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Pragmatic Pathologies of Judicial Review of Administrative Rulemaking

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PRAGMATIC PATHOLOGIES OF JUDICIAL REVIEW OF ADMINISTRATIVE RULEMAKING

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Agency rulemaking is designed to accomplish certain policy ends, but most administrative law commentaries focus on the standards courts apply and analyze those standards from a theoretical, internal perspective. In this Article, Professor Cross asserts that administrative law should consider the external, pragmatic consequences of judicial decisions. When consequences have been considered in prior research, he contends, the considerations have been naive and incomplete. Professor Cross argues that the consequences of judicial review of rulemaking are consistently and inescapably perverse. The intrinsic nature of judicial review tends to disrupt and obstruct positive regulatory programs and reduce the quality of the few rules that agencies do issue. Professor Cross concludes with a public choice explanation of why powerful political and private interests perpetuate judicial review, even at the expense of the public good.

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INTRODUCTION

Administrative law is the subject of much legal research. Unfortunately, research on judicial review of administrative rulemaking commonly dwells on the "trees" of procedural doctrine, while losing sight of the "forest" of social consequences of judicial review. When researchers do criticize judicial review for creating adverse consequences, they often seek to correct the problem through various doctrinal changes designed to enable judges to force "better" decisionmaking. I have recently questioned the theoretical justifications for judicial review of administrative rulemaking and have argued that those justifications do not support a judicial role.[1] Even absent a clear theoretical justification for judicial involvement, judicial review might yet be defended for pragmatic reasons if the practice tends to produce better regulatory results. In this Article, I consider the merits of the pragmatic justification for judicial review of administrative rulemaking. I argue that judicial review ineluctably produces pathological consequences, so that doctrinal reform is futile. Because the practice does not—and cannot—improve regulatory results, I conclude that it is not supported by any pragmatic justification.

In Part I of this Article, I discuss the importance of pragmatic, consequentialist analysis of judicial review of rulemaking. Such consequentialism should be relevant to any consideration of law, but in administrative law the concern is particularly compelling. Laws are passed to create consequences, and judicial review should be judged by whether it furthers the intended consequences.

The Part II of the Article explores the effects of judicial review of rulemaking and considers whether it is consequentially justifiable. I set forth the pathological consequences of judicial review for the functioning of the administrative state. The threat of judicial review ossifies the rulemaking process, making administrators slow and timid to address their responsibilities. Judicial review also disrupts administrative agendas, forces misallocation of resources, operates without regard to political and practical constraints on administrative action, and reduces the quality of promulgated rules.

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1. *See* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243 *passim* (1999).

In the third and final Part, I consider how administrative law has evolved in such a seemingly pathological pattern. The system of judicial review represents a strategic decision by members of Congress, who can take symbolic action on a perceived societal problem at the demand of voters while at the same time emasculating the true effect of the action, thereby escaping responsibility for the costs and other consequences associated with an effective response to the issue. Litigants and the courts conspire to bolster this structure because of their own self interests. Yet the structure is contrary to democratic accountability and the interests of the general public.

I. THE IMPORTANCE OF CONSEQUENTIALISM FOR JUDICIAL REVIEW

Consequentialism may not be quite so significant in relatively deontological areas of the law, such as First Amendment jurisprudence. Yet consequences are central to the judicial review of administrative agency decisions because the typical holding strives to command a consequence of some sort. While fundamental rights, such as those of the Bill of Rights, may trump consequentialist concerns, constitutional review sufficiently protects those very rights. In administrative law, on the other hand, institutional abilities and disabilities assume considerable importance. Thus, comparing institutional strengths and weaknesses is necessary to avoid purely symbolic action that may prove ineffective or even counterproductive. Disabling statutes is hardly the path to furthering the rule of law. The subsequent Part will demonstrate that judicial review has often produced such perverse results. As Lloyd Cutler has suggested, the best regulatory reform would be to close the law schools.[2]

It is critical, at this point, to distinguish consequentialism from utilitarianism, the cousin with which it is often confused.[3] While utilitarianism probably implies consequentialism, the converse is not true. One may reject a utilitarian position that seeks to maximize overall welfare or good, while still emphasizing the importance of consequences. For example, suppose that an individual ranks the welfare of the poor over the welfare of the rich—a position that is at least potentially contrary to utilitarianism—and that the individual

2. *See* KENNETH J. MEIER ET AL., REGULATION AND CONSUMER PROTECTION: POLITICS, BUREAUCRACY & ECONOMICS 467 (1998).

3. *See, e.g.*, Judith Lichtenberg, *The Right, the All Right, and the Good*, 93 YALE L.J. 544, 545 (1983) (distinguishing consequentialism from utilitarianism).

proposes policies to advance that end. Such a person must still attend to the consequences of those policies in order to see that they indeed benefit the poor.

Some ethicists have waged a vigorous attack on consequentialism, arguing that intentionalism, which focuses on the actor's intent or motives, is more consistent with morality.[4] For my purposes, this point could be conceded. First, the standard for judging individual action is not necessarily the same as for judging government action, and I am concerned solely with the latter.[5] Second, the objective of administrative law has never required an investigation of administrators' intentions. Judges are commissioned to evaluate the substance and consequences, rather than the morality, of administrators' behavior.[6] Hence, it is fair to judge the judges according to the consequences of their decisions.

My case for consequentialism echoes in great degree the growing recognition of the values of pragmatism in law, a movement led by Judge Posner.[7] The devotees of this position urge that the law should aim for the "best results," rather than rest upon some grand theory,

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4. *See, e.g.*, Germain Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 21, 21 (1978). *But see* Michael J. Perry, *Some Notes on Absolutism, Consequentialism, and Incommensurability*, 79 NW. U. L. REV. 967, 967–72 (1985) (arguing that even absolutist deontological claims are essentially consequentialist insofar as they are defended by virtue of their consequences).

5. *See* Lichtenberg, *supra* note 3, at 548 (arguing that utilitarianism wrongly ignores the " 'independence of the personal point of view' " (quoting S. SCHLEFFER, THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS 56 (1982))).

6. Review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–706 (1994), is based on the administrative record developed by the agency, and not agency administrators' subjective motivation for action. *See, e.g.*, *In re* Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency, 156 F.3d 1279, 1280 (D.C. Cir. 1998) (observing that "the ordinary APA cause of action does not ordinarily call into question the agency's subjective intent"); American Pub. Gas Ass'n v. Federal Power Comm'n, 567 F.2d 1016, 1043 (D.C. Cir. 1977) (observing that "courts rarely have [a] basis for undercutting officials' statements of reasons by inquiring into subjective motivations").

7. The so-called new pragmatism has become quite prominent. *See, e.g.*, RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 227–310 (1999) (discussing the "pragmatic approach to law" in a range of contexts, including administrative law); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1334–76 (1988) (noting that "[a]n impressive array of recent legal commentary has suggested a movement away from grand theory to something new, variously called [by different names, including] ... 'pragmatism' "); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 788 (1989) (discussing the "multiple and apparently clashing strands" of Holmes's reasoning that have developed into the "central tenets of American pragmatism"); Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1653 (1990) (stating that "[l]ately pragmatism has [been] revived"). Central to this approach is the "insistence that propositions be tested by their consequences." Posner, *supra*, at 1660.

such as formalism or Rawlsian liberalism. My claim, however, is more modest than that of most of the pragmatists. I do not claim that consequentialism should exclusively drive the law, but merely that it should be a substantial factor. Most significantly, I do not claim that consequentialism should be a universal legal standard—I argue only for its importance in the field of administrative law. Constitutional law, for example, might be a field where absolutist or deontological precepts should rule, at least on occasion.[8]

Some observers, perhaps even some courts, might dispute reliance on consequentialism in administrative law as well. Judge Posner has observed: "One wonders whether the [Supreme] Court has any clue as to the consequences of its administrative law decisions for society. Maybe it doesn't think that that is any of its business."[9] Yet consequences *should* be central to administrative law. Antipollution legislation, for example, is passed primarily to lessen pollution, not to provide another forum for public discussion.[10] Administrative law is not a playground for judges and litigants; rather, it is a means to a societal end. Regulatory laws "frequently vest result-oriented discretion in officials," and such discretion can be evaluated only in light of results.[11] As such, consequentialism should be paramount in administrative law.[12] Christopher Edley argues that the only source of legitimacy for judicial review of administrative actions lies in the courts' ability to enhance "[s]ound governance."[13] Courts are institutions of government, and, as Mark Tushnet has argued in a broader context, judicial review "cannot be defended except by seeing how it operates—whether in fact the government is better with it than without it."[14] Indeed, the case for consideration of

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8. *See* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 12 (1998) (describing and disagreeing with Ronald Dworkin's position that consideration of consequences is rarely relevant to constitutional decisionmaking).

9. Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953, 961 (1997).

10. Some might argue that the "rule of law" justifies nonconsequentialist judicial review of administrative rulemaking, but this justification cannot stand up under scrutiny. *See* Cross, *supra* note 1, at 1247. Today, few would embrace such legal formalism at the expense of consequences. *See* David Luban, *What's Pragmatic About Legal Pragmatism?*, 18 CARDOZO L. REV. 43, 44 (1996) ("*Fiat lex, pereat mundi!*—*let law exist though the world perish*—is a maxim that could be accepted by only the most dyed-in-the-wool formalist.").

11. Luban, *supra* note 10, at 44–45.

12. *See* RICHARD A. POSNER, OVERCOMING LAW 400 (1995) (arguing that in statutory interpretation judges should "use consequences to guide their decisions").

13. CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW 235 (1990).

14. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 152 (1999).

consequences may be so plain as to be uncontroversial.[15] Cass Sunstein argues that any legal interpretation "must be defended partly by reference to its consequences" and asks rhetorically: "If consequences, broadly conceived, do not matter, what does?"[16]

Any residual doubt about the relevance of consequentialism should be dispelled by the standards of judicial review itself. The very existence of rulemaking and the procedures adopted to govern the rulemaking process are attributable to the need "for sound evolution of policy . . . in the public interest."[17] Judge Wald, formerly of the District of Columbia Circuit Court of Appeals, has emphasized the "pragmatic focus" of the Administrative Procedure Act (APA) and the importance of judges thinking about how decisions "will play out in terms of agency functioning."[18] Courts reviewing agency rules themselves apply a consequentialist standard to agencies' actions, so it hardly seems unfair to judge the courts by the same standard. Judge Coffin of the First Circuit Court of Appeals has written that a beacon of judging must be workability, meaning the "extent to which a rule . . . can be pronounced with reasonable expectation of effective observance without impairing the essential functioning of those to whom the rule applies."[19] This is what I mean by consequentialism.

However, consequentialism does not mean that courts, commentators, or others necessarily should seek the most consequentially desirable policy outcome of every particular case or controversy. For a variety of reasons set forth in the following Part, such an approach is undesirable and often produces consequentially perverse results. Rather, this Article calls for a sort of "rule consequentialism." I argue that the focus should be on the general rules that are most likely to produce consequential sanity over the long run. Courts currently may be employing a form of consequentialism in trying to produce the best result for every individual case. Yet case-by-case consequentialism looks at individual trees rather than the larger forest and may be counterproductive. A more desirable consequential program might be to establish a general rule that creates the best consequences,

15. *See, e.g.*, Luban, *supra* note 10, at 44–45 (suggesting that "very few people think that lawyers should be indifferent to the outcome of legal decisions" and that such a claim is in itself "remarkably uncontroversial").

16. CASS R. SUNSTEIN, ONE CASE AT A TIME 240 (1999).

17. American Airlines, Inc. v. Civil Aeronautics Board, 359 F.2d 624, 629 (D.C. Cir. 1966) (en banc).

18. Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 258 (1996).

19. FRANK M. COFFIN, ON APPEAL 284 (1994).

rather than trying to assess the consequences of individual action on a case-by-case basis. In Part II, I urge that judicial review of rulemaking is not the type of wise general rule that can produce "best consequences."

My case for consequentialism at this point is thin. I claim merely that the proper standard for judicial review of rulemaking will consider consequences, without taking a definitive position on what consequences are desirable ones to be promoted in each individual circumstance. In the following Part, I argue that the consequences of judicial review are to cripple regulatory legislation and frustrate the aims of the New Deal and subsequent social legislation of the 1960s and 1970s. A free market libertarian would applaud these consequences and therefore, perhaps, affirm current patterns of judicial review. This position is potentially substantively legitimate, but must be justified on its merits, not secretly advanced through dishonest proclamations of the virtues of judicial review. Indeed, the final Part of my Article suggests that it is in fact this illegitimate disingenuousness that explains the law of judicial review.

II. PATHOLOGICAL CONSEQUENCES OF JUDICIAL REVIEW

Many analyses of judicial review, both pro and con, focus unduly on the outcomes of individually litigated cases, and devotees of judicial review emphasize the occasional decisions that appear to yield beneficial regulatory results. Such outcomes are but the tip of a much larger iceberg of influence, however. The shadow of judicial review has a pervasive effect on agency decisionmaking, and the commands of preceding cases can have an enormous unforeseen effect on policymaking, even in areas that are not related directly to the policies previously litigated. This in turn can have a substantial adverse effect on public welfare, costing the public the benefits of regulation, including lives saved. Scrutiny of these indirect effects is necessary.

This Part explores how judicial review of rulemaking interferes with the administrative process and indirectly yields significant adverse consequences. These consequences are sometimes, but not typically, attributable to "bad" decisions that compel unwise administrative actions. More often, however, the pathology of judicial review derives from the indirect, but unavoidable, effect that review has on the administrative process and on rulemaking. Below I describe how features of judicial review obstruct agencies' actions.

This Part identifies five discrete pathological effects of judicial

review. The first effect is ossification, whereby unpredictable judicial requirements considerably complicate and delay the promulgation of individual regulations. The second effect is agenda disruption, through which judicial demands for agency action undermine other actions that otherwise could have been taken through a more coherent and effective planning process. Third, judicial review compels inefficient and ineffective agency allocation of resources, as agencies become more concerned with surviving judicial review than with advancing their commissioned agendas. Fourth, judicial review commonly fails to understand the political and pragmatic limitations that agencies face, instead demanding an unachievable "best" that is the enemy of an achievable "good" outcome. Fifth and finally, judicial review results in poorer quality rules.

A. General Ossification

Thomas McGarity has described the relative "ossification" of rulemaking in recent decades as regulatory action has slowed or halted because of extensive procedural requirements.[20] The ossification is in part reflected in the extensive legal "hoops" through which an agency must jump in order to promulgate a rule. Agencies must write detailed *Federal Register* notices and prepare enormous technical support documents to justify their rules. Such efforts require considerable expenditures of resources and time.[21] These and other procedural demands bog down the regulatory process. For example, after the District of Columbia Circuit embraced "hard look" judicial review, the time required for the Federal Trade Commission (FTC) to adopt a new rule increased from a maximum of two years in the early 1960s to more than five years in the late 1970s.[22] Occupational Safety and Health Administration (OSHA) rules

20. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–87 (1992) [hereinafter McGarity, *Some Thoughts on "Deossifying"*] (observing that "[i]mportant rulemaking initiatives grind along at such a deliberate pace that they are often consigned to regulatory purgatory, never to be resurrected again"); *see also* Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 528 (1997) [hereinafter McGarity, *Ossification of Rulemaking*] (observing that "it has become so difficult for agencies to promulgate major rules that some regulatory programs have ground to a halt").

21. *See* MARC K. LANDY ET AL., THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS 124 (1990) (reviewing the history of Resource Conservation and Recovery Act regulations and observing that "very substantial resources were consumed meeting the requirements of administrative procedure and anticipating litigation").

22. *See* McGarity, *Some Thoughts on "Deossifying," supra* note 20, at 1389–90.

similarly have been delayed.[23] As individual rules take longer to promulgate, fewer rules are adopted.[24] The Administrative Conference of the United States has lamented that "the rulemaking process has become increasingly less effective and more time-consuming."[25] As a result of judicial demands, "an agency usually must commit tens of thousands of person-hours over a five-year period to the process of issuing, amending, or rescinding a single major rule."[26]

The foremost reason for this ossification of rulemaking has been "[j]udicially imposed analytical requirements."[27] The most common basis for judicial review of rulemaking is that of "reasoned decisionmaking," under which the court concludes that the agency failed to analyze the record correctly or consider some alternative that a litigant has dreamed up.[28] Walter Gellhorn recognized this pattern even before passage of the APA, warning that "sporadic, inexpert and superficial dictation by the courts will never produce methods of administration which are both workable and fair," but rather will "serve[] chiefly to obstruct the development of sound administrative processes."[29] In fact, research on the Food and Drug

23. *See id.* at 1387 (observing that the time required for Occupational Safety and Health Administration (OSHA) rulemaking increased from six months in 1972 to five years in the 1980s).

24. *See id.* (observing that of 19 Federal Trade Commission (FTC) rules proposed in the latter half of the 1970s, only seven were completed). In *Some Thoughts on Deossifying the Rulemaking Process*, McGarity lists several major areas of rulemaking that have been obstructed by ossification. *See id.* at 1413–18. In a subsequent article, McGarity observed that OSHA standard setting has been ossified by the "prospect of judicial review by a judge who demands that every fine nuance of the agency's decision be explained to that judge's satisfaction." Thomas O. McGarity, *Reforming OSHA: Some Thoughts for the Current Legislative Agenda*, 31 HOUS. L. REV. 99, 109 (1994).

25. Steven J. Groseclose, *Reinventing the Regulatory Agenda: Conclusions from an Empirical Study of EPA's Clean Air Act Rulemaking Progress Projections*, 53 MD. L. REV. 521, 529 (1994) (quoting ADMINISTRATIVE CONFERENCE OF THE U.S. COMM. ON RULEMAKING, IMPROVING THE ENVIRONMENT FOR AGENCY RULEMAKING 1 (1993)).

26. Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 71 (1997).

27. McGarity, *Some Thoughts on "Deossifying," supra* note 20, at 1389; *see also* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 443 (1998) (noting that "the availability of judicial review of agency rulemaking undercuts [agencies'] ability to respond rapidly to new developments in specialized areas"); Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 199 (1996) (reporting that judicial review of rules "is the primary source of the phenomenon of rulemaking ossification").

28. *See* Cross, *supra* note 1, at 1265 (describing the prevalence of reasoned decisionmaking review).

29. Walter Gellhorn, *The Improvement of Public Administration*, 2 NAT'L LAW. GUILD Q. 20, 22 (1939–1940).

Administration (FDA) found that the "agency resource costs associated with judicialized procedures were so great that they often served as a disincentive to issue rules or as a lever which industry used to secure concessions on proposed regulations."[30] Courts have demanded increasingly "synoptic" decisionmaking processes, which have compelled the production of "enormous" rulemaking records.[31] Aggressive judicial review "can impose a burden of proof on an agency that is extremely difficult—*read* extremely expensive—or impossible to meet."[32]

Judicial review inevitably increases the transaction costs of regulation, which, axiomatically, means less regulation.[33] In addition to mandating more procedures and analysis, the uncertainty of judicial review compels agencies to bend over backward and to implement more procedure than the average court is likely to demand.[34] Justice Breyer explains that a judicial decision requiring consideration of alternative policies can "lead the agency to establish procedures to consider thoroughly *all* alternatives in *every* case," which will only cause "considerable unproductive delay."[35] This delay means less regulation as resources become strained and as certain rules—that otherwise could be justified in themselves—become cost ineffective in light of the additional procedural demands.

Such judicially imposed analytical requirements are themselves bad enough, but they also are applied unevenly, which requires agencies to "prepare for the worst-case scenario on judicial review."[36] Hence, the regulatory process is not driven by the median judicial panel, but by a concern for appeasing the most intrusive judicial panel.[37] Indeed, the most intrusive circuit is likely to hear a case

30. WILLIAM F. WEST, ADMINISTRATIVE RULEMAKING: POLITICS AND PROCESSES 188 (1985).

31. *See* Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 466 (1986).

32. John S. Applegate, *Worst Things First: Risk, Information, and Regulatory Structure in Toxic Substances Control*, 9 YALE J. ON REG. 277, 297 (1992).

33. *See* JAMES Q. WILSON, BUREAUCRACY 283 (1989) (observing that the "more one has to explain and justify, the less one is likely to do").

34. Indeed, the "real impediment [to rulemaking] caused by judicial review is uncertainty" itself. JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE 165 (1997).

35. STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 58 (1993). The perception of agencies regarding judicial review is that "anything can happen." MASHAW, *supra* note 34, at 165.

36. McGarity, *Some Thoughts on "Deossifying," supra* note 20, at 1419; Shapiro, *supra* note 31, at 466 (observing that "agencies cannot know in advance when reviewing courts will make such demands," so they have an incentive to produce the most extensive record possible).

37. *See* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 44 (1977) (noting that judicial decisions may produce law for the "worst case or for the best," but

because plaintiffs who challenge the rule can be expected to select the most favorable forum for review.[38] In the early days of OSHA standard-setting, for example, "[d]ifferent industry organizations challenged every one of the new standards, trying their luck in different courts of appeal around the country while avoiding the pro-regulatory D.C. Circuit Court of Appeals."[39] The challenges struck gold with a Fifth Circuit success that was regarded as "a serious blow to OSHA's entire standard setting program."[40]

Besides leading to legally incorrect[41] results, the unintended encouragement of extreme and unrepresentative judicial outcomes undermines regulatory action prior to judicial review. When a regulator must anticipate and adapt to every conceivable challenge and the reaction of the most hostile judge, she is destined to spend most of her time "playing defense" with little time left for taking regulatory affirmative action.[42] Moreover, the "risk of reversal of rulemakings due to reasons an agency cannot predict or control will deter rulemaking generally."[43] The cost of "excessively stringent

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not necessarily for the "mean or modal case").

38. *See* R. SHEP MELNICK, REGULATION AND THE COURTS 362 (1983). Experienced litigants "in public policy cases are usually keenly aware of the political leanings of the judges before whom they appear." CHRISTOPHER E. SMITH, COURTS AND PUBLIC POLICY 14 (1993).

39. JEREMY RABKIN, JUDICIAL COMPULSIONS 222 (1989).

40. *Id.* at 223.

41. Of course, there is no external standard enabling us to test the "rightness" of a judicial decision. Because judges probably are among the best determiners of "rightness," to the extent any legal interpretation can be said to be objectively correct, the standard presumably would be the average judicial interpretation. When judges disagree, it seems fair to suggest that "rightness" more likely lies with the majority of judges rather than with extreme outliers. By definition then, the extreme interpretation is wrong.

42. As Jerry Mashaw has explained:

> Because the courts are relatively uninformed about what is important among the many issues thrown up by parties seeking review of a rule, and because they are technically and scientifically unsophisticated in analyzing the issues that they perceive to be critical to a rule's "reasonableness," the perception in the agencies is that anything can happen. This produces defensive rulemaking, if not abandonment of the rulemaking process.

MASHAW, *supra* note 34, at 165; *see also* McGarity, *Some Thoughts on "Deossifying," supra* note 20, at 1412 (reporting that agencies "must attempt to prepare responses to all contentions that may prove credible to an appellate court, no matter how ridiculous they may appear to agency staff"); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 74 (1995) (reporting that agencies cannot predict the issues upon which courts will focus).

43. Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 485 n.13 (1997) (citing authorities to this effect). Steven J. Groseclose has described the effect of judicial review on Environmental Protection Agency (EPA) rulemaking:

> The expectation of stringent scrutiny after promulgation of a rule causes agencies

[requirements] is a sluggish or paralyzed standard-setting process."[44]

This "sluggishness" has been well documented. An American Bar Association commission concluded that cumbersome administrative procedures led to excessive delay in regulation.[45] An investigation by the Senate Committee on Governmental Affairs found that undue delay was the largest impediment to effective functioning of federal regulation and blamed this delay on "overjudicialization" of the regulatory process.[46] A Carnegie Commission report also has detailed the extent of ossification.[47] The Commission observed that because of judicial scrutiny of rulemaking, agencies now require an average of five years to take action on a major rule, and many rules for which there is apparent need are never adopted.[48]

Thus, in addition to slowing the process of rulemaking, judicial review can have the effect of discouraging rulemaking altogether. Most agencies may act either by creating a rule to govern future actions (like a statute) or by creating standards by adjudicating enforcement actions (like common law). Agencies began to use rulemaking rather than adjudication in the 1960s and 1970s for good reason. Many benefits of rulemaking procedures have been enumerated, including: the provision of decisional standards, reduction of uncertainty, enhanced efficiency in enforcement, greater fairness, improved policy decisions, and greater accountability.[49]

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to take a defensive posture from the beginning of the rulemaking process. Extra personnel hours and resources are expended developing ultra-defensible records, and decisionmakers scrutinize each progressive step of the tortuous process. Rulemaking decisions are not based simply on EPA's fundamental technical expertise, but also on EPA's perception of the courts' likely reactions. A history of erratic judicial review of technical issues has created significant uncertainty within EPA.

Groseclose, *supra* note 25, at 536.

44. John P. Dwyer, *Overregulation*, 15 ECOLOGY L.Q. 719, 737 (1988).

45. *See* ABA COMM'N ON LAW & ECONS., FEDERAL REGULATION: ROADS TO REFORM 92 (1979).

46. *See* S. REP. NO. 95-72, at ix (1977) (Sup. Docs. No. Y 4.G74/9:R26/v.3–6) (finding that delay posed the greatest problem to effective regulatory function); *id.* at 52 (finding that overjudicialization was to blame for regulatory delay).

47. *See generally* CARNEGIE COMM'N, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISIONMAKING (1993) (reviewing and analyzing agency decisionmaking processes).

48. *See* S. REP. NO. 95-72, at 108.

49. *See* Pierce, *supra* note 27, at 189 (listing these and other benefits). As an example, Professor Pierce observes that a shift to rulemaking from adjudication enabled the Federal Energy Regulatory Commission (FERC) to create "a gas market in which robust competition yields aggressive innovation, unparalleled efficiency, abundant supplies, and low prices." *Id.* at 190; *see also* Alan B. Morrison, *The Administrative Procedure Act: A*

Ossification, however, increasingly has prompted agencies to shift from rulemaking back to adjudicatory methods of policymaking. Such a shift is economically inevitable—if courts make rulemaking more difficult and more costly, agencies will do less of it.[50] If an agency wants to continue acting, its alternative is adjudication. Yet such a shift produces inferior policy and incidentally undermines the very virtues that judicial review is intended to promote. When all the consequences of judicial review make even formal adjudicatory action too onerous for an agency, the agency may regulate functionally through mere "threats of prosecution" or "raised eyebrows," but these methods will cause losses of "openness, consistency, and, perhaps, rationality—precisely the values that administrative law has sought to protect."[51]

This effect of judicial review has been documented in an extensive study of the National Highway Traffic Safety Administration (NHTSA).[52] NHTSA began with active auto safety regulation and was in the vanguard of regulatory action. Because of difficulties with judicial review, however, NHTSA had problems promulgating rules requiring safety improvements in cars and therefore shifted to a program of recalls for automobile defects.[53] Judicial second-guessing played a major role in causing NHTSA to abandon systematic rulemaking.[54] Recalls were much easier to sustain in court and had fewer procedural requirements.[55] Recalls offered far fewer safety benefits, however, and "NHTSA's shift from standard setting to recalls signaled the abandonment of its safety

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Living and Responsive Law, 72 VA. L. REV. 253, 255 (1986) (arguing that rulemaking produces more rational policies and is more efficient for both agencies and interested parties).

50. *See* Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, LAW & CONTEMP. PROBS., Autumn 1991, at 249, 301 (explaining how making rulemaking more expensive will force "agency resources away from the rulemaking area into other, less productive forms of regulation").

51. Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 421 (1996).

52. *See generally* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990) (tracing the history of various National Highway Transportation Safety Administration (NHTSA) regulatory efforts).

53. *See id.* at 225 (observing that "[t]he result of judicial requirements for comprehensive rationality has been a general suppression of the use of rules"); *id.* at 249 (reporting that "the courts have been even more obstructionist than one might have expected").

54. *See id.* at 225.

55. *See id.* at 152 (observing that judicial practice was "giving the agency a hard time when reviewing its rules and an easy time when enforcing its recall orders").

mission."[56] Thus, judicial review undermined effective regulation and, incidentally, undermined the legislation that created the agency's original safety mission.[57] In addition, judicial review made the agency wary of taking any actions to compel safety that were not fully road-tested, thereby thwarting the agency's statutory mission of technology forcing for safety.[58]

There is broad, if not universal, recognition that rulemaking is a sagacious approach to policymaking.[59] It opens decisions to the entire public, not just to the parties whose interests are directly at stake in an adjudication.[60] Rulemaking is also more visible to the public and to the government institutions responsible for overseeing agency actions.[61] Rulemaking is more effective and efficient because it

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56. *Id.* at 167.

57. The Consumer Product Safety Commission (CPSC) had a very similar experience. *See* Terrence M. Scanlon & Robert A. Rogowsky, *Back-Door Rulemaking: A View from the CPSC*, REGULATION, July/Aug. 1984, at 27, 28 (describing how encumbrance of the rulemaking process has forced a shift to adjudication and limited the effectiveness of the CPSC). FERC also experienced comparable problems. *See* Richard J. Pierce, Jr., *Unruly Judicial Review of Rulemaking*, NAT. RESOURCES & ENV'T, Fall 1990, at 23, 23 (discussing the effect of judicial reversals of FERC rules); Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163, 167 (same).

58. *See* MASHAW & HARFST, *supra* note 52, at 69–105, 121–23.

59. *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW § 6.15 (1970) (describing rulemaking as "one of the greatest inventions of modern government"); WEST, *supra* note 30, at 58 (observing that "there has long been a near consensus among students of the administrative process that the use of rulemaking to guide individual decisions is desirable in most contexts"); Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349, 359 (1999) (noting that "[r]ulemaking, by its very design, is considered to be an efficient policy-making mechanism").

Some agencies eschew rulemaking in favor of adjudication (perhaps for reasons unrelated to concerns about judicial review), but this choice can result in criticism. The National Labor Relations Board (NLRB) is one such agency. Scholars have criticized the NLRB for its reliance on adjudication, noting the resulting lack of efficiency as well as other problems. *See, e.g.*, Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 163, 176–77 (1985) (arguing that rulemaking would provide better reasoned and more consistent policy); Charles J. Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9, 27 (1987) (arguing that rulemaking would be more economically efficient for the NLRB); *see also* Robert Willmore, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982, 983 (1980) (suggesting that the NLRB avoids rulemaking precisely to avoid clear statements of policy and to thereby avoid intrusive judicial and congressional review).

60. *See* Ralph F. Fuchs, *Agency Development of Policy Through Rule-Making*, 59 NW. U. L. REV. 781, 789 (1965) (explaining how rulemaking enables an agency to focus on key policy issues without being diverted by the narrower and more specific concerns of the parties to an adjudication).

61. *See, e.g.*, Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72

enables an agency to consider a broader range of information on the consequences of its decision and "because of the economy obtained by dealing directly with an entire category of situations in a single proceeding rather than making law on a case-by-case basis in numerous proceedings."[62] Beyond simply producing inferior policies, decisionmaking by adjudication contravenes the checking and dialogic purposes that judicial review means to advance.[63]

Ossification distorts the outcomes of rules and means less rulemaking overall. Decades ago, the Supreme Court warned that judicial review could transform executive agencies into "mere fact finding bodies deprived of the advantages of prompt and definite action."[64] This fear has largely come to pass. Judicial analytical demands have, for example, "substantially emasculated environmental control programs."[65] Agencies still regulate, but the process has become agonizing. Judicial review is not the sole cause of delay and rulemaking ossification, but it is a major cause.[66] And judicial review unavoidably causes ossification in proportion to its intrusiveness. It is the risk of unpredictable second-guessing by courts that forces agencies to expend many more resources in rulemaking.

B. Agenda Disruption

Ossification means that any one regulation is more difficult to adopt. Judicial review, however, also disrupts the ability of agencies to regulate via a coordinated and coherent regulatory agenda. When judges remand a regulatory decision, resources must be directed back to the now-vacated action. When judges compel regulatory action,

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VA. L. REV. 297, 328 (1986) (pointing out that "agency case law is less visible than agency rules" and that neither the executive nor legislative branches "can monitor agency law created wholly on a case-by-case basis as effectively as they can monitor agency law made in the form of rules").

62. *Id.*

63. *See* Cross, *supra* note 1, at 1247 (summarizing these justifications for judicial review).

64. Gray v. Powell, 314 U.S. 402, 412 (1941).

65. Howard Latin, *Good Science, Bad Regulation, and Toxic Risk Assessment*, 5 YALE J. ON REG. 89, 133 (1988). Latin provides the example of how comprehensive OSHA carcinogen regulation was destroyed by the courts. *See id.* at 132–33; Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms*, 37 STAN. L. REV. 1267, 1329 (1985) (stating that "making particularized risk estimates legally relevant emasculate[s] the regulation of carcinogens under prevailing conditions of scientific uncertainty").

66. *See* McGarity, *Some Thoughts on "Deossifying," supra* note 20, at 1396–98 (listing sources of ossification, beginning with notice and comment rulemaking procedures but including congressional and presidential oversight).

even more resources must be dedicated to the priorities set by the courts and often must be shifted to those priorities on short notice. APA procedural requirements may themselves disrupt agenda setting.[67] A new statutory interpretation issuing from judicial review likewise may disrupt a careful plan of agency action.

This Section focuses on judicial "agency forcing," which occurs when a court orders an agency to embark on a particular regulatory program or set rules for a particular hazard. Agency forcing is the most problematic agenda disruption that an agency might face, because the agency is compelled directly to concentrate on a particular problem that it may consider a lower priority than other concerns on its agenda. Thus, agency-forcing litigation is especially ironic and perverse, because a judicial intention to compel regulation and protect public health has the indirect effect of undermining those same goals.

When courts step in to command agency action, they thereby command a shift of agency resources to that action.[68] Agencies do not receive additional resources to respond to the judicial decree.[69] As a result, "[o]ftentimes new programs are [not] implemented because resources are devoted to meeting court demands."[70] For example, for many Environmental Protection Agency (EPA) divisions, "compliance with court orders ... [has] become the top priority," creating "judicial dominance over the formulation of EPA policy."[71] An empirical study of EPA's regulatory agenda under the Clean Air Act found that the Agency was more responsive to judicial deadlines than to statutory deadlines.[72] Setting deadlines for agency decisions simply "empowers private parties to use the courts to force an agency

67. *See* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 215 (1997) (reporting that "participation of a broad range of interests before an agency may affect the ability of agency decisionmakers to control their own agendas and set priorities").

68. Agency-forcing litigation, commonly initiated by an environmental or other public interest groups, is aimed at compelling an agency to take regulatory action against some particular hazard of concern to the group. *See* John D. Graham, *The Failure of Agency-Forcing: The Regulation of Airborne Carcinogens Under Section 112 of the Clean Air Act*, 1985 DUKE L.J. 100, 124.

69. *See* ROSEMARY O'LEARY, ENVIRONMENTAL CHANGE: FEDERAL COURTS AND THE EPA 160 (1993) ("With one exception, the EPA has not received additional staff or funds from Congress to enable it to comply with specific court decisions.").

70. *Id.* at 164.

71. *Id.* at 169; *see also* Cornelius M. Kerwin, *The Elements of Rule-Making*, *in* HANDBOOK OF REGULATION AND ADMINISTRATIVE LAW 356, 375 (David H. Rosenbloom & Richard D. Schwartz eds., 1994) (reporting that judicial orders "immediately become the top priority of the affected agency").

72. *See* Groseclose, *supra* note 25, at 536, app. at 562.

to reallocate its resources from tasks the agency considers more important to tasks it considers less important."[73] Some of these private parties may seem ideologically appealing, but there is no principled basis to let, for instance, the Sierra Club run EPA. Moreover, there are good reasons why such private organizations will not authentically represent the general public interest.[74]

Agenda disruption is sometimes called the "polycentric problem."[75] This problem arises because the types of issues for which agencies are responsible "cannot be resolved independently and sequentially; they are, rather, interdependent, and a choice from one set of alternatives has implications for preferences within other sets of alternatives," so that "[t]he decision-maker must take into account the whole network before she can reach a single decision."[76] Courts deciding cases almost inevitably must consider the issues of a particular case independently, out of context. Courts are unable to understand the complex interdependencies, much less address them.[77] The judicial process purposely isolates judges from the real-world effects of their decisions.[78] As a result, Martin Shapiro observes that "the judge enters highly complex ongoing situations just far enough and just long enough to pull out a crucial brick and then scampers away, leaving it to the rest of the political system to somehow make

73. Pierce, *supra* note 26, at 82.

74. *See* Ian Ayres & John Braithwaite, *Tripartism: Regulatory Capture and Empowerment*, 16 L. & SOC. INQUIRY 435, 465–66 (1991) (noting that such organizations have internal objectives other than their missions and may themselves be captured by outside interests).

75. For the classic discussion of this problem, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 *passim* (1978).

76. ANTHONY I. OGUS, REGULATION: LEGAL FORM AND ECONOMIC THEORY 117 (1994).

77. *See id.* (observing that the "adversarial setting of the judicial process does not lend itself to grappling with this problem"); *see also* Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 292 (1986) (observing that courts are incapable of dealing with polycentric characteristics or decisions, a problem "aggravated by the inability of courts to impose a coordinated or hierarchical structure, by their lack of familiarity with the often technically complex issues at hand, and by their lack of political accountability").

78. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 389 (1986) (observing that "courts work within institutional rules that deliberately disable them from seeking out information relevant to the inquiry at hand"); Patricia M. Wald, *Judicial Review of Complex Administrative Agency Decisions*, 462 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 82 (1982) (noting that "it is not unusual for us to learn from a newspaper or magazine article for the first time about the potential political, economic, or social effects of our decisions—effects which counsel, for their own reasons, may be reluctant to discuss").

sure that the wall does not fall down."[79]

In a different context, Frank Michelman urged that judicial action is incapable institutionally of accomplishing global fairness because "restriction to the occasional foothold which litigation furnishes may disable courts from making competent judgments about fairness, or from prescribing adequate cures for its absence, since fairness is a quality of courses or networks of decisions rather than of any particular decision which may generate a case or controversy."[80] Administrative law decisions "are ad hoc; they are rarely informed by a comprehensive view of the agency's work, and they cannot aspire to anything approaching the status of a coherent policy."[81]

On occasion, judges have recognized the problems of agenda disruption that can result from agency forcing.[82] The relative judicial deference to agency inaction is based on this recognition. More deferential review is provided when " 'the agency has chosen not to regulate for reasons ill-suited to judicial resolution, e.g., because of internal management consideration as to budget and personnel or for reasons made after a weighing of competing policies.' "[83] Yet this occasional recognition does not prevent frequent agenda-disrupting litigation.

In one case, the D.C. Circuit conceded that it would hesitate to order expedited OSHA regulation of ethylene oxide "if such a command would seriously disrupt other rulemakings of higher or competing priority."[84] OSHA contended that the court decision would be disruptive, but the court concluded that ethylene oxide was more important than the three other pending actions that would be

79. Martin Shapiro, *Judicial Activism*, *in* THE THIRD CENTURY: AMERICA AS A POST-INDUSTRIAL SOCIETY 129 (Seymour M. Lipset ed., 1979).

80. Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1247 (1967) (questioning courts' ability to define fairness in takings law).

81. Donald L. Horowitz, *The Courts as Monitors of the Bureaucracy*, *in* MAKING BUREAUCRACIES WORK 89, 97 (Carol H. Weiss & Allen Barton eds., 1980).

82. Examples of this recognition are rare. I have found only two cases that expressly considered the risk. *See* Sierra Club v. Thomas, 828 F.2d 783 (D.C. Cir. 1987); Public Citizen Health Research Group v. Auchter, 702 F.2d 1150 (D.C. Cir. 1983) (per curiam). The *Auchter* decision contended that its ruling would cause no such disruption. *Auchter*, 702 F.2d at 1158. However, *Thomas* rejected injunctive relief against the agency because of the risk of disruption. *Thomas*, 828 F.2d at 797–99.

83. Professional Pilots Fed'n v. Federal Aviation Admin., 118 F.3d 758, 763 (D.C. Cir. 1997) (quoting Bargmann v. Helms, 715 F.2d 638, 640 (D.C Cir. 1983)).

84. *Auchter*, 702 F.2d at 1158.

delayed by an agency-forcing decision.[85] The opinion is striking for its arrogance. The court was confident somehow that it better understood occupational risk than did OSHA. Subsequent research has proven the court wrong. The ethylene oxide standard prevented an estimated four to six cases of cancer annually.[86] However, it was estimated that the delayed standards, including hazard communication, asbestos, and ethylene dibromide, would have saved more than 250 lives annually.[87] The example of ethylene oxide suggests that even when judges try to be more polycentric, they are not good at it.

Other examples of agenda disruption through agency forcing are common. Under the Federal Insecticide, Fungicide, and Rodenticide Act,[88] litigation resulted in "major parts of [EPA's] pesticide program [being] shut down completely over a six-year period."[89] A similar consequence arose under the Clean Water Act[90] when successful environmental litigation, culminating in the Flannery consent decree, which compelled regulation of toxins in water, drew resources from more beneficial EPA programs.[91] The Clean Air Act's[92] hazardous air pollutant regulatory program has encountered similar difficulties. John Graham reports that court requirements regarding EPA standards for benzene, radionuclides, and arsenic caused "additional

85. *See id.* The three ongoing OSHA programs that were allegedly threatened by the agency-forcing order were a hazard communication standard to inform workers of the threats presented by hazardous substances on the job, an analysis of current regulations regarding worker asbestos exposure, and exposure standards for asbestos and ethylene dibromide. *See id.*

86. *See* RABKIN, *supra* note 39, at 234.

87. *See* Occupational Exposure to Ethylene Dibromide, 48 Fed. Reg. 45,956, 45,977 (1983) (proposed Oct. 7, 1983) (indicating in a notice of proposed rulemaking that the proposed new OSHA ethylene dibromide standard would save one to five lives per year); Occupational Exposure to Asbestos, Tremolite, Anthophyllite, and Aztinolite, 29 C.F.R. §§ 1910, 1926 (1987) (establishing the final occupational exposure to asbestos rule with estimated benefits of saving 75 to 88 lives per year); John F. Morall III, *A Review of the Record*, REGULATION, Nov./Dec. 1986, at 25, 30 (1986) (estimating that the hazard communication standard would save about 200 lives per year).

88. 7 U.S.C. §§ 136–136y (1994).

89. O'LEARY, *supra* note 69, at 65 (discussing how a series of court decisions required EPA to halt various regulatory programs and shift personnel even when the agency prevailed ultimately).

90. 33 U.S.C. §§ 1251–1387 (1994).

91. *See* Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 194 (1987). *See generally* MARC ALLEN EISNER, REGULATORY POLITICS IN TRANSITION 145 (1993) (observing that the "courts have forced the agency to redirect scarce resources to fund court-mandated programs that are often of less importance than other enforcement activities").

92. 42 U.S.C. §§ 7401–7671q (1994 & Supp. III 1997).

delays in the development of health assessment documents for unlisted pollutants, new delays in the Agency's review of emission standards now in effect for listed pollutants, and substantial setbacks in the development of several new source performance standards for pollutants under section 111 of the Clean Air Act."[93] Despite this loss of agency action, the attempt to force EPA decisionmaking "had little beneficial result" because of remediability problems associated with the court orders.[94]

Giving the courts control over any agency's agenda is irrational. In addition to courts' lack of accountability or expertise, individual judicial decisions are "narrowly focused on the issues presented in a case" and ignore the larger context of agency concerns.[95] Yet this larger picture is the most essential information in agenda setting. Because courts fail to consider individual issues in their full context, judicial agency forcing "divert[s] limited resources from an area of pressing need to one the agency has found not even worthy of consideration."[96]

Judicial control over agency agendas has a direct adverse effect on public health because "[h]uge amounts of resources have been dedicated to meeting court decisions, when the environmental and health benefits, at times, have been marginal."[97] Former EPA Administrator William Ruckelshaus complained that environmentalist-sponsored litigation has "forced [EPA] regulators to spend unjustified amounts of money to prevent insignificant health risks."[98] Judicial decrees aimed at specific hazardous air pollutants and toxic water pollutants have drawn EPA resources away from other efforts that would have provided greater environmental benefit.[99] This trend demonstrates that courts lack the information and expertise necessary to make wise allocations of resources among agency options.[100] As a result, other, more pressing problems go

93. Graham, *supra* note 68, at 124.

94. *Id.* at 127.

95. O'LEARY, *supra* note 69, at 169.

96. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 564 (1985).

97. O'LEARY, *supra* note 69, at 169.

98. Robert E. Taylor, *Group's Influence on U.S. Environmental Laws, Policies Earns It a Reputation as a Shadow EPA*, WALL ST. J., Jan. 13, 1986, § 2, at 50 (quoting Administrator Ruckelshaus).

99. *See* FRANK B. CROSS, ENVIRONMENTALLY-INDUCED CANCER AND THE LAW 153 (1989).

100. *See* Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, LAW & CONTEMP. PROBS., Autumn 1991, at 311, 358 (explaining that "courts are not in a position to make a considered judgment concerning how the

unattended.

The problems that agencies are forced to leave unattended and unregulated may be of considerable importance. EPA, for example, has been criticized extensively for focusing its efforts on small risks to health while ignoring greater risks.[101] This misdirected focus is attributable in part to judicial review.[102] The consequences of such distorted priority setting are tragic. The Harvard School of Public Health has calculated that improved priority setting across federal agencies could provide either savings of $31.1 billion from current cost levels with no additional loss of life or savings of 60,200 lives at current cost levels.[103]

While courts ordinarily do not take express note of the quantitative costs of agenda disruption, the Supreme Court has acknowledged in general terms the limitations of judicial review in agenda setting. In an opinion holding that an agency decision to use a particular program to achieve a statutory goal was committed to the agency's discretion, the Court explained that such decisions require:

> "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise": whether its "resources are best spent" on one program or another; whether it "is likely to succeed" in fulfilling its statutory mandate; whether a particular program "best fits the agency's overall policies"; and, "indeed, whether the agency has enough resources" to fund a program "at all" .... [T]he agency is "far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."[104]

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agency might best allocate its limited resources among competing priorities, court orders force agency choices that may misallocate those resources").

101. *See, e.g.*, Frank B. Cross, *The Public Role in Risk Control*, 24 ENVTL. L., 887, 929–30 (1994).

102. Judicial review shares blame with congressional oversight for the fact that "EPA's ... priorities are diverging from the agency's own perception of the relative risks presented by various environmental hazards." Lazarus, *supra* note 100, at 358; *see also* Applegate, *supra* note 32, at 296–98 (observing that priority setting to address the greatest risks requires agency flexibility and freedom from external controls); Lazarus, *supra* note 100, at 355 (reporting that "misdirected priorities" are a result of a "combination of impossible statutory mandates and increased judicial access").

103. *See* Tammy O. Tengs & John D. Graham, *The Opportunity Costs of Haphazard Social Investments in Life-Saving*, *in* RISKS, COSTS, AND LIVES SAVED 167, 177 (Robert W. Hahn ed., 1996).

104. Lincoln v. Vigil, 508 U.S. 182, 192 (1993) (reversing a lower court opinion directing spending decisions of the Indian Health Service and quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1987)); *see also* Sierra Club v. Thomas, 828 F.2d 783, 797 (D.C. Cir. 1987) (observing that courts are "ill-suited to review the order in which an agency

The Court's acknowledgment of the importance of respecting each agency's ability and need to set its own agenda is appropriate, but it commonly is ignored in circuit court opinions. Judicial commands for additional analysis or compelled regulation severely violate agency priority setting, but the lower courts blithely continue issuing such commands.

In addition to the problems of direct agency forcing, judicial review introduces systematic biases that impede sound regulation, thereby creating other disruptions in what could otherwise be sane agency agendas. For example, litigation creates a "managerial bias . . . toward regulating newly discovered hazards at the expense of long recognized but still inadequately regulated hazards."[105] Such new threats have a higher public profile and are thus more likely to provoke agency-forcing litigation.[106] Such litigation promotes the regulation of new problems at the expense of old problems.

The new problem bias has perverse effects on the public interest. Additional regulation of new hazards not only diverts regulatory attention away from old sources, but the greater control requirements imposed by the courts also add to the costs of establishing regulations to guard against these threats. The two results therefore combine to perpetuate the underregulated old hazards.[107] This result is perverse because new hazards are consistently safer than old ones.[108] Sunstein warns that to "regulate new risks in the interest of health and safety is to perpetuate old ones, and thus to reduce health and safety."[109] One study found that new source standards for electric power generation caused a twenty percent increase in air pollution in the northeastern states in 1980 due to the perpetuation of old generating plants.[110] The excessive regulation of new hazards may be substantially attributable

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conducts its business" and that courts are often "hesitant to upset an agency's priorities by ordering it to expedite one specific action, and thus to give it precedence over others").

105. RABKIN, *supra* note 39, at 232.

106. *See id.*; *see also* MELNICK, *supra* note 38, at 366 (noting that the results of judicial review are to place a "heavy regulatory burden on new facilities").

107. *See* Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 WASH. & LEE L. REV. 851, 877–81 (1996).

108. *See id.* at 876 (claiming that "new products and facilities are almost universally safer than existing ones"); Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 298 (1985) (observing that there is "hardly a product in use today—a car, plane, boiler, municipal water system, drug, vaccine, or hypodermic syringe—that is not many times safer than its counterpart of a generation or even a decade ago").

109. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 106 (1990).

110. *See* BRUCE YANDLE, THE POLITICAL LIMITS OF ENVIRONMENTAL REGULATION 88–89 (1989).

to Congress, but clearly is exacerbated by judicial review of rules.

Another inherent shortcoming of agenda setting through agency-forcing judicial review is grounded in its unavoidable structure of policymaking through legalism. Public interest advocates are drawn to the best legal case rather than the most important policy concern. For example,

> it seems unlikely that consumer safety advocates like Ralph Nader's Public Citizen would have focused attention on color additives or food additives posing absurdly tiny risks—when so many more substantial health risks, even so many more substantial carcinogens remain unregulated or underregulated—except for the fact that the Delaney Clause happened to provide an easy legal claim against the former.[111]

Yet the attempts to rigidly apply the Delaney Clause[112] actually increased the mortality and morbidity risks of pesticides. The National Academy of Sciences has demonstrated that vagaries in the law meant that the Delaney Clause actually would increase pesticide risks.[113] In addition, the strict application failed to account for the considerable potential health benefits of pesticides.[114] When the executive branch sought to apply a more rational and health-protective approach to pesticide regulation, however, it was struck down in court as contrary to the Delaney Clause.[115] The result was greater risk to public health and a diversion of agency resources from more pressing health problems.[116] As this example indicates, judicial control over agenda setting interferes with sound regulation. As a

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111. RABKIN, *supra* note 39, at 268.

112. The Delaney Clause prohibits food additives shown to cause cancer in animal tests from being used in processed foods, regardless of the relative risk of cancer or the actual risk to humans. *See* 21 U.S.C. § 348(c)(3)(A) (1994). For a discussion of the background of the Delaney Clause and the problems EPA faced when attempting to implement the law through regulations, see Frank B. Cross, *The Consequences of Consensus: Dangerous Compromises of the Food Quality Protection* Act, 75 WASH U. L.Q. 1155 *passim* (1997).

113. *See* COMMITTEE ON SCIENTIFIC AND REGULATORY ISSUES UNDERLYING PESTICIDE USE PATTERNS AND AGRIC. INNOVATION, NAT'L RESEARCH COUNCIL, REGULATING PESTICIDES IN FOOD: THE DELANEY PARADOX 40 (1987).

114. *See generally* Cross, *supra* note 112, *passim* (discussing at length how restrictions on pesticide use can undermine public health).

115. EPA sought to apply a de minimis standard for pesticide residues and avoid the paradoxical increase of risk created by the Delaney Clause. *See* Notice: Regulation of Pesticides in Food: Addressing the Delaney Paradox Policy Statement, 53 Fed. Reg. 41,104 (1988). A federal appellate court vacated this effort. *See* Les v. Reilly, 968 F.2d 985, 986 (9th Cir. 1992).

116. *See, e.g.*, Cross, *supra* note 107, at 911 (concluding that the focus on pesticide contamination of foods has diverted the FDA from greater hazards of microbial contamination of food).

result, it also undermines accountability to the public.[117]

C. *Resource Misallocation*

Resource misallocation attributable to judicial review is not limited to the direct agenda disruption that results from agency-forcing litigation. The shadow of judicial review necessarily compels agencies to devote considerable resources to surviving that review process. Consequently, agencies must devote more resources and authority to lawyers and legal research—and, concomitantly, fewer resources to substantive research and analysis. For example, the threat of judicial review under the Clean Air Act "greatly enhanced the bureaucratic position of politically naive and technically ignorant attorneys within ... EPA."[118] When an activist group succeeds in agency-forcing litigation, the simple result is that "limited agency resources may be expended in litigation over deadlines rather than in writing regulations."[119] For instance, in the case of the National Labor Relations Board (NLRB), the "very need to defend Board certification decisions in court is itself a substantial burden on the Board's resources that could otherwise be used to administratively process Board certification disputes more quickly."[120]

Even absent judicial review, agencies would surely devote some resources to legal analysis, in order to ensure that their actions are consistent with the law.[121] Jonathan Macey has observed that lawyers in agencies offer both costs and benefits.[122] He stresses that at some point the net value of lawyers becomes negative,[123] and his discussion suggests that the point has been passed. He observes, inter alia, that lawyers in agencies tend to be conservative, reactive, and risk adverse;[124] that they "add delay to the administrative decisionmaking process";[125] that they may produce structural regulations grounded in

117. *See* Rossi, *supra* note 67, at 221 (arguing that "[a]gency-supervised agenda setting is important" for accountability and neutral analysis). On the relative accountability of the bureaucracy versus the courts, see Cross, *supra* note 1, at 1274.

118. MELNICK, *supra* note 38, at 302–03.

119. McGarity, *Some Thoughts on "Deossifying," supra* note 20, at 1456.

120. Michael C. Harper, *The Case for Limiting Judicial Review of Labor Board Certification Decisions*, 55 GEO. WASH. L. REV. 262, 287 (1987).

121. *See* Cross, *supra* note 1, at 1329–30 (discussing evidence that agencies care about lawfulness regardless of judicial review); *id.* at 1290–1301 (discussing other incentives for agency lawfulness).

122. *See* Jonathan R. Macey, *Lawyers in Agencies: Economics, Social Psychology, and Process*, LAW & CONTEMP. PROBS., Spring 1998, at 109, 109.

123. *See id.* at 109–10.

124. *See id.* at 110–11.

125. *Id.* at 115.

"righteous indignation and moral superiority";[126] that they are "indifferent to objective truth and scientific rigor";[127] and that their inclinations are "fundamentally at odds with the model of administrative agency as dispassionate, technical, scientific, and truth-seeking."[128] On top of these disadvantages are the opportunity costs of lawyers—requiring the employment of more legal advisors inevitably reduces the availability of scientific advisors, given limited budgets.

The presence of judicial review, at least under prevailing approaches, requires a considerable increase in legal analysis with all of its costs; much of this increase should be unnecessary. Under the current system, agencies facing judicial review must not merely strive to ascertain the authentic meaning of the law, but also must anticipate and respond to the range of alternative meanings that might appeal to any given review panel. The agency also must devote resources to procedural and other administrative law requirements. Nicholas Zeppos has exposed how even the deferential *Chevron* rule produces this misallocation:[129]

> The significance of *Chevron* step one would lead the agency to devote more resources to the legalistic analysis that was at the core of *Chevron* step one than to policy expertise or political balancing.... Therefore, scarce agency resources would be shifted away from explanations that a court and the public might find more helpful.... [T]ime, space and expertise limits may lead the agency lawyer to emphasize the law over the policy.[130]

As the explanation of the rule tilts toward legalism, so does power within the agency. Zeppos observes that the *Chevron* analysis

126. *Id.* at 118.

127. *Id.* at 120.

128. *Id.* at 121.

129. The Supreme Court decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), directed that courts defer to some agency interpretations of statutes. The opinion stated that courts should reverse such interpretations only if: (1) the statute is clearly contrary to the interpretation; or (2) the statute is vague, but the interpretation is nevertheless unreasonable. *See id.* at 843–44. The decision has been interpreted as a noteworthy declaration of deference to agencies. *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2162–64 (1998) (summarizing *Chevron* and analyzing its implications).

130. Nicholas S. Zeppos, *Judicial Review of Agency Action: The Problems of Commitment, Non-Contractibility, and the Proper Incentives*, 44 DUKE L.J., 1133, 1147–48 (1995); *see also* WILSON, *supra* note 33, at 281 (observing that the courts changed "a political discussion of policy and discretion into a legal discussion of rights and procedures").

has caused a transfer of power to lawyers within agencies and to the Department of Justice, which must ultimately defend the rules promulgated.[131] Regulations are formulated "in a political environment that makes it more important to withstand legal attack than to withstand scientific scrutiny."[132] This consequence is surely a distortion; Congress did not delegate regulatory authority to EPA in order to empower Justice Department litigators.

EPA is probably the best example of the disadvantages of judicial review. As a practical matter, lawyers "have the last word in most EPA actions," rewriting regulations as necessary to survive judicial review.[133] Other agencies, however, have suffered similarly. For example, OSHA standard setting has become a battle between experts who seek to act quickly and lawyers who seek to make the best case for judicial review.[134] Under a regime of judicial review, the lawyers tend to win; the power and authority of scientific experts are concomitantly decreased. The obvious result is regulation with less scientific backing and an increasingly adversarial legal environment.[135] The same is true of the Federal Energy Regulatory Commission (FERC). Richard Pierce observed that FERC, to comply with judicial requirements, hired more lawyers in lieu of engineers and economists, but such a "reallocation of resources ... elevate[d] apparent quality of decisionmaking over actual quality of decisionmaking."[136] Similarly, legal efforts to compel the Office of Civil Rights to focus its resources on integration of higher education caused the Office "to ... neglect ... improving actual educational performance among blacks."[137]

Legal adversarialism also may undermine regulatory effectiveness in indirect ways. Professors Pildes and Sunstein

131. *See* Zeppos, *supra* note 130, at 1148–49.

132. WILSON, *supra* note 33, at 284.

133. O'LEARY, *supra* note 69, at 164; *see also* Patricia M. Wald, *The Role of the Judiciary in Environmental Protection*, 19 B.C. ENVTL. AFF. L. REV. 519, 534 (1992) (reporting that "agencies often draft their rules and rationales with judicial review in mind").

134. *See* EISNER, *supra* note 91, at 159.

135. *See* James V. DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399, 424 (1986) (observing that "like any other institution, a court may tend to place too much weight on the values with which it is most familiar—a court may overemphasize formalized procedures" to the detriment of scientific analysis).

136. Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7, 27 (1991).

137. RABKIN, *supra* note 39, at 180.

emphasize the importance of public trust to effective regulation.[138] Yet they also note that such trust is fragile and that the bureaucracy dedicated to the regulation of public risks largely has lost the public trust.[139] This loss is attributed in material part to the "tendency to resolve policy conflicts in adversarial settings, particularly litigation."[140] Legal analysis is obviously essential to regulation, and agency lawyers offer benefits as well as costs. But there is a desirable balance of legal resources—more is not always better—and judicial review has spurred agencies to devote exorbitant levels of resources to lawyering, thereby unleashing "an excessive focus on process rather than the substance of governmental decisions."[141]

D. Ignorance of Political and Practical Constraints

Judicial review consistently ignores the external political and practical factors that must lie at the heart of effective administrative action. Appellate arguments concentrate on the interests of the particular litigating parties and the specific legal provision at issue. Yet "[f]or a regulatory scheme to succeed, the agency must look beyond the impact of its decision on the immediate parties to the proceeding."[142] The agency must consider the practical consequences of the decision on its entire agenda, as well as the political consequences of action or inaction.

Judges commonly misinterpret the political nature of the statutes they are asked to interpret. For example, environmental statutes often contain broad, aspirational, pro-environmental language, yet also include significant restrictive exceptions as a political compromise.[143] In many cases, judges often miss the compromise because their efforts at textual interpretation "tend to devalue the policy balances struck by environmental agencies between broad pro-environmental aspirational language and narrow pro-industry exceptions."[144] A judicial decision may dwell on the wording of a given section of a statute without considering the purpose and

138. *See* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 40–43 (1995).

139. *See id.* at 41.

140. *Id.* at 42.

141. Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427, 429.

142. Seidenfeld, *supra* note 43, at 492–93.

143. *See* Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better Than Judicial Liberalism*, 53 WASH. & LEE L. REV. 1231, 1251–52 (1996).

144. *Id.* at 1267.

operation of the overall statutory scheme. With their abstract, even Olympian perspective, judges lack agencies' ability "to judge the administrability, enforceability, and likely consequences of new policies" so as to produce a "workable regulatory scheme."[145]

Political realities critically constrain and direct agency decisionmaking.[146] An agency "must consider how it will enforce its standards and what problems implementation of the standards will cause."[147] Courts are poorly positioned to appreciate and respond to such political realities.[148] More seriously, court intervention may attempt to deny the unavoidable presence of such political realities. For example, to satisfy judicial decisions, agencies may be forced to develop meaningless regulations that will never be effected. Courts also distort the political realities. A study of the FTC found that the adversarial administrative process compelled by procedural requirements discouraged political conflict resolution because "judicialized procedures have made it difficult for the FTC to fashion politically acceptable policies."[149] Likewise, fear of judicial review and courts' failure to consider political reality "denied [EPA] the opportunity to create a functional regulatory program [for hazardous air pollutants] and advanced few, if any, of Congress'[s] substantive goals."[150] Courts are also slow to respond to shifts in politics. Agencies' ability "to reformulate policies and interpretations as political administrations change is often a tremendous advantage in achieving an interpretation that can maintain majoritarian political support."[151]

Likewise, judicial review can sometimes ignore the political realities surrounding agencies' enforcement powers. For example, the Natural Resources Defense Council (NRDC) sought to strengthen the Clean Air Act by obtaining court orders requiring EPA to disallow state variances under Clean Air Act standards. The reviewing courts, however, were "woefully uninformed about the

145. John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 311 (1990).

146. *See id.* at 315 (suggesting that the "press, popular support, and potential political consequences are important factors at most stages of regulatory decisions").

147. Seidenfeld, *supra* note 43, at 493. A court, by contrast, "need not concern itself with any of these matters." *Id.*

148. *See* MELNICK, *supra* note 38, at 297 (explaining how "court decisions have squandered valuable administrative time and political capital").

149. WEST, *supra* note 30, at 173.

150. Dwyer, *supra* note 145, at 236.

151. Mank, *supra* note 143, at 1284.

informal constraints on ... EPA's enforcement program."[152] James Q. Wilson explains the effects of this environmental "victory":

> The courts and the NRDC thought they had closed a loophole; in fact they had gutted an incentive. The states, irritated by the EPA order complying with the court rulings, reduced their enforcement efforts, substituted informal for formal procedures, and refused to cooperate with much of ... EPA's program. To the states, the federal government had displayed a head-in-the-clouds ignorance of the complexity and variety of local pollution problems and had taken out of the states' hands a vital incentive that could be used to induce industry compliance with the clean-air program. In short, a series of court decisions intended to toughen the enforcement of anti-pollution law in fact weakened it.[153]

Unable to provide variances, the states halted enforcement efforts or adopted informal compliance methods, which reduced oversight by the public and EPA.[154] These decisions were not only politically uninformed, they were also legally "wrong"—they were later reversed by the Supreme Court.[155] By then, however, the damage had already been done.[156] The key point is that the court took the politics out of a fundamentally political issue, forcing it into a painful, legal Procrustean bed.

Courts also may ignore the practical realities of scientific limitations. Regulatory decisionmaking typically requires the use of scientific evidence, ranging from epidemiology to economics. A public health regulation, for example, may depend upon biological evidence of toxicity, statistical evidence of risk, engineering evidence regarding control technology, and perhaps economic evidence of compliance costs. Yet science seldom offers conclusive answers, and even if conclusive answers might be achievable, regulators lack the resources to find them. In this context, Professor McGarity suggests that agencies should employ a "rationality that recognizes the limitations that inadequate data, unquantifiable values, mixed societal goals, and political realities place on the capacity of structured rational thinking, and it does the best that it can with what it has."[157]

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152. MELNICK, *supra* note 38, at 191.

153. WILSON, *supra* note 33, at 288; *see also* MELNICK, *supra* note 38, at 178 (describing the decision as an "environmental disaster").

154. *See* MELNICK, *supra* note 38, at 190.

155. *See* Train v. Natural Resources Defense Council, 421 U.S. 60, 98–99 (1975).

156. *See* MELNICK, *supra* note 38, at 185.

157. THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF

Courts, however, may demand perfection. In a given case, only the merits of a single piece of regulation are before the court, causing tunnel vision that eliminates contextual consideration. The court typically sees only the challenged regulation, not the tradeoffs with other actions. A "common theme[]" of judicial review "is the inability and unwillingness of . . . court[s] to factor . . . agenc[ies'] lack of staff and budget in its decision."[158] Absent recognition of resource constraints, it is natural to demand perfection. But "[d]emanding the utmost care on ancillary issues can have the perverse effect of precluding agency regulation altogether."[159]

OSHA provides a telling example of this effect of judicial review. The agency "had a relatively small number of officials in its office of standards development," who were distracted by the threat of judicial review.[160] As the burdens of rulemaking expanded, OSHA's frequency of rulemaking plummeted. OSHA has been significantly slower in setting new standards than are its "counterparts in other countries."[161] Yet OSHA has been a relative success when compared to other agencies. For example, after the Consumer Product Safety Commission (CPSC) suffered a reversal in its attempts to ban certain formaldehyde insulation, the CPSC abandoned all efforts to set standards for toxic products.[162] In this case, judicial review did not slow the regulatory process, it halted it.

Demanding synoptic analysis fails to consider the costs associated with such analysis and whether the associated resources might be more profitably spent on another matter. The nature of science makes synopticism especially troublesome. There are no final scientific answers, only tentative ones. Science, by its nature, is always questioning, always exploring. The closer courts come to demanding that agency science provide a conclusive answer to scientific questions, the closer they come to demanding the impossible. Reviewing each case in isolation, judges are wont to demand optimization or a synoptic model. The agency, they reason, should consider every alternative and each piece of evidence thoroughly. While this model may improve an individual rule, it

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REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 5–6 (1991).

158. O'LEARY, *supra* note 69, at 113; *see also* Seidenfeld *supra* note 43, at 493 (noting that a court's "legal vantage point" has the effect of "diminish[ing] technical or practical constraints that the agency faces").

159. Seidenfeld, *supra* note 43, at 497.

160. RABKIN, *supra* note 39, at 224.

161. *Id.* at 228.

162. *See* McGarity, *Some Thoughts on "Deossifying," supra* note 20, at 1419 (noting that the "CPSC has not attempted to regulate a single additional toxic product.").

worsens the overall body of rules:

> Synopticism is not totally rational, because it fails to take decision costs into account. If an agency must know everything before it can make a rule, then the cost of rulemaking will, in some instances, be unbearable. And in many instances the rule either will be greatly delayed or will never appear at all. Either everything can't be known or new things to be found out keep popping up faster than everything can be known about them.[163]

In short, judges hold agencies to unreasonably high standards for individual regulations, thereby preventing agencies from carrying out their essential mandates. This effect is but one of many examples of how judicial tunnel vision focused on an individual case can disrupt sensible polycentric planning and cause unanticipated perverse consequences.[164]

Judicial intervention also frustrates agency efforts at coordination and coherence. A typical organic statute has "hundreds of provisions" that "relate to other provisions in complicated ways."[165] Courts examine the provisions in isolation and may yield a combination of interpretations that "simply will not work because of one or more of the many constraints that affect any agency's ability to perform its mission."[166] A judicial intervention on just one provision may upset the agency's entire program, when "an externally imposed construction of one term can force an agency to change its method of implementing its program in many other ways."[167] Once again, the lack of polycentrism inherent in judicial review interferes with sound

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163. Martin Shapiro, *The Supreme Court's "Return" to Economic Regulation*, 1 STUD. AM. POL. DEV. 91, 114 (1986).

164. *See* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 25 (1981) (describing how "the flow of litigation only directed attention away from the need for long-range planning"); SMITH, *supra* note 38, at 49 (referring to studies "indicating that judges frequently do not foresee the adverse consequences of their decisions").

165. Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 764 (1995).

166. *Id.* These constraints may be various:

> Some potential methods of implementing a program will not work because the agency cannot make the types of factual findings required. Other methods are impractical because they would require more resources than the agency possesses, they would create intractable enforcement problems, or they would anger members of Congress who are in a position to reduce the agency's appropriations.

Id. at 764 n.110.

167. *Id.* at 765.

governance. Judge Posner "wonders whether the [Supreme] Court has any clue as to the consequences of its administrative law decisions for society."[168] When decisions are clueless with respect to practical and political realities, those decisions may well be ineffective or even counterproductive. Judicial decisions cannot wish away such realities.

E. Producing Poor Quality Rules

The most common pragmatic defense of judicial review is that, by demanding better agency analysis and stronger supporting documentation, it produces fewer rules of better quality.[169] Anecdotal examples can be cited in support of this purported benefit.[170] Even if conceded, however, improved quality is an insufficient justification for judicial review if quantity suffers unduly.[171] Sidney Shapiro's review of OSHA suggests that judicial "insistence that the agency prove the obvious diverts precious time and resources from rulemaking initiatives."[172] A marginal increase in regulation quality (from explicitly proving the obvious) could cause a substantial decrease in quantity; the net result, therefore, may be an overall decrease in the quality of regulation. Moreover, judicial review actually reduces the quality of individual rules in several ways. In light of these concerns, the occasional benefit in rule quality is outweighed by the inherent pressure for overlegalization created by judicial review.

Of course, part of the problem in dealing with this issue is the difficulty of measuring the net effect of judicial review on rule quality. Cass Sunstein has sought to perform his own cost-benefit analysis of judicial review by analyzing the net benefits of various decisions on agency rules,[173] but his judgment was based largely on his personal

168. Posner, *supra* note 9, at 961.

169. *See, e.g*, Pierce, *supra* note 26, at 85 (observing that some argue that reasoned decisionmaking review is justified as a tool to improve the quality of agency decisionmaking); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 656 (1985) (contending that the threat of judicial review increases agency fidelity to "substantive and procedural norms").

170. *See* Lazarus, *supra* note 100, at 349 (concluding that it was "likely that an active judiciary improved the quality of EPA decisionmaking in some cases").

171. *See* Daniel A. Farber, *Environmental Protection As a Learning Experience*, 27 LOY. L.A. L. REV. 791, 804 (1994) (emphasizing that "improvements in quality come at the expense of delay and reduced output").

172. Sidney A. Shapiro, *Substantive Reform, Judicial Review, and Agency Resources: OSHA as a Case Study*, 49 ADMIN. L. REV. 645, 654 (1997).

173. *See* Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522 *passim*.

assessment of each decision's benefits and costs.[174] Even this standard was not easy for him to apply. For instance, he appeared to include the Clean Air Act prevention of significant deterioration decision as an example of both good and bad judicial review.[175]

Absent a universally accepted currency for measuring the effects of judicial review, an empirical study of its net effects on rule quality will be difficult to operationalize.[176] It is more fruitful to examine the systemic incentives created by judicial review and their likely effects on rule quality. By requiring additional scrutiny for particular rules, one might expect judicial review to produce additional information and thus to enhance rule quality.[177] Of course, any such enhancement is seriously undermined if judges tend to impose additional information requirements when they are ideologically predisposed against the agency's decision.[178] Moreover, the apparent benefit is

174. *See id.* at 528. For example, Sunstein cites the banning of DDT as an example of judicial review that produced a "significant benefit[]." *Id.* Yet the DDT ban may have caused more health harm than it prevented. *See* AARON WILDAVSKY, BUT IS IT TRUE? 58, 72 (1995); Cross, *supra* note 107, at 870–71, 890–91.

175. *Compare* Sunstein, *supra* note 173, at 528 (listing the prevention of significant deterioration (PSD) decision among the significant benefits of judicial review), *with id.* at 531 (citing adverse effects of the PSD ruling and uncertainty about existence of any environmental benefit from the decision). The PSD decision probably should be considered a negative. *See* MELNICK, *supra* note 38, at 76 (observing that "PSD has few friends and more than its share of enemies because it is incredibly cumbersome, causes unnecessary delays in the construction of industrial facilities, and diverts regulators' resources from more effective programs"). Sunstein elsewhere appears to subscribe to the view that the PSD decision was counterproductive. *See* SUNSTEIN, *supra* note 109, at 178–79 (describing unanticipated adverse effects of the decision, such as "protecting dirty existing plants against replacement with cleaner new ones"). The PSD decision essentially placed restrictions on sources located in areas that were well within the ambient air quality standards at the time. The decision was based on the need to protect the relatively pristine air quality of these regions. However, it had the perverse effects discussed above, such as perpetuating pollution in the regions where the problem was greater.

176. *See* Glicksman & Schroeder, *supra* note 50, at 298 (recognizing that "appraising the costs and benefits of judicial review can only occur from within a contestable political perspective"). Sunstein concedes this point, noting that a cost-benefit analysis of judicial review is complicated by the lack of criteria for assessment. *See* Sunstein, *supra* note 173, at 536.

177. Mark Seidenfeld suggests that, absent judicial review, agencies will have a tendency to rely unduly on the lead office for a regulation and give insufficient attention to a broader perspective. *See* Seidenfeld, *supra* note 43, at 507. Yet Seidenfeld elsewhere acknowledges that the political realities of regulation make it unlikely that eliminating judicial review would materially reduce the outside analyses of rules. *See id.* at 505. The relationship is more complex than Seidenfeld suggests. While judicial review may add importance to the views of other divisions within an agency, thus broadening perspective, it simultaneously disempowers high level agency officers, who have the broadest perspective of all. *See* MELNICK, *supra* note 38, at 382–83 (describing how judicial review undermined the influence of the EPA Office of Air Quality Planning and Standards).

178. *See* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit,*

undermined by other systemic consequences of judicial scrutiny. Rule quality will suffer from resource misallocation and other problems. Additional features of judicial review, including emphasis on procedure over substance, the promotion of adversarial legalism, and the lack of consideration for the practical consequences of rules, further conspire to reduce rule quality.

Judicial review focuses agencies on procedural compliance rather than the merits of the rule.[179] As Jerry Mashaw has explained, "[n]othing focuses an administrator's mind more keenly on recordkeeping, turning square procedural corners, elaborate justificatory analysis, and a host of other red-tape-producing activities than the prospect of judicial review."[180] Judge Wald, formerly a member of the D.C. Circuit, makes this plain; she notes that remands "are most often caused by the agency's failure to communicate or explain to generalist judges what they are doing, not by the agency's failure to do enough research or garner sufficient expert opinions for the record."[181] Judicial review does not improve the substance of regulations, just their explanation to an uninformed judicial audience. Resources devoted to such procedures and explanations (and resources devoted to discovering what procedures and explanations will be required) must be taken from other concerns, such as assessing a rule's merits or conducting additional rulemaking proceedings. The procedures may even undermine understanding of the merits, as the adversarial process "tends to warp the quality of the scientific and technical information" available to the agency.[182]

In theory, judicial review should give agencies an incentive to make thoughtful rulemaking judgments. The unpredictability of

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83 VA. L. REV. 1717, 1769 (1999) (noting that any benefit of improved quality of rulemaking "would be diluted if agencies were to believe that the fate of their regulations depends in large part on the nature of the D.C. Circuit panel that reviews them, rather than on the care taken to explain the reasons for their actions").

179. *See* Philip K. Howard, Administrative Procedure and the Decline of Responsibility, Keynote Address at the American Bar Association Section of Administrative Law and Regulatory Practice Symposium on the 50th Anniversary of the Administrative Procedures Act (Oct. 1995), *in* 48 ADMIN. L. REV. 312, 315 (1996). Howard notes that procedures are justified on the grounds that " 'more process means better decisions.' " *Id.* In fact, he argues, "more process means more defensiveness, it means distorted decisions." *Id.*

180. MASHAW & HARFST, *supra* note 52, at 415.

181. Patricia M. Wald, *Judicial Review in a Time of Cholera*, 49 ADMIN. L. REV. 659, 666 (1997).

182. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 21 (1982). Some of the reasons for this warped quality are found in Macey, *supra* note 122, at 120–25, which observes that the adversary process is inconsistent with scientific truth-finding.

courts, though, prevents agencies from protecting their rules in this fashion. Rather than try to guess what a court will require, the agency simply may choose to issue a less thoughtful rule and accept the inevitability of judicial second-guessing. Thus, "[t]he prospect of judicial review induces the agency to make a questionable or infirm decision in order to leave the final judgment with the courts."[183]

Agency-forcing guidelines can also "impose significant regulatory inefficiency costs and thereby seriously undermine the quality of rulemaking."[184] The focus on legalistic concerns comes at the expense of sound policy. After protracted litigation over EPA regulation of radionuclides under the Clean Air Act, for example, the Agency produced "sham regulations that in fact increased the amount of radionuclides that could be emitted in the air."[185] The rules essentially embraced existing control technologies and practices.[186] Judicial intervention "forced EPA to expend scarce resources to deal with a problem (non-uranium mine radionuclide emissions) that did not merit being regulated."[187] Even if the problem had in fact merited regulation, the judiciary could not effectively force the Agency to take action that it disliked, so the Agency produced sham regulations that conformed to the legal requirements of the opinion, yet lacked practical effect.[188]

Judicial review also skews the outcome of regulation in an unnecessarily antagonistic fashion. Legalistic adversarialism is incompatible with collaborative approaches to regulation. Under the current regime, rulemaking participants "dig in and defend their extreme positions."[189] Agencies become unwilling "to experiment with flexible or temporary rules."[190] When EPA successfully created voluntary testing approaches under the Toxic Substances Control Act,[191] the action was challenged by environmental interests and

183. Sanford E. Gaines, *Decisionmaking Procedures at the Environmental Protection Agency*, 62 IOWA L. REV. 839, 899 (1977) (basing his conclusion on "[s]tatements of present and former EPA employees").

184. Abbott, *supra* note 91, at 195; *see also* McGarity, *Some Thoughts on "Deossifying," supra* note 20, at 1456 (noting that "[w]hen agencies work feverishly under the threat of statutory or judicially imposed deadlines, the quality of the output may suffer").

185. O'LEARY, *supra* note 69, at 113.

186. *See* National Emission Standards for Hazardous Air Pollutants: Standards for Radionuclides, 50 Fed. Reg. 5190, 5192 (1985) (current version at 40 C.F.R. pt. 61).

187. Abbott, *supra* note 91, at 190.

188. *See id.* at 189–90.

189. Harter, *supra* note 182, at 19.

190. McGarity, *Some Thoughts on "Deossifying," supra* note 20, at 1392.

191. Toxic Substances Control Act of 1976, Pub. L. No. 94-469, 90 Stat. 2003 (codified

struck down.[192] Efforts to replace the voluntary approach with a more adversarial testing system proved futile and delayed the program considerably.[193] Likewise, in NHTSA and other agencies, the "willingness of the courts to second-guess the agency has also reinforced the adversarial posture of parties."[194] The result is to exclude compromise solutions, even when they might be preferable to picking a winner,[195] as compromise solutions typically are. Strict legal action "often engenders legalistic defensiveness and costly court battles," while "[e]ffective regulation requires cooperative problem-solving, elicited by negotiation about the sensible application of legal rules."[196]

Agency-forcing judicial decisions, driven by extreme litigation positions and unrepresentative circumstances,[197] tend to produce particularly extreme standards. This result is illustrated by decisions such as those striking down efforts by both EPA and the FDA to moderate the extreme and counterproductive Delaney Clause.[198] Similar extreme results were compelled by the decision holding that National Ambient Air Quality Standards were to be set without any regard for their cost or achievability.[199] Even the threat of such judicial outcomes can skew agency decisionmaking, for instance, because the expense and likelihood of being reversed in court creates

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as amended in scattered sections of 15 U.S.C.).

192. *See* Natural Resources Defense Council v. EPA, 595 F. Supp. 1255, 1260 (S.D.N.Y. 1984) (holding that EPA's program of negotiating voluntary testing agreements for various chemicals subverted the statutory scheme laid out by TSCA, which sought to impose formal procedures for testing chemicals on which data were lacking).

193. *See* O'LEARY, *supra* note 69, at 80–85.

194. MASHAW, *supra* note 34, at 164.

195. *See* Gerald F. Anderson, *The Courts and Health Policy: Strengths and Limitations*, HEALTH AFF., Winter 1992, at 98 (observing that "[s]ince the courts must select winners and losers, it is unlikely that a compromise solution will evolve from a court decision," even though "a compromise outcome may be preferable"); Horowitz, *supra* note 81, at 98 (contrasting the reasoning of judicial decisionmaking with other modes of decision, such as "negotiation and compromise").

196. Robert A. Kagan, *Regulatory Enforcement*, *in* HANDBOOK OF REGULATION AND ADMINISTRATIVE LAW, *supra* note 71, at 383, 385; *see also* BRUCE YANDLE, THE POLITICAL LIMITS OF ENVIRONMENTAL REGULATION 71 (1989) (describing how extremely costly regulations make it easier for industry to evade sanctions for violations).

197. *See* MELNICK, *supra* note 38, at 15 (noting that private control over litigation means that the courts are often presented with "highly atypical cases").

198. *See* Les v. Reilly, 968 F.2d 985, 990 (9th Cir. 1992) (striking down EPA's attempt to rationalize the Delaney Clause and reduce risk); Public Citizen v. Young, 831 F.2d 1108 (D.C. Cir. 1987) (striking down similar efforts by the FDA). In these cases, both agencies sought to evade the extreme requirements of the Delaney Clause by using a de minimis risk exception.

199. *See* Lead Industries Ass'n v. EPA, 647 F.2d 1130, 1150 (D.C. Cir. 1980).

incentives for agencies to announce stringent standards.[200]

As courts require stricter individual standards, the number of overall standards declines, as does the public health protection offered by the cumulation of standards.[201] This principle is known as overregulation causing underregulation.[202] John Mendeloff has demonstrated how the principle has operated at OSHA.[203] In its early days, OSHA embraced exposure levels suggested in the voluntary industry standards developed by the American Conference of Government Industrial Hygienists (ACGIH). By relying on the work of these outside experts, the Agency was able to regulate hundreds of chemicals.[204] OSHA subsequently tried to set much stricter standards for such substances, but was only successful with respect to ten chemicals.[205] During the same period, ACGIH lowered its standards for another hundred chemicals, and the combined health benefits of the superficially more lenient ACGIH approach were considerably greater.[206]

OSHA's failings are not attributable to administrative misjudgment; judicial review was central to the underregulation. One factor that "prevented OSHA from speeding up its standard setting was its insistence on adopting the most protective standards feasible—a disposition, reinforced by court decisions and advocacy groups, that continued throughout the 1980s."[207] The court had the naive theory that "greater protection for workers would follow automatically from more stringent statutory requirements," when in fact "stringent requirements tend to lead an agency not to regulate at all, thus producing underregulation."[208]

The risk of extreme overregulatory judicial commands may deter

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200. *See* MASHAW, *supra* note 34, at 164.

201. *See, e.g.*, Sunstein, *supra* note 173, at 526 (noting that the "courts' literal approach to the Delaney Clause has increased regulatory irrationality by imposing serious costs and in fact bringing about fewer rather than more improvements in safety and health").

202. For a general review of this problem, see CROSS, *supra* note 99, at 144–45.

203. *See generally* JOHN M. MENDELOFF, THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA (1988) (tracing the history of various OSHA regulatory efforts).

204. *See id.* at 82 (noting OSHA's adoption of ACGIH standards for the regulation of hundreds of chemicals).

205. *See* John Mendeloff, *Regulatory Reform and OSHA Policy*, 5 J. POL'Y ANALYSIS & MGMT. 440, 442 (1986). The typical exposure reduction from the ACGIH standards was 50%, while OSHA sought a 90% reduction in exposures. *See id.*

206. *See id.* (reporting that ACGIH actions promised to save several hundred more lives than the OSHA actions).

207. RABKIN, *supra* note 39, at 229.

208. Sunstein, *supra* note 173, at 532.

all regulation. If courts insist that "regulation, once undertaken, must be draconian, the government avoids regulating many substances at all."[209] This effect is illustrated by the regulation of hazardous air pollutants under section 112 of the Clean Air Act (before the 1990 amendments). EPA feared that courts would interpret the law strictly, requiring zero-risk regulation without respect to cost, which in turn made the Agency reluctant to take any action on hazardous air pollutants.[210] As a consequence, section 112 was broadly considered a failure.[211] EPA's efforts to interpret the section in a workable fashion were deterred by fear of judicial review.[212] This experience provides another example of how apparently protective judicial review perversely undermines the protective goals of statutes by deterring regulation. Similar results obtained under section 4 of the Toxic Substances Control Act.[213]

Even the fewer, stricter standards actually promulgated may be relatively ineffective—stricter standards "are harder to enforce than standards that seem more reasonable."[214] Industry resistance will be greater and compliance will suffer.[215] States, Congress, and the President may balk at enforcing rules that threaten major employers.

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209. SUNSTEIN, *supra* note 109, at 92.

210. *See EPA's Air Pollution Control Program: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 98th Cong. 19 (1983) (Sup. Doc. No. Y 4.En2/3:98-97) (testimony of William Ruckelshaus, Administrator) (declaring that agency fear of literal statutory interpretation leads to "paralysis in decisionmaking"); *Clean Air Act (Part Two): Hearings Before the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 97th Cong. 737 (1981) (Sup. Doc. No. Y 4.En2/3:97-103) (statement of Walter C. Barber, Jr., Director, Office of Air Quality Planning and Standards) (reporting that the potential for extreme interpretation had made the agency "reluctant to list chemicals" as hazardous air pollutants); Applegate, *supra* note 32, at 314 (noting that stringency prevented regulation, which meant that "the most hazardous air pollutants were not regulated *at all*"); Frank B. Cross, *Section 111(d) of the Clean Air Act: A New Approach to the Control of Airborne Carcinogens*, 13 B.C. ENVTL. AFF. L. REV. 215, 226 (1986) (reporting that EPA avoided full implementation of section 112 in order to avoid overly stringent judicial review).

211. *See* Cross, *supra* note 210, at 215–18.

212. *See id.* at 226–27; *see also* Dwyer, *supra* note 145, at 279–81 (noting that fear of judicial enforcement of severe standards polarized the interested parties and prevented an effective compromise solution); Graham, *supra* note 68, at 131 (reporting that fear of severe standards paralyzed EPA decisionmaking).

213. *See* John Mendeloff, *Does Overregulation Cause Underregulation? The Case of Toxic Substances*, REGULATION, Sept./Oct. 1981, at 47, 50 (reporting that stringent requirements limited EPA to regulating two or three substances annually).

214. MELNICK, *supra* note 38, at 297.

215. *See* Frank B. Cross, *When Environmental Regulations Kill: The Role of Health/Health Analysis*, 22 ECOLOGY L.Q. 729, 780 n.281 (1995) (citing sources indicating that more extreme regulations produce public backlash, increase industry resistance to compliance, and reduce government compliance efforts).

The courts themselves may further this result, striking down the very stringent standards that they originally demanded.[216] In the context of air pollution transportation controls, "the federal courts contributed to ... EPA's problems by ordering it to formulate aggressive attainment plans and then, once the implications of the original orders became clear, refusing to help ... EPA enforce them."[217] Even if the rules are sustained in court, the cost of defending them hampers agencies,[218] and the resulting adversarialism may undermine the goals of the statutory program.[219] Finally, when extreme standards are implemented, they increase the probability of creating countervailing risks that exceed those prevented by the regulation.[220]

The costs of judicialization and the domination of judicial policymaking by extreme positions also frustrates innovative and potentially more effective regulatory approaches.[221] When agencies take any action at all, they are encouraged to "play it safe" and hew close to the existing law and past practices. For instance, because of

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216. *See* FREDERICK ANDERSON ET AL., ENVIRONMENTAL IMPROVEMENT THROUGH ECONOMIC INCENTIVES 15 (1977) (noting that particularly costly government requirements mean that "a firm can reasonably expect to make a convincing case in court about the infeasibility or unreasonableness of the agency's emission requirements").

217. MELNICK, *supra* note 38, at 301.

218. *See* Edward W. Warren & Gary E. Marchant, *"More Good Than Harm": A First Principle for Environmental Agencies and Reviewing Courts*, 20 ECOLOGY L.Q. 379, 388 (1993) (observing that the efforts to "defend overly stringent regulations that provide limited extra benefits at high marginal costs" require agencies to "expend both resources and precious political capital" that would be better devoted to greater problems).

219. *See, e.g.*, John T. Scholz, *Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness*, 85 AM. POL. SCI. REV. 115, 128–33 (1991) (finding that cooperative enforcement was more effective than adversarial enforcement and concluding that labor involvement in regulation setting, which magnified the adversarial nature of the process, actually reduced the effectiveness of regulatory enforcement).

220. *See generally* Cross, *supra* note 107 (discussing the dangers of attempting to avoid known risks without considering the costs and other implications of the avoidance efforts). Regulating a given risk may simply produce the use of alternatives that have a greater risk, such as when energy regulations have caused a switch to hazardous fossil fuels or even more hazardous conservation measures. *See id.* at 863–82. Regulating a risky substance or activity also may cause harms by forcing the public to forego the benefits provided by that substance or activity, as when rigorous standards for new drugs cause a delay in the marketing of beneficial drugs. *See id.* at 882–97. Regulation may even cause harms directly, when the activities taken in furtherance of the regulations produce risks, as when cleanups initiated under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) endanger workers. *See id.* at 898–908.

221. *Cf.* Applegate, *supra* note 32, at 314 (reviewing how stringent policies can limit innovation); Glicksman & Schroeder, *supra* note 50, at 301 (discussing how judicial review thwarts implementation of "innovative approaches to substantive problems"); McGarity, *Some Thoughts on "Deossifying," supra* note 20, at 1452–53 (observing that "stringent substantive judicial review can hamper innovation and experimentation").

"the threat of judicial review," EPA frequently seeks to set standards adapted to incremental changes in existing technology, "even though an overhaul and modernization may be more efficient."[222] As a result, polarization among competing interest groups has frustrated promising pollution prevention and market incentive programs.[223] By empowering factions, judicial review discourages market-based regulation.[224]

The obstruction of more efficient, market-oriented regulatory methods has the effect of adding additional and unnecessary costs to the enormous sums already spent for pollution control.[225] Current regulatory methods produce tens of billions of dollars of economic waste.[226] Some commentators suggest that the amount of waste is even greater and that more efficient regulatory strategies could save hundreds of billions of dollars in pollution control regulation alone.[227] Limited existing efforts at using market-based regulatory methods have already shown significant savings.[228]

Frustrating efficient innovations also undermines the effectiveness of existing regulation. EPA Administrator Carol Browner has remarked: " 'If we are to clean up our air, we need to move beyond the one-size-fits-all approach and work toward flexibility and innovation—solutions that work for real people, real communities.' "[229] Current command and control approaches suffer

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222. Marianne Lavelle, *Some Costs Benefit Companies*, NAT'L L.J., Nov. 27, 1995, at A1.

223. *See* Lazarus, *supra* note 100, at 362–63 (concluding that "polarization of institutional forces has . . . prevented any meaningful effort to implement these alternative approaches").

224. *See* Michael S. Greve, *Introduction: Environmental Politics Without Romance*, *in* ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 1, 7 (Michael S. Greve & Fred L. Smith, Jr. eds., 1992) (describing how market standards are contrary to the interests of producers and how technology-based standards benefit technology manufacturers).

225. *See, e.g.*, Pildes & Sunstein, *supra* note 138, at 97–99 (describing the inefficiencies of traditional command and control regulatory approaches).

226. *See* Richard B. Stewart, *United States Environmental Regulation: A Failing Paradigm*, 15 J.L. & COM. 585, 588 (1996) (estimating that traditional command and control methods cost twice as much as efficient regulatory methods). Stewart estimates the amount of waste as "tens of billions of dollars annually." *Id.*

227. *See* Pildes & Sunstein, *supra* note 138, at 97 (noting that between 1972 and 1985, the United States spent more than $600 billion on pollution control and estimating that the gains from this expenditure might have been achieved for only 25% of the cost, had more efficient methods been employed).

228. *See* Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 260–61 (1996) (summarizing research on the extent of actual and projected savings of such programs).

229. *Air Pollution: EPA Administrator Will Not Fight Bill to Repeal FIP Requirements*

from insufficient information, intermittent overregulation and underregulation, failure to adapt to local circumstances, inability to integrate control efforts, and failure to provide an incentive for technological advances in pollution control.[230] Market incentive regulation can offer more environmental benefit than do classic command and control regulations.[231] For example, the market-based acid rain control program, which was adopted pursuant to explicit statutory direction, has proved more effective than traditional command and control regulations at much less cost.[232] Market-based approaches may be a win-win scenario, offering more control at less cost, but the possibility of obtaining these benefits may be frustrated by judicial review because it precludes innovation and serves to aggravate the worst aspects of command and control regulation.[233]

Negotiated rulemaking is another type of potentially beneficial regulatory innovation that has been frustrated by the adversarial legalism that judicial review promotes. The confining structure of the APA and the adversarial culture it inculcates make regulatory negotiation difficult, if not impossible.[234] Negotiated rulemaking may

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in 1977 Law, 25 Env't Rep. (BNA) No. 41, at 1998 (Feb. 17, 1995) (quoting Administrator Browner).

230. *See* Stewart, *supra* note 226, at 588–89; *see also* SUNSTEIN, *supra* note 109, at 88 (observing that command and control technology regulations perpetuate old plants, fail to encourage new technology, and prevent the government from developing sensible priorities). Sunstein reports that "[t]here is considerable evidence that the government could accomplish its antipollution goals far more effectively through decentralized, incentive-based strategies that are focused on pollution reduction rather than on the means of achieving that end, and that also rely on market incentives." *See* SUNSTEIN, *supra* note 109, at 88.

231. *See* SUNSTEIN, *supra* note 109, at 87–88; J.B. Ruhl & Harold J. Ruhl, Jr., *The Arrow of the Law in Modern Administrative States: Using Complexity Theory to Reveal the Diminishing Returns and Increasing Risks the Burgeoning of Law Poses to Society*, 30 U.C. DAVIS L. REV. 405, 452–81 (1997) (discussing generally the shortcomings of command and control environmental regulation); Norman W. Spaulding III, *Commodification and Its Discontents: Environmentalism and the Promise of Market Incentives*, 16 STAN. ENVTL. L.J. 293, 295 (1997) (suggesting that "tradable pollution permits may hold great promise for reducing air pollution more effectively than command and control regimes").

232. *See* Dallas Burtraw & Byron Swift, *A New Standard of Performance: An Analysis of the Clean Air Act's Acid Rain Program*, 26 Envtl. L. Rep. (Envtl. L. Inst.) 10,411, 10,419 (1996) (concluding that the tradable permit acid rain program is more effective than prior command and control approaches); Rick Santorum, *Linking Our Land and Our Liberty*, 18 U. PA. J. INT'L ECON. L. 455, 460 (1997) (observing that the acid rain program has led to a 50% reduction in sulfur dioxide emissions and has cut costs by two-thirds).

233. *See* Stewart, *supra* note 226, at 590–91 (reporting that the "dysfunctions of our command centered environmental regulatory system are exacerbated by the adversary culture . . . and the legal superimposition of formalized decisionmaking procedures, and searching judicial review over the central planning process").

234. *See* S. REP. NO. 101-97, at 6 (1989) (Sup. Docs. No. Y 1.1/2:serial13924) (reporting

offer a variety of advantages to society and affected parties.[235] Regulatory negotiation offers the promise of better information in rulemaking,[236] "may be less costly and more expeditious," and "may even result in 'better' regulations that take into account important practical details and respond to varying needs."[237] Congress has recognized the value of the method and has encouraged it statutorily.[238] While regulatory negotiation is not appropriate for all circumstances, the process provides a valuable option that is largely foreclosed by APA judicial review.

Quality rulemaking is further undermined by the generalist judiciary's lack of scientific and technical sophistication. This relatively common criticism of the judiciary emphasizes that generalist judges "lack information and may also lack the experience and skill to interpret such information as they may receive."[239] The adjudication process exacerbates the ill-informed nature of judicial review.[240] One can find concessions of this point by judges who choose to defer agencies' positions. But when judges disagree with agencies' policy results, humility turns to arrogance; "many judges have been unwilling to acknowledge their lack of expertise" as they "have routinely opined on the quality of the evidence and on the

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that "agencies are confused about how to reconcile negotiated rulemaking procedures with the APA and the Federal Advisory Committee Act"); Harter, *supra* note 182, at 102–03 (noting that a stringent standard of judicial review can undermine innovative procedures such as negotiated rulemaking); Philip J. Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 AM. U. L. REV. 471, 485 (1983) (reporting that hard look judicial review could defeat the benefits of consensual rulemaking and inhibit its use); Andrew F. Popper, *Administrative Law in the 21st Century*, 49 ADMIN. L. REV. 187, 191 (1997) (reporting that "[n]egotiated and hybrid rulemaking struggle to survive in the land of the APA").

235. *See generally* Harter, *supra* note 182, at 28–31 (cataloging the benefits of negotiated rulemaking). In conventional rulemaking, the agency publishes a proposal, takes comments from all interested parties, and publishes a final rule. *See id.* In negotiated rulemaking, the agency sits down with the most centrally interested parties, perhaps an industry being regulated and a prominent public interest group, and works out a final rule that all parties find acceptable. *See id.* While negotiated rulemaking is not necessarily universally or even generally desirable, it may be very well suited for certain regulatory controversies.

236. *See* Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1627 (1986).

237. Harter, *supra* note 234, at 489.

238. *See* The Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561–570a (1994 & Supp. IV 1998).

239. HOROWITZ, *supra* note 37, at 31.

240. *See id.* (remarking that the "adjudication process conspires in a dozen small and large ways to keep the judge ignorant of social context").

scientific and economic foundations of agencies' actions."[241] For example, the D.C. Circuit prohibited a de minimis polychlorinated biphenyls (PCB) exemption, floridly writing that "[h]uman beings have finally come to recognize that they must eliminate or control life threatening chemicals, such as PCBs, if the miracle of life is to continue and if earth is to remain a living planet."[242] Such dramatic language is hardly scientific, and in reality restricting PCBs has proved to be unnecessary and counterproductive.[243] Regardless of the merits of any particular case, there is a systemic problem when judges make policy decisions without comprehending the relevant policy issues or the relevant evidence.[244]

The case-by-case nature of judicial review also frustrates coherent policymaking.[245] Review is inescapably "piecemeal" and "unlikely to advance the objective of coordinating an increasingly complex environmental policy, let alone of coordinating it with other pressing items on the domestic or foreign policy agendas."[246] Courts' decisions are dependent on cases, as chosen by private litigants. The policy "outcome of important cases" can be decided by the "accident of who gets to court first."[247]

Judicial review is ill-suited to evaluate the policy consequences of judicial decisions.[248] Consider, for example, a review of Nuclear Regulatory Commission policy. Challenges to the policy will center entirely on the narrow risk of nuclear power being regulated.[249] The challenge, however, will not consider the most important question—

241. EISNER, *supra* note 91, at 169; *see also* MELNICK, *supra* note 38, at 14 (noting that judicial "independence can breed arrogance," as "[j]udges may simply impose their policy preferences on administrators").

242. Environmental Defense Fund, Inc. v. EPA, 636 F.2d 1267, 1286 (D.C. Cir. 1980).

243. *See* WILDAVSKY, *supra* note 174, at 38–55.

244. *See* MELNICK, *supra* note 38, at 371 (noting that judges reviewing EPA "came to their policy-based decisions without using the adjudicatory process to investigate policy issues").

245. *See* RABKIN, *supra* note 39, at 32 (noting that "judicial protection for particular interest group claims excludes various policies from general efforts to integrate or coordinate policy operations: it encourages fragmented or incoherent policy efforts").

246. Glicksman & Schroeder, *supra* note 50, at 301.

247. MELNICK, *supra* note 38, at 15.

248. *See* Anderson *supra* note 195, at 98 (noting that "judges do not always have the tools to discover unintended consequences of their decisions"); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 80 (1991) (observing that "courts tend to underweigh, or be underinformed about, the systemic and prospective consequences of their decisions because they focus on the particular parties and adjudicated historical facts before them").

249. *See, e.g.*, Public Citizen, Inc. v. United States Nuclear Regulatory Comm'n, 940 F.2d 679, 680 (D.C. Cir. 1991); Union of Concerned Scientists v. United States Nuclear Regulatory Comm'n, 920 F.2d 50, 55 (D.C. Cir. 1990).

the net risk from power generation. Striving to prevent a small risk from nuclear power can cause a shift to other sources, such as coal burning, that will produce a greater risk overall.[250] By considering risks in isolation, courts cannot produce a sensible overall risk policy.[251] Even worse, courts have no method to monitor, detect, and correct perverse consequences that may result from their decisions.[252]

There is a growing recognition that efforts to regulate risks in isolation may create greater overall risks.[253] Such countervailing increases in risk may result from the risks created by alternatives to the regulated substance or activity, when regulation causes use of a harmful substitute. Countervailing increases may also result from ignoring the health benefits foregone in consequence of the regulation when a regulated substance has overlooked benefits exceeding the risk. Finally, increases may also result from risks created directly by regulatory remediation requirements and through other channels.[254] Agencies' single-mission orientation sometimes leads them to make the same types of counterproductive decisions.[255] However, judicial review that focuses on isolated statutory provisions is even more susceptible to the tendency. An agency with a relatively broad overall mission, such as EPA, is more likely to adopt a sensible, polycentric vision of overall risk than is a court confronted with evidence regarding only a single regulation.[256] The "litigation setting ... magnifies the possibility of unanticipated consequences that a

250. *See* Cross, *supra* note 107, at 852.

251. *See* Matthew McCubbins et al., *Positive and Normative Models of Procedural Rights*, 6 J.L. ECON. & ORG. 307, 328 (1990) (describing how judicial review of Nuclear Regulatory Commission approvals largely destroyed the nuclear industry but in so doing the courts "may well have been blind to (or unconcerned with) the policy significance of its procedural requirements").

252. *See* Horowitz, *supra* note 81, at 99.

253. *See, e.g.*, JOHN D. GRAHAM & JONATHAN B. WIENER, RISK VERSUS RISK: TRADE-OFFS IN PROTECTING HEALTH AND THE ENVIRONMENT *passim* (1995) (presenting a series of case studies demonstrating how efforts to reduce one risk have produced a greater countervailing risk).

254. *See* Cross, *supra* note 107, at 862–908 (cataloging cases in which regulation resulted in a net increase in risk).

255. *See* BREYER, *supra* note 35, at 11–19.

256. *See* GRAHAM & WIENER, *supra* note 253, at 260 (remarking that the "courts have not ... been a reliable source of leadership for more intelligent management of society's risk portfolio" and that "expert agencies are far better equipped for this task than are generalist judges with small staffs and little ability to collect data or monitor results"); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 107 (1983) (observing that courts are "ill-equipped for 'social cost accounting,' " because "courts lack the administrator's presumed investigative resources, analytic competence, and technical literacy" and must "view social policy issues through the refracting prism of judicial review").

more comprehensive view might perceive and attempt to limit or control."[257]

A final way in which judicial review negatively impacts regulatory quality is through its tendency to produce only tentative rules. The theory that more extensive judicial participation and analysis will yield the "one right rule" reflects an unrealistic assumption of certainty. In a world of uncertainty, no rule is unquestionably right or perfectly defensible. The search for a rule defensible in court, therefore, does not focus the agency on the best rule, but instead drives agencies to adopt the most defensible rule. McGarity has found that the "overall effect of evaluative hard look review is not so much to force the agencies to deal with uncertainty as it is to force agencies to be more timid in advancing their statutory missions"[258] because agencies may be more inclined to adopt the provisions that have not been seriously challenged in the rulemaking record. Moreover, there "is little sense of finality about an agency decision, and this may weaken the agency's incentive to take seriously its responsibilities."[259] Because judicial decisions are unpredictable, review does not create an incentive for "better" rules, just safer ones.

In short, judicial review of rulemaking is ill-designed for either wise policy or implementation of the laws. The tendencies noted above may sometimes cancel each other out, and yield a good rule, but such an event is merely lucky happenstance. Over all, judicial review has "substantially emasculated environmental control programs in the past decade."[260] Similar adverse effects have been felt on highway safety programs, occupational safety programs, consumer product safety programs, electricity regulation, and other administrative regimes. Judicial review functionally undermines the substance of the law by pledging fealty to its letter. The resulting effects on administrative programs alone should be sufficient to dejustify judicial review.

III. THE ILLEGITIMATE PUBLIC CHOICE OF JUDICIAL REVIEW OF RULEMAKING

The defense of judicial review may ultimately retreat to a democratic position. After all, Congress authorized judicial review in the Administrative Procedure Act and in various organic statutes.

257. HOROWITZ, *supra* note 37, at 37.
258. McGarity, *Ossification of Rulemaking*, *supra* note 20, at 556.
259. JAMES Q. WILSON, THE POLITICS OF REGULATION 390 (1980).
260. Latin, *supra* note 65, at 133 (1988).

Some might argue that such a congressional command is compelling, notwithstanding the policy detriments associated with judicial review. Moreover, judicial review is typically favored by interest groups on both the right and the left. Congress has the right and authority to be unwise. It is not constitutionally or ethically compelled to establish a pragmatically effective system of regulatory review.

If everyone affected is happy with judicial review, why rock the boat? Indeed, some might argue that prevailing satisfaction with judicial review is a sufficient pragmatic defense of the process and calls into question Part II's conclusions on its pathological consequences. However, the reasons why Congress and many affected parties favor the disruptions caused by judicial review are illegitimate.

A. Why Congress and the Executive Illegitimately Favor Judicial Review

To begin with Congress, it seems a fair question to ask why Congress would favor judicial review of administrative action. While such review serves to check the competing executive branch, it may also undermine the power of Congress, especially to the extent that it obstructs achievement of the goals of the legislation Congress passes. Judicial review is a transfer of power from both the executive branch and Congress to the judiciary. Why would Congress acquiesce to such a loss of power?

Congressional devotion to judicial review can be explained readily as part of legislators' attempt to escape from electoral accountability. Individual congresspersons have policy goals, but also are highly concerned with reelection.[261] An individual legislator's chances of winning reelection are enhanced by taking actions that have (or appear to have) positive consequences for which the legislator may take credit and by avoiding blame for any negative consequences of the action. However, such actions evade accountability. In the real world, few, if any policies have only positive consequences. This is particularly true in the regulatory context, where laws are intended to offer some public benefit, but inevitably impose direct costs on the regulated entity and indirect costs on society as a whole. Some commentators suggest that regulatory statutes, by their nature, seek to escape accountability—"[a]s generally stated intentions to do something, they placate the

261. *See generally* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 57–73 (1974) (discussing the electoral incentive to take credit and avoid blame).

public, yet at the same time they provide latitude for administrators to do."[262]

Congress can claim to have addressed a problem through regulatory statutes while escaping any negative consequences of the legislation (and blaming other branches for any failure of the legislation to solve the problem). In the end, legislators thus escape blame for negative consequences. They also can escape retribution from regulated groups that disfavor action while taking credit from the public that seeks the action. Consequently, some legislators are able to posture with concern for a problem that they do not sincerely care to address. The strategy works because the general citizenry does not appreciate the inescapable pragmatic significance of procedural statutory detail.[263]

Of course, Congress cannot count on the executive branch to "do nothing," especially in the presence of a broad public demand for action. An activist President might seek to regulate aggressively and accept the consequences of such action. Regulated groups may not be a key part of the President's constituency, and Presidents are term-limited and consequently have less concern for reelection. The actions of such a President could force legislators to accept the real-world consequences of their legislation or, at least, to make hard choices in new legislation to restrict the regulation. At this point, judicial review intervenes to obstruct the efforts of such a President and keep the legislation largely symbolic.[264] Mark Graber observes that "[e]lected officials in the United States encourage or tacitly support judicial policymaking both as a means of avoiding political responsibility for making tough decisions and as a means of pursuing controversial policy goals that they cannot publicly advance through open legislative and electoral politics."[265] In the case of the Clean Air Act, for example, judicial review has caused EPA to set "stringent standards while backing down on enforcement deadlines," which "has helped turn national standards into long-range goals, as opposed to

262. WEST, *supra* note 30, at 27.

263. *See* CHARLES R. SHIPAN, DESIGNING JUDICIAL REVIEW: INTEREST GROUPS, CONGRESS, AND COMMUNICATION POLICY 16 (1997). As Shipan explains, "[m]ost constituents do not consider the political battles over procedural details to be important" and "pay little, if any, attention to these battles." *Id.* For interest groups, however, "these battles are of central consequence." *Id.*

264. *See* Kerwin, *supra* note 71, at 356 (observing that Congress creates procedural requirements for agencies so it can "influence the process and to protect special interests without being held responsible for the content of individual rules").

265. Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 37 (1993).

legally binding requirements."[266] Congressional provision of judicial review thus can "be recognized as an attempt to pass the buck for addressing the problems that have surfaced with the regulatory process to the courts—without charging both *political* branches of the federal government to take greater responsibility for the manner in which society's resources are allocated through regulatory decisions."[267]

Legislators not only seek to evade accountability for potentially unpopular regulation, but also seek to attend to the influence of regulated interests. Judicial review of rulemaking is structurally obstructive of government action and strongly in the interest of these regulated entities. The APA itself was passed at the behest of conservatives seeking to undermine the New Deal.[268] Business interests supported the APA because they "understood fully that the APA could become a central tool for delaying, if not completely frustrating an activist government."[269] Judicial review has always been favored by powerful special interests who can use the courts to frustrate regulatory action.[270] Judicial review enables Congress to pass statutes in response to public demand, yet defang any serious threat to regulated entities.

From the perspective of the legislator, the ideal self-interested action is symbolic legislative action.[271] Through symbolic legislation, Congress can take a publicized legislative stand for a popular end, such as a clean environment, while escaping the consequences of the costs of such regulation.[272] Congress, therefore, may favor judicial

266. MELNICK, *supra* note 38, at 295.

267. ROBERT E. LITAN & WILLIAM D. NORDHAUS, REFORMING FEDERAL REGULATION 115 (1983).

268. *See, e.g.*, Cross, *supra* note 1, at 1285–88 (arguing that the APA was the product of antiregulatory forces); Matthew McCubbins et al., *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 209–13 (1999) (describing how the APA was the design of antiregulatory forces and setting forth votes as evidence); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 *passim* (1996) (closely analyzing the history of the Act's passage).

269. PAUL C. LIGHT, THE TIDES OF REFORM: MAKING GOVERNMENT WORK, 1945–1995, at 68 (1997).

270. *See* Cross, *supra* note 1, at 1315–26.

271. *See, e.g.*, Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 46–52 (1982) (describing how Congress creates vague legislative commands in order to escape accountability for consequences); Kagan, *supra* note 196, at 383 (observing that "politicians appease the electorate by enacting well-publicized regulatory legislation, while subsequently starving enforcement agencies of the resources needed to implement the laws forcefully").

272. Graber suggests that "mainstream politicians may facilitate judicial policymaking

review precisely because review renders Congress's own statutes less effective.[273] The legislators thereby get credit for taking action, can shift the blame for implementation shortcomings and escape the blame potentially associated with the costs of effective implementation.[274] In the end, legislators avoid making hard decisions and appear to be a "friend to all."[275] Congresspersons give federal agencies "huge, even utopian, goals," but saddle them with "a large number of constraints that prevent them from achieving these goals efficiently—or even at all."[276] While this is perfectly rational from the viewpoint of a legislator seeking reelection, the approach is an illegitimate effort to escape the duty to legislate and be held accountable for the consequences of legislation.

This pattern is quite apparent in environmental law, which is pervaded by symbolic statutes that carry potentially significant real-world implications.[277] Politicians strategically embrace unrealistic goals, such as the elimination of all pollution, but simultaneously create regulatory roadblocks that restrain even moderate achievement.[278] The symbolic statutory goals themselves create such roadblocks by encouraging extreme positions in litigation and

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in part because they have good reason to believe that the courts will announce those policies [the politicians] privately favor but cannot openly endorse without endangering their political support." Graber, *supra* note 265, at 43; *see also* EISNER, *supra* note 91, at 45 (noting that some statutory authorizations are "symbolic efforts designed to assuage the demands of mobilized constituents").

273. *See* WILSON, *supra* note 33, at 242 (noting that the result of congressional "structural and procedural arrangements ... has been the creation of bureaucratic organizations that cannot function effectively").

274. *See, e.g.*, DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 62 (1974) (referring to the legislative art of making "pleasing judgmental statements" without having to actually produce action on difficult issues); Glicksman & Schroeder, *supra* note 50, at 293 (observing that "Congress can satisfy its environmental consumer constituents by enacting legislation, [and] it may then be able to satisfy its regulated-interests constituency through lax implementation," which can be accomplished by "ensuring that the regulatory process grinds slowly"); David Schoenbrod, *Delegation and Democracy, A Reply to My Critics*, 20 CARDOZO L. REV. 731, 740 (1999) (observing that Congress delegates in order "to claim much of the credit for the benefits of the laws but shift to the unelected agency officials much of the blame for the inevitable costs and disappointments when the agency fails to deliver all the benefits promised").

275. Smith, *supra* note 141, at 456.

276. R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 257 (1992).

277. *See generally* Dwyer, *supra* note 145, *passim* (describing the hazards involved with symbolic legislation, focusing on section 112 of the Clean Air Act).

278. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES 96 (1994) (describing how a "politician may declare an abiding concern for the environment and even support broad (albeit vague) legislation and at the same time block implementation ... under the guise of some procedural or jurisdictional rationale").

polarizing interested parties in a manner that prevents an effective compromise solution. The encouragement of symbolic congressional action creates another substantial problem by overpromising results, raising the public's expectations unrealistically and undermining more moderate and effective action. The misperceptions created by overly broad environmental statutes "pose a most serious obstacle to environmental policy reform."[279]

The original adoption of the APA itself reflects this congressional attempt to escape accountability through symbolic legislation. The Act was passed with, and still includes, very ambiguous language regarding the scope of judicial review, leaving some commentators to conclude that "instead of agreeing on specific provisions, the parties agreed to a game of roulette in which the courts [spin] the wheel."[280] The losing party then can "blame the unfavorable outcome on loose-cannon, activist courts."[281] Through the fiction of legalism, legislative responsibility is displaced, and democracy is corroded.[282] When Congress actually disapproves of an unpopular agency policy, it can use its oversight authority as pressure for modification.[283] But judicial review means that Congress need not be accountable for weakening popular agency policies, leaving it to the courts to frustrate their effects.[284]

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279. Fred L. Smith, Jr., *Conclusion: Environmental Policy at the Crossroads*, *in* ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS, *supra* note 224, at 177, 178; *see also* Bradley C. Bobertz, *Transferring the Blame*, ENVTL. FORUM, Jan./Feb. 1996, at 23, 23 (complaining that "the fact that we deal harshly with culturally accepted *symbols* of environmental problems makes it less likely that we will deal with the problems—and their causes—themselves").

280. Shepherd, *supra* note 268, at 1665.

281. *Id.*

282. *See* SMITH, *supra* note 38, at 23 (noting how reliance on judicial policymaking undermines democracy at the legislative level and renders the public "passive, apathetic, and deferential" to judicial decisionmaking).

283. *See* Cross, *supra* note 1, at 1294–97 (discussing congressional checking of agencies).

284. An interesting natural experiment demonstrating this effect was noted in Schoenbrod, *supra* note 274, at 731. He writes:

> Congress has recently provided us with a laboratory experiment to see if legislators are willing to step forward to repeal agency laws with which they disagree. In the name of congressional responsibility, Congress enacted the Congressional Review Act, which sets up expedited procedures for floor votes to repeal new agency laws before they go into effect. In the first eighteen months of this procedure, agencies promulgated thousands of regulations, many of which have been criticized by legislators. But the Senate voted on only one of them, and the House on none. The experiment shows that legislators react to responsibility as vampires do to garlic—they flee.

Id. at 739.

In addition to the illegitimate attempts to escape from accountability, judicial review is sometimes prompted by democratic shortcomings within Congress itself. Judicial review fails to promote the intent of Congress as a whole; instead it advances the goals of certain key committees and their staffs.[285] When judicial review considers legislative history, it empowers a "relatively few individuals" on "committees and their staffs."[286] These individuals exercise their control and influence judicial review through a "carefully placed phrase in the legislative history or committee reports, [or] a stealthy insertion into the congressional record," thereby giving themselves disproportionate control over the discrete policy areas in which they are most interested.[287] The undue power of individual members and their staffs is magnified because congressional efforts to check the courts and modify decisions through legislative action must pass through the committee system.[288] This is strategic behavior by the key drafters of legislation, but there is no democratically principled basis for empowering a small minority of Congress (or their appointed agents), when the alternative is empowering the agents of the Executive, who represents the entire nation.

One might expect the executive branch to resist judicial review, much as President Franklin D. Roosevelt fought the predecessors to the APA and the Clinton Administration fought judicial review provisions in more recent regulatory reform bills.[289] However, the executive branch has relatively little power to resist some such review, given the established existence of the APA and congressional lawmaking powers. Moreover, the executive branch may itself become complicitous, relying on judicial review to escape accountability for its own difficult administrative decisions.[290] Judges,

285. *See* MELNICK, *supra* note 38, at 112 (describing how the PSD decision "enhanced the power of already powerful committee members and their staffs"). A review of the Clean Air Act experience found "many examples of court-committee symbiosis," enabling committees and subcommittees to "push the programs of special interest to them." *Id.* at 376–77; *see also* James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 14 (1994) (noting that judicial search for statutory interpretation empowers a "handful of legislators" or authors of committee reports).

286. LANDY ET AL., *supra* note 21, at 287.

287. SHIPAN, *supra* note 263, at 19.

288. *See* John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 576–77 (1992) (describing the effect of congressional committees on legislative responses to court rulings).

289. *See* Sunstein, *supra* note 228, at 271.

290. *See* Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent*

largely freed from accountability concerns by life tenure, are happy to accept this decisionmaking power. Government institutions thus conspire to establish judicial review, even when it is counterproductive.

B. *Why Even Public Interest Groups Illegitimately Favor Judicial Review*

Private organizations provide no counterbalance to this government institutional bias. Given the consequences of judicial review of administrative action, it is obvious why regulated entities favor it. The procedural complexity of judicial review has been characterized as "a legislative bone thrown to the unsuccessful opponents of regulatory legislation."[291] Litigation stalls, obstructs, and deters costly regulatory action. Antiregulatory parties are well aware of how judicial review provisions can enable them to subvert legislative goals.[292] A detailed case study of communications legislation reveals how interested parties fought extensively over apparently arcane procedural judicial review provisions that had favorable substantive implications.[293] A Congress already amenable to procedural requirements is influenced by major contributors to introduce favorable judicial review provisions. Meanwhile, the general public has difficulty mobilizing to oppose this influence and may be satisfied by the general symbolic proclamations of action because it is unaware that the substance of the legislation is undermined by procedural requirements.

One might wonder why pro-regulatory groups, such as environmental activist groups, also seem to favor judicial review.[294] Once again, there are rational, if politically illegitimate, reasons for

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Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government, 40 STAN. L. REV. 203, 273 (1987) (observing how "the Reagan appointees at EPA found it far more convenient to hide behind the constraints of [a Clean Water Act] consent agreement than to make this decision on their own authority").

291. MASHAW, *supra* note 34, at 185.

292. *See* Charles R. Shipan, *Interest Groups, Judicial Review, and the Origins of Broadcast Regulation*, 49 ADMIN. L. REV. 549, 553 (1997) (observing that "interest groups know which types of provisions are most likely to help them achieve their goals and pressure members of Congress to write such provisions into law").

293. *See* SHIPAN, *supra* note 263, *passim*.

294. Of course, there is always the possibility that pro-regulatory groups simply misunderstand the consequences of judicial review. *See, e.g.*, WILLIAM F. WEST, CONTROLLING THE BUREAUCRACY 60 (1995) (suggesting that public interest groups unwisely favored aggressive judicial review of Federal Trade Commission action because "they apparently failed to appreciate ... that the context of consumer protection had changed to one of promoting policy change").

this position. It is a mistake to believe that all environmental groups are uniformly interested in the protection of the general environment or public health.[295] Most groups have their favored environmental subissues on which they focus. For example, the Sierra Club initiated the litigation producing the prevention of significant deterioration (PSD) program out of concern for protecting pristine areas, even though the program's effect was to increase environmental problems in more populated areas.[296] The PSD program prohibited degradation of ambient air quality in parts of the country that were already well inside the range of compliance for federal standards. It had an environmental benefit in these geographic areas, but its net environmental effect was negative.[297] As this example demonstrates, judicial review is an opportunity to advance a group's particularized agenda, even when advancement comes at the expense of the goals of other groups. In other words, a group that is especially interested in the regulation of radionuclides will benefit from a court order commanding such regulation, even if the effect of the order is to preclude other more important environmental regulations.[298] Similarly, the AFL-CIO has petitioned in court for regulation of relatively small worker hazards while ignoring "some of the most severe hazards . . . apparently because the workers most affected are not generally unionized."[299]

In addition to seeing court action as a means of furthering a favored, narrow policy objective, public interest groups also may have institutional motivations for favoring judicial review.[300] This narrowed focus may be a natural consequence of competition among public interest groups. In a crowded field, a group can differentiate itself by specializing in a particular issue of concern to a potential constituency. Once expertise in a narrow area is established, it may

295. *See* Rabkin & Devins, *supra* note 290, at 274 (noting that "public interest groups, however well-meaning or sincere, may frequently be captivated by highly partisan or highly parochial perspectives on public policy").

296. *See* Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 438 (1990) (observing that the effect of the PSD decision was to "perpetuate the existence of old, particularly dirty producers in New York," and concluding that the "foreclosure of new risks has thus increased the magnitude of old ones").

297. *See* Greve, *supra* note 224, at 112 (observing that "[e]ven the best-intentioned private enforcers will invariably be guided by the costs and benefits of litigation to themselves, not to society").

298. *See supra* notes 184–88 and accompanying text.

299. RABKIN, *supra* note 39, at 235.

300. *See* Rossi, *supra* note 67, at 219 (observing that environmental interest groups are "guided by the immediate costs and benefits of litigation to themselves, not by the public benefit of their action").

become self-perpetuating, as the public interest group gains a trademark reputation of sorts in the area. That reputation may enhance the group's policy clout, which in turn presumably enhances its fundraising abilities. Like Congress, such groups have reason to favor symbolic action and judicial review in furtherance of symbolic victories.[301] Participating in judicial review gives some groups a reason for existence and a justification for considerable fundraising.[302] Public interest groups can seek money in order to bring additional litigation and to counteract the efforts of industry in court. An occasional success in court can be trumpeted in future fundraising appeals as evidence of the group's efficacy and importance, regardless of the functional consequences of the case. Moreover, successful litigation can result in lucrative legal fee awards for interest groups with their own attorneys.[303] Even ineffective judicial review can assist fundraising efforts, because failures may be used to demonstrate the need for more money. Public interest groups also can use judicial review to establish political relationships, even at the expense of the group's objectives.[304] Accordingly, judicial review of regulation can help environmental groups, for example, at the same time that it undermines the objectives of environmental protection statutes.[305]

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301. *See, e.g.*, ACKERMAN & HASSLER, *supra* note 164, at 25 (noting that a successful lawsuit can "yield a palpable sense of victory for both the environmental lawyer and his clients," though such litigation consequentially "obscures as much as it instructs"); Ayres & Braithwaite, *supra* note 74, at 465 (reporting that nongovernment organizations may "focus on deriving satisfaction from symbolic victories"); Perritt, *supra* note 236, at 1641 (noting that public interest groups may "prefer short term litigation victories," because the "publicity associated with a dramatic victory and extreme statements made in litigation tend to facilitate fund raising and other facets of membership support").

302. *See, e.g.*, RABKIN, *supra* note 39, at 29–31 (suggesting that public interest groups can have strong incentives for striking defiant postures against government agencies or policies, even when such posturing has little or no effect on the government's position). The AFL-CIO, for example, fought for a standard on ethylene oxide in order to help it "expand unionization in a traditionally nonunionized field." *Id.* at 235; Lazarus, *supra* note 100, at 334 (noting that the "filing of lawsuits also provided environmentalists with media events that provided publicity for their cause and incidentally aided fundraising efforts"); *see also* Ayres & Braithwaite, *supra* note 74, at 465 (observing that adversarial conflict may help private organizations increase financial contributions and membership).

303. *See* JONATHAN ADLER, ENVIRONMENTALISM AT THE CROSSROADS 45 (1995). In 1987, the Natural Resources Defense Council (NRDC) received over $600,000 in legal fees from the federal government. *See id.*

304. *See* RABKIN, *supra* note 39, at 180 (noting that the Legal Defense Fund pursued litigation against the Office of Civil Rights that was "pushing race discrimination issues to the margins," because the process "enhanced its coalition with women's groups and with advocates for the handicapped").

305. Perhaps this public choice vision is unfair, and perhaps public interest groups sincerely believe that judicial review will enhance the public objectives of government regulation so that court intervention can be transformed from a brake into an accelerator.

Even if a decision preventing states from granting Clean Air Act variances has the effect of harming the environment, it can sound like progress in fundraising literature. Moreover, public interest groups may pursue short-term victories even at the expense of long-run losses, if the short-term victories can be played up.[306]

Because of policy and financial motivations, public interest groups have a vested interest in judicial review. Mark Tushnet has observed that "[p]eople with vested interests in using the courts to challenge official action—public interest law firms of the left and right—are bound to oppose doing away with judicial review."[307] Ultimately, judicial review is a self-interested bargain between Congress and special interest groups (and perhaps the executive and judicial branches). All have their interests served, but judicial review does not serve the public interest. This result is unsurprising. Mancur Olson's classic theory of collective action proposes that the diffuse interests of the general public will suffer before the interests of narrower collectivities.[308]

C. *How Judicial Review Has Become a Lose-Lose Proposition for the Public*

Perhaps the best and most coherent defense of judicial review of administrative action would involve the frank concession that in the course of advancing special interests, such review effectively obstructs regulation and that such obstruction is a good thing. Conservatives could argue that we should structure institutions so as to make regulation especially difficult. Certainly, ample evidence demonstrates that many regulations are unnecessary, expensive, or even counterproductive. From some public choice perspectives, judicial review might be the ideal tool to restrain unwise regulation while still assuaging public demands for government action. Of course, our Constitution does not necessarily call for the most

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If so, their position is historically weak, and such a transformation is "spectacularly unlikely given our political traditions." Jerry Mashaw, *Imagining the Past; Remembering the Future*, 41 DUKE L.J. 711, 717 (1991).

306. *See* Brett McDonnell, *Dynamic Statutory Interpretations and Sluggish Social Movements*, 85 CAL. L. REV. 919, 920 (1997).

307. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 155 (1999).

308. The classic exposition of the theory is in MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION *passim* (1965). The theory suggests that smaller groups will be better able to organize because of extreme free rider problems associated with large groups. For a concise summary of the theory, see Frank B. Cross, *The Role of Lawyers in Positive Theories of Doctrinal Evolution*, 45 EMORY L.J. 523, 528–32 (1996).

efficient approach, especially when that approach would contravene democracy. Nevertheless, the argument against regulation should be made on its merits, not in back-door procedural deals. Moreover, judicial review may be unjustifiable, even under this restraint of regulation standard, for several reasons.

First, a considerable body of regulation is already in place. Judicial review may now be more likely to frustrate deregulation than to limit regulation in the first place.[309] Private interest groups have their own interests in preventing deregulation. When the Interstate Commerce Commission (ICC) sought to deregulate transportation, the "trucking industry complained bitterly about the 'lawlessness' of deregulatory initiatives by ICC and used litigation (and the threat of more litigation) to slow the pace of moves toward greater competition during the 1980s."[310] Analogously, slowing the pace of regulation also slows regulatory approvals; for example, FDA resources dedicated to meeting judicial requirements were drawn from the processing of new drugs, many of which promised considerable therapeutic benefits.[311] The public, therefore, has been harmed by the slowed access to new treatment possibilities. However, the manufacturers of existing drugs benefit when potential competitors are prevented from entering the marketplace in a timely fashion. Judicial review thus may benefit industry groups even at the expense of overall efficiency.

Second, while judicial review reduces the overall quantity of regulation, review may perversely make the surviving regulations much more inefficient and burdensome. As noted above, litigation sometimes drives administrative decisions to relatively extreme positions. In addition, the increased administrative process requirements of the APA have made decisions overly legalistic and have "shut out any room for" governmental accountability.[312] Judicial review also may have prevented agencies from revisiting rules and improving them.[313] While the Clean Air Act mandates periodic review and revision of national ambient air quality standards every

309. *See* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507, 540 (1985) (observing that "agencies are finding a substantial percentage of their deregulatory decisions overturned for failure to pass the 'arbitrary and capricious' test").

310. RABKIN, *supra* note 39, at 91.

311. *See* Cross, *supra* note 107, at 885 (discussing the benefit derived from FDA new-drug approvals).

312. Howard, *supra* note 179, at 315–16.

313. *See, e.g.*, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 393 n.93 (1986) (criticizing NHTSA for leaving in place an ineffective safety standard because it could not obtain agreement from interested parties and hence feared judicial review of any modification).

five years, for instance, EPA consistently has failed to conduct such reviews and, when rules are revised, the agency "tends to set the standard at or near existing levels, in part because of the difficulty of justifying any departures from the status quo."[314] This consequence, a reluctance to revisit and improve rules, "may disserve both regulatees and regulatory beneficiaries."[315] The inherently cautious and legalistic response required by judicial review also frustrates innovative, efficient regulatory approaches.[316] This effect makes regulation costlier and less effective.

At this point, of course, APA judicial review of administrative rulemaking is well established and seldom challenged. It is time to change this blithe acceptance, to scrutinize the consequences of judicial review, and to ask whether they make sense, either as a matter of pragmatic consequence or as a system of governance. If, as I contend, judicial review has pathological consequences for government, it should be eliminated.[317]

CONCLUSION

While judicial review of administrative rulemaking is often regarded as a largely procedural matter, its substantive consequences are enormous. Unfortunately, when analyzing the proper scope of administrative law, such consequences typically are overlooked or at least downplayed. Yet given the purposes of regulation, the consequences of judicial review should be at the forefront of our legal and policy analysis. Examination of those consequences demonstrates the perversity of judicial review of administrative rules, a pathology grounded in the institutional illegitimacy of the review process itself.

314. McGarity, *Some Thoughts on "Deossifying," supra* note 20, at 1390–91.

315. *Id.* at 1391.

316. *See supra* notes 221–38 and accompanying text.

317. *See* Cross, *supra* note 1, *passim* (discussing the failure of judicial self-restraint and the need for abolition of judicial review).