisions about problems raising both difficult moral issues and complex technical issues. In this rulemaking there were many unavoidable, nonquantifiable judgments involved in setting the standards. However, the systematic factual investigation, which in this case was largely provided by outside consultants under bureaucratic direction, was equally critical to reaching a sound decision.

The federal Environmental Protection Agency (EPA) promulgated the first NSPS for coal burning power plants in 1971(43) in response to the 1970 Clean Air Act. This rule set a flat limit of 1.2 pounds/million BTU on emissions of sulfur dioxide from new coal power plants. The Clean Air Act Amendments of 1977 gave EPA one year to promulgate a new standard.(44) EPA was slow to meet the statutory deadline. Under pressure of a Sierra Club suit in federal district court EPA finally issued the new NSPS in 1979, almost a year late.(45) With respect to the legitimacy and soundness of the bureaucratic decisionmaking process, it can be observed that the decision of setting the standards was both required and structured by the democratically enacted legislation. The legislatively adopted legalistic technique of setting a judicially enforceable deadline invokable by a private group served to ensure timely bureaucratic action.
The controversial part of the second NSPS was the extent of additional control of sulfur dioxide. The issues involved were: (46) whether the same percentage reduction in sulfur dioxide emissions from plants burning clean low sulfur coal should be required as from plants using dirty high sulfur fuel; the best achievable efficiency of the technology available to reduce sulfur dioxide emissions; the maximum quantity of sulfur dioxide emissions per unit of heat input; and the averaging time over which violations would be measured. The effect of the final standard is to require use of flue gas desulfurization (FGD) technology, also known as scrubbing.

In early 1977 EPA began the rulemaking process by contracting with different consulting firms for work on the following topics: (47)

- Coordination of contractor studies and environmental impact statement
- Factors affecting sulfur dioxide emissions from steam generators
- FGD waste characteristics and disposal
- Impact on coal production
- FGD energy and water consumption
- FGD availability and costs
- Classifications of modifications and reconstructions
- FGD design and operating parameters
- Analysis of political issues and economic impacts
EPA formulated a tentative proposal for NSPS which it used as a basis for internal discussion and which it presented to industry and environmental groups for their comment. Initially, Teknekron, a consulting firm, had been employed to analyze national economic impacts. It used a computer model of the utility industry, developed earlier largely through EPA funding. It predicted emissions and the mix of fuel use in electricity generation under different scenarios. ICF, Inc. was initially hired only to analyze coal production. ICF's conclusions about coal production were fed into the Teknekron model. In the final stages of setting the standard these two consulting firms took preeminence over the others. After comment by industry and environmental groups on the tentative standard, both the Teknekron model sponsored by EPA and an ICF model of total costs sponsored by the Department of Energy (DOE) were run in competition. The Teknekron model favored full scrubbing, whereas the ICF model favored partial scrubbing. Full scrubbing was a control option under which utilities got no credit for using cleaner fuel; whereas, under partial scrubbing they did. Based in part on these results, EPA favored full scrubbing, while DOE favored partial scrubbing. The two agencies then agreed to coordinate their work and to hire ICF to perform all remaining analyses. They selected the ICF model over the Teknekron model because they believed it was more developed and would provide more convincing justification for whatever outcome was eventually selected.

Both of these models performed cost effectiveness analysis. That is, they considered only the tradeoffs
involved in achieving particular reductions in emission. In effect, emissions were used as a surrogate for benefits. A true cost benefit analysis was not attempted because it would have required too much unavailable information. For example, it would have required predicting the actual location and sizes of new power plants, predicting the impact on air quality through dispersion modeling, estimating the size of the affected populations, and calculating actual harm based on dose-response relationships.

Many considerations which could not be reduced to a common metric were important in setting the final standard. In addition to overall levels of emissions, impacts on visibility in the West and acid rain in the East were concerns. Environmental problems other than air pollution, such as water use in the West and solid waste disposal had to be considered. The monetary costs to utilities and consumers and the political costs of altering the demands for high sulfur and low sulfur coal had to be balanced. To appreciate the intensity of the conflict between interests favoring continued use of higher sulfur eastern coal and those favoring development of lower sulfur western coal supplies, it can be noted that demand for western coal by midwestern utilities had risen from 0.1% of 93 million tons bought in 1979 to 24.7% of the 119 million tons bought in 1977. Limiting oil consumption and maintaining reliability of electrical power generation were considerations. Judgments had to be made about technological questions such as the feasibility of scrubbers and baghouses, the amount of monitoring data statistically required to prove
compliance, and the variability in sulfur content of coal. Regional economic impacts and the investment behavior of utilities also had to be assessed.

In short, the standard depended on a large variety of variables, understanding some of which required simple, but extensive factual information and others of which required rather sophisticated technical knowledge. The decision required, however, was not amenable to technical resolution. It required a number of predictive factual judgments and substantial assessment of the relative values of various political interests.

Following promulgation of the NSPS, the Sierra Club, the Environmental Defense Fund, the California Air Resources Board, and industry groups challenged it in court. In a 121 page opinion the court of appeals for the District of Columbia Circuit concluded that EPA had not exceeded its statutory authority and that the rule was reasonable.(55)

Although the modeling exercise was at the center of the standard's determination, it did not eliminate subjective assessments from the decisionmaking process. Indeed if it had, a reviewing court would have probably invalidated EPA's decision. The Court of Appeals actually stated

We conclude that EPA's reliance on its model did not exceed the bounds of its usefulness and that its conduct of the modeling exercise was proper in all respects. We are in fact reassured by EPA's own consciousness of the limits of its model, and its invitation and response to public comment on
all aspects of the model. The safety valves in the use of such sophisticated methodology are the requirement of public exposure of the assumptions and data incorporated into the analysis and the acceptance and consideration of public comment, the admission of uncertainties where they exist, and the insistence that ultimate responsibility for the policy decision remains with the agency rather than the computer. With these precautions the tools of econometric computer analysis can intelligently broaden rather than constrain the policymaker's options and avoid the 'artificial narrowing of options that can be arbitrary and capricious.' (footnotes omitted) (56)

In subsequent litigation, despite not having prevailed, the Sierra Club and the Environmental Defense Fund argued that under the Clean Air Act (57) they were entitled to attorney fees for having represented the public interest. The Court of Appeals held that they were entitled to attorney fees, (58) and then awarded the Sierra Club a fee of about $45 000 and the EDF about $46 000. (59) The Supreme Court reversed holding by a 5-4 vote that at least some measure of success on the merits was required for award of attorney fees. (60)

Although none of the intervening groups was finally awarded attorney fees, this does not diminish the importance of their participation. EPA knowledge that the record it compiled and its use of the record would be subject to independent scrutiny substantially improved the rigor of its analysis. Although the
perfectionist liberal would argue that all of the intervening groups in the judicial and agency proceedings should be entitled to the same degree of support and that an objective principle needs to be found to determine which other interests should have been represented in the proceedings, this case demonstrates the sound functioning of the interest representation model. Despite the lack of government financial support, both industry and environmental groups were able to organize themselves sufficiently well to participate effectively.

A corollary of this train of thought is that the Supreme Court erred in disallowing fees to the environmental groups. Even if the groups did not prevail on the merits, they should have been awarded fees to encourage the kinds of contributions they made to improving the decisionmaking process.(61)

Total United States government costs in establishing the NSPS up to the time of its promulgation were estimated to be $3 175 000.(62) Of this total $690 000 was for EPA staff time, and $2 220 000 was paid to outside contractors by EPA.(63) The balance of $265 000 was spent by the Department of Energy.(64) In light of the billions of dollars of utility investments required and the possible impacts on air quality and coal mining, the cost does not seem excessive.(65) EPA's investment in the standard setting produced two worthwhile results which might not otherwise have surfaced. The final standard adopted partial scrubbing, i.e. not requiring low sulfur fuel to be scrubbed to the same degree as high sulfur fuel. The modeling exercise indicated that partial scrubbing reduced total emissions more than full scrubbing because
its lower operating costs gave utilities less of an incentive to prolong the life of even dirtier old plants. Partial scrubbing also permitted the use of a promising new technology, dry scrubbing, on lower sulfur fuels. EPA's investment in technology assessment contributed to demonstrating the viability of alternative scrubbing technologies, including dry scrubbing. Finally, although some credit was given for use of clean fuel, at least some scrubbing was required in all cases. This eliminated the advantage of low sulfur western coal over higher sulfur eastern coal, which satisfied labor, management, and regional interests with a vested stake in eastern coal production.

Democratic decision of the NSPS, whether legislatively or by referendum, would have been infeasible because of the degree of factfinding required. This is not to say that the decision was made solely on a factual basis. The many nonquantifiable judgments and value assessments involved in the decision have already been alluded to. The combination of methodical fact finding made possible by substantial commitment of financial and human resources and by the prior existence of a substantial decisionmaking infrastructure together with adequate functioning of the interest representation model produced not only a sound decision, but also a relatively legitimate one.

C. France

French administrative law has traditionally accepted the liberal premise of the distinction of policymaking and policy
implementation. To legitimize bureaucratic decisionmaking, France relied heavily on the legalistic technique of administrative judicial review. The unrestrained legislative supremacy of parliament, at least until its limitation by the 1958 constitution, constituted a political control on bureaucratic independence. Participation in bureaucratic decisionmaking was limited in accordance with the belief that the election of parliament and parliamentary debates were the appropriate times for public participation. The traditional method of participating in bureaucratic decisionmaking was limited to the possibility of an association or an individual to challenge the legality of a bureaucratic decision before the administrative courts. France's long history of administrative and political centralization until recently precluded any experimentation with decentralization as a legitimating technique.

French administrative law is now changing. To explain how French administrative law is changing, the peculiarities of the French constitutional system will first be discussed with the two fold purposes of illustrating traditional French notions of political responsibility and the importance of legalism as a legitimating technique in the French system. The growing opportunities for participation in bureaucratic decisionmaking will then be discussed with particular reference to air pollution control decisions. As in the United States, judicial review has an important role to play in insuring the meaningfulness of public participation. Along with the recent decentralization policy, and the jurisprudential insistence on maintaining the traditional
administrative judicial controls on bureaucratic decisionmaking, a statutory effort has been made to provide for greater participation in particular administrative decisions. The enquête publique proceeding, previously a largely empty formality, has been reformed to provide for meaningful public participation. Moreover, the French electoral system is being changed from the Gaulist model which produced strong majorities of the Right or the Left in parliament to a proportional system expected to produce coalition governments of the center. This fundamental change in French politics will undoubtedly have an effect on the conduct of the public administration; however, speculation on its effects exceeds the already ample scope of this thesis's investigation.

Finally, the new decentralization policy will be discussed. Because French air pollution control policy has not traditionally involved local democratic control and because the present decentralization policy has not yet affected air pollution control policy, no reference is made to air pollution control. Chapter V, however, considers in detail how relations between central and local bureaucratic authorities with regard to air pollution manifest phenomena useful for evaluating how relations between central and local levels of government ought to be structured within the context of decentralization.

1. Legalism: constitutional structure

The traditional heavy reliance of French administrative law on legalism to provide legitimacy(67) became even more necessary
because of the constitutional remedy imposed to resolve the political instability of the Third and Fourth Republics. The 1958 constitution establishing the Fifth Republic gave truly remarkable powers to the president and the administration. A literal reading of the constitution could lead to the conclusion that these powers were unchecked by either legislative or judicial authorities. However, the jurisprudence of the Conseil d'Etat and to a lesser extent the constitutional establishment of a constitutional court have ensured continued respect for the rule of law.(68)

Prior to 1958, French constitutional law made the legislature the supreme source of law. Legislation could cover any topic; it was not subject to any kind of judicial constitutional review; and it certainly overruled an administrative act of the government. But, like in contemporary Italy, the incapacity of Parliament to pass laws in timely fashion made it necessary to grant quasi legislative powers to the government. In large part, the 1958 Constitution was a "constitutionalization" of previous unconstitutional practices (decrets-lois, lois-cadres, etc.). The profound innovation of the 1958 constitution was to grant the administration a regulatory power independent of the legislature. The grant of regulatory power to the administration has led to greater efficiency by reducing the chronic instability of pre 1958 governments, but at the cost of legitimacy. Article 34 of the 1958 constitution spells out the limits of legislative powers. It provides that legislative enactments, i.e. laws, are to fix the rules concerning civil rights, national defense, citizenship, marriage, inheritances, criminal law, taxation, nationalizations,
and denationalizations. Laws are also to determine the fundamental principles of the organization of national defense, civil law, commercial law, and labor law. Article 34 further specifies that the budget and the general economic and social goals of the state are to be determined by law. Article 37 establishes the breadth of administrative power by providing that all matters not enumerated by article 34 fall within the realm of regulation.

Following adoption of the 1958 constitution, there was fear that article 37 granted uncontrolled discretion to the president and the administration. To appreciate how the administrative courts have avoided this result, it is necessary to understand their structure and history.

The administrative courts exist in France as the result of a unique notion of the separation of powers. The French view is that the judicial branch should not in any way interfere with the administrative or executive branch. Yet, there is the view that the administration must be subject to the law in two senses. Its acts should be subject to review for conformity with the law, and it should be responsible for damages it causes when it violates the law.

The jurisprudence as to the criteria for administrative jurisdiction has had a long evolution, of which one of the milestones was the Blanco decision of 1873. This jurisprudence is now basically interpreted to establish the administrative courts as serving for any action against the state in the exercise of public power. In addition to actions
against the state, actions may be brought against private entities exercising a public power.\(^{(71)}\) Although the Conseil d'Etat has a long history as an administrative court, the French administrative courts only fully assumed their modern form in 1953 when tribunaux administratifs, administrative courts of first instance, were created. At that time the Conseil d'Etat became a court of appeal.\(^{(72)}\)

Prior to the 1958 constitution the administrative courts controlled the legality of administrative acts against the law, e.g. statutes and decrees, and against the quasi constitutional "general principles of law" (principes généraux du droit). The Conseil d'Etat has developed the notion of general principles of law through its case law. The concept of general principles of law, as developed by the Conseil d'Etat, includes many fundamental rights ordinarily considered part of constitutional law. The following have been identified as general principles of law: freedom of opinion and thought, freedom of commerce, equality, self defense in judicial proceedings, the adversary character of judicial proceedings, nonretroactivity of administrative decisions, the obligation of administrative impartiality, the obligation of the administration to indemnify its agents for condemnations pronounced against them when they were not at fault, the ban against the administration giving away public property, unjust enrichment, and double jeopardy (ne bis in idem).\(^{(73)}\)

Article 37 of the 1958 constitution clearly removes a category of administrative acts from review in light of legislation. It does this by providing that if a subject matter
is not specifically identified as within the scope of legislative regulation by statute, then it is reserved to the administration for regulation. The unanswered question at the adoption of the constitution was whether the administrative courts could continue to control administrative acts in light of the quasi constitutional general principles of law. The Conseil d'Etat said that they could.

The Conseil d'Etat's fundamental decision for ensuring the continued subjection of administrative acts to these almost common law constitutional principles occurred shortly after adoption of the 1958 constitution. The decision was the 1958 decision Syndicat des Ingenieurs-Conseils.(74) At issue was a provision of the 1946 constitution which gave the president of the council (prime minister) truly autonomous powers for "colonial" matters. The Conseil d'Etat held that even these powers were subject to general principles of law because of the preamble to the 1946 constitution. The preamble of the 1946 constitution, which is incorporated by reference into the preamble of the 1958 constitution, provides: "Il |le peuple francais|| reaffirme solennellement les droits et les libertes de l'homme et du citoyen consacres par la Declaration des droits de 1789 et les principes fondamentaux reconnus par les lois de la Republique." (The French people solemnly reaffirms the rights and liberties of man and of the citizen consacrated by the Declaration of rights of 1789 and the fundamental principles recognized by the laws of the Republic.) Shortly afterwards, this jurisprudence was confirmed
with respect to the exercise of the regulatory powers under article 37 of the 1958 constitution. (75)

In addition to the administrative courts, the Conseil Constitutionnel is another guarantee of the rule of law in the French system. However, the Conseil Constitutionnel, unlike the Corte Costituzionale or any American court, can only pass on the constitutionality of a law prior to its promulgation. The Conseil Constitutionnel acquires jurisdiction in two basic ways. Under article 61 of the constitution, it automatically passes on the constitutionality of organic laws. Organic laws are referred to in a number of articles of the constitution without being generally defined. From the constitution's references to organic laws, they can be categorized as treating the functioning or organization of the public authorities. (76) Article 61 also permits the President, prime minister, or president of either house of parliament to submit a law to the Conseil Constitutionnel for review prior to promulgation. The 1974 amendment to article 61 of the constitution (77) extends this power to sixty deputies or sixty senators. The effect of these provisions is that specific administrative acts cannot be challenged before the Conseil Constitutionnel as unconstitutional. For this reason the Conseil Constitutionnel has not constituted a limit on administrative discretion, even though its jurisprudence is constitutionally defined as definitive. Pursuant to the article 62 of the constitution proclamation of the definitiveness of Conseil Constitutionnel decisions, the Conseil Constitutionnel's identification of constitutional principles should be
authoritative for the Conseil d'Etat. However, were the Conseil d'Etat to have a view different from that of the Conseil Constitutionnel, there is no mechanism to appeal a decision of the Conseil d'Etat to the Conseil Constitutionnel. This kind of conflict has in fact occurred with respect to the application of Community law in France. Nonetheless, on a large number of occasions the Conseil Constitutionnel has recognized certain general principles of law as constitutional principles and thereby increased their persuasiveness as authority. Since its 1971 decision recognizing that the preamble of the French constitution, which makes broad statements about substantive and procedural rights, is a source of constitutional rights, the Conseil Constitutionnel has begun to play a much greater role in the elaboration of the content of French legislation. Although the Conseil Constitutionnel has no way to impose its will on the Conseil d'Etat, except by reviewing laws later to be implemented by administrative regulations, its views as to what constitutional law has to say about various kinds of decisionmaking are likely to have increasing effect on the elaboration of French legislation.

2. Legalism: administrative legal challenges

The Conseil d'Etat's jurisprudence on general principles of law has had constitutional significance in ensuring respect for the principle of the rule of law. This, however, does not constitute the full importance of the French administrative courts.
as sources of legitimacy for bureaucratic action. The action of the administrative courts as a whole on far more mundane questions of the legality of specific bureaucratic decisions has been an important manifestation of legalism as a legitimating technique and a means of assuring participation in the bureaucratic decisionmaking process.

The standard legal device for contesting a bureaucratic decision is a legal challenge for exceeding authority, known as recours pour exces du pouvoir. As previously discussed, a finding of exceeding authority can be based on violation of a specific legislative enactment or alternatively on violation of a general principle of law. A finding of exceeding authority results in annulment of the act challenged. It is relatively easy to bring this kind of action. The administrative courts grant capacite d'ester en justice (capacity to act) to foreigners and to associations, including those which are not formally declared (or registered) to the authorities. Interet a agir (interest to act) is another kind of standing criterion which must be met. The interest must be legitimate and reasonable and must be personal to the individual or group bringing the action. Although the case law on this point is somewhat fragmented, it is clear that access to the administrative courts is relatively unrestricted.

Over the last fifteen years environmental associations have already assumed a role in challenging decisions, although they are more important for water than air problems. Growing awareness of acid rain and of the data produced by the monitoring networks in
French cities may change this. A survey(87) of 1500 French environmental associations found that the departmental anglers associations were the most organized with over four million members. Factors contributing to their importance are that they have financial resources coming from fishing licenses and that they have powers to cite polluters. In general the associations in the survey did not believe that a request to the public administration to reconsider a decision was very effective, and they hesitated to attempt administrative litigation because of time and cost factors.

Environmental associations generally bring their actions on the theory of exceeding authority rather than as actions for indemnisation (compensation) because except for anglers associations, the conditions for establishing damages are too severe.(88) In general, proceedings brought by the associations have been useful for indicating gaps in the law and for clarifying the use of circulaires, instructions, and directives.(89)

The benefit of the liberality of standing is limited by the administrative courts' reluctance to correct administrative decisions.(90) It is virtually impossible to obtain a stay of execution of a decision pending resolution of the judicial proceedings.(91) In the specific area of classified installations, i.e. the basic permitting program for industrial sources of pollution, administrative judges seem to be less hesitant to reform administrative decisions than in other areas.(92) However, in decisions involving assessments of costs and benefits administrative judges are likely to stress the
positive aspects of progress. On a basic political question, as for example nuclear power where proceedings brought by associations have been systematically rejected,(93) the courts are unlikely to run counter to the administration. A computerized study of all the environmental decisions of the Conseil d'Etat from 1971 to 1982 found that the Conseil d'Etat systematically decided against environmental interests especially when the economic interests at stake were large.(94) Finally, the French administrative judge does not have the power to issue injunctions against the administration; thus, enforcement of decisions can be difficult.(95)

As in Italy, directly damaged parties can seek damages and closure of the offending plant in the civil courts.(96) The civil judge can order changes to minimize future damage as long as such orders do not conflict with orders of the administration.(97) However, like the administrative courts, the civil courts are extremely reluctant to interfere with administrative authorizations by ordering closure of a plant.(98)

3. Participation: the enquete publique

To recapitulate, the ease of bringing an administrative action for exceeding authority has made it an important means of public participation in bureaucratic decisionmaking. Its value, however, should not be overemphasized because it comes after the initial decision has been made and because the administrative courts are unlikely to either directly or indirectly frustrate the
public bureaucracy's intention. The 1983 law reforming the procedure for the *enquete publique*\(^{(99)}\) may increase the meaningfulness of public participation by overcoming these defects. Significantly, the heading of the law denominates its subject matter as the democratization of the enquete publique.

An enquete publique is required for the award of an air pollution permit to an industrial facility.\(^{(100)}\) To obtain an authorization to operate an installation of the first class, i.e. an industrial installation of one of the categories judged to present serious pollution problems, a request must be made to the prefect (*Commissaire de la Republique*) containing detailed site and process information\(^{(101)}\) as well as an environmental impact study.\(^{(102)}\) Because these studies are performed by the promoters of the project, they have been criticized as generally lacking in objectivity and completeness.\(^{(103)}\)

After the request is completed, the enquete publique begins. The procedure for an enquete publique is for a designated person to receive comments from the public and then prepare and submit a report to the prefect. This procedure was widely criticized\(^{(104)}\) because the report had no legal effect at all on the permitting decision; the prefect chose the person; the content of the report was completely at the person's discretion; the person chosen was usually a retired mayor or public functionary; and it was sufficient to publicize the enquete publique by posters in the town halls of the area the prefect judged to be effected.

The recent reform has made the procedure more serious.\(^{(105)}\) The administrative court of first instance for the area now
designates the Commissaire or Commissaires. Whether there is one or more depends on the "nature and importance of the operations." The prefect, as the authority who has ultimate responsibility for the permitting decision, is obligated to publicize the enquête by all appropriate means. The enquête lasts from four to six weeks, and all interested parties must be heard. The eventual report must take account of all the counter proposals made. If the report is negative, and the prefect makes an affirmative decision, the competent administrative tribunal may annul the decision on one of the grounds identified in the report if it finds such a ground to be serious and of a nature to justify annulment. The persons investigating are paid by the state, but the other expenses of the investigation are born by the party seeking the permit.

The enquête publique takes place independently of local elected officials. As a matter of policy, the environment ministry does try to see that the affected mayors are kept informed of enquêtes publiques. However this seems to be a matter of courtesy to the mayor to permit reasonably informed response to inquiries rather than an effort to trigger active local input.

Following submission of the report the prefect has three months to decide whether and on what terms to grant the authorization. Once the final decision is issued, the requestor of the permit has two months in which to seek administrative judicial review. Private parties, including associations, and local government entities ordinarily have four
years to seek administrative judicial review of the decision on the ground that it will create a public nuisance, endanger public health, public safety or environmental protection, or harm agriculture or historical sites. (117)

4. Decentralization: the 1982-83 reform and its historical context

The novelty of the present decentralization effort can only be appreciated in light of the immediately preexisting state of French administrative law. Under this law, the principle of legalism was for practical purposes the only legitimating factor. Some legitimacy was provided by the national electoral process, especially by the popular election of the president who serves as head of the administration, by the election of parliament, and by the election of mayors and presidents of the departmental councils. However, the remoteness of national elected officials from administrative decisionmaking was an inherent limit to the legitimacy they provided, especially in light of the governmental structure established by the 1958 constitution. Moreover, mayors and the presidents of departmental councils had few, if any, significant powers. It is against this background of centralization and legalistic control that the present policy of decentralization must be measured. (118)

French doctrine distinguishes between decentralization and deconcentration. Deconcentration is the assignment of decisionmaking authority to local offices of the central
bureaucracy. An example of deconcentration is the decision of an *ingénieur des mines* at the departmental level on an air pollution permit under the classified installations law. The decision is centrally controlled in that it is made according to centrally defined criteria; it is subject to central review of the merits; and finally it is subject to administrative review of its legality. Numerous administrative reorganizations aimed at deconcentration have been undertaken over the years. (119) Although deconcentration may be more efficient than centralization, it is a priori no more democratically legitimate than centralization because it does not necessarily imply any greater degree of democratic control or participation. Decentralization, in contrast to deconcentration, has never been previously seriously undertaken. The territorial fragmentation of France (36,000 communes of which 28,000 are communes with populations of less than 2000) (120) and the fear of encouraging clientelism (121) constituted effective barriers to decentralization. Likewise in contrast to deconcentration, it is associated with local political responsibility. Because of its emphasis on local political responsibility, the present political and administrative reorganization is clearly decentralization and not deconcentration.

There are two fundamental laws instituting the decentralization policy and a plethora of implementing laws, decrees, and circulaires. (122) The first of the two fundamental laws is the law of 1982 on the rights and liberties of communes, departments, and regions. (123) Regions, departments, and communes
all previously existed, but the law gives them a new significance. The historical background of these three entities permits appreciation of the magnitude of the innovation provided by the new policy.

Regions are the youngest of the three levels of government. They were statutorily instituted in 1972 as strictly administrative structures with economic planning, coordination, and infrastructure related tasks. They were run by regional prefects whose duties paralleled those of the departmental prefects about to be described in some detail.

Unlike the regions, communes and departments have existed from the period of the French revolution. Following the chaos of the revolution, the departments were established as administrative territories within which it was possible to reach the central seat of administration by one day's travel. The law of 28 pluviose an 8 (17 February 1800) created the prefectoral system to run the departments and to oversee the communes. Initially prefects and mayors were chosen by the central government. As the nineteenth century progressed, mayors and the municipal and departmental councils came to be elected. However, they remained without significant power. It was the departmental prefect who retained ultimate authority for all local administrative decisions. The prefect made these decisions under central control.

The prefects constituted a relatively homogeneous professional corps of bureaucrats. Although there was low
turnover within the corps, prefects were frequently rotated from one department to another. (129)

Two developments worked to erode the authority of prefects. The creation of field services in the new technical or specialized ministries following the second world war effectively limited the prefects' authority because the prefects lacked the knowledge to control their activity. (130) Moreover, although mayors as local elected officials formally had little power compared to the prefects, the cumulation of local and national elected offices gave them effective political power to control the prefects' careers. (131) A prefect was no match for a mayor of a large city who was also a member of parliament and perhaps even a minister. This was of course much less true for the vast majority of small communes.

The 1982 law does not alter the existing regional, departmental, and communal territories. It retains the concept of elected councils for communes and departments, and anticipates the creation of a popularly elected regional council. (132) It also does not alter the election of the mayor by the municipal council. Its great innovation is to make local government independent of the central administration by removing the former control by prefects over local governmental actions. To do this it abolishes the departmental and regional prefects. It provides that the popularly elected regional and departmental councils are to choose from their number a regional (133) and a departmental (134) president. This official is to assume the prefect's previous responsibility as the territorial official with executive
power. (135) The prefect is replaced by a representative of the state (Commissaire de la République). (136) In theory the only central control remaining over the acts of communes, departments, and regions is the power of this representative to refer acts to the administrative courts for a control of their legality. (137) Because of the previous erosion of prefectoral authority, abolition of the prefects, while of unquestionable symbolic importance, is not the most important result of the law. The most important results are the potential for diminution of central administrative control and the establishment of local democratic responsibility.

The basic principles of the 1982 law can be characterized as follows. (138) There is a complete rejection of the concept of subordination through the law's provision that the only control of administrative acts is a review of their legality in the administrative courts. There is a principle of separation in that each of the three kinds of local government levels has its own governing body which is not subordinate to the state or to any other territorial governing body. A later law (139) specifically provides that there is to be no relationship whatsoever of gerarchical control as between the three levels of local government. Each is autonomous of the others. Finally, the law provides local elected assemblies as the sole means of controlling local decisionmaking. Other potential instruments, such as referendums or public hearing procedures, (140) were not provided for.
The Conseil Constitutionnel found the 1982 law to be constitutional except for one relatively minor point in its decision of 25 February 1982. The Court found that the law's limitation of central control to a review of legality by the administrative courts did not contradict the article 72(3) of the constitution provision that the central government was to control local decisions. Article 72(3) provides "In the departments and the territories, the delegate of the government shall be responsible for the national interests, for administrative supervision, and for seeing that the laws are respected." The law was unconstitutional only in that it made local governmental decisions executory before the representative of the central government had a chance to determine whether to institute review before the administrative courts. This part of the law was found to interfere with the article 72(3) constitutional provision for central oversight. The problem was resolved by a July 1982 law making local government acts executory only after notification to the commissaire de la republique.

Although the 1982 law established the structure of local government, it said nothing about the subject matters of local government responsibility. A 1983 law starts the process of transferring powers to local government entities. This process has been continued by a complicated set of measures giving the local government entities their own financial resources in the form of various kinds of block grants from the State. The transfer of state personnel to the local entities has also been complicated. The details of transferring state employees to the
regions and departments are to be negotiated between the affected local governments and the relevant representatives of the state. (145) Many of the former state officials, including prefects, have in effect jumped ship by arranging individually with the local government entities to perform for them the functions they formerly performed for the State. (146) The principal subject matter transfers so far have involved education and social benefits. Responsibility for these two subject areas is now shared in a complex way between the state and the three local government levels. Criteria involved in the distribution of responsibility include the size and importance of the facilities involved and whether personnel or capital decisions are involved. (147)

There are many who question the wisdom of the policy of decentralization and its implementation. One former prefect fears that local democracy will not produce management as effective as that produced by the prefectoral system. He believes that local control will politicize decisionmaking in a negative way, that local decisionmakers will consider only the short run, and that regional imbalances will be exacerbated. (148) Another factor is the creation of new administrative structures without suppression of the old ones. This multiplication of structures will lead either to inefficiency or to the need for state control sufficiently detailed to frustrate the aims of decentralization. (149) In fact despite abolition of the prefectoral system, the state still has substantial possibilities for controlling local discretion. The 1982 law instituting the
regionalization process provided that the state could limit local discretion by imposing technical norms under national laws or under decrees in application of a national law provided that such norms were generally applicable to individuals or to public or private law legal entities. (150)

French administrative law is in a state of rapid evolution because of the decentralization reform. Decentralization challenges the philosophical premise of central administrative control on which the previous system operated. Although accepting the concept of meaningful local political responsibility is a definite break with the past, there is no reason to think that the guarantee offered by legalism will be diminished under the new system. As under the system of central control, the administrative courts continue to have the final word on the legality of public decisions.

It is difficult to foresee the medium and long term results of decentralization in France. One possibility (151) is that the decentralization policy will have little effect on the conduct of government decisionmaking. The local administrations of major cities will continue to have the degree of independence they had already de facto achieved under the old system. The only substantive difference could be that the judicial review of decisionmaking by the numerous small communes will prove less flexible and accommodating than prefectoral control. Another alternative is that local autonomy could become quite real and lead to strong politicization of local decisionmaking along with extensive patronage arrangements. Unlike Italy, France has a
tradition of strong and effective central administration. This factor, in addition to the political and cultural differences in the two societies, makes it difficult to rely on the longer standing Italian experiment with decentralization for predictions about what will happen in France. Perhaps the most that can be asserted for the present is that the French experiment with decentralization offers an opportunity for achieving greater legitimacy through local democratic responsibility. Whether the relative soundness of the previous system of central administration will be retained and even whether the decentralization policy will amount to more than window dressing are questions which it is as yet too soon to attempt to answer.

D. Italy

The techniques of political responsibility, participation, legalism, and decentralization are all applied to the Italian public bureaucracy. Despite the use of these techniques, or perhaps because of their misuse, there is general dissatisfaction with Italian bureaucracy. On a superficial level, it is easy to point to estimates that employees in some ministries work only two or three hours a day, (152) and conclude that gross mismanagement is the problem. The difficulties of the Italian public bureaucracy, however, run much deeper and are the product of a complex history and byzantine contemporary politics. Although emphasis will be placed on the misuse of legitimating techniques as causes contributing to the dysfunctions of the Italian
bureaucracy, these problems should not obscure the advantages which could potentially be obtained by more appropriate use of them.

1. Politics and bureaucratic structure

The embrace of pluralistic democratic politics after World War II in reaction to the fascist debacle was a clear effort to legitimize political decisionmaking. The coalition politics which have replaced fascism, however, have if anything compromised the legitimacy of bureaucratic decisionmaking by gravely interfering with its potential soundness. Although governments change quite often, the composition of the governing coalitions is remarkably stable. The lack of alternation in political control prevents sweeping changes. At the same time, the fragility of particular governments combined with the stable party composition of successive governments has proven a fertile ground for patronage arrangements. Despite constitutional checks on patronage, the direct infiltration of party control into the public bureaucracy has been massive. This infiltration has been achieved by the identification of certain ministries as fiefdoms of particular parties. Even beyond the identification of particular ministries with a certain party, the patronage phenomenon has influenced the bureaucratic structure profoundly. In addition to the twenty ministries composing the central government, there are two "amministrazioni," four "aziende autonome," and thousands of "enti pubblici."(153) The amministrazioni are the state monopolies
(tobacco, matches) and the postal service. The aziende autonome are the railroads, the highway department, the phone company, and an organization concerned with agricultural stabilization. Enti pubblici are a mixed bag of local and national quasi governmental organizations with responsibilities for municipal services, health care, pensions, and economic development. Many enti pubblici are run of the mill business enterprises which are publically controlled. The political parties have struggled mightily to use these various organizations to increase their power. The boards of directors of the enti pubblici make ideal patronage posts for administrative officials.(154)

In a country which suffers generally from chronic unemployment, and in which one area, the South, lags far behind the rest of the country in economic development, there is a tendency to see employment in the public bureaucracy as a social welfare program. Although the Italian bureaucracy at the time of the unification of Italy was overwhelmingly dominated by Piedmontese, it has now become meridionalized.(155) Throughout the country, employees from southern Italy represent a disproportionate part of public employees,(156) and featherbedding of the work force would seem to be especially pronounced in southern Italy.(157)

Although the political parties have penetrated deep into the public bureaucracy, the fragility of the governing coalition gives the bureaucracy a measure of independence. Bureaucrats remain in power much longer than individual ministers and governments. In fact, in 1921-1923 with the rise of fascism and in 1945-1948 with
its substitution by a democratic form of government, the Italian political elites completely changed. In the public administration, however, there was substantial continuity. (158) Even today, Italian bureaucrats in positions of responsibility tend to be overwhelmingly men over fifty who have worked their way up through the ranks of the public administration. (159)

One survey of 1400 senior civil servants and members of parliament in seven western democracies (including the United States and France) found that, "The average senior Italian bureaucrat entered the civil service at the age of 22, and there he has stayed for thirty-five years. More than 90 percent of the members of this gerontocracy have spent their entire adult lives in national government and more than 80 percent have spent all this time in a single ministry. Lateral entrants into the Italian bureaucratic elite are virtually nonexistent." (160) Moreover, on average 15 percent of the bureaucrats interviewed in the seven country survey were classified as expressing authoritarian political views. In Italy the percentage was 47 percent, and of the 47 percent, 92 percent first entered the public administration during the fascist period. (161) Efforts to make higher positions available to outsiders have not worked. (162) Efforts to encourage existing bureaucrats to retire have had only limited success. A 1972 law provided sufficient financial incentives to encourage 11,000 bureaucrats representing 30% of management level positions to leave. (163) A 1974 law encouraged another 4000 to leave. (164) Many senior bureaucrats, however, did not find the incentives sufficient.
The weakness of Italian coalition governments has two immediate consequences -- the inability to organize the public administration and the inability to direct it.

With the passage of time, the organization problem becomes increasingly severe. The substantive division of responsibilities among the various ministries no longer corresponds to real social and governmental problems. (165) Because parliament makes no serious attempt to comprehensively structure the public bureaucracy, the public personnel's interest in saving their jobs takes an unhealthy priority. (166) Simultaneously, the number of enti pubblici continues to grow. It is evidently easier to add minor entities subject to party control than to rework the underlying structure in a way that would have unforeseeable effects on party positions. The public administration considered in the limited traditional sense of the ministries accordingly becomes a kind of funding transfer agency peopled only by lawyers rather than by technical experts. (167)

The inability of governments to direct the public administration has had a further negative consequence on parliamentary legislative activity. Italian legislation has become characterized by an excessive preoccupation for detail. Because governments have proven unable to direct the public administration, parliament has reacted by attempting to provide minutely precise direction to bureaucratic action. In practice the detail frequently turns out to overlook important problems of implementation or to result in insoluble complexity. The final result is paralysis of bureaucratic action due to an interminable
series of bureaucratic, judicial, and political proceedings to determine the meaning of legislative pronouncements. The substantive air pollution law analyzed in chapter V manifestly suffers from this phenomenon.

During the time of the liberal state, that is the period from the unification of Italy until the rise of fascism, bureaucratic legitimacy was ensured by the personal political responsibility to parliament of the head of each ministry. Article 95, 2 of the present constitution proclaims the continued applicability of this principle. This theory is no longer tenable for the practical reasons of the overall increase in the size of government, the increasing proportion of governmental activities outside the traditional ministerial framework, and the development of Italian coalition politics. As the Italian notion of the separation of policymaking and policy implementation developed, the contradictions of the liberal theory of bureaucratic legitimacy became apparent. That is, it was recognized that the complete political control of the minister led to subjective decisions, decisions which opportunistically, rather than neutrally, implemented the politically determined policies. Although originally inspired as an anti union measure,(168) the introduction of civil service protections for bureaucrats in 1908(169) and subsequent updatings(170) worked to isolate the bureaucracy from political pressures in the implementation of policies. However, as already noted, such protections have not been sufficient to prevent patronage arrangements from deeply permeating the bureaucracy.(171)
The post war constitution contains some elements which attempt to perpetuate the old liberal notion of a neutral bureaucracy. Article 1 of the constitution proclaims that the Italian Republic is democratic with sovereignty residing in the people. The constitutional structure provides that the people elect parliament, from which a government is formed. The ministers of the government are then responsible for controlling the administration. However, the constitution itself limits the effective exercise of this responsibility. Political appointments below the ministerial level are not possible because articles 51, 97, and 98 provide that access to public employment is to be available to all citizens on equal terms according to merit. Thus, entry into the public administration is on the basis of competitive entrance examinations. By adopting these protections against patronage, the present constitution manifests the liberal antinomy between the neutrality of bureaucracy and its political responsibility. In fact the phases of making and implementing policy are not distinct. Thus the theory of legitimating bureaucracy by making it politically accountable to the government runs afoul of the idea that bureaucracy ought to be autonomous from political considerations in order to guarantee the politically neutral implementation of policy. On a more practical level, the principle of competitive entrance examination is frequently not in fact applied. Either there is no examination, or the examination is not based on objective and uniformly applied criteria.
The traditional idea of ministerial responsibility implied the need for hierarchical responsibility, i.e., a pyramidal decision structure. The political accountability offered by such a structure has in modern times become minimal. The limited cabinet level personnel is incapable of the kind of control over the hundreds of thousands of employees in the public administration necessary to validate the legitimating theory of ministerial responsibility. (174) Sandulli, writing in 1966, thought the solution to this problem was merely to recognize the actual limited policy and managerial role of ministers by eliminating their formal responsibility for every act of the ministries. (175) Guarino in 1962 proposed creating an elite professional corps of managers and technicians to be placed between the ministers and the bureaucracy as a whole. (176) These proposals were never acted on.

2. Legalism

In conjunction with the lack of coherent political direction, and of course also as a reaction to fascism, legalism is an important legitimating technique of bureaucratic decisionmaking. On a constitutional level, article 28 of the constitution specifically adopts the principle of legality in the administration of the laws by making public employees criminally and civilly responsible for action not in accord with the law. Article 97 also requires the public administration to be organized according to the law.
The maximum expression of the supremacy of the rule of law is the post war establishment of the Constitutional Court. This court has the power to declare laws unconstitutional and to determine how a law ought to be interpreted so as to avoid a constitutional problem. In any judicial proceeding in which a constitutional question is raised, the judicial body must determine whether the question is not manifestly unfounded and whether it is irrelevant. If its answers are affirmative, it must suspend its proceedings and refer the question to the Constitutional Court. With respect to litigation of any kind involving an administrative action, the constitutional challenge would be to the statutory provision on which the administrative action was based.

Of greater practical importance in the day to day functioning of the public bureaucracy is the judicial control of bureaucratic decisions. The conversion of the Consiglio di Stato into an administrative court of second instance in 1971 by the creation of regional administrative courts of first instance testifies to the growth of this judicial control. Because of the poor functioning of the state bureaucracy, recourse has been widely made to civil, criminal, accounting, and administrative judicial actions to vindicate both public and private interests. These actions to correct the malfunctioning of the public bureaucracy are discussed with regard to air pollution in chapter V. For the moment, it is necessary only to explain the theory on which the civil and administrative courts are routinely involved in actions of the public bureaucracy.
Private parties may bring actions against the public administration before both the civil and administrative courts according to the classification of the interest at issue. Simple interests are those where the individual has no particularized interest in the outcome of a decision beyond a generalized interest in sound public decisions. Such interests are not accorded any judicial protection. At the other end of the scale are subjective rights, which are rights recognized by the legal order as belonging exclusively to their owners and protected in a direct and immediate manner. Such interests may be protected by an ordinary civil action. Remedies include injunctions staying the application of the adverse administrative decision and damages. Legitimate interests are ranked lower than subjective rights, but are actionable before the administrative courts. A legitimate interest is an individual interest strictly connected to a public interest and protected only in an action to protect the public interest. When the jurisdiction of the administrative courts is invoked to protect a legitimate interest, they have the power to annul the challenged order.

Whether a subjective right or a legitimate interest is involved depends on whether a norma di relazione or a norma di azione is at issue. A norma di relazione involves a direct relationship with an individual, whereas a norma di azione has to do with the functioning of the public administration. The subtleties of this distinction are illustrated by the example of expropriation. If there is a claim that the expropriating governmental body is not the correct one, or that there is a
procedural flaw in the expropriation, the individual whose property is being expropriated has a legitimate interest to protect before the administrative courts. The individual's particular interest is made protectable by the general interest in the correct procedural functioning of the administration. In contrast, a claim that the compensation is inadequate is a claim of subjective right. The individual's property right is an individual, personal entitlement, which therefore is protectable before the ordinary courts.\(^{(182)}\)

There is a third category of protectable interest, weakened subjective rights. Such rights exist when a subjective right conflicts with the public interest. For instance, a contract to manage public land contains subjective rights against private parties, but as against the state, it provides the private contracting party only legitimate interests because of the public interest involved. Thus claims against the state under the contract could be brought only before the administrative courts.

These jurisdictional criteria for deciding between the civil and administrative courts are complex. In France, where there are also civil and administrative courts, the criterion is the much more simple one of whether the suit is against the state. The complexity in Italy derives from the 1865 law which gave the civil courts the power to entertain cases against the public administration when subjective rights are involved. Giving the ordinary courts this jurisdiction was seen as a guarantee of liberty because of the civil courts' greater independence and accessibility than the Council of State.\(^{(183)}\) The notion of
legitimate interests as the criteria for administrative and civil jurisdiction entered Italian law through the 1889 law creating an adjudicative section in the Council of State. The ambiguities in the distinction between legitimate interest and subjective right are becoming increasingly apparent as the volume of administrative litigation grows and as public bureaucratic action increases in scope. The Court of Cassation has the responsibility for determining whether ordinary or administrative courts have jurisdiction over particular cases. Its decisions in the environmental area which highlight this ambiguity are discussed in chapter V.

For the moment, it suffices to note that there is a doctrinal current which advocates expanding the concept of interesse legittimo to include diffuse interests, i.e. those interests which do not particularly effect any one individual, such as is frequently the case with environmental protection. Romano argues that since the 1889 statutory language is vague, it should be interpreted as broadly as possible consistent with constitutional articles 24, 103, and 113 providing for administrative justice. Since these articles in effect establish the administrative judge as a guarantor of democracy through the principle of legalism, he argues that the correct conception of legitimate interest is indeed very broad. For Romano, the qualifications for having a legitimate interest ought to be no more than a generous standing criterion. Although there is statutory provision for general actions in the public interest, i.e. the so-called azioni popolari dealing with charity, municipal
election law, and actions on behalf of a municipality,\(^{(187)}\) such actions are quite exceptional.

3. Participation: collegial decisionmaking

Although the Italian courts have been reluctant to make lawsuits a widely available instrument of public participation, the post war political theory of pluralism together with the fascist ideas of corporatism have led to unfortunate reliance on another form of bureaucratic decisionmaking, namely collegial decisionmaking. Collegial bodies are widely employed in Italy to make bureaucratic decisions.\(^{(188)}\)

In practice, collegial bodies may be simple advisory bodies, or they may have substantive decisionmaking powers. They may be entrusted with the decision of policy matters or with resolution of technical matters. The individuals composing them may be bureaucrats or representatives of interest groups.

Considered in the optimistic perspective of how they might improve the functioning of the public bureaucracy, they might be considered to improve data collection capabilities.\(^{(189)}\) While this justification may have been reasonable in a simpler time, it overlooks the need for sustained and sophisticated data gathering and analysis for many modern bureaucratic decisions. With respect to the impartiality of the public bureaucracy, collegial bodies might improve it by assuring more deliberative consideration of decisions.\(^{(190)}\) Appointment of members of collegial bodies as interest group representatives, the exaggerated size of some of
these bodies, and their use for routine technical decisions together work to minimize any deliberative benefits of collegial decisionmaking. Other justifications advanced for collegial bodies are that they permit simplification of complex procedures and ensure coherent decisions by concentrating disarticulated groups and authorities. They are also asserted to provided for more effective representation of group interests.

As will be seen in chapter V in the case of air pollution, it has been a mistake to entrust collegial groups of bureaucratic officials with the responsibility for technical decisions. Responsibility for making decisions is excessively diffused, and the existence of a collegial body is used as an excuse for avoiding the creation of a bureaucratic body with the resources necessary to make the required technical decision. In theory the practice of placing interest group representatives on collegial bodies might be considered a salutary direct application of the American interest representation model. However, making interest groups part of the deciding body rather than parties to which the deciding body must react (under threat of judicial invalidation of the decision if it does not) leads to paralysis of decisionmaking, interest group capture, or decisions made without adequate bureaucratic preparation.

These problems of collegial decisionmaking are not unique to Italy. To a much lesser extent, air pollution control policies at the state level in the United State have suffered similar problems. One case study of environmental programs in nine states(191) concluded that the use of administrative structures to
diffuse political accountability is one of the main problems in environmental policy. The study not only argues for greater legislative oversight of administrative activities, but also criticizes existing structures. Single leaders with responsibility are preferred over appointive boards because single leaders are more accountable. (192) As will be discussed in chapter V, forceful federal intervention helped overcome these problems in the United States. As will also be discussed in chapter V, strong central intervention is lacking in Italy.

4. Decentralization

The Italian constitution of 1948 provides that Italy is to be a regional state. The constitutional declarations of 1948 remained largely rhetorical until the early 1970s when a substantial effort was made to make the regions something more than paper entities. (193) Until the creation of the regions, the decisions of local entities were subject to approval by provincial prefects representing the ministry of the interior. The abolition of this central control is recognized as a fundamental break with the past. (194) The content of all constitutional declarations becomes more fully defined over time; however, the Italian constitution's vision of the regionalization process relies especially heavily on future legislative activity for its definition.

Italy is divided into fifteen ordinary statute regions and five special statute regions. The five special statute regions
have special charters approved by constitutional laws. These charters give them a slightly greater degree of autonomy than that provided for ordinary statute regions. The ordinary statute regions are not completely autonomous as a matter of practice nor as a matter of constitutional theory. Like the special statute regions, they have popularly elected regional councils which select from their number a regional executive committee and a president.

Article 117 of the constitution lists subject areas in which the regional councils are to have legislative powers within the context of national framework laws. Article 118 of the constitution grants the regions administrative competence for these subject areas and permits the state to delegate to the regions such other administrative functions as it deems appropriate. The constitution does not define clearly separate spheres of regional and state activity. Rather, it defines subject areas in which the otherwise exclusive central monopoly on lawmaking does not apply. This constitutional grant of regional legislative power is not self executing because it presupposes the enactment of national framework legislation to set the fundamental principles of regional action. Moreover, the constitution provides a complicated mechanism for central control of regional legislative acts. The Constitutional Court has jurisdiction to determine whether regional legislative action exceeds the bounds of article 117. If the central government is dissatisfied with the merit of a regional law, it may request the regional council to reconsider it. Only in case of acts contrary to the
constitution or grave violations of law may the President of the
Republic dissolve the regional council and require new elections
to be held.(196)

This constitutional framework for the regions undoubtedly
reflects a compromise between those who were nostalgic for the
napoleonic model of central control and those who supported
creating a kind of federation. Because the constitutional
framework for the regions relies so heavily on subsequent
discretionary state action to implement it, its declarations must
be considered more programmatic than self executing. From a
structural perspective, the role of constitutional jurisprudence
will be to ensure that regional legislation remains within
constitutional bounds. To require national legislation to provide
for transfer of state bureaucracy and legislative power as
constitutionally anticipated seems to be beyond the Constitutional
Court's power.

The ambiguity of the Italian experience with regionalism can
be appreciated by considering the long delay in starting to
implement the constitutional declarations on regionalism, the
continuing lack of financial autonomy of the regions, and the fact
that none of the national government ministries has ever been
restructured to take into account the fact of regionalism.
Chapter V's discussion of regionalism and air pollution will make
these contradictions clearer.

Nonetheless, the Italian regions represent the creation of a
new democratic institution, an event rare in the life of western
democracies. In addition to the organizational principle of
central and local relations to be discussed in chapter V, social and political realities have profoundly influenced the development of the Italian regions. There is a general perception that regions in the north of Italy have been more successful than regions in the south. To investigate this perception, one study attempted to rate the success of regional governments. It examined such variables as the stability of regional governments, promptness in adopting budgets, the percentage of authorized funds actually spent, the number of proposed laws actually enacted, the innovativeness of regional legislation, and regional planning efforts. The results confirmed the common perception that northern and communist governed regions were more successful; however, it also identified factors other than geography and party preference as the keys to the success of regional government. It found that successful regions were those in which the traditional political culture was participatory and sociable rather than passive and parochial. It also found that regions whose social stability was not disrupted by the massive internal migration that characterized post war Italy were more successful.

The importance of these kinds of factors in determining the success of decentralization illustrate the limited scope of this thesis. The legitimacy of bureaucratic decisionmaking is undoubtedly affected by the social and political environment in which the bureaucracy exists. However, like the authors of this study who argued for the importance of a select group of factors, chapter V will attempt to show how attention to relations between central and local authorities can contribute to successful
employment of the legitimating technique of decentralization in the field of air pollution control.

5. Conclusion

In summary, the efforts to legitimize Italian bureaucratic decisionmaking are multifold. Political responsibility is theoretically ensured by parliamentary control of the formulation of laws and the responsibility of ministers to parliament. The development of the rule of law has made judicial protections through recourse to the administrative and civil courts an important protection, even if some activists would argue that judicial review ought to be even more accessible.(198) Through the collegial form of administrative decisionmaking, political parties and interest groups participate directly in bureaucratic decisionmaking. Finally, the regionalization process is intended to increase the degree of democratic control.

E. EEC

The Community and its institutions were established by the Treaty of Rome, also known as the EEC treaty.(199) The Commission, the Council of Ministers, and the Court of Justice are the most important Community institutions in an operational sense.(200) The Council is the Community's legislative body, and consists of representatives of member state governments. Despite treaty provisions providing for weighted majority voting, it has
been informally agreed since 1966 that it will ordinarily take action only by unanimous vote.\(^{(201)}\) The fourteen member Commission is the Community's executive body. Its members are appointed for four year terms by member states. The Commission has the sole right to propose Community legislation to the Council. It also oversees and directs the over 11,000 Community employees.\(^{(202)}\) The Court of Justice, consisting of ten judges appointed by common accord of the member states, is the institutional referee between Community institutions and member states.\(^{(203)}\) It is also the sole authentic interpreter of Community law.

1. Member state agreement permitted the development of Community environmental policy

The functioning of these three institutions in the development of the Communities' environmental policy illustrates how legalism and member state political control have remained the legitimating grounds for Community action to the exclusion of significant public participation and Community level democratic control.

The critical step in initiation of the Community's environmental policy was the declaration in favor of such a policy by the heads of state and government of the member states at the summit of Paris in 1972.\(^{(204)}\) The policy was instituted as the result of a political agreement of the member states rather than through some kind of autonomous decision by Community authorities.
This political accord was all the more necessary for institution of a Community environmental policy because the EEC Treaty does not mention environmental protection. The Commission and the Court of Justice contribute in important ways to the Community's environmental policy, but the policy is fundamentally based on the political accord of the member states. Following the political consensus of 1972, the Commission developed an environmental action program to guide Community action. It was adopted by the Council of Ministers in 1973. It has since been followed by two other plans.

The debate over whether the Treaty of Rome authorizes an environmental policy is now dead because of the political consensus that there should be an environmental policy and because of the fact of extensive Community environmental legislation. Nonetheless, it illustrates how the Treaty of Rome can be interpreted to accommodate the political will of the member states.

The legal foundation of the Community's environmental policy comes from articles 100 and 235 of the EEC treaty.

Article 100 permits Community policy in fields involving the harmonization of laws, regulations, and administrative action affecting the establishment and functioning of the common market. For example, the early Community legislation regulating motor vehicle emissions was based exclusively on article 100. The Court of Justice in a pair of cases condemning Italy for tardy implementation of directives on detergents and on sulfur content of fuel oil has held that article 100 may be used as a basis for Community environmental
legislation. It observed that "Provisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and if there is no harmonization of national provisions on the matter, competition may be appreciably distorted."(211) Because of the need to show effects on competition, article 100 alone might have been insufficient to motivate all Community environmental protection measures because some of them seem to be much more directed to treating substantive environmental problems rather than to the goal of achieving uniform laws. For this reason article 235 is a useful supplement to article 100.

Although article 189 of the EEC treaty limits Community institutions to the exercise of enumerated powers only, article 235 provides that by unanimous Council action, additional powers may be exercised to obtain a Community objective. Article 2 of the Treaty provides that it is a Community purpose "to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion . . . ." When the Council approved the first environmental action program in 1973 it determined that this language included environmental protection.(212) This statement constitutes a declaration of the Council's willingness to base environmental protection measures on article 235. Although elimination of barriers to trade and of distortion of competition was the original rationale for Community environmental measures, it is now accepted that protection of health and the environment and sound management of natural resources are valid motivations for Community policy.(213)
The Court of Justice has aided this expansion by adopting at a very early date a doctrine of international law, the implied powers doctrine. (214) Under this doctrine measures not anticipated by the Treaty may be employed if necessary to effectively exercise a Community power. An example of the exercise of this doctrine is the Community's power to make international agreements necessary to its effective internal functioning. (215) The Court's affirmation of the implied powers doctrine as part of Community law makes it probable that should a Community environmental measure based solely on article 235 be challenged before the Court, the Court would approve the Council's expansive interpretation of articles 235 and 2 as permitting Community environmental legislation.

2. Community participatory institutions work in a vacuum

The two Community institutions which to some degree provide for public participation in Community decisionmaking are notably absent in the establishment of the Community's environmental policy. They are the Economic and Social Committee and the European Parliament.

The Economic and Social Committee is an advisory body composed of management, labor, consumer, professional, and agricultural representatives appointed by the Council. (216) Although its reaction to Community legislation is routinely solicited, it has no effect on the content of such legislation. The reason for the unimportance of this procedural structure for
participation is the lack of any tool to require that it be taken seriously. Unlike the American interest representation model in which the federal judiciary is ready to invalidate bureaucratic decisions in which public concerns were not considered, and unlike democratic systems in which injured interest groups may seek retribution by working for the election of other officials, there is nothing in the Community system which requires that the Economic and Social Committee's contributions be used.

The European Parliament potentially provides not only an opportunity for participation, but also for democratic control. Although its opinion is routinely requested on Community legislation pursuant to article 43(2) of the EEC treaty, there is no way of ensuring that it carries weight. The only exception to this lack of power is in the Community budgetary process where it has the power to block approval of the Community's budget. A further theoretical exception is the Parliament's power to request the resignation of the Commission, which would then be reappointed by the member states. This power is so drastic that its exercise is improbable. Since 1979 the European Parliament has been an elected body. Although giving it significant responsibility would increase the democratic legitimacy of Community decisionmaking, so far the member states have been unwilling to agree on this kind of reform.

In the absence of such reform, the role of the Council of Ministers as the Community body which in fact formulates and adopts Community legislation serves as the principal legitimating factor of such legislation. The Council of Ministers is composed
of representatives of national executive branches of government. In all of the member states, the executive branches are in one way or another democratically accountable. That politically accountable national representatives determine Community policy compensates for the impotence of the elected European Parliament, the irrelevance of the Economic and Social Committee, and for the bureaucratic constitution of the Commission, the Community's executive organ. (220)

3. Directives are a decentralization policy

The forms which Community legal instruments may take reflect the importance of the member states' political control as a fact limiting the autonomy of the Community. However, they also provide a means for legitimating Community policy through decentralized control of its implementation. Because of the lack of direct democratic legitimacy of Community decisionmaking, the heavy reliance on national level implementation of Community policy is a legitimating factor.

The principal Community legal acts provided for in article 189 of the EEC treaty are directives and regulations. Both are to be proposed by the Commission and approved by the Council. Regulations are directly applicable to member states and individuals. Directives ordinarily require national administrative and/or legislative implementation. The goals contained in them are binding; however, member states are free to
select the manner of achieving them. They may, however, have
direct effects in circumstances about to be discussed.(221)

The total number of directives of all kinds in force has
grown from less than 28 prior to 1970 to more than 700 in
1980.(222) Seventy pieces of Community environmental legislation,
principally in the form of directives, were enacted between 1973
and 1982.(223) Implementation in national law and practice of
directives is a major problem.(224) There has been a natural
tendency for the Commission to focus on formal compliance with a
directive, i.e. whether a member state has enacted laws receiving
the directive into national law. It is generally difficult to
find empirical data of any kind on member states' substantive
compliance with directives.(225) The most readily available
information regards the proceedings against member states
instituted by the Commission before the Court of Justice for
infractions of directives.(226) However, these proceedings regard
formal compliance, not actual implementation. Because of the
diversity in member state legal and administrative systems,
comparative studies of compliance are complex. The Commission is
reluctant to release what information it has because of the
political sensitivity of the issue of noncompliance. Compliance
in fact varies from member state to member state. For example,
Italy has been condemned forty six times by the Court of Justice
for noncompliance with directives; whereas, the next most often
condemned countries, France and Belgium, were each only condemned
seven times.(227) Factors affecting national compliance with
directives include the institutional mechanisms for implementing
directives in national law, the stability of national governments, and the efficiency of national public administrations. (228)

4. The European Court of Justice promotes legalism

The role of the Court of Justice in establishing the characteristics of Community law and the effects of Community legislation in particular has served to make legalism an important legitimating device for Community decisionmaking. As part of its determined effort to consolidate Community powers, the Court of Justice has worked to make Community law increasingly available to individuals and private legal actions. The foundation of this effort was the determination that Community law has supremacy over national law. The Court of Justice made this assertion with respect to ordinary national law in 1964. (229) In the early 1970s it asserted that EEC law has supremacy even over national constitutional law. (230) The constitutional courts of Germany and Italy have had reservations about accepting Community supremacy with respect to constitutional law, but with respect to ordinary law, the doctrine is not seriously questioned. (231)

Two additional legal institutions make the doctrine of supremacy relevant to the application of Community law.

a. Its business comes from the reference procedure

First, there is the Article 177 EEC treaty procedure of reference by a national court for a preliminary ruling on a
question of Community law. This reference is obligatory for courts against which no judicial remedy is available under national law, i.e. courts of last resort. Through this procedure, barring uncooperativeness by national courts, the Court of Justice is the ultimate arbiter concerning doubts about the supremacy of Community law.

b. Direct effect doctrine

The completing legal doctrine which makes Community law available to individuals is the doctrine of direct effect. Direct effect in practice means immediate applicability without the need to await member state implementing provisions. The doctrine applies to three kinds of provisions of Community law. Regulations are made directly applicable by article 189 of the EEC treaty. Certain treaty provisions are also by their terms directly applicable.232 The most remarkable application of the doctrine of direct effect is to directives. It is also the most important for environmental policy because of the quantity of environmental directives.

The application of the direct effect doctrine to directives is remarkable because pursuant to article 189(3) of the EEC treaty, member states are obliged to take steps to achieve the result sought by a directive, but the choice of methods to be employed is left to the member state. Notwithstanding this indication in the treaty that directives were intended chiefly to stimulate member state enactment of national law, the Court of
Justice first held in 1970 that a provision of a directive may have direct effect. (233) In 1977 the Court of Justice held that national courts may invalidate national legislation and regulation pursuant to a directive and that Community rights may be invoked before any national judge. (234) It particularly said that any judge may disapply national law in conflict with a directly effective provision without having to wait for any legislative or other constitutional procedure. (235) In 1979 the Court reaffirmed that when a directive allowed for an implementation period on the part of member states and a member state failed to implement the directive within the allowed time, then existing national legislation in conflict with the directive could no longer be applied by national courts. Only the provisions of the directive could be applied. (236) The Court of Justice's jurisprudence on direct effect does not absolve member states of the obligation to implement directives by national law. (237) In the early cases direct effect was invoked by an individual acting against a member state. Now, an individual may invoke a directly applicable provision of a directive against another individual. (238)

The direct effect doctrine does not remove the member states' discretion about how to implement directives provided that they do so in a timely fashion and in compliance with the directives' provisions. Nonetheless, the doctrine is an important supplement to direct Community powers with respect to member states because of the specificity of the rules contained in many environmental directives and because of the extensive member state delays in receiving them fully into national law.
5. Conclusion

The Community's bureaucratic decisionmaking suffers from special problems of legitimacy because it is neither a federal state nor a traditional international organization. As in a federal state, the ten, shortly to become twelve, member states have transferred part of their sovereignty to the Community; however, the member states retain extensive control over the Community's activity. The characteristics of the Community as a unique supranational organization are its extensive tasks, its autonomous legal system, and the direct applicability of that legal system to citizens of member states. Because the Community is a young organization and because of its novelty as a supranational organization, its development has so far emphasized the expansion of its powers rather than the legitimacy of its decisionmaking. Member states have been reluctant to relinquish their direct political control over Community decisionmaking. Accordingly, democratic political responsibility at the Community level and public participation in Community decisions are insignificant.

Legalism, in contrast, is highly developed, largely as a result of the European Court of Justice's interest in consolidating and expanding Community powers. The Court's jurisprudence establishing the supremacy of Community law has the effect of increasing the accessibility of Community law to
individuals, thereby making legalism an important legitimating technique.

With respect to decentralization, the control of Community decisionmaking by the executive branches of the democratically governed member states is the chief source of legitimacy. This is not by any means true decentralization because local autonomy is not involved; rather, the component peripheral governmental units, i.e. the member states, directly control central decisionmaking. To the extent that decentralization exists within the Community system it can be found in the legislative instrument of the directive. The kind of discretion left to individual member states in the implementation of Community legislation contributes to compensating for the remoteness of democratic control at the Community level.
Chapter V - Decentralization works when the center survives

To the general problem of legitimating bureaucratic decisionmaking, this chapter adds a detailed consideration of decentralization and bureaucratic decisionmaking in the context of air pollution control. The ramifications of this combination are developed through analysis of the United States, French, Italian, and EEC administrative and legal structures for implementing air pollution policy. Although these systems are formally quite diverse, they share a common interest in favoring locally controlled bureaucratic decisionmaking. As expressed in American political theory, the interest in local control is motivated by the desire to establish political boundaries

(1) large enough to encompass a heterogeneous mixture of people and problems so as to avoid tyranny of the majority (Madison's defense of the American Republic against Montesquieu's criticism of large republics is based on this principle) and (2) small enough to ensure that most of the problems (are) of concern to most people. (1)

This interest is most fully realized in the United States. As part of a traditionally federal system, American state and local governments are well established as democratic political units with substantial bureaucracies. Italy as a constitutionally proclaimed regional state has been attempting for the last twenty
years to establish its regions as viable democratic decisionmaking centers. France of course is the paradigm of a unitary state; however, the socialist efforts at decentralization since 1982 represent an effort to make the departments and regions autonomous democratic centers of bureaucratic control. At the Community level, the tensions between member state desires to retain national sovereignty and the need for stronger Community institutions are at the center of the Community's development. Finding ways to accommodate member state desires for autonomy without weakening Community institutions to the point of paralysis is the key to future evolution of the Community.

The problem of air pollution has some unique characteristics which suggest that decentralization should respect a particular organizational principle to avoid unacceptably compromising the soundness of bureaucratic decisionmaking. The principle is as follows.

First, localities (regions, states, member states) must have primary responsibility for control of air pollution arising from sources within their territory. The rational for this proposition is that local democratic control is a source of legitimacy for bureaucratic decisions. The proposition is most true for stationary sources, but even for motor vehicles it will be seen to have some relevance.

Second, local discretion must be limited by centrally determined minimum standards, and the central bureaucracy must be capable of impelling action. Otherwise, local inertia will ordinarily prevail, and nothing will be accomplished.
Broad citizen access to judicial authority for the purpose of mandating bureaucratic compliance with statutory provisions should be available to insure that the central bureaucracy fulfills its responsibilities. Opportunities for recourse to the courts in American, French, and Community law have been discussed in chapter IV. This chapter will discuss more fully judicial actions in Italy because of their potential importance to remedying central inertia in Italy.

Finally, should the locality choose to require control beyond the centrally established minimums, it ought to be permitted to do so.

The American system of air pollution control is taken as a model of the expression of this principle. In terms of relations between central and local authorities, it will be argued that the American system of air pollution control contributes to sound and legitimate decisionmaking. The French system of air pollution control has not yet been significantly affected by the decentralization policy. Although the French system of air pollution control is not decentralized in the sense of allowing for local democratic control, it is deconcentrated. That is, local bureaucrats of the central bureaucratic organization have some decisionmaking power independent of the central organization. In many ways, this results in a functional similarity to the American system of air pollution control with respect to soundness. However, the lack of local democratic control poses legitimacy problems, which successful implementation of the decentralization policy may ameliorate. The actual state of the
division of responsibilities between central and local authorities in the case of Italian air pollution control policy allows for neither sound nor legitimate decisionmaking. The dysfunctions of the Italian system provide evidence in favor of the necessity of respecting the principle. It will not be argued that Italy should attempt to copy the French or American systems. Instead, the opportunities for achieving respect of the principle in the context of Italian political and institutional realities will be evaluated. Finally, the relationships between member states and Community authorities will be examined in light of the principle. It will be argued that the Community needs to undertake certain kinds of initiatives to ensure the success of its air pollution control policies.

A. The principle of central impulsion and limited local discretion

Local and central authorities perceive costs and benefits of alternative decisions differently. Local authorities may suffer from lack of basic technical knowledge, and they may be intimidated from undertaking strong air pollution control efforts by fears of influencing economic activity to locate in other areas. They may likewise feel that locally produced emissions which have impacts elsewhere are not in fact a local concern. Central authorities are not affected, or at least are affected to a much lesser degree, by the fear of discouraging local economic activity and of the externality effect of local origin, but
nonlocal impact. They are also more able to muster the technical knowledge to understand the air pollution problem.

The focus on local and central behavioral differences is not an abstract consideration of the relative merits of centralization and decentralization. Such abstract consideration is however related to the present behavioral analysis. Professor Stewart has listed some arguments for and against centralization. In favor of decentralization he argues that maximum social utility is achieved if regional preferences are reflected, if there are possibilities for experimentation on a local scale, and if diseconomies of scale are avoided through diversity. Nonutilitarian arguments he advances are that decentralization furthers political participation and cultural diversity. Arguments for centralization include the competition between localities to have less stringent standards, economies of scale in data collection, data analysis, standard setting and identification of control technologies, disparities in effective representation (that is that environmental groups may do better at the national level), spillover problems, and the fact that if environmental quality is seen as a moral value for which society should be prepared to sacrifice, central authorities may be less subject to accepting material arguments against it.

Many of these arguments are used in the analysis which follows. But rather than relying on them to support a general consideration of whether central or local control is better, they are used to explain why central and local authorities behave in different ways, and in consequence how a system should be
structured to provide for most effective policy implementation. Local authorities have the advantage of responding to local realities more readily than central authorities; however, as part of their greater responsiveness to local political reality, they are also generally more inclined than central authorities to not respond to chronic air pollution problems.

The local political class is likely to close its eyes to air pollution for two reasons. First, alleviation of air pollution involves diffuse benefits, but highly concentrated costs. Moreover, because the benefits of air pollution control are not divisible, its control fails to provide the local political machine with political currency. Second, the implicit threat that local industry will either relocate entirely or curtail local expansion further dampens local incentive for control.

A study of Gary and East Chicago, neighboring industrial cities bordering Lake Michigan, documents the disinclination of local politicians to act in such circumstances. Both cities had political machines which showed no interest in making air pollution an issue. In both cities outsiders to the political machine were responsible for adoption of air pollution control ordinances. Moreover, Gary, where United States Steel is by far the dominant industry, did not enact a smoke ordinance until many years after East Chicago, which has a variety of industries. United States Steel was passive in its opposition to air pollution control in Gary; whereas industry in East Chicago, acting through the Chamber of Commerce, actively opposed air pollution control. The study concludes that the mere passive presence of United
States Steel in Gary sufficed to prevent emergence of air pollution as a political issue. The leverage of United States Steel was the fear of city residents that making life difficult for United States Steel would encourage it to direct new investment elsewhere. Based on an additional statistical survey of leaders from forty-four midsize cities, the study concluded, "Industrial behavior may deserve some place in the attempt to account for neglect of the dirty air issue, but it is industrial inaction and not industrial action that proves to be the critical form of behavior." (4)

The behavioral differences in local and central authority action derive from the externality character of air pollution, especially air pollutants which may have impacts substantially beyond the localities in which they are emitted. Examples of such pollution problems are smog and acid rain. (5) The traditional use of the term externality with regard to air pollution is to refer to the fact that polluters do not bear the costs of pollution and thus emit more than economically efficient. The term is used here in a related, but different sense. Although air pollution can be an extremely local problem of the sort traditionally handled by nuisance law, as for example when neighbors complain of smoke from an incinerator, more often it is a problem of at least regional, national, or even international significance. Emissions from any one locality make a relatively small contribution to the total problem, and with the changing winds may not make a significant contribution to the pollution problem of the locality in which they arise. In addition, locally severe pollution damages may not
be perceived because local officials and citizenry lack knowledge of the existence and effects of air pollutants. Thus it will frequently be the case that there is no particular local incentive to control pollution.

Indeed, there are substantial disincentives to local action. Localities will perceive principally the costs of pollution control and in fact may receive only a small fraction of the total benefits of reduced emissions. Profit maximizing industry will seek to locate in areas having minimum pollution control costs. Local action could be seen as directing jobs to other areas. Macroeconomic studies have concluded that aggregate effects of environmental policies on employment are marginal. However, this does not negate the possibility of particular plant closings nor of a relocation effect on industrial investment. These considerations imply that local action will be more restrained than central action. Further, some pollution control activities require resources beyond the capability of local bureaucracy. For example, understanding the engineering and economic aspects of many industries in order to determine what kinds of control it is feasible to require demands technical resources likely to be available only on a central level.

This is true whether ambient or technology based controls constitute the conceptual foundation for pollution control. For example, considerable technical resources were required to set the United States ambient standards. Considerable resources are also required to set United States technology based standards such as New Source Performance Standards and French technology based...
standards as embodied in arrêts types. It is not possible to assert a priori that the United States approach of ambient standards requires less central technical direction than the French reliance exclusively on a technology approach because the United States approach is necessarily extensively supplemented with technology based standards.

In any event, these considerations are likely to lead to inertia in local democratic decisionmaking and in the local bureaucracy. The principle of assignment of authority illustrated by the substantive discussion to follow is that the central level is best suited to fix the goals of air pollution control and to impel local action. However, there must be a local bureaucratic component to air pollution control because of the numerous case by case decisions whose content must necessarily be influenced by local circumstances as well as the more global effects of air pollution. Moreover, local decisionmaking is important not only for administrative reasons. Local democratic determination also lessens, although it does not eliminate the severity of the moral problem (which is discussed in chapter III) of to some extent waiving the individual's a priori right to health as part of a collective deliberation concerning the priority to be accorded to air pollution control.

The reasons that both bureaucratic and democratic decisionmaking at the central level will effectively address air pollution correspond loosely to those for which local action is unlikely. Central decisionmaking is not subject to the externality problem in the same way as local decisionmaking. At
the central level the problem of pollution is seen as a whole, not as something to be exported from one locality to another by the prevailing wind. Strict standards can be set without fear of another region setting less severe standards in order to attract industry seeking to avoid air pollution controls. Of course uniform standards in one country could very well direct industry into another country, especially within the EEC. Moreover, to avoid all relocational effect in the case where ambient standards are used, provision will have to be made for the problem of blockage of further industrial development in areas where air is dirtier than allowed and for the consequent stimulus of development in areas where air is cleaner than required. But, leaving aside the issue of whether this latter kind of relocational effect is desirable, the initial problem of regional competition for weak standards is effectively resolved by a centrally imposed minimum standard. Finally, central bureaucracy will have the technical resources to be able to develop feasible minimum standards for particular categories of sources.

Thus, in decentralization of air pollution control central authorities must remain a partner with local authorities. To overcome the problem of competition for laxer standards, central decisionmaking must set uniform national standards. To solve the problem of local inaction, central bureaucracy must have the power to impel action by local authorities.

However, the centrally imposed standards must be minimum standards. There are cases in which local authorities have taken initiatives well beyond the central requirements. In these
exceptional cases, a particularly severe local pollution problem was perceived. Examples include the action by Torino to deal with pollution from heating(7) and by California to deal with vehicular pollution.(8) These unusual cases give rise to a competition between localities and between local and central authorities to have stricter standards. Also, although central authorities are usually able to resist pressure from sources of pollution for laxer standards, in some exceptional cases, local authorities may be able to insist more effectively on stricter standards. An example would be the case of a nationalized electric utility, in which case a locality may well be capable of imposing stricter standards than central authorities. However, the general rule of the need for establishment of central minimums is illustrated by the otherwise exceptional case of Torino. Although the comune spontaneously took action in 1976 to deal with pollution arising from domestic heating, it was evidently agreed in 1966 in a meeting between the mayor and the head of Fiat, the leading local industry, that the comune would not in any way interfere with Fiat with respect to air pollution.(9) Although Fiat may have done an acceptable job of self regulation, this agreement is a clear example of the susceptibility of local governmental levels to local industrial pressures.

Finally, central decisionmaking may also suffer from inertia. If there is a strong political will to have effective implementation there of course will be no such problem. In the absence of such political will, the legalistic reliance on the judicial power invoked by private rights of action to require
compliance with statutory and administrative provisions, which was discussed in chapter IV, can be an important instrument for providing the necessary momentum.

B. United States

1. Federal intervention conditioned substantial state action

a. State-federal relations: a brief history of American air pollution control

American city governments have for over a hundred years attempted to reduce air pollution. For example, the city of Chicago adopted a smoke ordinance in 1881. However, municipal efforts were inadequate because municipalities could not bring sufficient bureaucratic resources to bear on the problem. The states were slow to follow because air pollution was seen as a strictly local problem. For example, Illinois did not create a state air pollution control agency until 1963. Between 1955, the year of enactment of the first federal air pollution statute, and 1970, the states were for practical purposes left completely free to do as they chose in air pollution matters with little or no federal control.

The first federal legislation on air pollution provided for federal research grants and information dissemination. The Clean Air Act of 1963 provided federal grants for state enforcement, permitted interstate compacts (although none were
ever established), and created an extremely cumbersome enforcement procedure known as an abatement conference. To deal with particular air pollution problems, state, local, and federal pollution control officials were to confer with pollution sources to reach a settlement. Incentive for agreement was the rather remote possibility of a federal law suit. Only eleven such conferences were ever held. National standards for cars were introduced by the Motor Vehicle Air Pollution Control Act of 1965. Finally, the Air Quality Act of 1967 provided for establishment of federal air quality criteria which were to be adopted by the states. Federal enforcement suit was allowed after air quality standards had been violated for 180 days and if a Governor requested the suit or if there was an interstate effect. Because the procedures established by these laws were so awkward and because they created no substantial bureaucracy, neither state or federal authorities took much action under them. In the late 1960s and 1970s federal and state governments for the first time seriously addressed the problem of air pollution. They were ultimately more successful because they created bureaucracies powerful enough to manage air pollution.

A few statistics illustrate the historical allocation of resources devoted to air pollution control. In 1968-1969, census data indicated that five states (California, New York, New Jersey, Massachusetts, and Pennsylvania) were responsible for 60% of the $17 million spent on air pollution control administration by the states. Six cities (Chicago, New York, Baltimore, Philadelphia, Washington, and St. Louis) accounted for 66% of the
$5.6 million spent by municipal governments, and Los Angeles County accounted for 44% of the nearly $10 million spent by county government. (20) These sums represented a substantial increase over 1961 when all state and local programs in air pollution control administration amounted to just over $10 million. (21) At the national level, appropriations for air pollution control increased from virtually nothing in 1955 to $11 million in 1963 to $109 million in 1970. (22) These statistics show that early efforts at control were primarily confined to a limited number of urban areas. They are consistent with the hypothesis that the major increase in federal bureaucratic resources at the beginning of the 1970s was necessary for the increased responsiveness to the air pollution problem.

b. Wisconsin: a case study

The state of Wisconsin provides a case study of how a modern bureaucratic decisionmaking system evolved within the context of democratic control as air pollution problems became more widespread and complex. (23) The increasingly apparent inadequacy of local control efforts was not rectified until the federal government intervened to require the establishment of significant state level bureaucracy. Federal intervention was provoked by increasing public awareness of air pollution, which in turn was partly due to prior local efforts to resolve the problem.

Milwaukee, Wisconsin's major city, has been the state's leader in air pollution matters. As early as 1846 a municipal
ordinance permitted city officials to remove nuisances to the inhabitants' health and convenience. (24) In 1884 an ordinance declared emission of sparks from any chimney attached to a manufacturing establishment to be a public nuisance and required use of spark arresters. (25) An 1898 ordinance declared emission of "dense smoke" to be a nuisance, although private residences were exempted. (26) Offenses were subject to fines up to $50 or to a sixty day jail term. In 1899, an exceptionally productive year for enforcement activities, the city Commissioner of Health made 575 smoke inspections and issued 221 abatement orders. No court enforcement proceedings were undertaken. (27) Due to a decline in enforcement activity by the Commissioner of Health, a 1904 ordinance created the office of smoke inspector to administer the city's air pollution control efforts. (28) The office, held until 1926 by the same man with two assistants, did not prevent Milwaukee's air pollution problem from worsening. (29) From 1926 to 1946 other city agencies primarily regulating building safety were responsible for air pollution control. (30)

Until the late forties, air pollution was perceived as a problem of visible particulate emissions from smokestacks. The perception of air pollution as a localized problem is emphasized by a 1909 state legislature resolution requesting the city council of the state capital to abate "the soft-coal nuisance" which was blackening the new, white marble capitol. (31) In the beginning this emphasis on local, esthetic effects may have been realistic; however, as urbanization and industrialization increased, effective regulatory action required a more sophisticated
understanding of air pollution. Clear direction to the
administrative agencies responsible was lacking, and vigorous
enforcement action was effectively blocked by owners of the
polluting industries. The initial democratic decisions of 1898
and 1904 failed to create a bureaucratic apparatus strong enough
to effectively treat the city's air pollution problem on its own
or to mobilize public awareness to create a stronger apparatus.

The nuisance actions brought in state courts, although
relatively frequent, did little to compensate for the lack of
democratic interest in air pollution and the inadequacy of the
bureaucracy. From 1872 to 1900 the state supreme court favored
industrial polluters. "Complaining pollution receptors who merely
wished to take a consumer's enjoyment out of their land generally
saw their claims defeated in court."(32) From 1900 to 1923 the
courts began to grant some judicial relief to land owners.(33)
Finally, after World War II the courts consistently favored the
interests of plaintiff pollution receptors over pollution causing
market oriented activities.(34) Although the courts eventually
began to recognize plaintiffs' claims, such individual litigation
was not and could not be an important part of air pollution
control. The suits involved too few of the actual polluters.
Proof by private parties was difficult, and bringing suit
expensive. Discrete interventions by judges without technical
expertise did not effectively address the overall air pollution
problem.

From 1947 to 1973, state law, recognizing that increasing
industrialization and urbanization required areawide control, gave
the County of Milwaukee primary responsibility for air pollution control in the metropolitan area. (35) The County instituted a permitting program and set limits on the maximum volatile content of combustibles. Although the County's effort was constructive, it did not go much beyond regulating particulate emissions. The County did not have sufficient bureaucratic resources to explore more deeply the nature and extent of its pollution problem.

At the state level the Board of Health had had nominal responsibility for air pollution control from 1937, but nothing was ever done. (36) Its responsibility was made explicit when the Governor designated it the state air pollution control agency in response to the 1953 federal clean air legislation. According to a thirty year veteran of the board, officials there did not consider air pollution a problem. They thought air pollution was solely a smoke problem best suited for local control. (37) Further, although the Board had the power to abate nuisances, it had no knowledge of control methods. (38)

Federal legislation in 1967 provided for federal preemption of air pollution control in the absence of state action. (39) In response Wisconsin passed its own Clean Air Act (40) administered by the new Department of Natural Resources. (41) The section was staffed by only two people until 1970. (42) In 1970 the federal Environmental Protection Agency was created, (43) and the 1970 Clean Air Act Amendments required EPA approval of state air pollution control plans. (44) The state then prepared a comprehensive plan consistent with federal guidelines, which EPA subsequently approved. (45) By 1974 federal money funded two
thirds of Wisconsin's air pollution control program, which permitted use of computers, meteorologists, and sophisticated monitoring equipment for the first time.\(^{(46)}\)

The federal legislation of the 1960s and 1970s established a significant central government bureaucratic apparatus. It also required Wisconsin to establish a bureaucracy adequate to begin to cope with the problem. Several reasons exist for the failure of Wisconsin to have spontaneously created a bureaucratic framework suited for air pollution control. Lack of understanding of air pollution was certainly one factor. The balance of diffuse benefits of air pollution control as against very discrete incidence of control costs diminished local political initiative to raise the issue of air pollution. Also, as a single state, Wisconsin had substantial disincentive to act in isolation for fear of orienting economic activity to other states. It must be noted, however, that control efforts such as Wisconsin's played a role in pushing the air pollution problem to public consciousness and creating the consensus on which federal legislation depended.

2. Contemporary federal air pollution control law

The American air pollution control policy since 1970 is an example of how to recognize legitimate state interests in autonomy and local responsibility while providing for central setting and enforcement of uniform goals. The balancing of American federalism has helped reduce competition between states to have
laxer standards, overcome governmental sloth in implementing controls, and attain the proper degree of bureaucratization.

Authorizations for the Clean Air Act were due to expire at the end of fiscal year 1981. (47) The Act has remained in force, but its content continues to be the subject of legislative debate. (48) Despite Congressional reluctance to weaken the Act, the Reagan administration's appointees and budget cutting have resulted in less stringent enforcement. (49)

The introductory sections of the Clean Air Act of 1970 as amended (50) recognize the need for central leadership by providing that "prevention and control of air pollution at its source is the primary responsibility of States and local governments; and . . . Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution." (51) Consistent with these introductory passages, states have primary responsibility for awarding permits to air pollution sources within federally established constraints.

United States central bureaucracy makes three kinds of decisions which local decisionmakers cannot adequately handle. First, central bureaucracy sets ambient air quality standards. Second, it monitors compliance with them through its power to review and disapprove State Implementation Plans. Third, it sets New Source Performance Standards.

The Act requires the federal Environmental Protection Agency (EPA) to identify hazardous pollutants. For hazardous pollutants arising from numerous sources, EPA issues uniform air quality
In the early 1970s EPA established standards for six principal pollutants. For hazardous pollutants not arising from numerous sources, EPA sets emission standards. The states are responsible for developing plans (State Implementation Plans -- SIPs) to meet EPA air quality standards. States have free choice of how to meet the standards subject to the constraint that EPA approve the plan. An additional constraint arises from New Source Performance Standards (NSPSs), uniform emission standards established by EPA for new sources of air pollution.

Further constraints imposed on states' freedom of choice are that their implementation plans respect the prevention of deterioration and nonattainment provisions of the Act. Congress provided for zoning and then specified the allowable deterioration in each of the three kinds of zones for two pollutants. Eventually deterioration criteria are to be specified by EPA for all pollutants for which there exist ambient air quality standards. Nondeterioration of visibility is a special concern in areas classified by the Act as not to be subject to lessening of air quality. If an area has not attained air quality standards, the state plan must require especially stringent conditions in the permits issued under it. For prevention of deterioration, visibility protection, and nonattainment, EPA is to issue regulations which are to be incorporated in state plans.

The Act imposes uniform standards on new vehicles, but concedes to EPA the authority to grant postponements and to California the authority to require stricter standards.
may permit other states not meeting air quality standards to adopt the California standards. (63) As discussed below, EPA may require the states to implement vehicle inspection programs to reduce emissions from vehicles in use.

3. Central controls are:

a. New Source Performance Standards

New Source Performance Standards (NSPS) are uniform national emission standards for new investments. (64) Central bureaucracy is especially necessary for regulation of pollution from new industrial sources given the particular susceptibility of localities to the possibility of channeling new industrial investments to areas with laxer controls and given the need for technical competence. With these standards precise technical conditions are established regulating the controls to be used by particular sources. These conditions are, however, applied by the state in individual permitting decisions, thus allowing for local review and appreciation of such factors as siting. Clearly, the administrative burden is dispersed by this structure, and a not inconsequential margin of discretion is left to the states.

b. Air quality standards

The setting of minimum ambient air quality standards is also best done on the basis of costs and benefits as perceived at the
central level. Although United States ambient air quality standards are asserted to be based on neutral scientific criteria indicating safe threshold values, it is generally conceded that there is not sufficient basis for setting standards in that way. Instead, the standards are the result of a cost benefit analysis which values health benefits rather highly, something which a local decisionmaker would not be readily able to do given its lesser sensitivity to externalities, or rather its greater sensitivity to local and short term concerns. These ambient air quality standards provide a bound or more accurately an impetus to the state in the design of the plans, SIP's, to attain compliance with these standards.

c. State implementation plans

EPA's power to approve the plans and to substitute itself for a state which does not produce a satisfactory plan is essential to attainment of the ambient air quality standards. Nonetheless, the states actually decide the details of what kinds of sources are subjected to controls and to what extent. Their more extensive bureaucratic resources are also better able to determine case by case the controls to be applied in each permit issued under the SIP and to monitor compliance. The states also may impose stricter controls than required under their federally approved SIP if they so desire. The margin of discretion left to the state bureaucracies in implementing the standards is appropriately subject to local democratic direction by state legislative control.
over budgets and administrative organization and by state executive and legislative control of the selection of administrative managers. At the same time the federal bureaucracy maintains the power to intervene in place of the state if its SIP or SIP implementation is unsatisfactory. (67)

i. EPA pushed states

The case of Pennsylvania illustrates the importance of the requirement in the federal Clean Air Act of 1970 that EPA approve state implementation plans. (68) In 1970 Pennsylvania created the Department of Environmental Resources, an environmental superagency which took responsibility for air pollution. (69) It had comprehensive permitting, planning, and enforcement authority. (70) This arrangement replaced that established by the Air Pollution Control Act of 1960. (71) Under that Act an air pollution commission with five state government representatives and six public representatives set standards and issued air pollution abatement orders. Technical qualifications demanded of the public representatives were such that industry representatives dominated the board. (72) The Bureau of Air Pollution Control in the Department of Health enforced the board's order. In 1968 legislative amendments permitted the Department of Public Health to issue abatement orders and limited the jurisdiction of the Commission to appeals. (73) At no time during the ten years from when Pennsylvania first became active in air pollution control until the federal Clean Air Act of 1970 were adequate technical...
and administrative resources devoted to the task of air pollution control. In fact, the major issue in EPA approval of Pennsylvania's SIP was the number of state personnel to be employed in administering the plan. In 1973 the state employed approximately 115 to 120 people in air pollution control. To approve the plan, EPA required increasing employment to 305 people.

EPA intervention has consisted not only in requiring that states modify their SIP's. When EPA requested Ohio to modify its SIP, it refused. EPA itself accordingly revised the SIP. When the state refused to comply with the requirements of the SIP, EPA had the power to sue it in federal court for violating the Clean Air Act.

ii. Transportation control plans and state implementation plans

The importance of EPA's power of intervention is further illustrated by the controversy over transportation control plans. The Clean Air Act has from the beginning allowed EPA to require provision for periodic inspection and testing of motor vehicles to be included in State Implementation Plans as a condition of their approval. When EPA first attempted to require states to adopt so called transportation control plans as part of their SIPs, it was unsuccessful. These plans would have required not only inspection and maintenance of cars, but also would have limited the use of cars in major cities. In the mid 1970s, four federal appellate courts addressed the question of
EPA's authority to require adoption of the plans. In Pennsylvania v. EPA the court held that EPA could require Pennsylvania to enact the plan. In Brown v. EPA and Maryland v. EPA the courts found that as a matter of statutory interpretation EPA could not force the state to adopt particular plans; rather, it had to itself adopt and enforce the plan. In District of Columbia v. Train the court found that the EPA regulations were massive intrusions in excess of the federal commerce power upon state sovereignty as protected under the Tenth Amendment. The political furor was such that the attempt was abandoned, at least in its draconian form. Consequently, the Supreme Court declined to rule on the merits of the controversy.

Congress responded to this stand off in the 1977 Clean Air Act Amendments by giving EPA additional power to achieve compliance. First, for areas that would not meet the ambient air quality limits within statutory deadlines, a construction moratorium on new sources of air pollution was imposed. Second, to induce noncomplying states to adopt appropriate control measures, including vehicle inspection and maintenance, EPA was authorized not to approve Clean Air Act projects and grants, and the Department of Transportation was authorized not to approve highway projects and grants. Third, EPA was authorized to withhold sewage treatment grants from noncomplying states. When EPA again attempted to require vehicle inspection and maintenance programs as part of State Implementation Plans, it met with greater success. The plans are now functioning successfully in fourteen states. In California and in
Pennsylvania,(86) which despite the earlier court judgment upholding EPA's requirement of a transportation control plan had taken no action, it was necessary to invoke the moratorium and funding cut off provisions of the 1977 amendments to persuade the state legislatures to adopt the necessary measures.

The inspection and maintenance programs involve a short visit once a year or every two years to a garage for the check and possibly minor repairs to the vehicle. The inconvenience and costs are low, and the emission reductions are significant.(87) The outcome of the controversy is an illustration of how central elected and bureaucratic officials are able to take a longer range perspective than local officials. Because they are less subject to short term political considerations, they were able to persevere in having the program adopted. At the same time, the controversy illustrates the need for both local administration and local political decisionmaking, even though in the context of federal bounds. EPA itself was manifestly incapable of running the inspection programs. The programs were possible only when designed and run by local officials in ways consistent with local needs. The diversity of ways in organizing the inspections reflects these divergent local needs.

iii. Diversity in state implementation plans: examples of autonomy

The variety of state administrative and political structures which have been adopted to meet the action requirements of federal
legislation further reflects the opportunities for adaptation to local needs. The institutional arrangements of four states for air pollution control can be briefly mentioned by way of illustration. In all four states, new state legislation was adopted in response to the 1970 Clean Air Act.

In Illinois prior to 1970, environmental programs were distributed throughout state government, were understaffed, and subject to capture by special interest groups. The Illinois Environmental Protection Act of 1970 created three state agencies. One, the Illinois Environmental Protection Agency, is to recommend standards, do permitting, and undertake enforcement action. The latter responsibility is in competition with enforcement actions brought by the attorney general and citizen suits. The Pollution Control Board, comprised of five full time members with its own staff and funds, sets environmental standards and adjudicates disputes. Thirdly, the Illinois Institute for Environmental Quality undertakes planning and research. In 1970 the Illinois EPA had 246 employees, a number which grew to 632 in 1973. The state appropriation for the Illinois EPA in 1970 was $3.25 million, increased to $6.9 million in 1973. The latter sum was augmented by $2.6 million federal program grant. The pollution control board received $1.1 million with a staff of 20 in 1973, and the Institute for Environmental Quality received $2 million with a staff of 22.

Minnesota chose a different administrative structure. In 1967 it created the Pollution Control Agency, a small single
purpose agency that in 1972 operated on $1.2 million in state funds and $417,000 in federal funds. A part-time nine-member pollution control board set standards and issued permits.

The Washington Clean Air Act exhibited yet another pattern in the early 1970s. In 1970 a three-member Hearing Appeal Board was created at the state level, but both state officials and the nine active regional air authorities could undertake standard setting, permitting, and enforcement. The boards of the regional authorities represented major cities and counties in their territories. Appeals from decisions of both state authorities and the regional authorities were to the Hearing Appeal Board, after which judicial review in state courts could be sought. Funding of these authorities in the early 1970s was one-fifth local government, one-fifth state, and three-fifths federal. The authorities had limited power to raise funds through property taxes. Although the state had the power to fix minimum standards and if it found action by a regional authority inadequate, to substitute itself for the regional authority, the regional authorities had substantially greater effective power because of their larger staffs. For example, the Puget Sound authority, whose territory included Seattle, in 1971 had a staff of 50 whereas the entire state staff consisted of only 32 people.

In 1972 New York state created a superagency, the Department of Environmental Conservation, with responsibility for air pollution. With a total staff of 2,182 in 1972, the state
provided $38 million in funds, and federal authorities provided
$4.7 million.\textsuperscript{(118)} As in many other states, the principal city, New York City, had a larger enforcement staff for air pollution than the state. Thus the New York City staff of 300 was delegated responsibility for air pollution matters within the city.\textsuperscript{(119)} State aid was available to reimburse the city for its costs.\textsuperscript{(120)}

These examples of state programs illustrate not only the possibility of experimentation within a federal bureaucratic system, but also the reality of a capacity for decisionmaking at state and local governmental levels. They show that air pollution did not become important in the democratic agenda until it was made so by federal bureaucratic intervention. Only when pressed by federal authorities did the states democratically create appropriate bureaucracies. However, the locally created bureaucracies exhibit great diversity in structure, which is an indication that they were adapted to local needs and preferences. That the federal intervention left the structure of the local response to the local democratic process resulted in greater legitimacy for the bureaucratic structures then created than if federal authorities had directly imposed a particular bureaucratic form. Moreover, leaving specific implementation decisions in local hands meant greater responsiveness to the political questions intermixed with the technical questions that required bureaucratic resolution.
4. Conclusion

The basic structural features of United States air pollution control policy are sound and should remain unchanged. Although there is a climate of encouraging reduced federal activity in all fields, and hence a tendency to argue for a reduced federal role in air pollution prevention, in fact air pollution policy is a model of a well functioning system of state autonomy in the context of federal bounds. The primary administrative burden of permitting the approximately 200,000 stationary sources subject to federal requirements (121) is on the states. For purposes of perspective, consider that the local agency with responsibility for air pollution control in the Los Angeles area, the South Coast Air Quality Management District, has 500 employees, an annual budget of $23 million (of which 72% comes from permit fees), and 60,000 pieces of equipment under permit at 25,000 locations. (122) Within the constraint of meeting the federal air quality standards, the states have extremely broad discretion to allocate the burden of control. Thus discretion is appropriately limited by the New Source Performance Standards for the most mobile category of industrial sources, new investments. But even here, states retain authority for individual permit applications.
C. France

French environmental law was substantially revised and made more significant by a series of new statutes adopted in the second half of the 1970's. As in Italy older laws dealing with environmental matters have generally not been repealed; however, this legal sedimentation and the consequent assignment of powers and duties to various authorities has been less cumbersome because of the stronger organization of the central bureaucracy. The principal laws on air pollution are a 1961 statute which regulates air pollution generally and a 1976 statute which reworks a system of regulating industrial installations traceable back to 1810. These laws have been implemented over the years by a complex of decrees, arrêts, and circulaires which are best understood in the context of the bureaucratic structures for applying them.

Although the decentralization policy discussed in the preceding chapter represents a new direction in the theory of the French political system, so far it has had no practical impact on the air pollution control policy as constituted by the texts just referred to. Prior to the decentralization policy the key administrative actors were the environment ministry, the prefects, and the ingenieurs des mines, who worked in the central offices of the environment ministry or in one of its eighteen peripheral offices known as a Direction Interdépartementale Industrielle. The substantive role of the environment ministry is unchanged. It
has, however, been formally converted from a ministry into a secretariat of state under the control of the prime minister.\(^{(130)}\)

The role of prefects in air pollution control is now filled by the Commissaires de la Republique, and the peripheral offices of the environment ministry have been renamed Directions Regionales de l'Industrie et de la Recherche. These nominal changes have not caused any change in the functioning of the preexisting bureaucratic system about to be described. Whether the policy of developing local political autonomy, which is the innovation of the decentralization program, will eventually be extended to air pollution control remains to be seen.

Despite the nonapplication of the decentralization policy to air pollution, French air pollution control policy is of great interest to a study of decentralization. Although not decentralized in the sense that there exists local democratic autonomy, substantial authority has been delegated to local administrative officials of the central government. The relations between the local and central bureaucrats manifest phenomena similar to those of the American system notwithstanding the absence of democratic autonomy in the French system. Accordingly, the French experience will serve as additional support for the proposition that a central power of impulsion is needed to overcome local inertia.

This discussion of central and local decisionmaking concerning air pollution control in France will proceed as follows. First, the programs providing for no local decisionmaking or for only token local decisionmaking will be
discussed. They are the establishment of fuel quality limits, motor vehicle emission limits, so called zones of special protection, and monitoring programs. Then, the industrial air pollution control program will be discussed. This program requires significant local bureaucratic decisions. Although these bureaucrats all work for the central state, they have substantial autonomy from the central bureaucracy by virtue of being the authorities who deal directly with specific pollution sources. The central authorities cannot effectively eliminate this discretion because of the sheer number of local sources, and they may not even want to limit it because it spreads responsibility otherwise born by the central level. Following this presentation of substantive air pollution law, three factors limiting the autonomy of local bureaucrats will be discussed. They are the uniform professional background of the deciding local bureaucrats, the use of branch contracts, and the use of arretes types.

1. French air pollution law

Two parts of French air pollution control policy without local input are the national standards on the quality of fuel for heating and the administratively determined national limits on vehicle emissions. Zones of special protection may be created for major urban areas to reduce emissions from heating and other combustion. Because the four existing zones for Paris, Lille, Lyon, and Marseille were established several years apart,
it can be presumed that local political preferences could play an actual role in the fact of designation, even though the decree regulating establishment of the zones does not give local authorities an independent formal voice. Instead, it leaves all responsibility to the central administration.

The active national air quality monitoring program,(135) commenced in 1971, likewise permits token local input. There are 120 pollution monitoring networks distributed throughout France and linked by computer.(136) These networks are used to provide background information and, for nine of the monitoring networks, to determine when to order fuel switching or closing of major industrial facilities because of peak concentrations.(137) At the national level the environment ministry is responsible for the monitoring program, and at the local level the peripheral offices of the environment ministry under the direction of the Commissaires de la Republique have responsibility.(138) If an individual plant is responsible for most emissions in an area, it pays for and runs a monitoring network; otherwise, monitoring networks are to be run by local associations composed of industry, municipal government, state bureaucracy, and local environmental group representatives.(139) Although there are those who point to this control of local monitoring networks as an example of decentralization, it is in reality at best an example of deconcentration because the issues over which the local body has control are of an importance too minimal to be able to speak of the local political responsibility inherent in the concept of decentralization.
The Agence pour la qualite de l'Air, in operation since 1983, (140) facilitates and performs activities of surveillance, prevention, and information with regard to air pollution. It is directed by a council composed one third each of state, local government, and various interest group representatives. The agency is empowered to borrow, give subsidies, and collect air pollution taxes. No air pollution taxes have so far been imposed. The Agency's action has been limited to subsidizing research, development, and demonstration monitoring networks and to public education.

The classified installation system regulates industrial pollution. It is the "piece maîtresse" of the French system of environmental protection regulation. (141) The objectives of the law on classified installations are to protect health, public safety, and the environment. (142) Balancing the costs and effectiveness of available control techniques against the desired environmental quality of the surrounding area is an integral part of the statute's implementation. The permits issued under the law must take into account "d'une part, de l'efficacité des techniques disponibles et de leur économie, d'autre part, de la qualité, de la vocation et de l'utilisation des milieux environnants" (on one hand, the efficiency and economy of the available techniques, and on the other, the quality, designation, and use of the surrounding areas). (143) In accordance with the philosophy of balancing and realistic assessment of costs, the engineers who evaluate permit applications are first instructed to perform a technical and economic review of the emission controls which could be imposed on
the source with a view to requiring the best technology economically achievable. A second part of the analysis is to consider whether the residual emissions will be compatible with the desired quality of the ambient environment. The general emphasis is to be on prevention rather than waste treatment. (144)

Selection of those industrial activities to which the law applies is a central function. Under the law the Conseil d'Etat, the highest central administrative body, as well as the administrative court of last instance, is to issue a classification of installations known as the nomenclature. (145) In this nomenclature an industrial activity can be assigned to the first or the second class. Installations falling within one of the first class categories are required to obtain an authorization before opening from the departmental prefect (now Commissaire de la Republique). Installations of the second class are required only to declare themselves to the prefect.

The 1976 law on classified installations reformed the previous 1917 law. Although it formally expanded the coverage of the classified installations regulatory scheme, in practice control may have been lessened. Not only has the Conseil d'Etat been hesitant to expand the coverage of the nomenclature, (146) but it has also significantly raised the threshold limits permitting an industrial installation to operate merely by declaration. (147) The environment minister has responsibility for asking the Conseil d'Etat to modify the nomenclature when necessary. (148) Disputes about whether a particular installation falls within one of the
categories of the nomenclature are decided by the administrative courts.(149)

As described in chapter IV, individual air pollution permits are formally issued by the prefect following the enquete publique procedure. In fact, it is the local office of the environment ministry which establishes the content of the air pollution permit. Once a permit has been issued, an installation must notify the prefect of any changes in its situation.(150) And the prefect may at any time alter the permit, although to do so, the essential steps of the original procedure for granting it must be followed.(151)

This permitting procedure only applies to first class installations. Second class installations are required to declare themselves to the prefect.(152) Although not the subject of specific arrêtes, they are required to follow departmental regulations for the pertinent type of installation.(153) Some categories of second class installations require special authorization to locate in residential areas as defined by zoning laws.(154)

Each year about 2500 permits are issued after an enquete publique for new or modified first class installations.(155) There exist about 50 000 first class installations.(156) About 10 000 declarations regarding second class installations are registered every year.(157) There exist about 550 000 second class installations.(158)
2. Limitations on local bureaucratic autonomy are:

Although as already noted in chapter IV, administrative judicial review is not a significant constraint on the prefect's discretion in granting an air pollution permit, there are three significant limits on the prefect in particular and on local bureaucratic independence in general. As already noted, they are the uniform professional training of the engineers who actually determine the content of air pollution permits, branch contracts, and arretes types.

a. Corps des mines

The authorities who process individual permit applications are crucial to the French system of air pollution control because of the balancing approach it adopts. The competence of the corps des mines ensure that the necessary case by case determinations are made. Moreover, the elite character of the corps ensures a substantial uniformity of approach.

The corps is small. Through the early 1970's it had only 300 members. They are graduates of an Ecole des Mines, prestigious and selective schools located in Paris, St. Etienne, and Nancy. Only about 190 students per year are accepted. Virtually all of the successful applicants are graduates of the Ecole Polytechnique, a military school through which much of the French power elite passes. At the Ecoles
des Mines, the professors are overwhelmingly members of the Corps des Mines. (163)

The members of the corps des mines who evaluate permit applications work in a Direction Regionale de l'Industrie et de la Recherche, (164) each one of which may assist the prefects of as many as nine departments. (165) Each Direction is a peripheral office of the environment ministry.

Relations between French industry and the government engineers who regulate it are close and harmonious. The levels of control required are determined by negotiation between the engineer and the industrial installation in light of the economic ability of the installation to implement them. (166) Although they benefit from broad statutory discretion to impose whatever controls they deem necessary to protect the environment, in practice considerations of environmental safety are tempered by economic considerations. (167) It is almost unthinkable that an industrial installation would be closed for nonrespect of permit conditions. (168)

There are a number of reasons that members of the corps des mines get along well with industry.

Although ingénieurs des mines work for the environment ministry, they are largely on loan from the ministry of industry. At the environment ministry's creation in 1971 the staff problem was resolved by lending the ministry already existing personnel from other sources. (169) Thus in 1971 there were 377 engineers on loan from the ministry of industry to the environment ministry. (170) What happened in 1970, however, was more than the
simple resolution of a personnel resource problem. The corps des mines is but one of a number of elites corps. Its traditional rival is the corps des ponts et chaussées, traditionally responsible for public works construction. In the early 1970's as the corps des ponts et chaussées was adopting itself to become active in urban and regional planning, the jump of the corps des mines into the environment ministry represented a means of maintaining its position relative to its traditional rival. (171)

In fact the "lending" of personnel from a grands corps to other state administrations is a common practice and serves to increase the prestige of the corps. (172) The competence of the corps des mines is undoubtedly an asset to the implementation of French air pollution control; however, the origin of the corps in the ministry of industry necessarily affects its outlook on environmental issues.

Moreover, the engineers have close links with the industry they regulate. Since 1969 they have received an additional preparation in a training institute financed jointly by the public bureaucracy and by industry. They share this course with the industry engineers with whom they are to deal in their regulatory activity. (173) Graduates of the ecoles des mines also routinely move from positions as civil servants to important jobs with industry. (174)

These facts may contribute to the respect that the managements of industrial installations have for the engineers which regulate them. In an interview with the head of a rock wool plant, relations concerning a permit application were described as
friendly and on a technical and engineering basis. The head of the factory was told that the factory should do its best from a design point of view to reduce pollution and that then the state engineers would examine the proposal. (175) In the same vein the chief of the part of the environment ministry responsible for industrial pollution has written that in negotiating agreements with particular plants, functionaries should keep the negotiations on a technical and engineering level. (176) These two examples illustrate the pivotal role of the engineers as the officials who ordinarily set the content of permits and also their generally good working relationship with industry. (177)

b. Branch contracts

Five branch contracts, dealing principally with water pollution, were signed by the Minister of Environment and industry representatives between 1972 and 1977. (178) In these contracts the industrial parties and the Minister agreed on a timetable for control and the extent of control. The industrial parties received subsidies for control investments. The contracts' contents were then embodied by the environment ministry in orders binding on the prefects.

From 1972 to 1980 there were six branch programs, distinguished from branch contracts in that no government subsidies are involved. (179) These agreements affected industries with significant air pollution problems and principally involved agreements with industry on the timing and extent of pollution
control investments. In an additional case, an agreement was reached with a large conglomerate, Pechiney-Ugine-Kuhlmann, on the controls to be applied to its various businesses. (180) Other large French companies did not seek such agreements, preferring instead to negotiate with the environment ministry on problems as they arose. (181)

The most recent example of a branch program is that dealing with air pollution from asbestos. It was signed by the environment minister and two firms representing 80% of French asbestos consumption. (182) The provisions of the contract (183) were then embodied in a technical instruction of January 29, 1981 issued by the environment ministry to the prefects to guide their application of the law on classified installations. (184) The substance of the contract was to require industry to adopt a series of changes in work practices and to invest in certain control devices to reduce emissions. With respect to water pollution investments, funds from an existing subsidy program were to be made available.

The legality of contractual agreements with industry has been questioned on the theory that the administration ought not to be able to bargain over matters which are within its unilateral duty to regulate. (185) Administrative jurisprudence has avoided facing the question. (186) Likewise, they have been criticized as lessening the obligations that would otherwise be imposed on industry. (187) If it were true that all of the theoretically applicable controls would in fact be rigorously applied absent a collective agreement, then both the legal and practical criticisms
might have some substantive merit. The practical criticisms may have merit insofar as the central authorities yield to political pressure from industry. However, by and large in the absence of central control the local authorities, including the prefects and local representatives of the environment ministry, would probably not undertake as comprehensive action to treat the problem because they lack the technical means to undertake the necessary review and because of general inertia. The perspective underlying the criticisms of the branch contracts is the view that pollution is criminal activity in the same way as robbery or assault. (188) Viewing pollution as a social problem in need of social management rather than in the perspective of individual attacks on social and personal rights permits recognizing the utility of the branch contracts. Although some of the branch contracts may impose requirements less strict than what might be required by law, (189) their utility needs to be judged in practical as well as formal terms. If compliance with the law would not have been obtained in any event, the necessity of a branch contract illustrates the inadequacy of legislative proclamations as a means of regulating pollution rather than administrative weakness.

c. Arretes types

Another kind of instrument used to limit discretion, the arrete type, is an order issued by the environment ministry. It can be issued as a circulaire, as an instruction, or as an arrete. It may or may not be published in the Journal Officiel. (190)
Arretes types have been issued for a large number of very specific kinds of industrial installations. They are ordinarily quite precise as to what technical controls must be applied. The fact that standards can be established unilaterally by the environment minister via arretes types has, incidentally, been an important incentive for the industrial parties to branch agreements to negotiate them.

Arretes types, like branch contracts, bind the prefects in a way similar to how SIP's and NSPS's constrain state permitting decisions in the American system. In practice they bind the prefect thus preventing excessive susceptibility to local interests and pressures. They also provide for application of a level of technical expertise which, despite the existence of support to the prefect by the Corps des Mines, could not otherwise be brought to bear on each individual case. Yet, the prefect still has responsibility for application of the arrete type to each permit application, which invariably presents unique aspects. Such delegation relieves central authorities of a substantial administrative burden and within the bound of the arrete type permits local appreciation of such factors as siting, etc.

Both branch agreements and arretes types, although to varying degrees, represent the achievement of consensus on principle at the national level through a bargaining process between the industry affected and the central bureaucracy. Clearly the central bureaucracy is ordinarily better suited than local authorities to counterbalance the pressure of industry in such a negotiation. Negotiation also has the additional merit of to some
extent solving the problem of industry's attitude in achieving compliance. Industry should be more willing to comply with a negotiated agreement than with unilaterally imposed government regulations. These agreements are actually implemented through controls applied by local bureaucracy in the course of permitting. Thus, they are extremely potent instruments for establishing an effective air pollution control program by virtue of the fact of allowing for local administration combined with forceful central direction.

3. The French approach to Community law

Because France is a unitary state whose constitution vests substantial power in the public administration, it has not had difficulty in complying with Community environmental directives. Community norms have been routinely incorporated into French environmental law by administrative order. The judicial response to Community law has been considerably more reticent.

The French courts have conflicted on the acceptability of Community law. Article 55 of the constitution provides for the supremacy of regularly ratified or approved international law on condition of its reciprocal application by other states. In 1975 the Conseil Constitutionnel seemed to open the way for easy acceptance of Community law. In a decision involving a challenge to a proposed law on abortion as inconsistent with the European Convention on Human Rights, it held that refusing to apply a national law because of its inconsistency with an
international rule is not constitutional review. Under this holding, the ordinary civil and administrative courts could address questions of the applicability of Community law and of its supremacy over national law without crossing the boundary into the territory of constitutional review, from which they are prohibited.

The Cour de Cassation a few months later followed the Conseil Constitutionnel's lead. It held that Community law took priority over national law enacted subsequent to ratification of the EEC Treaty. It also found that the power of member states to bring proceedings before the European Community Court of Justice against other member states which fail to comply with the EEC Treaty satisfied the reciprocity requirement. Shortly afterwards it held that the Treaty also prevails over earlier French legislation.

Unfortunately for the application of Community jurisprudence, the Conseil d'Etat has rejected this principle. In a case challenging the election procedures for representatives to the European Parliament, the Council of State observed that assessing the conformity of a national law adopted subsequent to the EEC Treaty would be equivalent to passing on its constitutionality, a power which the Conseil d'Etat does not have. If the Conseil d'Etat persists in its view that disapplication of a national law because of its nonconformity with Community law is a constitutional question, the effective supremacy of Community law will be seriously limited in France. This is because the Conseil Constitutionnel can only pass on the constitutionality of a law
prior to its promulgation. Moreover, the Conseil d'Etat has created an additional barrier to the application of Community law in France. It has squarely rejected the Court of Justice's view of direct applicability by holding that only acts first received into national law may have any effect in internal law. Even more threatening for the application of Community law than rejection of the direct effect doctrine is the reasoning by which the Conseil d'Etat reached this conclusion. The Conseil d'Etat rejected the direct effect doctrine based on a literal reading of article 189 of the treaty. It found the treaty language to be so clear that no reference to the Community Court was required to interpret it. This use of the so called *acte clair* doctrine provides the Conseil d'Etat with a very easy way to control what issues it submits to the Community Court and to avoid its obligations under article 177 of the EEC treaty to refer questions to the Court of Justice.

Because the direct effect of directives is a useful technique for overcoming member state inaction with regard to implementation of directives, this attitude of the Conseil d'Etat is very threatening for the application of Community law. Because France, however, has routinely complied with Community air pollution directives, it may not have a major impact in the field of air pollution control.
4. Conclusion: the lack of democratic decentralization

The French tradition of central control and technocracy has produced a system, quite surprisingly so in light of the structural differences between the two systems, analogous to that of the United States with regard to the functioning of relationships between central and local authorities. Specifically, French central authorities can and do provide minimum control levels for local-permitting decisions. Formally, except as introduced by Community directives, there is nothing comparable to the minimum air quality standards as established in the United States. The French control program is based not on air quality standards, but rather on a cost-effectiveness approach. No overall, official air quality standards exist except as introduced relatively recently through Community directives. Implicit standards exist as shown by the implementation of zones of special protection in urban areas to deal with what were perceived as excessively high ambient air concentrations of pollutants. But such implicit controls are not written and do not form the basis of specific control decisions. Rather, the best technologically achievable controls consistent with reasonable cost are to be applied to reduce specific emissions. Moreover, French central authorities ensure efficient local action on permitting decisions by providing the staff which evaluates permit applications. In addition to ensuring that local action occurs, the staffing of the central and local offices of the environment
ministry by an elite corps of engineers provides the expertise which makes case by case determinations feasible. Although the United States EPA passes primarily on the sufficiency of local permitting efforts through its approval of SIPs and assumes local permitting responsibility only as a last resort, the net result of ensuring action is the same in both systems. The requisite degree of uniformity is maintained by intervention of the environment ministry through informal administrative review and through use of arretes types and branch contracts dealing with entire categories of industry.

The substantial difference between the United States and French systems is that the French bureaucratic centralization has left virtually no meaningful role for local democratic input to the local bureaucratic decisionmaking. This poses a serious legitimacy problem, which might be ameliorated by transferring the peripheral offices of the environment ministry from the prefects' (Commissaires de la Republique) authority to the authority of the elected regional or departmental councils. The degree of legitimacy in central level decisionmaking is also questionable. Despite the judicial review of the administrative courts, the technocrats of the administration have broad discretion under the present constitution to act independently of any legislative check. Because this independence may be not only justifiable but necessary as well in light of the political instability of French government prior to the advent of the Fifth Republic, special attention ought to be given to curing the local legitimacy problem in the context of the decentralization policy.
Decentralization is a policy of the French government. Without questioning the policy goals of promoting democracy through increased local decisionmaking powers, it can be asserted on the basis of the present analysis that steps toward reducing the power of central impetus through the branch contracts, arretes types, and the existence of the corps des mines must be approached with extreme caution to avoid weakening the effective program developed thus far. If powers are to be decentralized, those powers which could be be given to the elected regional or departmental councils are those now nominally belonging to the prefect (Commissaire de la Republique), but in fact exercised by the peripheral offices of the environment ministry. Such a transfer would establish a tension between the professionalization of the ingenieurs des mines and the desire of the local assembly to politically set priorities. Any tendency to basely politicize the permitting process, e.g. making permits conditional on political contributions, could be counteracted by continuing the arretes types and branch contract programs. Such continuation would also help mitigate any tendency toward local inertia. The ingenieurs des mines could remain state employees on loan to the local entity, or they could become local employees. Some central requirement as to their number and qualifications would seem advisable due to the inertia problem. Delegation of permitting powers in the context of continued central controls would not fundamentally diminish the efficiency of the system although it would ameliorate the legitimacy problem by allowing for more
direct democratic accountability should the system function poorly and by allowing for some local determination of priorities.

D. Italy

Unlike France and the United States, Italy does not have a well functioning air pollution control program. The Italian decisionmaking structure for bureaucratic decisionmaking on air pollution is mistaken. Lack of resources, poorly conceptualized administrative organization,(202) and excessively frequent reforms are manifestations of the lack of a coherent vision of the decisionmaking process. On the last point alone, it can be noted that administrative reorganizations or new air pollution laws have occurred every three or four years since the mid 1960s. Although Italy has a great production of laws, the Italian parliament ordinarily pays little attention to the implementation of the laws it passes. Accordingly, Italian legislation suffers from a lack of clear language, provision of financial resources, and provision of administrative resources.(203) These general characteristics are amply confirmed by Italian air pollution legislation.

As part of achieving the coherent vision necessary for an effective air pollution control program, Italy ought to reflect on the condition of having a central power to impel and guide local action within a framework of limited discretion. For the moment Italy has neither a central power capable of impelling local action nor are there meaningful limits on local discretion. Some tools to modify this state of affairs are available to central
level executive authorities. Moreover, the Italian judicial system provides a number of interesting means for overcoming any hesitation on the part of central executive authorities to use these tools. Additionally, Community rules may work to provide the central impetus and control which is now lacking. Notwithstanding these various possibilities for improvement of the present situation, it is quite possible that the general confusion about the proper organization of government, including problems of clientelism as well as of the distribution of powers between local and central authorities, may result in maintenance of the status quo, i.e. general inaction interrupted by occasional isolated interventions.

1. Constitutional context

Article 117 of the constitution lists the subject matters in which regions have legislative competence within the bounds of national framework laws. Article 118 provides that the regions are to have administrative competence for the subject matters listed in article 117, along with administrative competence for such other matters as the State may delegate. Whether environmental protection falls within one of the listed categories of article 117 determines whether the regions may have general legislative powers, albeit within the context of national framework laws, for environmental matters. Regions may have general legislative powers for matters not presently listed in article 117 only when it is amended by constitutional law. On the
other hand, the last sentence of article 117 says that state laws may delegate legislative power to regions to provide for their implementation. Thus, for example, article 7, presidential decree law no. 616 of 1977, accords regions such powers for the matters for which it transfers them administrative competence. (204)

Moreover, although article 118 states that regions are to have administrative competence for the matters listed in article 117, it also says that the state may delegate administrative responsibility for such other matters as it chooses to the regions. (205)

In this situation, the precise constitutional basis for regional action with regard to environmental protection may be either that the state has elected to delegate to regions competence for administrative action to protect the environment or that environmental protection is a regional legislative competence because it falls within one of the categories listed in article 117.

It is difficult to identify air pollution as being one of the subject areas listed in article 117 as regional legislative competences. (206) The Constitutional Court's broad definition of environmental protection makes the task even harder. The Court has defined environmental protection as including environmental protection of the countryside, protection of health, and protection of the earth, air, and water from pollution. (207) This definition would seem to exclude as possible homes for environmental protection all of the competences listed in article 117 except "urbanistica." However, in the same decision the
Constitutional Court would seem to deny that environmental protection is included within the notion of urbanistica.(208) At most the Court's decision would admit that urbanistica is a limited part of the broader subject of environmental protection. The case involved a challenge to a regional law forbidding construction along coastlines. The constitutional question was whether the subject matter of the regional law was "urbanistica," which is a regional competence, or protection of the countryside, which under article 9 of the constitution is a state competence. The Court found that "urbanistica" included zoning regulations outside of, as well as within, centers of population.

In a 1972 decision(209) the Court observed that "urbanistica" ought to have the meaning that it did at the time of the Constituent Assembly, the Italian constitutional assembly following World War II. This assertion of the Court has been criticized as erroneous for the reason that the Court for the definition of urbanistica at the time relied on a 1942 law which did not in fact unambiguously define the term.(210) More cogently, however, it has been argued that it is wrong in principle to freeze the content of constitutional interpretations to those of the framers.(211) It is urged that the correct orientation, asserted to be found in the earlier jurisprudence of the Court on another subject,(212) is that constitutional language should be interpreted in light of the legislation currently in force. To subject all constitutional provisions to the meaning assigned them by contemporary legislation would negate their character as guarantees. However, to the extent that the
constitutional provisions on regionalism are understood as programmatic guidelines for future legislative and judicial implementation rather than as guarantees of regional autonomy or central supremacy, looking to current legislation as an interpretive aid is justifiable.

It is especially justifiable in light of the approach taken to implementing the constitutional vision of regionalism. The presidential decree law no. 616 of 1977, the fundamental text in implementing the constitution's regionalization provisions, does not strictly follow the list of competences identified in article 117 of the constitution. Instead of providing for transfer of duties to the regions in each of the listed article 117 competences, it identifies four broad categories of transfers. They are administrative organization, social services, economic development, and land use planning. (213) Although these broad categories by and large encompass the article 117 competences, the political approach to implementing the constitution's regionalization provisions has clearly not relied on a literal reading of their terms.

Article 80 of the 1977 presidential decree law includes environmental protection within its definition of "urbanistica." (214) To interpret article 80's reference to environmental protection as meaning only urban planning in the sense of zoning activity is an artificial construction which is belied by the actual transfer of responsibilities to the regions. (215) If article 80's broad definition of urbanistica in the context of transferring administrative functions to the regions...
is given weight in determining the meaning of urbanistica for purposes of the article 117 of the constitution's delineation of regional competences, then it would seem that the regions ought to have legislative competence for environmental matters. The constitutional model of regionalism permits national framework laws to set bounds on regional legislation, but within those bounds, the ability of regions to legislate on environmental matters would be an opportunity to increase their political responsibility.

Reaching a result in line with current legislation and practice is entirely consistent with the Constitutional Court's unique role in the Italian regionalization process. Italy is not a federal state formed by the union of sovereign states as is the United States. It is a centralized unitary state in the process of disaggregating itself. Accordingly, the role of the Constitutional Court is not to facilitate the growth and assertiveness of central power, as for example might have been the role of the United States Supreme Court at one time or as might actually be the role of the European Community Court of Justice; rather, the role of the Constitutional Court ought to be to encourage the rational development of the regionalization process. Rational development of regionalization requires that all of its decisions on questions of regionalization, not just on air pollution or on environmental protection, should be made in light of the principles argued for in this essay. Thus while it must encourage the development of regional autonomy, it must not neglect to likewise encourage development of effective powers of
central guidance, motivation, and, if necessary due to local inaction, substitution for local authorities. The Court's preliminary orientation on the question of central powers is encouraging. It has approved the central setting of procedural and methodological standards for regional urban planning purposes. Thus it accords significance to the central function of coordination and direction. Whether it would consider stronger central actions as invasions of regional autonomy remains unclear.

The specific question of whether air pollution falls within the legislative competence of the regions may seem unimportant in light of the superficiality of the regional legislation so far adopted. It might well, however, become a constitutional question of the first order if the Constitutional Court were to adopt an unsound interpretation of the article 118 grant of administrative functions to the regions for matters in which they have legislative competence. Sound structural organization requires that certain powers, whether exercised administratively or legislatively, reside at the central level, and others at the local level. In the United States federal system, the states have permitting authority and are free to legislate; however, as an administrative matter, uniform emission standards for new sources are centrally established and federal administrative action can substitute for inadequate state action. Hopefully, the Constitutional Court's jurisprudence and future legislation will be sufficiently prudent to permit solutions which respect the principles of hierarchical organization advanced in this essay.
The substantive criterion according to which environmental protection ought to be or ought not to be classified as a regional legislative competence is whether doing so would unduly impede state action to overcome regional inertia.

How the constitutional jurisprudence on state and regional relations will unfold cannot be foreseen; however, the Constitutional Court and Parliament ought to accept the invitation contained in the last sentence of article 117 of the Constitution. That sentence provides that state laws may require regional laws to provide for their implementation. Parliament's failure to adopt state laws taking advantage of this prerogative is one of the major weaknesses of the air pollution control policy. By taking a clear position in its jurisprudence, the Constitutional Court could help stimulate Parliament to overcome this failure.

2. Italian air pollution law

In Italy the administration is generally not effectively organized to deal with environmental matters. At the central level responsibilities for environmental matters are distributed over thirteen different ministries. At the regional level responsibilities are spread among numerous bureaucratic bodies, which frequently have little if any technical competence.

Specifically with respect to air pollution, the applicable laws do not provide for sufficient central powers of intervention. And, with respect to regional and local authorities, they do not provide for the creation of bureaucratic structures capable of
seriously confronting the administration of air pollution control. That is, apart from the misconception of the relations between central and local authorities, there is a pronounced lack of viable bureaucratic organizations. This lack of organizations is due partly to a lack of political will to create them and partly due to the incoherence of the national legislation. The governing provisions on air pollution are three superimposed laws passed in 1934, 1966, and 1978. The texts providing for development of Italy's regions as autonomous administrative and political entities represent an additional layer of complexity. Interpreting these superimposed provisions is an uncertain task made more difficult by the failure of the national legislation to clearly and rationally delineate bureaucratic responsibilities. It goes almost without saying that in addition to failing to delineate responsibilities, the national legislation fails to require allocation of the resources for development of effective bureaucratic organizations. It has been suggested that new legislation is desirable, if for no other reason than to clean up the interpretive mess.(218)

The basic scheme for regulating air pollution is not in itself terribly complex. In essence, air quality limits are centrally established, but industrial sources must seek operating permits from local mayors. The mayor must in turn seek a binding opinion from a regional advisory body, the Comitato Regionale contro l'Inquinamento Atmosferico (CRIA) or its equivalent, on what controls to impose on the plant. Air pollution from space heating is controlled under a separate permitting system through
comunes. (219) Fuel quality limits (220) and uniform standards for vehicles are centrally established. (221) Electric power plants are also centrally regulated. (222)

a. 1934 health code

The oldest of the three laws treating air pollution is the 1934 Testo Unico delle leggi sanitarie, which as part of a general codification of public health law established a system of classified installations for regulating industrial pollution. (223) Under this law, the Minister of Health maintains a list of two categories of industry required to seek permits from mayors. First class industries are those which must be removed from areas of habitation unless a particular demonstration of safety is made. Second class industries are those which require special precautions for the health and safety of the neighborhood. Mayors are responsible for licensing the industrial facilities located in their comunes which fall within one of these two categories. In the thirties, mayors may have been competent to license the typical industries of the period. However, a mayor acting without bureaucratic support is obviously incapable of determining under what conditions to license a modern industrial facility such as for example a refinery. Unfortunately, the subsequent legislation on air pollution, although making some effort to bring technical expertise to bear on the licensing problem, has not constituted an effective substitute for the essentially personal role of the mayor.
The useful feature of this 1934 law is its provision for central establishment of industrial categories. Central classification of hazardous industries represents a significant economy of scale and a saving of duplication of effort over a system in which each region would establish its own classifications. It also provides a basis on which national emission limits might be established by industrial category, although no such limits have ever been established. One of the provisions on regionalization about to be discussed might be interpreted to delegate the function of establishing lists of hazardous industries to the regions. However, the lists were updated not only in 1971 and 1976, but also in 1981, well after the 1977 provision in question. Therefore it would seem safe to assume that this sensible central power has been retained.

b. 1966 air pollution control law

The second law on air pollution, law no. 615 of 13 July 1966, establishes a general framework for limiting emissions. Although the law deals with all kinds of air pollution, the winter smog problems of northern Italy arising from domestic heating and the inversions typical of the area in winter were a particular motivation for adoption of the law. This may be a factor in explaining why the law's provisions on industrial pollution do not seem well thought out.

The 1966 law does not repeal the law on classified installations just described. The mayor apparently retains
the powers granted under the 1934 law to block operation of
polluting industrial facilities. The continued effect of the 1934
law is still somewhat unsettled because the Council of State in
1972 said that the 1966 law superceded the 1934 law whereas the
Court of Cassation in 1974 and 1975 affirmed that the two laws
could coexist. Nonetheless, even administrative tribunals
permit mayors to exercise authority under the 1934 law.

Rather than repeal the 1934 law on classified installations,
the 1966 law imposes on industry an additional general obligation
not to augment ambient concentrations by applying emission
controls within the strictest limits that technical progress
permits.

The law's implementing decree for industrial installations in
1971 established ambient air concentration limits for eleven
pollutants. However, these values only apply in areas
classified in one of two zones. Cities in the center and
north of Italy with more than 300,000 inhabitants and in the south
of Italy with more than 1,000,000 are classified in zone B.
Cities with populations of 70,000 to 300,000 in the center and
north of Italy and with population of 300,000 to 1,000,000 in the
south of Italy are classified in zone A. The minister of health
may for good cause classify smaller cities into one of the two
zones. Unless an area is classified into one of the two zones,
the 1966 law does not apply. Instead only the 1934 law on
classified installations applies. This limited zoning scheme was
an error caused by the failure to recognize air pollution as a non
local problem at the time of the law's enactment. In addition to
not recognizing the non local nature of air pollution, the zoning scheme skews the location of industry in a way that does not correspond to the severity of air pollution problems and fails to consider problems of nondegradation.

The 1971 values for ambient air quality were updated for the first time in 1983 under a subsequent law to be described shortly. The new values will eventually apply throughout the national territory. If an industrial source would cause an increase in ambient concentrations beyond the established limit values, it would not be allowed to locate in a particular zone.\(^{(236)}\)

The 1966 law creates regional technical committees to instruct the mayor on what technical controls to require as a condition for issuance of an operating permit.\(^{(237)}\) These committees are collegial bodies and have never been given extensive staffs. Their present organizational failings will be elaborated after first finishing the task of describing the major legislative texts.

Decrees implementing the 1966 law for combustion installations,\(^{(238)}\) industrial installations,\(^{(239)}\) and diesel vehicles\(^{(240)}\) were issued at the beginning of the 1970s. Gasoline powered vehicles were treated by a separate law in 1971.\(^{(241)}\) In 1973 a law dealing specially with Venice was enacted. It provided for a planning process to deal with pollution problems, required the use of natural gas for home heating, and reinforced the sanctions of the 1966 law for pollution in Venice.\(^{(242)}\)

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c. Presidential decree law no. 616 of 1977 on regionalization

Reassignment of responsibilities between the state and the regions as the regionalization provisions of Italy's constitution(243) began to be implemented in the 1970s hindered orderly implementation of the existing air pollution laws. First, a 1972 reform provided for maintenance of the state's jurisdiction for air pollution,(244) but gave the regions some administrative functions.(245) Then the presidential decree law no. 616 of 1977 completely reworked the division of responsibilities between the state and the regions.(246) As already mentioned it defined environmental protection as part of urbanistica,(247) and provided that administrative functions for urbanistica were transferred to the regions,(248) which means that the regions may legislate on the matter with respect to implementation, spending, and administrative organization.(249) Article 101 of the decree law transferred administrative responsibility for air pollution, including the classified installation system, to the regions. Read together with articles 102(7) and 104 of the decree law, it results in reserving responsibility for controlling vehicular pollution to the state except that comunes are entitled to control emissions of vehicles in use. As a matter of fact, there are no controls on vehicle emissions apart from manufacturing specifications.(250) The existing laws on electric power plants,(251) which provide for a central role in their siting and operation, are expressly continued in force.(252) The state also
reserved to itself research activity, (253) national level monitoring of air pollution, (254) and the setting of minimum emission and ambient air quality limits. (255) Because of the need for technical expertise and because of the greater central ability to resist locational pressures, the decree wisely reserves to central authorities the setting of minimum emission limits. It is noteworthy, however, that no effort to set industrial emission limits has been undertaken.

Other provisions of the decree indicate that the organizational consequences for air pollution control were not well thought out in its drafting. Provinces are given the responsibility for monitoring industrial emissions, (256) and comunes are given the responsibility for monitoring emissions from space heating. (257) Rather than assign the monitoring of industrial emissions to the provinces, as a matter of logic it would have been better to give monitoring responsibility to the body with de facto permitting authority, i.e. the regional CRIA. Likewise, the larger heating installations are little different from industrial installations with respect to air pollution, and it is illogical that they should be subject to a different regime. In any event, even prior to the 1977 organizational changes, relatively little had been done to establish the administrative and technical apparatus necessary to implement the existing 1966 law. (258)
Finally, following the start of the administrative reorganizations, a third law affecting air pollution control was enacted. The primary purpose of this law, law no. 833 of 23 December 1978,(259) was to reform the health care system. Pollution problems were included in the law as one of the many responsibilities of the local and national health care services created by the law. Because the 1978 law was intended to insure general protection of health, it is accepted that it does not annul any of the preexisting specialized legislation on pollution.(260) The law gives the President of the Council of Ministers the power to fix by decree ambient air quality standards for chemical, physical, biological, and noise pollution in work and living environments and in the external environment.(261) These powers were exercised by a 1983 decree(262) which established new ambient air quality limits to eventually replace those established under the 1966 law in 1971(263) as well as those established by particular laws for electric power plants.(264) The air quality limits set by the decree are to be met by 1993,(265) and efforts to meet these limits are not to lead to degradation of air quality.(266) Regions are to develop plans to achieve the required air quality within a maximum of ten years, and to implement them are to make use of the national health service and the competent state technical agencies.(267)
This decree is a positive contribution to air pollution control. In addition to updating the ambient air quality limits, it makes them applicable throughout the national territory. It also introduces the principle of nondegradation into Italian air pollution control policy. Its chief insufficiencies are that it says nothing about who is to be responsible for taking action and that it fails to adequately specify the kinds of action to be taken. By failing to assign specific duties to the regional CRIA's or to the new bodies created by the 1978 law, it leaves the problem of creating effective bureaucracies in limbo. Accordingly its direction that regions are to develop air pollution control plans is largely hollow, especially in light of the fact that it fixes no consequences should no plans or inadequate plans be developed.

The problem of coordinating the 1978 health law with previous legislation is serious because the 1978 law creates entities which might be seen as competing with the CRIA's.(268) The 1978 law establishes the unita sanitaria locale (USL) as the primary local administrative unit for health care. Among its functions is l'igiene dell'ambiente.(269) The duties of the USL are to include the identification and control of factors of harm, danger, and deterioration in work and living environments; indication of measures to eliminate risk in work and living environments; and verification of compatibility of industrial siting with zoning.(270) Notwithstanding the creation of the USL's, the mayor remains the local public health authority.(271) Thus permit demands are still to be made to the mayor, although there are
those who argue that the USL's should assume this responsibility.(272) The law anticipates that regional laws will designate certain USL's as multizonal headquarters for environmental problems.(273)

Some efforts along these lines have been made. For example, a regional law of Emilia-Romagna provides that the multizonal headquarters are to provide technical support activities to local government units for environmental matters.(274) The details of these activities are left to agreements to be negotiated between local governments and the multizonal headquarters.(275) Within the multizonal headquarters, there is to be a specific section with responsibility for air pollution.(276) There is also to be an interdisciplinary working group on air pollution.(277) The law is a sound one in that it provides for bureaucratic structures rather than massive committees. However, it does not speak to the relation between the regional CRIA and the structures created by the 1978 law on health care reform. A law of Toscana is even less definitive. As part of a reshaping of the membership of its CRIA, it says that the CRIA may "also" rely on USL's to accomplish its work.(278)

One function which might appropriately be assigned to a multizonal headquarters would be the formality of receiving permit applications. Alternatively, they could be designated as the authorities to act on the merits of permit applications. However, to substitute these multizonal headquarters for the regional permitting authorities altogether would not be advisable. The populations included in USL's are to be from 50 000 to 200 000
people, although larger USL's are possible for the major cities. Even though the multizonal headquarters serve substantial populations, they are still too small and have too many other health care responsibilities to assemble the necessary engineering skills to evaluate air pollution permit applications. The present superposition of legislative texts does not clearly spell out the division of duties between the health care bodies and the regional committees created under the 1966 law (the CRIA's). To prevent each kind of body from asserting that responsibility belongs to other authorities, a central effort to define their roles should be made as part of the effort to develop effective working bureaucracies.

e. The permitting process

To more fully understand the functioning of the three substantive laws -- the 1934 TULS, the 1966 antismog law, and the 1978 national health law, it will be helpful to look at the responsibilities of the established permitting authorities in detail.

As already outlined, the basic model is for the mayor to issue permits to industrial sources relying on a CRIA, a regional technical advisory board, to supply the technical details. The initial request for a pollution permit is to be made to the mayor at the time a building permit is sought for a new plant or for modification of an existing plant. (280) The applicant is to present a detailed technical report on the industrial facility and
the air pollution associated with it, which the mayor transmits to
the CRIA. (281) The CRIA then has sixty days to act on the
permit. (282) Before operation of the industrial installation, an
additional authorization is required from the mayor. (283) The
1966 law and its implementing regulation require the mayor to
include the CRIA conditions in a permit; (284) however, the mayor
also has independent power under the 1934 legislation to refuse to
grant a permit, to place additional conditions on it, or to take
the necessary measures when no permit at all has been sought. (285)
This power is potentially useful in the face of the CRIA's
frequent passivity in imposing control requirements. The mayor
has not been a very effective figure in compensating for the
inactivity of the CRIA because the mayor ordinarily has no
technical expertise available to make complex engineering
judgments and because the mayor in practice is ordinarily afraid
that a strong stand will direct jobs to other locations. There
are some cases in which the mayor has acted, but these are mainly
regarding the largest industrial installations concerning which
there has been public controversy. Such isolated interventions do
not effectively address the overall pollution problem.

Under the present system the regional CRIA's have also been
poor decisionmakers. They suffer from the same inertia as the
mayor, although they have on occasion responded reasonably well to
particular problems which have attracted public attention. (286)
Their problems have been threefold. The division of
responsibility for making decisions on particular permits is badly
distributed between central and regional authorities. The
structure of CRIA's themselves is mistaken. And, central authorities have been unable to require commitment of resources to CRIA's.

First, with respect to the regional and central division of decisionmaking, the system might be somewhat more functional if central authorities took some role in fixing emission standards by category of industry. In such case the mayor or the local CRIA would have a fixed set of criteria to impose in granting a permit. As it is, the central role is limited to fixing air quality limits. The translation of air quality limits into specific emission limitations or control technologies is quite difficult because of the complexities of assessing the impacts of specific emissions on air quality levels(287) and because of the degree of engineering knowledge required. The mayor cannot of course be expected to have the necessary knowledge. CRIA's, as the bureaucratic support to the mayor, can be expected to have this kind of expertise; however, they have not so far developed it. They will probably not develop it until required to do so by central authorities because of the externality character of air pollution. Even if they did develop the necessary expertise, the margin of discretion inherent in establishing permit conditions directly on the basis of ambient air quality limits is such that as a regional authority the CRIA would be quite susceptible to industry threats, express or implied, to locate in a relatively less stringent region. The susceptibility to this kind of pressure is even greater because of the absence of any kind of national effort to ensure minimum levels of regional stringency.
The Minister of Health has the authority to give instructions on measurement methods and maximum emission levels; however, it has not been exercised.

f. Regional legislation

CRIA's were originally to consist of regional level functionaries, all of whom had significant other responsibilities. While assigning government officials with other full-time responsibilities to a committee may not be a bad idea when broad-based policy decisions are required, such an assignment is most unwise when the need is for detailed decisions requiring substantial engineering expertise. The system as originally envisaged by the 1966 law might have worked if the CRIA's had been given a competent staff to actually prepare permits; however, no substantial staff was ever assigned to them during their period as state bodies.

The legislative provision which made CRIA's regional bodies allowed the regions to legislate on their composition and to broaden their functions to other pollution problems. This extremely lukewarm invitation to regional legislation is symptomatic of the improper conceptual approach to regionalism within the subject of air pollution control. Instead of a bland authorization to act, the decree should have established certain standards in terms of personnel and technical competence which the regions would be obliged to achieve in whatever way they saw fit. A simple authorization is an invitation to inertia.
Notwithstanding this conceptual defect, there has been some regional legislative activity modifying the compositions of CRIA's and broadening their functions to other kinds of environmental problems. (291) Sicily, (292) Toscana, (293) Lazio, (294) Veneto, (295) Liguria, (296) Umbria, (297) and Emilia-Romagna (298) have all also either modified the compositions of CRIA's or added other kinds of pollution problems to their jurisdiction. These reorganizations of the CRIA's have unfortunately not generally involved assigning them a staff which individually prepares permit requirements. Instead, the CRIA's remain excessively numerous collegial bodies without identification of an individual or of a staff responsible for seeing that a permit application is carefully studied and that sensible requirements are imposed.

The regional law of Emilia Romagna (299) is typical in this regard. Its CRIA is to consist of the chief regional official for environmental affairs, two regional employees with experience in environmental protection, one public health expert, two experts in industrial installations, one chemist, one meteorologist, one acoustical expert, one expert from a university, three other experts, three experts chosen by the regional government from a list proposed by management organizations, an agronomist chosen from a list submitted by a farmers' association, an expert chosen from a union list, and experts representing local monitoring networks. To the extent that other regional bureaucracies are affected, their representatives may participate. It is difficult to conceive how twenty or more people as part of a collegial body can in any meaningful way pass on the content of a technical
engineering assessment. If they were to seriously try, the delays in permitting would be extensive. The collegial approach might serve a useful participatory function in other settings, but in the present context it is at best a weak substitute for bureaucratic organization.

Sicily's environmental legislation is another example of the same mistaken approach of creating crowds of people to deal with a problem rather than a structured bureaucracy. A 1977 law(300) creates the Comitato regionale per la tutela dell'ambiente, a body with thirty two members whose duty it was to prepare a master environmental plan. The law also created environmental commissions of fifteen people for each of the provinces contained in Sicily. With reference to air pollution, the law did provide for regional funding of monitoring networks; however, it neglected to say whether the regional commissions or the provincial commissions had the duty of passing on air pollution permits. Presumably its declaration that the national laws on air pollution continued to apply meant that the old CRIA was to continue in operation. A 1980 regional law(301) assigned the duty of establishing emission limits to the provincial committees and provided for assumption of technical personnel by the region and comunes. This law, although making more clear the application of the earlier regional law, has the defects of continuing the process of crowd decisionmaking on technical matters, failing to provide technical staff to the permitting authority, and decentralizing permitting authority even further below the regional level. Having provincial committees as the permitting
Notwithstanding these examples of the failings of regional legislative activity, regional legislation has made some contributions. In the early 1970s, Lombardia, Emilia Romagna, Toscana, and Puglia took the relatively modest step of providing for financing of measuring networks. It should however be noted that the monitoring network envisaged by the Lombardia regional law was not fully established because of incompatibilities with a comparable size network established by the province of Milan. At the beginning of the eighties, Liguria and Emilia Romagna adopted regional laws making what were essentially the preexisting national air pollution controls applicable to all industrial installations, whether or not they were located in the larger comunes to which the applicability of the 1966 law was limited. This action corrected one of the obvious flaws of the national legislation. It can also be noted that the two provinces of Trentino and Bolzano, which as part of the special statute region of Trentino-Alto Adige benefit from special guarantees of autonomy, have each established complete air pollution control programs including generalized emission limits and bureaucratic support.

In the end the regional legislative activity on air pollution may be like the bulk of regional legislative activity, which deals
with trivialities of administrative organization or with authorizations of particular expenditures. (307) The regional laws just mentioned in fact raise strong suspicions that they amount to little more than a reshuffling of organization charts, rather than a real start at efficient bureaucratic activity. The CRIA's lack of administrative resources is a lack of financing and a lack of technical personnel. The ability of the regions to resolve the financing problem is limited because most of the regions' budgets comes from precommitted state transfers. (308) This is true notwithstanding the constitutional intent that the regions have financial as well as political autonomy. (309) To remedy the financial problem either the magnitude of unconstrained regional funds will have to be increased, or alternatively, there will have to be some initiative at the central level to guide funds into the CRIA's. Such an initiative could be in the context of a framework law requiring the development of a certain level of regional bureaucratic proficiency in air pollution permitting. Such a law could also treat the problem of technical personnel, although the personnel problem is ultimately a regional one because the central authorities are completely lacking both in the resources to enforce standards directly and in the ability to recruit qualified technicians.

g. A sampling of regional bureaucratic activity

Italian central government administrative officials do not have a good grasp of what the regions have actually done from a
practical, as opposed to a legislative, point of view with respect to air pollution control. (310) The one empirical study undertaken of regional administrative activity in the field of air pollution control (311) reveals that regions have adopted significantly different strategies of activity and that the effective central establishment of minimum standards of activity would prove useful.

The three regions studies were Emilia Romagna, Lombardia, and Piemonte. This study found that the central government was absent from air pollution control activity. (312) The governmental levels active were the comunes and the regions. During the late 1970's, the CRIA's of these three regions had staffs of nine, twenty two, and three functionaries, respectively. The professional background of the nine Emilia Romagna functionaries was predominantly meteorology, and Emilia Romagna gave priority in its administrative activity to the establishment of monitoring networks. In Lombardia, where the dominant professional background of the staff was engineering, priority was given to control of emissions. In Piemonte, with its small staff, there was little activity. Of nine comunes investigated in these three regions, four (Torino, Piacenza, Bologna, and Sesto San Giovanni) spontaneously created bureaucratic structures of from one to eighteen people to engage in air pollution control activity.

In light of the study's finding that efforts to control industrial air pollution emissions have been largely ineffective, (313) the question of why these regional and municipal efforts are insufficient must be addressed. The insufficiency of local efforts together with the extreme variance in the level of
regional efforts supports the need to have stronger central intervention to ensure a minimum level of regional activity. On the local level the study found that even though Torino had a staff of eighteen, far above that of other cities, it did not have sufficient power to strongly regulate local industry, now was it able to amass sufficient expertise to confront the technical questions involved.

With respect to the three regions studied, only Lombardia appears to have undertaken significant substantive activity. The study characterizes the monitoring activity undertaken by Emilia Romagna as having largely symbolic rather than substantive value. Although the regions have not acted effectively to manage the air pollution problem nor have they effectively provoked central intervention to strengthen their position, it would appear that they are beginning to recognize the inadequacy of the present state of affairs. The emergence of an effort by the regions themselves to come to a common agreement on emission standards evidences the desire for establishment of some form of minimum standards which for practical purposes do not now exist in any sense.

In summary, the existing legislation on air pollution establishes a system in which the central government has only minimal powers to regulate regional action and virtually no power to overcome regional and local inertia. The central government has the power to set minimum emission standards, but it has never exercised it. This power ought to be exercised to provide a bound on the discretion of regional authorities. The only instrument
for establishing a minimum bound on regional action which central authorities have used is the establishment of minimum air quality standards, which were recently updated. Although a step in the right direction, these standards establish only a formal minimum. To ensure that they are respected, the central government needs to establish emission standards for at least some categories of sources. Moreover, with respect to the regions it needs some kind of a power of substitution analogous to that of the American EPA to substitute itself for states which are not adequately enforcing air pollution control limitations. Financial initiatives aimed at increasing the capacity of the regional bureaucracy devoted to air pollution control would also be helpful. A concomitant approach would be to centrally require regional development of effective bureaucracies with the threat of central substitution if they are not developed. Whatever tools are adopted as incentives for reforming the regional bureaucracies, the regional authorities with permitting responsibility need to be converted from interdisciplinary study seminars into true bureaucratic permitting organizations. This is likely to happen only if there is a central initiative because of the externality and inertia factors. Because the initial central legislation favored the collegial decisionmaking approach on the mistaken theory that a variety of public officials would among themselves have the expertise to set air pollution permit requirements and out of a desire to avoid altering the balance of political influences over the administrative process,(319) one might be pessimistic about the
likelihood of a sufficiently bold central legislative reform in Italy.

3. Potential remedies to the lack of central administrative power

Italian judicial activism and the Italian response to Community law are two areas of law which provide tools to overcome the poor conceptualization of the present air pollution control framework. Because an understanding of the Italian system of judicial review will aid in understanding a potentially powerful use of Community law, it will be discussed first.

a. Judicial activism as a substitute for central administrative power

In lieu of central executive impulsion to overcome the abundant bureaucratic inertia, the Italian courts have acted to motivate bureaucratic action or alternatively have directly undertaken the necessary action. In the continued absence of effective central direction, the courts ought to continue to develop their ability to motivate bureaucratic action. Some recent jurisprudential developments in this sense are very encouraging. It appears that the Italian judicial system can potentially, and indeed has to some extent already commenced to play a role as important as that of the American judiciary in environmental protection. However, the use of legal proceedings differs from the American experience where the chief role of the
courts has been to review or require administrative action. In Italy, judicial proceedings are all too frequently in place of administrative action. Although these various judicial proceedings are a means of compensating for failures of administrative control, they are not a fully adequate substitute because they are only isolated interventions which occur after the fact of damage. Preventive action through administrative control is a more effective remedy for pollution related damages.(321)

i. Criminal proceedings

In Italy criminal actions are often used to compensate for administrative deficiencies.(322) These actions are facilitated by the powers of pretori. A pretore is a magistrate whose subject matter jurisdiction includes all crimes with a penalty of less than three years of imprisonment.(323) The position of the pretore in Italy is unique in that the pretore may initiate criminal actions and then pass judgment on them.(324) Because of the nature of the judicial career in Italy, pretori are frequently young and enthusiastic. They have therefore been disposed to look for new ways to apply long standing criminal law providing for relatively light penalties to environmental problems.(325) The effectiveness of criminal actions would be increased were all public prosecutors, including the pretori, sistematically organized to prosecute violations of environmental laws.(326) Even if criminal actions cannot completely full the role of an
effective administrative program, in its absence their symbolic value is far from negligible.\textsuperscript{(327)}

\textbf{aa. Actions against polluters}

Criminal actions have been brought against polluters under a number of statutory provisions. Article 635 of the criminal code provides for criminal liability for damage to property. Article 650 of the criminal code, providing for up to three months in prison for non-observance of public health regulations, is useful as are various other provisions of the criminal code dealing with criminal negligence.\textsuperscript{(328)}

Of all the relevant criminal provisions, the one most relied on is article 674 of the criminal code, which condemns offensive emissions. One case involving prosecution under article 674 was against a gravel plant causing air pollution.\textsuperscript{(329)} The plant had a permit under the 1966 air pollution control law, which provides that the best technical controls possible are to be used.\textsuperscript{(330)} The court held that article 674 meant that even if there was an administrative authorization, there was still criminal liability for noncompliance with article 674's ban on offensive emissions. Applying criminal liability regardless of the compliance with permit conditions is important because it manifests an evident distrust in the public administration. Moreover, the penalty provided by the 1966 law for violation of permit conditions is at most 3,000,000 lire (about $1,500),\textsuperscript{(331)} a sum which constitutes a minimal deterrent. By making recourse to article 674, there is at
least the possibility of a short jail term, and the problems of proving a violation of permit conditions are avoided. This does not mean that article 674 by itself is an effective deterrent to pollution. By its very nature as a criminal provision, its use is limited to isolated, after the fact prosecutions. In the case just discussed the polluter was condemned to a 50,000 lire fine (about $25), hardly a stiff penalty or an effective deterrent.

The need to coordinate provisions for criminal liability with later law enacted with greater consciousness of the air pollution problem can produce rather forced results on occasion. For example, in a proceeding against managers of industrial installations near Taranto, the pretore distinguished between emissions of dust and smoke. In this pretore's view the joint effect of article 674 of the criminal code and of the 1966 law on air pollution was as follows. With respect to smoke emissions, respect of the 1966 law implied no possibility of criminal liability. On the other hand, with respect to dust emissions, compliance with the 1966 law was irrelevant to the existence of criminal liability under article 674. Without entering into the merit of the rather close statutory interpretation used to reach this conclusion, it is quite clear that the distinction has no rational scientific basis. This type of result is one of the costs of the lack of a coherent statutory scheme and of an effective bureaucracy to manage the air pollution problem.

The actions so far discussed have had environmental benefits chiefly through their deterrent effect. That is, they work by
inducing fear of penalties for not complying with what administrative scheme there might be or for causing emissions violating limits, albeit imprecise, established through criminal law. The more extreme form of this kind of action involves the use of the article 674 criminal action as a substitute for effective administrative action.

An example is an article 674 proceeding before a pretore against essentially all of the major industries surrounding a city. The investigations preliminary to issuing the decision took two years and involved numerous experts, citizen groups, and industry representatives. The result was four condemnations to fifteen days of arrest and three 600,000 lire fines (about $300), all of which were suspended provided the offending conditions were eliminated within a year. Although the penalties imposed are light, the decision is important because it does what the public administration had not done, i.e. provide for a way to require reduction in pollution levels. The case is a clear example of judicial substitution for the public administration. The kind of investigation undertaken and the information which had to be weighed are far more typical of an administrative rather than a criminal proceeding.

At times pretori seem frustrated even within the ample constraints of their role of substitution of the public administration. One pretore went so far as to invite the Constitutional Court to engage in some judicial lawmaking. The pretore raised the question of the constitutionality of the law no. 615 of 1966 on the grounds that its lack of effective criminal
enforcement provisions constituted a denial of the constitutional right to health. The Constitutional Court declared the question inadmissible on the ground that only the legislature could remedy such positive gaps in the law. (334)

bb. Actions against public officials

Local and regional officials have been criminally prosecuted under article 328 of the criminal code for failure to exercise review or decision functions with regard to air pollution. (335) This provision is especially interesting because by making recourse to it the pretori are requiring local authorities to act, which is what central executive, legislative, and administrative authorities ought to do directly. The difficulty with relying on criminal responsibility of public officials rather than on effective administrative or political accountability is the harshness of criminal sanctions for the lax exercise of frequently highly discretionary authority. It is also difficult to identify which officials are in fact responsible for the complete absence of administrative capability to deal with air pollution problems. In one case this problem was overcome on the theory that the local pollution problem was so blatantly obvious that the head of the provincial administration which failed to create a monitoring network must have been aware of it. (336) Citizen groups which wish to provoke prosecutions of public officials are advised to first call the problem to the attention of the officials in writing so as to create a record of wilfull neglect. (337)
Finally, criminal prosecutions occur only in limited cases and only after the fact of grave environmental damage. Accordingly, article 328 prosecutions are useful, but not as desirable as an effective public administration in the first instance would be.

The jurisprudence of the Court of Accounts, a special administrative court responsible for review of state finances, has developed in a way such that its accounting actions serve a function quite similar to article 328 criminal prosecutions of public officials.\(^{338}\) On the basis of provisions establishing the liability of public functionaries for damage caused to the state,\(^{339}\) the Court has held that public officials can be personally responsible for damages to the environment caused by failure to carry out their responsibilities or by negligent decisions.\(^{340}\) The facts related to an authorization to build a tourist village in a national park. In a subsequent appeal the Court reaffirmed this decision and specified that the damages were due to the state, not to comunes or regions when functionaries or agents of the public administration were prosecuted for environmental damages.\(^{341}\) Damages were finally assessed at one billion lire (about $500 000).\(^{342}\)

The Court acknowledged the difficulties of quantifying in monetary terms the damage caused to the National Park by allowing the construction of fourteen kilometers of road and construction of a fifty hectare subdivision from 1962 to 1964. It arrived at the damage assessed by considering estimates of the costs of destroying the subdivision, restoring the land, damage to the image of the park, and damage to flora and fauna. It picked what
it felt to be a reasonable figure. In doctrine it has been observed that the laws establishing the Court of Accounts' jurisdiction were enacted before environmental problems rose to public consciousness. (343) A particular consequence of this fact is the lack of any useful statutory criteria for the estimation of damages. The only adequate resolution to the advance of the Court's jurisprudence beyond the capacity of the laws under which it acts would be new legislation. Because state employees are unlikely to have the assets to pay extremely large judgments, the determination of the particular amount of the damages is in fact academic. The assessment of damages is therefore more of a punitive act than a means of compensating the state.

In another case, (344) the official who authorized discharge of titanium oxide into the ocean near Livorno was held personally liable for the damages incurred.

The Court of Cassation fully approves this orientation of the jurisprudence of the Court of Accounts. (345) It has held that the Court of Accounts had jurisdiction over a proceeding for damages against a bank which, as an agent of the public administration, was involved in the illegal exportation of private funds. By holding that the Court of Accounts could entertain an action for this kind of indirect damage, i.e. the economic impact of illegal exportation of capital, the Court of Cassation implicitly approved the Court of Account's exaction of monetary compensation for damages to the public interest in the environment.

Actions before the Court of Accounts to recover damages to the state are brought by the Procuratore generale, a career
prosecutor of the Court. Other parties may not bring actions in the public interest although they can always ask that an action be commenced and once an action has started, they may participate freely. The Court of Accounts has also allowed public entities to freely participate. Previously the procuratore generale of the Court was considered the exclusive state representative before the Court. The new theory of the procuratore generale in the kinds of damage actions at issue here is that the procuratore generale acts in the property interest of the state understood as the community. Therefore other state entities can participate freely in the proceedings to represent their interests, which may or may not coincide with the community interests identified by the procuratore generale. The Court of Cassation has reiterated its approval of the activist approach of the Court of Accounts by considering the procuratore generale of the Court of Accounts to be fully equivalent to the public minister, i.e. the ordinary public prosecutor.

ii. Civil and administrative actions

The usefulness of the civil and administrative courts for environmental protection has increased greatly in recent years. The Court of Cassation, supported by the Constitutional Court, has broadened the standing criteria for environmental actions in the civil and administrative courts. It has also made injunctive relief available against pollution causing health damages, a kind of relief which was not previously available.
As already explained, both the civil and administrative courts in Italy have jurisdiction over actions against the state. The civil courts can enjoin enforcement of an administrative decision and can also award damages against the state, but they cannot reform an administrative decision. The administrative courts have the power to require reconsideration of an administrative decision. The standing requirements before the civil and administrative courts are respectively a subjective right and a legitimate interest. The jurisprudential development of the constitutional right to health now makes it possible for individuals to initiate civil and administrative proceedings to block or reform administrative decisions that will result in levels of pollution which infringe the constitutional right to health.

The Constitutional Court has accepted the application of article 32 of the constitution to directly provide individual and collective rights to health.(350) It has also found that articles 2043 and 2059 of the civil code, which concern compensation for damages, to be constitutional provided that they are interpreted to refer not just to property damages, but also to damage to the constitutionally protected right of health.(351) By this decision the Court rejects the previous doctrinal position that compensation was available only for loss of earning capacity.(352) It would seem that the Court has opened the door to the kinds of claims for pain and suffering routine in American tort law.
aa. The jurisdictional boundaries of the civil and administrative courts

The Court of Cassation's jurisprudence on the constitutional right to health has greater practical import than the Constitutional Court's because it is responsible for regulating the jurisdictional boundaries of the civil and administrative courts. (353) In the event of a dispute over the jurisdiction of a court of first instance, it is possible to ask the Court of Cassation for a preliminary ruling as to which court has jurisdiction. It is in a number of these preliminary rulings that the Court of Cassation has enlarged the scope of actions entertainable before the civil courts, and by implication, before the administrative courts as well.

In a 1979 case (354) the neighbors of a potential nuclear power plant site brought an action before a civil court asking for a preliminary technical study before further decisions on localizing the plant were made. A complex administrative procedure for siting nuclear plants was provided by law; however, in response to a request for a preliminary ruling on jurisdiction the Court of Cassation decided that the neighbors could bring their action in the civil courts. It distinguished between two kinds of interest -- indivisible and divisible interest. Examples it gave of indivisible interests are national defense and public order. Divisible interests include health and environmental protection. In the Court's view, what distinguishes divisible from indivisible interests is the ability to identify an
individual interest distinct from the collective interest. By limiting jurisdiction to those cases where an individual, i.e. divisible, interest can be identified, the Court's hope is to anchor itself on the slippery slope leading to full judicial involvement in all political issues. In this particular case, the Court found that the neighbors met the requirement for an actionable interest because their property and environmental interests as farmers were potentially violated. In this case, the plaintiffs needed to show a subjective right because they were attempting to bring their action before the civil courts. Consequently the Court held that their interests constituted a subjective right, rather than non actionable diffuse or indivisible interests, because they had particular interests distinct from the general interest.

The subsequent decision of the Court of Cassation, issued only a few months later, (355) amplifies the analysis of the preceding case. This decision was also rendered in a preliminary jurisdictional proceeding. In the suit three neighbors of the site of a proposed sewage plant for Naples complained that it would degrade environmental quality and produce noxious emissions. The Court held that even though the health interests involved were shared by an indefinite number of subjects, they still constituted an actionable subjective right by virtue of the constitutional declaration of the right to health in article 32 and the article 24 of the constitution guarantee of the ability to seek judicial protection of one's rights. The Court stated that the diffuse
character of the interests at stake constituted no barrier to the existence of a subjective right.

The Court of Cassation's insistence on the constitutional right to health could also have a broadening effect on the kinds of actions entertainable before the administrative courts. In particular, the Court of Cassation, sitting in its role as the court which draws the bounds of civil and administrative jurisdiction, could permit challenges by third parties against administrative authorizations which would permit air quality limits established by law to be exceeded. (356) Doctrine has already urged that the law no. 833 of 1978 on health care reform (357) accords individuals the necessary legitimate interest in health. (358) Article 32 of the Italian constitution defines health as a fundamental individual rights and a collective interest. Either the 1978 law or the constitution itself could be the basis of allowing such actions. The fact that interests in health are involved may be the determining factor to allow third party challenges to air pollution permits. The Court of Cassation has held that being a resident of a comune is insufficient to accord a legitimate interest to challenge the award of a building permit. (359) The one factor distinguishing this case from the air pollution example is the direct relevance of health interests in the case of air pollution.

The final effect of the Court of Cassation's discovery of the right to health could be that environmental claims might be made either to the civil or administrative courts depending on the remedy sought. For industrial permits the difference in available
remedies may not matter because a successful action in either set of courts will block the permit. That is, civil courts can block the administrative decision to issue the permit, and the administrative courts can require reconsideration of the substance of the permit decision. The possibility of raising environmental claims in either civil or administrative proceedings in combination with the direct effect of Community directives establishing air quality limits, a topic discussed below, may prove to be an important new tool for preventing environmental degradation if the Italian state fails to fully implement the relevant directives.

bb. Expansion of injunctive remedies

The Court of Cassation has provided another new tool for civil litigation concerning environmental protection.

In civil actions, the provisions most relied on are article 2043 of the civil code dealing with damages for illicit conduct and 844 of the civil code dealing with property rights. Peripherally relevant are articles 890, 2049, 2050, and 2051 of the civil code dealing with civil liability. Article 890 provides that machinery or harmful materials placed on property must respect the required distances from the boundaries established by safety regulations, or in the absence of such regulations, the distances required for safety. Article 2049 makes principals responsible for negligence of their agents, e.g. an employer is responsible for acts of an employee. Article 2050 makes anyone
engaging in a hazardous activity responsible for the resulting damages unless they can show that they adopted all useful measures to avoid the damage. Article 2051 provides that the custodian of things is responsible for any damage they cause except in case of fortuity.

In a civil action against a polluter, the two goals of the action are to obtain damages and to require that the offensive pollution cease. Until recently an action for damages and for an injunction was limited to property owners to protect their property rights. By judicial decision this has now changed so that individuals other than property owners may obtain injunctive relief to protect health rights. Article 844 of the civil code permits a kind of nuisance action by property owners if levels of pollution exceed the "normal levels of tolerability."(360) Article 2043 of the civil code is a general tort liability provision. It provides for award of damages whenever through negligent or intentional conduct an unjust injury is caused.(361)

Both the Constitutional Court(362) and the Court of Cassation(363) have taken article 844 at face value and considered it as dealing only with property rights. Article 2043 has instead been used as the vehicle for giving content to the article 32 of the Constitution declaration of the right to health.(364) The limitation of using articles 844 and 2043 in this way was that injunctive relief was not available to prevent health damage. Article 844's provision for injunctive relief was limited to property rights, and article 2043 provided only for award of damages, not for injunctive relief. The Court of Cassation, in a
case involving a noisy boiler in the central heating system of an apartment building, has now taken the position that because of the constitutional importance of the right to health, the injunctive powers available under article 844 may by analogy be applied to prevent conditions causing health damages.(365)

In the same decision, the Court went on to conclude that damages under article 2043 were not limited to traditional property damages. To do so it had to overcome article 2059 which limits award of nonproperty damages to cases specifically determined by law.(366) It overcame article 2059 by determining that the reference to nonproperty damages meant only emotional and psychic damages ("dolore, sofferenza, tristezza," i.e. pain and suffering).(367) The Court had previously held that damages under article 2043 were not limited to decrease in earning potential, but instead included the value of injuries per se.(368) In the present decision the Court further broadened the kind of damages compensable under article 2043. After noting that article 2043 limited itself not to property damage, but rather to "unjust damages,"(369) the Court defined unjust damage as including not only injury to the person objectively measurable in an economic sense, but also injury measurable only in a subjective way, i.e. biological and social damage.(370) By taking this broad position on the recovery of damages, the Court has improved the capacity of the judiciary to substitute itself for the public administration in resolving environmental issues.
cc. Standing

The broad conception of damages, the opportunity to generally obtain injunctive relief in civil actions, and the broadening of the jurisdictional criteria for the civil and administrative courts are contrasted by a seeming reserve against the notion of public interest law suits. In fact, while the Italian courts have been generous in according standing to individuals, they have been careful about the extent to which they have made standing available to public interest groups. (371)

Italia Nostra, an Italian conservation group, has made a particular effort to bring public interest actions. (372) It met with some success when the highest administrative court, the Council of State, granted it standing to challenge the administrative authorization of a road threatening a lake. (373) The narrowly drawn decision recognized it as a moral entity fulfilling a state role on the basis of its state charter. It was allowed to bring the action because its state charter anticipated such an activity. Shortly thereafter, in a criminal action against officials who expanded a campground in a public park, the Court of Cassation denied Italia Nostra standing to join the criminal proceeding as a civil party on the ground that it could show no damage to its interests. (374) And now, even the Council of State has denied Italia Nostra standing in a case involving construction in a national park which threatened its scenic beauty. (375) The Council of State reasoned that there may exist a
legitimate interest in environmental protection, but to bear such an interest, a group or individual must have a specific interest distinguishable from the general public interest. Recognition of an association by the state, such as that accorded Italia Nostra, is insufficient to confer a specific interest. The Council found that as a national organization with an abstract charter, the organization did not have interests tied to a particular natural environment more or less definable in some way.

These decisions against Italia Nostra limit the ability of environmental groups to undertake public interest litigation. They express the Italian concern for categorizing rights and interests, and thereby limiting standing to avoid involving courts in politically debated questions. Nonetheless, the opening of the courts to individual claims of damage because of environmental degradation has had some effect even on the treatment of associations. Even the Council of State appears willing to allow associations to bring administrative actions if they can show some specific damage. The Council of State has also determined that for purposes of intervening as amici curiae (intervento adesivo), the degree of interest required by an association is less than if the association attempted to bring a proceeding on its own behalf. It accordingly allowed amicus interventions by Italia Nostra and the Italian chapter of the World Wildlife Fund in an administrative judicial proceeding.\(^{376}\) Likewise, pretori continue to allow individuals, local associations, and even Italia Nostra to participate as parties in criminal proceedings concerning environmental degradation.\(^{377}\) The Court of Cassation
has even permitted a mayor, as representative of a comune, to become a civil party to a criminal proceeding to seek damages for unauthorized construction.(378) Finally, there is a persistent doctrinal current in favor of allowing both individuals and associations to bring environmental actions in competition with actions instituted by the public minister as representative of the public interest.(379)

The bottom line of the Italian jurisprudence on standing may be very similar to that of American jurisprudence. In 1972 the Sierra Club managed to have a case reach the Supreme Court in which it asserted that as an association it was entitled to bring an action to block development of a mountain resort.(380) The Supreme Court denied that its "moral interest," to use the Italian terminology, in protecting the mountains was sufficient to accord it standing. By amending its complaint to allege that individual interests of its members in recreation were damaged, the Sierra Club was easily back in Court.(381) The ultimate result in Italy may be similar. That is, environmental groups may be blocked from litigating on the basis of injury to their self declared purposes; however, it may be easy for them to demonstrate the required specific damage.

It can also be noted that hostility to public interest litigation by private groups does not necessarily imply hostility to other forms of public interest litigation. The theory of interesse legittimo on which the jurisdiction of the administrative courts is predicated after all has the collective interest as one of its bases. The criminal actions brought by the
pretori are also in the public interest. In this vein it has been suggested that an approach to more effectively provide for the protection of the collective interest in administrative proceedings would be to institute a public prosecutor (pubblico ministero) in each of the administrative tribunals of first instance and in the Council of State. Analogous to the way the public prosecutor initiates criminal actions in the collective social interest, the public prosecutor would bring administrative actions to protect the collective environmental interest.(382)

b. Community law

Community law has been given a mixed welcome in Italy. Italy of course adhered to the Community treaties and participates fully in Community institutions. However, it has been exceedingly slow to accept directives into national law and to implement them. As an interim solution to the problem of directives, a 1982 law(383) delegated to the government the power to receive into national law ninety seven directives issued from 1964 to 1980. The necessity of relying on such measures is due to the complexity of Italian politics which causes Community law issues to receive a lower priority than national political issues.(384) It may also be due to the low level of parliamentary involvement in the formulation of national input into the establishment of directives as well as to some extent a deliberate political choice to go slow on implementation.(385)
Notwithstanding this less than overwhelming embrace of Community law, Community law provides four important structural benefits to Italy in the field of air pollution control. They are the central setting of standards, the stimulus these standards provide to revamping the existing national system, the direct applicability of the Community standards, and the power of the central government to substitute itself for local inactivity.

i. Central establishment of standards and stimulus of national reform

The central establishment of standards is the most obvious of the four benefits. That is, it suffices to look at the directives fixing ambient air quality limits for concrete examples of the establishment of standards. It is however unclear what use will be made of the Community standards in Italy. The benefit of stimulus to revamping the national system cannot be quantified short of determining whether a reform is in fact adopted, but it can be noted that as a result of the Community directive on sulfur dioxide and particulates, there is an effort directed by the Ministry of Health to draft and eventually propose a new, comprehensive air pollution control law. So far, there has been no integration of the directive into national law. A more precise example of Community stimulus of national action is the adoption of national law to comply with the Community directive on sulfur content of fuel oil.
Another exterior source of law which will tend to have the same effect is the Convention on long distance transfrontier pollution ratified by Italy in 1982.\textsuperscript{(389)} The importance of Community law as a stimulus to national reform can be appreciated in comparison to the effect of this conventional treaty. The Convention on long distance transfrontier pollution amounts to little more than an agreement to exchange information and a good faith commitment to attempt to reduce pollution. In contrast, the Community law sets precise goals to be attained by defined deadlines and provides legal mechanisms for encouraging compliance.

The other two structural benefits of Community law, i.e. direct applicability and increased powers of central intervention, are for the present only potential benefits. However, they are actual tools which are available to national actors. It remains only for the appropriate actors to seize them.

ii. The scheme for dividing implementation responsibilities under Community law between the regions and the State.

aa. The national receiving law

Under the presidential decree law no. 616 of 1977\textsuperscript{(390)} the basis of the legal framework for regional application of directives is to be the national law receiving the directive into domestic law. The model adopted was that of the national framework laws which ought to have regulated regional activity
within the other fields constitutionally assigned to the regions. The national law receiving the Community directive is an opportunity to engineer the distribution of powers between central and regional authorities and is part of the stimulus provided by Community law for reform of national institutions and programs. The adoption of this model is based on a literal reading of the EEC Treaty article 189 which distinguishes between regulations and directives as Community legislative instruments. Regions are allowed under article 6 of the presidential decree law no. 616 to take administrative action to implement regulations, which the EEC Treaty in article 189 defines as directly applicable. The conceptual framework in which a state implementing law is required before any regional activity with the purpose of implementing a directive reflects the article 189 distinction between directives and regulations. In contrast to regulations, article 189 provides that directives are to fix the goals to be obtained, but to leave the means for achieving the goals established to the member states. If the premise is accepted that directives are always sufficiently general as to require some legislative interpretation before they can be implemented, then the requirement of a national implementing law makes sense. If there are different ways a directive could be implemented, it is appropriate for the national legislator to provide for some uniformity of approach in the regional implementation of a directive. It is also appropriate to specify the division of responsibility for various implementing actions between the State and the regions.
One difficulty with this scheme is that quite frequently the Italian parliament has not managed to receive a directive into national law, let alone to identify regional responsibilities for a directive's implementation, within a reasonable time. The kind of crisis measures adopted to incorporate directives into national law are evidence of this. Another problem is the constitutional issue raised by a contradiction in the premises of the requirement for a state implementing law prior to regional action and of the delegation to the government of the power to receive directives into national law. The premise of a state implementing law prior to regional implementation is that the directive allows for discretion in its implementation, and that this discretion must be limited. The 1982 law designed to resolve the problem of receiving directives into national law delegated in blank to the government the reception of directives into national law. If this reception is indeed a discretionary rather than a merely technical act, as the presidential decree law no. 616's requirement would seem to imply, article 76 of the Constitution's requirement that any delegation of lawmaking power to the government be accompanied by strict criteria is violated.

In any event, the requirement of a state implementing law prior to regional legislation has been criticized as leading to needless delay. It is argued that the national parliamentary delays are worse violations of Community obligations than any potential regional delay in adopting implementing legislation. Because of the reasons about to be discussed with respect to the doctrines of direct effect, the requirement of
a national implementing law may turn out not to be such a great hindrance.

bb. Central government substitution

The central government's power to substitute itself for local inactivity when a matter of Community law is involved is a very potent tool for overcoming local inertia. Article 6 of the presidential decree law no. 616 of 1977 is the text which expressly accords the central government the power to substitute itself for the regions if they do not implement Community law. This approach to ensuring regional implementation of Community law has been found acceptable by the Constitutional Court on the ground that the State has exclusive responsibility to ensure that international obligations are respected. Implementation of Community law is an obligation deriving from adherence to the Community treaties and therefore a state responsibility which takes precedence over regional autonomy.(394) This precedence applies even to the special statute regions which otherwise benefit from special guarantees of autonomy under article 116 of the Constitution.(395)

The importance of this power of substitution arises from the fact that if Community law were not involved, national central authorities would have neither the statutory nor the constitutional power to substitute themselves for local authorities in the face of local inaction. The power is potentially important, but pessimism is justified about the
prospects for its meaningful exercise. (396) So far the central administration has shown no effective capacity to intervene directly at the regional level, and there is no reason that the mere fact of the involvement of Community obligations would necessarily make a decisive difference.

iii. Direct effect

The last of the structural benefits of Community law relates to the Community law doctrine of direct effect. This doctrine in combination with continued opening of the Italian judicial system to citizen suits may provide a significant spur to administrative action. The direct effect of directives has been developed from a line of Court of Justice jurisprudence which is not entirely self evident from a literal reading of Article 189 of the EEC Treaty. That article provides that regulations are to be directly effective, that is to have effect without the need for national implementing legislation, and that directives are to leave the choice of means of implementation to the member states. The literal reading of this article would conclude that directives have no effect in member states until they are made effective by national law.

The Court of Justice, however, has declared that directives, or parts of directives, may have effect in national law without any receiving activity under national law if they are unconditional and sufficiently precise. (397) This direct effect is important in the absence of national law implementing measures
or when national law implementing measures are inadequate. The most recent major pronouncement of the Court of Justice on the subject of direct applicability of directives declares that if a member state has not implemented a directive which is unconditional and sufficiently precise, then the directive may "be relied upon as against any national provision which is incompatible with the directive or in so far as [the directive] . . . defines rights which individuals are able to assert against the state." (398)

Various Community environmental directives contain provisions which fulfill the criteria for direct effect. With regard to air pollution, the directives on ambient air quality fix standards which Italy is unconditionally required to meet by a certain date and which are quite precisely defined. (399) Indeed they are defined numerically. These directives also contain nondegradation provisions. (400) If there is a right under national law for individuals to assert these rights against the state, then the state can be prevented from taking action in contrast to them. For example, the state action violating the directly effective provisions of the sulfur dioxide and particulate directive setting ambient air quality standards would be the granting of a pollution permit which would lead to exceeding those standards. In the Italian context, parties wishing to assert a right against the state must do so in the context of a legitimate interest or a subjective right. Both of these concepts have already been discussed at some length, and the jurisprudence indicating an opening of the judicial system to the right to a healthy
environment indicates that individuals may be able to gain standing to assert that an administrative action which would lead to violation of the limits established by the directive would violate their rights to have air quality at least as clean as that required by the directive. It is unclear whether such rights ought to be categorized as legitimate interests, as subjective rights, or as both. The confusion about the proper doctrinal classification of these rights and consequently about which court has jurisdiction over claims for their enforcement does not lessen the forcefulness of the Community law on direct effect. In an early case, (401) the Court of Justice said that the classification of a right as a subjective right or as a legitimate interest was an internal matter for Italian law, but that whatever the answer the Community law right must be protected.

aa. The jurisprudence of the Constitutional Court on Community law

The Court of Justice's declaration of the direct applicability of directives is not in itself sufficient to ensure that national courts will in fact directly apply them. This is particularly true in light of the difficult reception Community law has had in the highest Italian court, the Constitutional Court. In 1964 in its first major confrontation with Community law, the Constitutional Court determined that adherence to the Community treaties by ordinary law, rather than a constitutional amendment, was acceptable; however, it went on to consider
Community law as a kind of ordinary treaty law with the consequence that it could be modified by subsequent national laws. (402) The Community Court of Justice rejected this position in a related case between the same parties by declaring the supremacy of Community law over national law. (403) In 1973 the Constitutional Court retreated from this position, which constituted a grave threat to Community lawmaking power. (404) Although it accepted the supremacy of Community law even over subsequent national law, it insisted on the necessity of centralized constitutional review to apply the Community law. The Community Court of Justice in 1978 expressly declared that centralized constitutional review to apply Community law could not be required. (405) Only in 1984 did the Constitutional Court declare its acceptance of the result demanded by the Court of Justice. (406) In its 1984 decision the Court allows Community law to be applied in preference to subsequent conflicting national law by any Italian court without the need for centralized judicial review. However, rather than adopt the Community Court's monist theory of the supremacy of Community law, the Constitutional Court adopts a dualist theory under which Community law's application is permitted only insofar as the Italian legal system determines to allow its application. By adopting this theory the Constitutional Court retains the ability to control Community law against national constitutional values. A potential additional consequence of adopting this theory is that the Constitutional Court might decide to undertake its own interpretation of article 189 of the EEC Treaty rather than rely on the Court of Justice's.
The jurisprudence of these court on the direct applicability of directives is mixed. It should be born in mind that following the Constitutional Court's recent decision on the relation of Community and national law, all of the old jurisprudence may be subject to reconsideration if similar questions are represented to the corresponding courts. The Constitutional Court has accepted the full supremacy of Community law except for when internal constitutional values are compromised. Accordingly, the Italian judiciary ought to follow the logic of the Constitutional Court and fully embrace the jurisprudence of the Court of Justice. The Constitutional Court itself has not yet confronted the problem of direct effect of directives. However, in one case it acknowledged in passing, and significantly without criticizing, the Community jurisprudence on direct effect of directives.

In one case since its 1984 decision, the Constitutional Court has affirmed that the acceptance of the supremacy of Community law includes acceptance of the supremacy of jurisprudence adopted by the Court of Justice. The case involved a challenge to a national law permitting refund of improperly paid customs duties only following a showing that the burden of the tax had not been shifted to others. The Court held that ordinary judges had to apply case law of the Court of Justice containing the propositions of nondiscrimination and that the burden of proof could not be
rendered so onerous as to effectively deny the right of refund. That acceptance of the full supremacy of Community law was not narrowly limited to regulations bodes well for the eventual recognition by the Court in an appropriate case of the direct effect doctrine. In doctrine it has been urged that the logic of the 1984 decision compels acceptance of the principle that directives having direct effect are applicable by ordinary judges without recourse to the constitutional review procedure.(410)

The Court of Cassation has on occasion clearly rejected the direct effect of directives; however, more recently it seems to be coming to accept the doctrine.

In a 1976 case(411) the Court of Cassation adopts a literal reading of article 189 of the EEC Treaty and thereby excludes the possibility of direct application of directives. The Court however resolves the direct effect question by finding that Italy had implemented the directive in question and that therefore the provisions of the directive had no direct effect. It also finds that because the disputed contract was formed prior to the relevant directive, principles of temporal succession of laws indicated it did not govern the controversy. This result does not present a direct challenge to the Court of Justice's present jurisprudence.

The attitude of this case is nonetheless contrary to the spirit of the Community jurisprudence. In other unpublished cases as recently as 1981 the Court of Cassation has spoken against the doctrine of direct effect.(412) However in one 1980 case, a section of the Court of Cassation has given direct effect to
Community directives dealing with tax matters. More recently the Court of Cassation referred a question to the Court of Justice for a ruling on whether a provision of a directive was directly applicable. When the Court of Justice answered that the provision, regarding the levying of customs duties or of charges having equivalent effect on imports of poultry meat, was directly applicable, the Court of Cassation without fanfare applied the directly applicable provision of the directive.

In a 1980 case the Council of State indicated that it wanted nothing to do with overseeing the implementation of Community law. In response to the claim that regulation of the ingredients of cosmetics violated a directive, the Council of State shrugged its shoulders. It said:

Al riguardo il Collegio osserva che tale motivo, introdotto con perplessità della stessa difesa della società appellante, che si da carico di rilevare come le direttive comunitarie non siano vincolanti per gli Stati membri, prima che questi, con proprie misure interne, provvedano ad adeguare le rispettive legislazioni alle direttive medesime, non ha certamente maggior pregio del motivo in precedenza esaminato, proprio per le reazioni esposte dalla stessa difesa dell'appellante.

Il problema, poi concernente l'obbligo di adeguamento alle predette direttive certamente sfugge alla competenza di questo Collegio e, più in generale, alla giurisdizione del giudice
di legittimità (come di quello ordinario), investendo la competenza degli Organi di giustizia internazionale. (417)

(This claim, introduced with perplexity by the very counsel of the appealing company, who takes care to note that Community directives are not binding on member states until the member states adopt them into national law, is no more convincing than the previous claim for the very reasons set forth by appellant's counsel.

The problem of the obligation to comply with Community directives certainly escapes the competence of this body, and more generally the jurisdiction of the judge of legitimacy (such as that of the ordinary judge). The problem is one of the Organs of international justice.)

The effect of these comments is to hold that the noncompliance of a statute on which an administrative act is based with a directive not yet received into national law is not a grounds for annulling the administrative act.

Any negative jurisprudence of the Council of State and of the Court of Cassation ought to be challenged before the Constitutional Court as unconstitutional under the article 11 of the Constitution incorporation of Community law into national law. Notwithstanding the lack of clear guidance from the highest ordinary courts, one pretore has issued a judgment which fully embraces the concept of direct effect. (418) In that case the
pretore acquitted a person who marketed a shampoo which did not comply with Italian law's requirements on biodegradability of detergents, but which did comply with a Community directive which had not yet been implemented in Italy.

It can be hoped that for the sake of integration, all of the Italian courts will eventually come to acknowledge the Community jurisprudence on direct effect. A logical consequence of this jurisprudence is that an Italian judge in a civil or administrative action is required to look to the Community directive establishing air quality limits when a particular permit is challenged. If the permit would lead to violation of the Community limits, then it should be annulled. Of course, if the Community directive is appropriately implemented by national law, the direct effect issue is moot. However, absent such implementation, Community norms can be viewed as a form of central control compensating for the lack of national central activity. They will help prevent the worsening of air quality, and by paralyzing concession of new permits, they will awaken political interest in establishing an effective permitting system.

4. Conclusion

The Italian air pollution control program is characterized by broad diffusion of responsibility and authority. Effective implementation has been hindered by the lack of central power to intervene to stimulate and guide local decisionmaking. There has also been a lack of resources and of clear assignment of
responsibility among the various authorities. Because of the relative immaturity of Italy's experiment with regionalism, reform efforts which suitably structured state and regional relations could prove a model for other subject matters. Any reform with a prayer of success will deal with the problems of establishing effective bureaucracies without sacrificing the legitimacy advantages of regional autonomy. If relations between central and local authorities and between democratic and bureaucratic decisionmaking are properly structured, perhaps the present pathological importance of judicial proceedings will recede.

E. EEC

1. Overview of EEC air pollution law

   Community legislation treats vehicle emissions,(419) ambient concentrations of sulfur dioxide and particulates,(420) ambient concentrations of lead,(421) ambient concentrations of nitrogen oxides,(422) and emissions from industrial plants.(423) It also sets standards for lead in gasoline(424) and sulfur in fuel oil.(425) The Commission has proposed legislation to limit emissions from large combustion plants.(426) The Community has also adhered to the Convention on long-range transboundary air pollution.(427) The Convention provides for information exchange and commits the parties to "endeavour to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary air pollution."(428)
Of the directives on air pollution, the directives on fuel quality and vehicle emissions do not pose very complex questions of relations between the central Community authorities and the member states. Although the political controversy over their adoption and updating has at times been intense, their basic principle is simple. The relevant directive establishes a common minimum or minimums which all member states are held to respect. Because of the limited sources of the products involved, i.e. refineries and vehicle manufacturers, it is a relatively simple matter to require compliance with the directives' standards. A car model either is or is not manufactured to the appropriate standards. A fuel either has or does not have a certain lead or sulfur content. A member state might choose not to comply with a directive for political motives, although such a choice is unlikely given the practice of continuing negotiation on a proposed directive until a compromise is reached. However, in no case for these directives will a member state have difficulty in complying because of lack of administrative infrastructure. These directives serve a function of central impulsion by the mere establishment of minimum limits.

A more detailed look at the directive limiting the sulfur content of fuel oil confirms these assertions. The directive, based on the ground of harmonization of laws, sets limits on the sulfur content of gas oil, a fuel used for diesel vehicles, domestic heating, and small commercial installations. Sulfur emissions from this fuel are considered to be serious because they are concentrated at ground level in urban areas. The
motivation for action was notice to the Commission by France, Italy, Netherlands, and Germany of national plans to deal with the problem. There was fear that these plans would pose problems for the oil industry. (430) Under the directive approved, after 1976 only two types of fuel oil are allowed, types A and B. (431) After 1980 the maximum sulfur content of type A fuel was 0.3% and for type B 0.5%. (432) Designation of areas in which type B fuel could be burned was left to the member states. They were permitted to assign areas to zone B if they were low pollution areas or areas where fuel oil made a low contribution to pollution. (433) Spot checks by member state authorities of compliance are required. (434) With the exception of Italy, which only recently adopted the legislation to apply the directive, compliance with the directive has been good. (435)

In contrast to these directives, the directives on sulfur dioxide and particulates, on nitrogen oxides, on lead, and on emissions from industrial plants, as well as the proposed directive on emissions from large combustion plants, do require rather sophisticated administrative structure for their implementation. For the directives on fuel quality and vehicle emissions, once the central Community minimums are established and incorporated into national systems, there is little role for Community intervention. Because the implementation of these other directives is so much more complex, there is more room for inertia on the part of the member states and more room for recalcitrance short of outright rejection of a directive. Because the Commission, as the executive organ of the Communities, possesses
only extremely limited bureaucratic resources, the effective implementation of the directives on industrial plants and on air quality limits requires particularly refined Community legislation in order to permit the Community to have the power to meaningfully stimulate member state action.

For the time being, it is unlikely that the Commission will be given the power to substitute itself for poorly performing member states in the way that the American EPA or the French central administration substitute themselves for local authorities in their systems. What might happen if various projects of political union and institutional reform were adopted is too problematic to speculate on. The one present exception to the Commission's lack of preemptive power serves to illustrate how far the Commission is from the status of the executive authorities in a federal or unitary state.

The exception relates to new policy initiatives. Member states are required to inform the Commission of environmental measures they anticipate. Under this agreement unilateral national actions affecting the environment are to be notified to the Commission to enable it to take preemptive Community action if appropriate. The Commission has two months to notify the member state of its intention to propose a regulation or directive, and five months to actually make a proposal. The Council has five months to act following receipt of the Commission proposal. National measures urgently needed to protect safety or health are not subject to the waiting period. This agreement gives the Commission a chance to preempt individual member state action by
proposing a collective policy. This is not however the same as being able to directly act in place of a component governmental unit. Moreover, this procedure has been criticized as merely allowing the Commission to impose a pointless one year delay. The delay is considered pointless because one year is asserted to be insufficient time to ensure adoption of a directive.

The remainder of this section is devoted to analyzing the strengths and weaknesses of the Community directives on ambient air quality and industrial plants. As a correction to the structural weakness of the Commission's position, it will be suggested that the Community ought to capitalize on and further develop a provision of the industrial plant directive along the lines of some techniques used in France and the United States. It will be argued that the roots of the necessary kinds of institutional structures already exist within Community practice.

2. The ambient air quality directives

The 1980 directive establishing minimum ambient air quality standards for sulfur dioxide and particulates is a fundamental development in Community policy. The directive established limit values and guide values. Limit values are to protect human health. Guide values are long term precautions for health and environment. Values are established for sulfur dioxide in conjunction with particulates and for particulates separately. Before October 1982 member states were to submit to the Commission plans to bring into compliance by 1993 any regions which will
exceed the values established by the directive after April 1, 1983. (442) All implementation measures must be reported to the Commission, (443) and states must establish monitoring networks and report violations of the standards. (444) The directive established alternative measurement techniques and permits use of other techniques if proved to produce equivalent results. (445) Finally, the laws, regulations, and administrative provisions necessary to implement the directive were to be brought into force within two years of the directive's effective date. (446)

The directive on lead follows the pattern of the directive on sulfur dioxide and particulates. It fixes limit values for concentrations of lead in the air, but permits more stringent member state requirements. (447) Member states have five years to comply with the directive's limit values, and are to submit plans to the Commission explaining how they will comply. (448)

The recent directive on nitrogen oxides also follows much the same pattern as the directive on sulfur dioxide and particulates. It fixes limit values which are not to be exceeded and guide values, which if exceeded, are to promote special attention by member states. (449) To attain the limit values in areas where they are exceeded "as rapidly as possible and by 1 January 1994 at the latest," plans are to be submitted to the Commission. (450) More severe values may be set by member states. (451)
3. Emission standards as part of EEC air pollution law

a. The need for emission standards as a form of central impulsion

These directives require substantial action on the part of member states. However, it is unclear how recalcitrant states can be prodded into the required action if they choose not to act. The directives say nothing about how the Commission is to evaluate the sufficiency of member state implementation plans or what it may do if it finds a plan inadequate. They also contain no provision for ensuring that the Commission staff is up to the task of compiling the data from the measuring stations and assessing the compliance status and implementation plans of the member states.

The directives' declaratory and hortatory value is clearly a positive step. They give member states a yardstick against which to measure their own standards. To the extent that a national government can be considered less subject to the weaknesses that a subnational entity is plagued with in attempting aggressive action against air pollution, the Community standards are yet more valuable. However, the directives on ambient air quality affect fundamental issues of energy and industrial policy as well as requiring complex administrative actions for their implementation. Because of the complexity of the administrative actions and judgments involved in their implementation, member states have the option of fudging their implementation. They may do so out of
simple inertia or inability to muster the requisite organization, or alternatively because they see the directives as incompatible with their economic and energy policy priorities. Accordingly, it would aid in insuring implementation of the directives if the Commission were somehow involved in the fixing of emission limitations.

Regulation by industrial category is a key part of the successful American and French air pollution control programs. In both systems the regulation involves imposition of emission standards, or what for present purposes amount to the same thing, imposition of particular kinds and levels of control techniques. The relevant French experiences are branch contracts, branch programs, and arretes types. These instruments all specify the technical standards and controls to which particular kinds of industrial facilities would be subject in individual national permitting decisions. Such is also essentially the content of American New Source Performance Standards. Similar kinds of Community regulation of air pollution, e.g. uniform emission standards, uniform control techniques, and investment plans for industrial categories designed to deal with specific kinds of pollution problems, could be envisaged.

b. The industrial plant directive: the provision for emission standards

The recent directive on air pollution from industrial plants, adopted four years after the sulfur dioxide and particulate
Directive, has increased the likelihood of successfully attaining ambient air quality goals.\textsuperscript{(452)} It does so chiefly by making Community emission standards for industrial sources a more realistic possibility.

The directive has two operative requirements. One is that member states require air pollution permits for industrial plants within categories listed by the directive which are authorized or modified after 1987.\textsuperscript{(453)} The second is that these permits may be issued only when the national permitting authority is satisfied that:

1. all appropriate preventive measures against air pollution have been taken, including the application of the best available technology, provided that the application of such measures does not entail excessive costs;
2. the use of plant will not cause significant air pollution particularly from the emission of substances referred to in Annex II;
3. none of the emission limit values applicable will be exceeded;
4. all the air quality limit values applicable will be taken into account.\textsuperscript{(454)}

The first two of these provisos amount to no more than exhortations to national authorities to impose reasonable conditions. The notions of "appropriate preventive measures," "excessive costs," and "significant air pollution" lack meaningful
precision. The Court of Justice, as the only judicial body authorized to interpret Community law, could better define their content in the context of a specific case; however, these notions will for practical purposes remain rather vague. The last of the four provisos merely emphasizes the preexisting requirements of the ambient air quality directives. The third of the four requirements is the directive's potentially most useful innovation. The emission limit values to which it refers are provided for elsewhere in the directive. Specifically, the directive provides that the Council, acting unanimously on proposition of the Commission, may set not only measurement methods, but also emission limits for categories of industry. None have so far been established.

Establishment of these emission limitations will help overcome the inherent weakness of the ambient air quality directives in two ways. First, by specifying precise emission limitations it eliminates the otherwise practically unbounded discretion which member states have in the translation of the general ambient air quality standards into emission limits for specific sources. Second, the emission limitations may compensate for the Commission's incapacity to intervene directly in member state administrative efforts. The emission limitations will be precise numerical limits, and either they or the control technology which corresponds to them will be required to be included in permits for new or modified installations. If a national permitting authority issues a permit without meeting these conditions, it is violating Community law. It should
therefore be a relatively simple matter for someone with standing, e.g. a neighbor or an environmental group, to invoke the jurisdiction of the appropriate national court to invalidate a defective permit.

In some systems it might be protested that the emission standards need to be independently received into national law because they are adopted subsequent to the directive authorizing them. Whatever the merits of this argument, the Court of Justice could find it to be moot under the direct effect doctrine. By analogy to its jurisprudence holding that provisions of directives can be invoked prior to their adoption into national law if they are sufficiently well defined so as to be self executing, it could determine that Community measures adopted pursuant to a directive have the same direct effect. This represents an advance over the potential direct effect of directives establishing ambient air quality limits because an important evidentiary step is omitted. Rather than require proof that the emissions allowed by the permit would lead to exceeding the ambient air quality limits, under the new directive it will only be necessary to show that the permit in question does not contain the Community emission limits.

The adoption of emission standards as a Community regulatory strategy in the industrial plant directive is all the more important in light of a previous failure to adopt such a strategy. In 1975 the Council adopted a directive regarding the use of petroleum products in power stations. It requires use of fuel oil in new or modified power plants to be subjected to prior authorization by member states. Its sole purpose was to limit
petroleum imports. Because no emission limits are imposed, this directive is an empty formality with respect to air pollution control.

A proposed directive for large combustion plants would adopt the approach of focusing on emission limitations by sector. Although emission limits by sector were evidently not acceptable in 1975, their anticipation by the 1984 directive on industrial plants bodes well for the adoption of the proposed directive on large combustion plants. The directive would apply to combustion plants with a capacity over 50 megawatts, but not drying plants except for cement and brick works and ore roasting plants. Thus, the directive would apply to fossil fuel electric power plants, large industrial boilers, and spaceheating plants. Over a ten year period the directive would require member states to reduce emissions from these sources by 60% for sulfur dioxide, 40% for dust, and 40% for nitrogen oxides. Member states are to devise plans to achieve these reductions. In addition, national licenses would have to contain emission limitations specified by the directive for sulfur dioxide, dust, and nitrogen oxides.

Although the proposed directive on emissions from large combustion plants and anticipated emission limits under the directive on industrial plants are novel for their specificity, regulation by industrial category has been undertaken in other environmental fields. A 1975 directive establishes a general framework for regulating waste disposal. The acute pollution problems of the titanium dioxide industry are the subject of a
later, more specific directive. \( (463) \) Within the context of the 1975 directive, the later directive requires member states to adopt a rigorous permitting program for production and disposal of titanium dioxide wastes and to develop plans to eliminate the problem.

With regard to water pollution, the framework directive on discharge of dangerous substances into the aquatic environment provides for a sectoral approach to water problems. \( (464) \) Under the directive the Commission may submit proposals for regulation by industrial sector to the Council. \( (465) \) These emission limits would have to be respected by national permits to sources of water pollution. The directive as a whole represents a compromise between the United Kingdom, which wanted uniform water quality standards, and the rest of the Community, which wanted effluent standards. The United Kingdom wanted water quality standards because it thought such standards would be more favorable to its industry given the greater possibilities of dilution offered by the higher water volume in its rivers. \( (466) \) Under the compromise the United Kingdom was allowed to employ water quality standards under restrictive conditions. \( (467) \)

The same issue has been responsible for inaction on a 1975 Commission proposal for a directive on reduction of water pollution caused by wood pulp mills. \( (468) \) The proposal established effluent standards for new and existing wood pulp mills.

The issue of technology based versus ambient quality standards is important to the extent that it can be used, as in
the case of water pollution, to block agreement on a program of action or to hold out for more favorable terms. But in theory the same environmental result could be achieved under either approach, and the fact that the political results of sectoral pollution control policies have to date been mixed should not imply that sectoral air pollution control policies are not necessary or feasible in the Community. Because of the obvious greater difficulty in establishing the effect of a particular source of air pollution on ambient air concentrations than in establishing the effect of a particular source of water pollution on a body of water, emission standards are especially important for giving Community air pollution control policy the impulsive force necessary to stimulate member state action.

c. The need for a stronger institutional position for the Commission

Three kinds of problems exist with the current state of the Community's regulation of stationary source air pollution emissions by sector. First, although the directive on industrial plants anticipates the establishment of emission standards, no emission standards have so far been issued. Because the directive authorizing issuance of emission standards was adopted only in 1984, it can be hoped that time will cure this problem. Second, the Commission does not have an environmental bureaucracy organized to undertake substantive regulation. So far, the limited Commission staff has played a normative generation and
coordinating role. Whether sufficient personnel will be assumed, either directly or through consultancy arrangements, to generate good standards remains to be seen. The resolution of this issue depends a great deal on the political priority assigned to air pollution. Because air pollution is presently a lively issue, standards may be forthcoming. The third kind of problem is related to the staffing problem by its political and structural character. The directive on industrial installations permits adoption of emission standards only by unanimous vote of the Council. Hence, any single member state can block agreement on a standard. In a national system this would be like allowing the president of a French region to veto an arrete type or the governor of an American state to veto a New Source Performance Standard. Although member states should be allowed to imposed more stringent standards if they so desire, requiring unanimity in a legislative body as to administrative regulations is likely to lead to deadlocks. The Commission ought to be given some authority independent of the Council to issue emission limitations.

Two kinds of legitimacy problems are involved in the exercise of such power by the Commission. One is the constitutional legitimacy within the institutional framework of the EEC treaty of the exercise of such power. The other is the political responsibility of the Commission in an absolute sense.

i. The "constitutionality" of delegating the power to establish emission standards to the Commission
The constitutional question can be affirmatively resolved. The Court of Justice held in 1970 that "the Commission shall . . . exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter." (469) This statement was made in the context of a challenge to a system for abridging the normal Community legislative process. Ordinarily, the Commission must propose legislation to the Council, which may then adopt it with any amendments it deems appropriate. The Court of Justice case challenged an advisory committee system whereby if a Commission proposal was satisfactory to the advisory committee, the Commission rather than the Council could adopt it directly. The Council of course established the advisory committee system. Reminiscent of the American constitutional doctrine on delegation of legislative powers to administrative agencies, the Court of Justice upheld the system on the theory that the Council could delegate implementing power to the Commission.

The Court of Justice in resolving this case took up one of the earliest "constitutional" principles it had established. In a 1958 decision under the European Coal and Steel Treaty the Court held that "delegations of powers . . . can only relate to clearly defined executive powers, the use of which must be entirely subject to the supervision of the High Authority" (the Commission of the European Coal and Steel Community). (470) Delegations were permissible only insofar as they did not frustrate the institutional procedural guarantees of the Community decisionmaking process. The Court also observed in 1958 that delegations "must be subject to precise rules so as to exclude any .

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arbitrary decisions and to render it possible to review the data used," and that a delegation of powers may only be accomplished by express decision.(471) Within these bounds Community "constitutional" law permits the advisory committee system.

There are three kinds of advisory committees.(472) Management committees are used to regulate markets for agricultural products. There are also regulatory committees for diverse trade matters. Finally, there are about twenty five committees for the adaptation to technical and scientific progress of directives.

The system of committees on adaptation to technical progress is already in a functional sense close to a system which would delegate the Commission the power to fix emission standards. Committees for adaptation to technical progress already exist for the sulfur dioxide and particulate,(473) lead,(474) and nitrogen oxides(475) directives. They work as follows.

The Commission proposes changes to the committee, which is composed of representatives of the member states. If the committee agrees with the proposal by weighted majority voting, a system designed to prevent either the large or the small member states from forming controlling blocks, then the Commission may adopt the proposal. If the Committee disagrees, then the proposal is transmitted to the Council. If the Council does not act within three months, the proposal is adopted.

The limitation of these existing committees on adaptation to technical progress is that they are expressly forbidden to deal with matters other than measurement methods.(476) However, were
the Council to confer greater powers on them, there is no constitutional impediment to their exercise.

ii. Motor vehicles and air pollution as a precedent

Indeed, in the motor vehicle field, directives tightening emission limits have been twice issued by the Commission through the mechanism of a committee on adaptation to technical progress. Community regulation of motor vehicles consists of limiting vehicle emissions of carbon monoxide, nitrogen oxides, and hydrocarbons, and of limiting the lead content of gasoline. The first Community action was taken in the context of a 1970 directive which established a certification procedure to regulate general safety related characteristics of motor vehicles. A Council directive which followed shortly thereafter applied this procedure to motor vehicle emissions. The certification procedure is that once a model of a vehicle is accepted by one state as meeting the Community emission limitations, it is to be marketable in all states without additional testing and without meeting additional requirements.

Modifications of the emission limits as technology progresses are to be done under the procedure of article 13 of the 1970 general safety directive. Under this article 13, there exists a committee for adaptation to technical progress composed of representatives of the member states and chaired by a Commission representative. If by a weighted majority vote the committee approves a proposal by the Commission or a member state
to change the limitations, the Commission may issue a directive mandating the new limits. (480) If the committee rejects a proposal, the Council may still embody it in a directive by a qualified majority vote. (481) And if the Council does not act within three months, the Commission may then issue the directive. (482) The procedure clearly establishes a bias in favor of emission controls without introducing excessive delays or the possibility of stalemate because of broader political disputes at the Council level. In particular, it allows for majority voting. At the Council level, decisions are ordinarily made only unanimously since the 1966 Luxembourg compromise. (483)

The procedure for adaptation to technical progress has been used to permit the Commission, not the Council, to issue a directive which further tightened emission standards for previously regulated pollutants. (484) The procedure was also used to allow the Commission to adopt a directive introducing limitations on nitrogen oxide emissions, the third principal motor vehicle pollutant. (485) Although this procedure still allows for member state input through the technical progress committee on a policy change, it avoids unilateral vetoes because the committee need only approve a Commission proposal by a majority vote for it to become law.
iii. A legitimacy problem with delegation of legislative power to the Commission

The relevance of this experience with motor vehicles is that it demonstrates that using the committee procedure to permit the Commission to issue emission standards for stationary sources is not a large step beyond present practices. However, although the committee on technical progress procedure is in theory constitutionally permissible under the EEC Treaty, and although it has in fact been used to make substantive decisions, it nonetheless poses objective problems of legitimacy. These problems relate to the basic structure and functioning of Community institutions.

In principle, there is no reason why the Council could not directly delegate decision powers to the Commission. The procedural device of the committee for adaptation to technical progress serves to ensure member state control over Commission decisions. So far the Court of Justice has not found any fault with the system of national control through the committee system. However, the European Parliament has resolved that article 155(4) of the EEC Treaty, stating that the Council may delegate powers to the Commission, implies that the Commission should not be fettered in the exercise of delegated powers by the committee procedure. (486) The report prepared for the debate on the resolution states,
In the institutional structure set up by the EEC treaty, it is for the European Parliament, and not a collectivity of national civil servants whose work is conducted in secret, to supervise the work of the Commission."(487)

The Parliament, as an elected body, is claiming that the Commission ought to be responsible to it in the same way as a national government is responsible to the legislature in a national parliamentary system. Were the European Parliament's desires to be satisfied, the legitimacy of Commission decisionmaking would increase. However, for the moment, the member states are unwilling to relinquish the political control they exert through the Council and the technical progress committees.

In these circumstances, it may be that the technical progress committees are the best possible solution. When all legislative power is reserved to the Council, legitimation flows from the direct control of the Council by the member states. Simple delegation of legislative power to the Commission represents a decrease in legitimacy because of the Commission's lack of democratic accountability and because of its greater independence from member state governments. When the Commission's exercise of legislative power is limited by the advisory committee procedure, the member states have at least a limited control through the weighted majority voting procedure. Accordingly, the procedure of Commission plus advisory committee seems to be more legitimate than the procedure of Commission only. Thus, although the
European Parliament's position that the Commission should not be fettered by the advisory committee system and that the Commission should be politically responsible to it may be an ultimate solution to the Community legitimacy problem, in the interim the advisory committee system would seem to be a practical solution to the problem of avoiding impasses at the Council level and of not losing what political legitimacy there presently is in the Community legislative process.
Chapter VI - Structural conclusions count

The promise of developing a clear notion of legitimacy was the achievement of the ability to comparatively investigate techniques of legitimating bureaucratic decisionmaking. In contrast to what a stereotypical liberal theory would indicate, legitimacy was shown not to be a quality which bureaucratic decisionmaking either had or did not have. Instead, legitimacy was defined as a relative concept. The relativism of legitimacy allowed the comparative investigation of the techniques of legalism, participation and decentralization in four very different legal systems.

Although the differences in the four systems are indeed great, certain convergences can be noted.

A. Participation and legalism

In the United States, the interest representation model represents a combination of the techniques of legalism and participation. The seriousness of participation is assured by the judicial control of the observance of procedural rules regarding participation. In France legalism has traditionally been limited to judicial control of the legality of the substance of bureaucratic decisions. The 1983 law reforming the enquête
publique procedure suggests that something approximating the interest representation model may develop in France. The 1983 law permits dissent to be effectively registered in the course of the enquête and invites the reviewing judge to reverse the administrative decision if public input was wrongly overlooked. The enquête procedure and French administrative courts are obviously not the same as say American notice and comment rulemaking and federal courts. There is, however, a functional similarity.

With respect to judicial activism, Italy diverges in an important way from France and the United States. Although its judicial review shares with France and Italy the legalistic premise of ensuring the rule of law, in practice, the Italian judiciary is far more involved in substituting itself for deficient administrative action than it is in ensuring that the administration acts within the rule of law. Participation is achieved not through a judicially enforced process, but rather through the existence of collegial decisionmaking bodies and through direct political pressures or cooption of the public administration.

Legalism and participation seem to be a potentially powerful combination. Participation with the option of judicial review works to ensure the application of the underlying substantive rules. At the same time it occurs in a context in which it does not unduly disturb the basic organization of bureaucracy.
Although participation through the collegial model might be a useful extension of the basic legitimating device of political control, the substitution of collegial bodies for bureaucratic organization is a clear mistake. It amounts to trying to make do without a bureaucracy, and if nothing else, the results in Italy testify to the desirability of having bureaucratic organization to address air pollution.

The European Community is in a different situation because of its supranational character. Participation and legalism are clearly separated. Direct participation in its decisionmaking is insignificant given the member state control of its decisionmaking. More precisely, it is the executive branches of member states which control Council decisionmaking. Although all member states are democratic the kind of legitimacy present for ordinary national legislation is missing from Community legislation because nothing like a national parliament is involved at the Community level in making Community legislation. Individual member states are subject to interest group pressures. However, their responsiveness to these interests as executive authorities is different from that of an elected legislature.

Despite the lack of direct participation in the making of Community rules, legalism turns out to be an important device for ensuring respect of Community rules and for censuring their nonapplication. The direct effect doctrine in particular is a
tool for overcoming member state refusal to implement Community directives.

### B. Decentralization

With respect to decentralization, there are also surprising convergences as well as some divergences with significance. Federalism, centralism, regionalism and supranationalism might seem to be experiences too diverse to yield meaningful comparative results. In fact, the results achieved are quite useful.

A general principle of hierarchical organization necessary for the success of a decentralized air pollution control policy has been empirically analyzed in light of the structure and functioning of United States, French, Italian, and EEC air pollution policies. The principle is validated by the relative success of the American and French policies, which respect the principle, and by the difficulties experience by the Italian policy, which does not respect the principle. More specifically, the French and American policies provide for local administration of air pollution control, but leave the central level ample powers to fix minimum standards and to impel local action. The French policy, although effective, suffers from legitimacy problems because of the remoteness of local bureaucratic authorities from democratic control. In Italy the central level does not have a real power to impel action by the regional bodies which directly
administer air pollution control; however, the development of EEC norms combined with continued judicial intervention could compensate for the lack of national central direction. The recent EEC directive on industrial plants providing for eventual establishment of Community emission limits is an increase in central Community power which will make achievement of Community ambient air quality goals more likely. Establishment of these industrial emission standards and adoption of the proposed directive fixing emission limitations for major combustion installations are steps which, consistent with the principle of administrative organization argued for herein, will improve the Community air pollution control policy.

From a policy perspective, the investigation of decentralization has provided useful results for each system. The recommendation for the United States is to retain the basic structure of federal state relations of its present policy. For France it is to adopt the ongoing decentralization policy to air pollution control in a way that maintains the present advantages of central impulsion. For Italy, which is engaged in the first stages of a review of its air pollution legislation due to the prompting of Community legislation, the recommendation is to achieve a greater central capacity to require regional action. In the absence of this improvement, the possibilities of judicial activism and of Community legislation to fill the gap have been traced. Viewing the relation of the European Community
institutions and the member states in the perspective of central/periphery relations, the need for Community emission standards and the desirability of an alteration of the Community legislative process has been identified.

C. Significance of the results

These results regarding decentralization, legalization, and participation may seem modest. After all, they leave untouched undeniably important issues such as how much air pollution control is desirable, who pays for it, the choice between traditional regulation versus economic incentives, and so on. In fact, however, the conclusions reached help to make the decisions of these other issues and their subsequent application possible.

Without attention to legitimating techniques, the decisionmaking system risks going "tilt" when faced with the combination of simultaneously difficult moral and technical issues. This is the combination characteristic of air pollution control issues and many other problems of modern society.

The United States Supreme Court's opinions in a 1980 case involving a challenge to a standard for exposure to a toxic substance, benzene, illustrate this point.(1)

Regulation of toxic substances shares with air pollution the difficult problems of assessing costs and benefits of control and of balancing risks of individual injuries against social costs of
reducing risk. The American statutory standards for regulating toxic substances, expressed in terms of the necessity of protecting health and the environment, possibly qualified by the notion that only unreasonable damages must be avoided, do not fully resolve these problems.(2) The ambiguity of this language is typical of environmental protection legislation generally. It leaves extremely difficult social choices unresolved. Bureaucrats accordingly face the choice of how to assess risk of harm and of how to balance the costs of reducing that risk against the potential benefits.

The standard in question in the 1980 case was established by the Secretary of Labor under the Occupational Safety and Health Act of 1970.(3) That act defines an occupational safety and health standard as one "reasonably necessary . . . to provide safe or healthful employment . . .".(4) It further provides that the Secretary of Labor is to set a "standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life."(5) From the Supreme Court's opinions, it appears that the challenged standard was set at a stringent level which was technologically feasible. Meeting it imposed high costs, but did not involve the financial ruin of the industries involved.
A minority of four justices felt the standards should be upheld. They reasoned that the quoted statutory language implies that uncertainty should be resolved in favor of protecting the worker. They found that the majority's rejection of the standards reflected a political, pro industry bias.

Four of the justices voted to invalidate the standards on the ground that the statutory definition of occupational safety and health standards implied the requirement that the Secretary of Labor make a threshold determination that increasing the stringency of a standard would indeed produce some benefits. They would leave open possibilities of the Secretary's imposing the proposed standards if the preliminary determination were made. This solution is legally satisfying, but may be no more than a way of dodging the extremely difficult social question involved in the challenge to the standard. It is subject to the dissenting justices' criticism that it is a deliberately forced interpretation of the statute.

Justice Rehnquist, who writing separately provided the fifth vote necessary to invalidate the standard, directly identified the underlying social question. He framed the issue as being "whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths."(6) As between setting the standard at the proposed level and setting it at a stringent, but less severe level, it appeared that the greater stringency would reduce a small risk of cancer,
but at a relatively high cost. His doctrinal solution to the lack of clear statutory direction as to how to answer this question is to revive the nondelegation doctrine. He argues that Congress as a politically responsible body has the duty when it delegates power to bureaucratic bodies to provide an intelligible principle for its exercise.

His proposed solution is intellectually laudable, but practically unworkable. It is laudable because it recognizes the heart of the problem as political choice. It is practically unworkable because it overlooks the fact that to arrive at even an approximate assessment of the costs, benefits and uncertainties involved, a sustained process of systematic and technical investigation is required. A democratic political forum such as the Congress is manifestly not equipped to undertake this kind of assessment.

The fact of the political choice inherent in the assessment remains. The issue is only partially resolved if one accepts the minority of the Supreme Court's view that Congress did in fact express itself in favor of a conservative posture with respect to risk. This is so because the language of the Occupational Safety and Health Act as well as of the other statutes dealing with toxic substances is insufficiently precise to remove all bureaucratic discretion. Even were the statutory direction expressed in quantitative terms, it would be impossible to avoid bureaucratic discretion in assessment of the risks involved.
In these circumstances the issue becomes how to legitimize what is necessarily a bureaucratic decision. The political power of Congress to dictate the criteria under which the bureaucracy decides is a legitimating factor. Its power to alter the statutory scheme when it disapproves of bureaucratic action is part of the legitimating factor of political control. The legalistic technique of establishing a rule and of providing for judicial review of compliance with the rule is a legitimating technique which in fact resulted in invalidation of the proposed benzene standard. Participation in setting the standards, whether through the American interest representation model, or through some other scheme, is another means for legitimating the decision. Finally, decentralization of the decisionmaking level is a potential legitimating tool despite the fact that it would not seem to be indicated in the case of occupational health standards such as the one for benzene because of the tendency of interregional competition to lead to lowest common denominator decisions. Moreover, when the risk is low, and when the consequences of stringent control may include the relocation of an activity crucial to local life, the factor of duress involved may render it inappropriate to delegate the decision to the directly affected populations. Decentralization is nonetheless a useful technique in other contexts. The implications of the condition of central impulse necessary to overcome the analogous problems in
the case of decentralization in the air pollution field have been explored in depth.

This short excursion into the benzene problem illustrates the generality of the considerations developed with respect to air pollution, but much more importantly, it emphasizes the importance of bureaucratic legitimacy.

Bureaucratic decisionmaking on issues of profound political significance is a reality of modern society which will not change. The admittedly ambitious hope of this essay is that the comparative and interdisciplinary investigation of this thesis into the legitimacy problem as experienced in one real policy context will lead to more sound and legitimate social decisionmaking.

This may sound like a naive desire for a better world, but what better motivation could there be for warming the altars of intellectual discourse?