

## CONGRESS, THE SUPREME COURT, AND THE QUIET REVOLUTION IN ADMINISTRATIVE LAW

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### INTRODUCTION

In the last decade, the relationship between legislative and judicial control of federal administrative discretion has changed dramatically. In the 1960s and 1970s, Congress continued its long tradition of transferring authority to administrative agencies in broad and relatively standardless delegations.<sup>1</sup> During that period, administrative discretion was constrained by activist judicial review, which was based on whatever legislative intent courts could discern in the vague statutes empowering agencies to act.<sup>2</sup> In the 1980s, however, the Supreme Court has adopted a more restrained approach to the review of administrative decisions, re-

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1. *See infra* note 20 and accompanying text. Although such delegations imposed relatively few front-end constraints on agency discretion, Congress had the power to supervise agency discretion by use of the legislative veto. This back-end tool for controlling agency discretion was eliminated when the Supreme Court invalidated the legislative veto. *See infra* notes 126-28 and accompanying text.

2. *See infra* text accompanying notes 117-25.

stricting or eliminating almost all of the activist techniques previously employed to police agency discretion.<sup>3</sup> At the same time, Congress has increasingly resorted to narrow and specific legislative grants of authority, especially, although not exclusively, in the area of environmental law.<sup>4</sup> Thus, just as Congress has expanded its efforts to confine administrative discretion at the beginning of the agency decisionmaking process, judicial willingness to confine agency discretion at the culmination of that process has declined.

The recent congressional attempts to reduce agency discretion confound earlier theories that Congress would not narrow administrative discretion through specific legislation unless the Supreme Court began to invalidate vague and standardless legislation as a violation of the constitutional prohibition on excessive delegation of legislative authority, commonly known as the nondelegation doctrine.<sup>5</sup> Although the Court has not invalidated any statute under the nondelegation doctrine since the 1930s,<sup>6</sup> its adoption of restraint-oriented judicial review gives Congress the same impetus to legislate more specifically. Absent such specific legislation, agency discretion could expand greatly in the absence of either legislative or judicial controls.

Remarkably, Congress has yet to fully analyze the effects that the Court's more restrained approach to review will have on the scope of administrative discretion. Congress's reassertion of front-end controls seems attributable to other factors, such as dissatisfaction with the performance and ideologies of agency personnel in the Reagan administration.<sup>7</sup> At most, Congress's narrower delegations are a largely unconscious and uncoordinated response to the decline of judicial control over agency discretion.

Despite Congress's failure to recognize the connection between the Supreme Court's reduced willingness to limit agency discretion and Congress's ability to do so, we believe that such a connection exists. Accordingly, this Article systematically analyzes the potential effects of restraint-oriented review on agency discretion. Moreover, it establishes a framework that may enable Congress to choose the mix of legislative and judicial controls that would maximize the possibility of successfully controlling agency discretion in a variety of legislative situations.

Superficially, the decline of activist judicial review seems to make administrative decisionmaking more democratic, increasing control by

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3. *See id.*

4. *See infra* notes 38-100 and accompanying text.

5. *See infra* note 25 and accompanying text.

6. *See infra* note 26 and accompanying text.

7. *See infra* notes 34-37 and accompanying text.

accountable legislators and decreasing control by a nonelected judiciary.<sup>8</sup> The matter, however, is not so straightforward. In some areas, Congress has not produced more specific legislation; in these cases, the switch to restraint-oriented review has simply made administrative agencies less accountable, despite the theoretical presence of presidential control.<sup>9</sup> For this reason, we believe, from both a normative and an institutional perspective, that the Court has gone too far in its pursuit of judicial restraint.<sup>10</sup> Moreover, increased legislative control is not necessarily the appropriate response to unconfined agency discretion. Although Congress's move toward narrower and more specific forms of delegation is generally desirable, it will not work for all substantive areas of administrative law.<sup>11</sup> Accordingly, Congress must continue to rely on courts to prevent abuses of delegated discretion.

Since the need to increase control over agency discretion may arise in diverse situations, we recommend that Congress rely on a mixture of more specific delegations and more active judicial review. Congress ought to extend its use of new methods of delegation beyond the environmental law area, while carefully seeking to avoid the problems that these methods have already created.<sup>12</sup> At the same time, Congress should reestablish by statute some of the recently abandoned techniques of activist judicial review.<sup>13</sup>

## I. THE CHANGE FROM LOOSE TO TIGHT CONTROL IN LEGISLATION

Congress has recently sought to tighten its control of administrative discretion through a variety of legislative innovations. Although others have noted this change,<sup>14</sup> it is not generally recognized that, in limiting administrative discretion, Congress has replaced the traditional model of agency delegation with three alternative models.

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8. See *infra* note 204 and accompanying text.

9. See *infra* notes 207-09 and accompanying text.

10. See *infra* notes 204-47 and accompanying text.

11. Political circumstances will make it difficult to produce specific delegations in some situations. Moreover, even when such delegations are possible, their inherent disadvantages may make them an undesirable response to certain kinds of excessive agency discretion. Finally, even narrow delegations will normally confine but not eliminate agency discretion. See *infra* notes 101-09 and accompanying text.

12. See *infra* p. 844.

13. See *infra* notes 248-68 and accompanying text.

14. E.g., Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980's*, 3 YALE J. ON REG. 351 (1986); Muskie, *Reflections on a Quarter Century of Environmental Activism: On Postponing Deadlines, Second-Guessing the Congress, and Ignoring Problems Until It Is Too Late*, 18 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,081 (1988).

### A. *Models of Delegated Power.*

When Congress creates an administrative agency, it must determine both the agency's "regulatory discretion," or its authority to determine *whether* to regulate, and its "legislative discretion," or its authority to determine *how* to regulate. Congress can choose constraints that maximize or minimize each type of discretion.

The following chart indicates the possible combinations of congressional choices concerning regulatory and legislative discretion:

<i>Extent of agency discretion</i>	DISCRETIONARY	PRESCRIPTIVE
	Maximum regulatory discretion	Maximum regulatory discretion
	Maximum legislative discretion	Minimum legislative discretion
	COERCIVE	MINISTERIAL
	Minimum regulatory discretion	Minimum regulatory discretion
	Maximum legislative discretion	Minimum legislative discretion

Under the "discretionary" model, agencies have the most discretion concerning whether and how to regulate.<sup>15</sup> The "ministerial" model reflects minimal agency discretion concerning whether and how to regulate.<sup>16</sup> Agencies that operate under the "prescriptive" and "coercive" models have an intermediate level of discretion. Under the prescriptive model, an agency has broad discretion over whether to regulate, but if the agency decides to do so, Congress specifically indicates what types of regulation the agency must adopt.<sup>17</sup> The coercive model, in contrast,

15. For example, the Federal Communications Commission (FCC) operates under the discretionary model: its decisions whether to regulate are subject only to the constraint that they not be "arbitrary and capricious," *see, e.g.*, *Action for Children's Television v. FCC*, 564 F.2d 458, 478 (D.C. Cir. 1977) (FCC's decision not to issue regulations concerning television programs targeted at children held not "arbitrary and capricious"), and its decisions concerning how to regulate are subject only to the constraint that they be in the "public convenience, interest, or necessity," 47 U.S.C. §§ 303, 307 (1982).

16. For example, the Federal Energy Regulatory Commission (FERC) operates under the ministerial model when it performs some of its functions under the Natural Gas Policy Act of 1978. The Act requires FERC to regulate the prices charged by some producers of natural gas and supplies a formula that the agency must use to implement those price regulations. 15 U.S.C. §§ 3312-3319 (1982).

17. For example, the Environmental Protection Agency (EPA) operates under the prescriptive model when it implements portions of the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7642 (1982). The EPA has discretion to decide whether a pollutant is sufficiently hazardous to require nationally uniform emissions limitations. *See id.* § 7412(a)(1) ("hazardous air pollutant" means air pollutant

reflects minimal agency discretion over whether to regulate, but substantial agency discretion to choose the method or type of regulation.<sup>18</sup>

For both political and institutional reasons,<sup>19</sup> Congress has until recently relied almost entirely on the discretionary model in delegating authority to regulatory agencies.<sup>20</sup> As a political matter, a broad delegation of legislative authority is sometimes the only way to prevent disagreement over particular policy issues from frustrating a consensus to regulate.<sup>21</sup> As an institutional matter, Congress may lack the expertise, time, or foresight to address policy choices involved in complex regulation and to establish appropriate solutions.<sup>22</sup> Not long ago, these political and institutional factors were considered such significant obstacles to nondiscretionary delegations that then-Justice Rehnquist<sup>23</sup> and a host of com-

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that, "in the judgment of the Administrator," causes or may cause certain adverse health effects). Once the EPA designates a pollutant as hazardous, however, it must issue regulations in accordance with a statutory timetable, *id.* § 7412(b)(1), and its ability to consider the regulation's economic impact in setting the appropriate degree of emissions control is limited. See *NRDC v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (holding that EPA Administrator cannot consider cost and technological feasibility in determining what is "safe").

18. For example, the 1977 amendments to the Clean Air Act require the EPA to review information on radioactive pollutants to determine whether the pollutants might endanger public health. If the EPA makes a positive determination, it can regulate the pollutant in question under any of three different emissions control mechanisms in the Act. 42 U.S.C. § 7422 (1982) (authorizing EPA to regulate radioactive pollutants as criteria pollutants under section 7408, as hazardous air pollutants under section 7412, or as new stationary source emissions under section 7411).

19. See, e.g., R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* § 3.4 (1985); Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 *TEX. L. REV.* 1175, 1203-07 (1981).

20. R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 19, § 3.1, at 44 ("In most cases . . . Congress has given agencies considerably more discretion by passing enabling acts that are effectively standardless."); Pierce & Shapiro, *supra* note 19, at 1196-97 (Congress "could conceivably exercise strict control by narrowing the range of agency discretion in the enabling legislation under which [an agency] operates. Efforts to enact this type of legislation, however, have met with little success.").

21. M. FIORINA, *CONGRESS, KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 41-49 (1977); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 *CORNELL L. REV.* 1, 43-45 (1982); Jaffe, *An Essay on Delegation of Legislative Power*, 47 *COLUM. L. REV.* 359, 366-67 (1947); Pierce & Shapiro, *supra* note 19, at 1197; Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1669, 1695-96 (1975).

22. Aranson, Gellhorn & Robinson, *supra* note 21, at 21-24; Davis, *A New Approach to Delegation*, 36 *U. CHI. L. REV.* 713, 720 (1969); Pierce & Shapiro, *supra* note 19, at 1198; Redford, *Regulations Revisited*, 28 *ADMIN. L. REV.* 543, 563-64 (1976); Strock, *The Congress and the President: From Confrontation to Creative Tension*, 17 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,006, 10,006 (1987); see K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 58 (1969) ("Legislative bodies often are not equipped—or often strongly believe that they are not equipped—to do more than to establish a legislative framework within which administrative discretion must be left largely free."); Stewart, *supra* note 21, at 1695 ("In many government endeavors it may be impossible in the nature of the subject matter to specify with particularity the course to be followed.").

23. See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 546-47 (1981) (Rehnquist, J., dissenting) (Congress's failure to specify whether Occupational Safety and Health Act requires use

mentators<sup>24</sup> believed that Congress would never legislate more specifically unless the Supreme Court reinvigorated the nondelegation doctrine,<sup>25</sup> which has been moribund since the 1930s.<sup>26</sup> Yet, despite these predictions, Congress has begun to adopt more specific legislation, primarily in the environmental area.

### B. *Adopting Alternative Models of Delegated Power.*

Congress has shifted from the discretionary model of delegation to alternative models that give less discretion to the administrative agencies. Although most of these changes have taken place in the context of environmental legislation, Congress has the capacity to make similar changes in other regulatory areas.

Beginning in the 1970s, Congress enacted a series of statutes to prevent deterioration of workplace and outdoor environmental quality.<sup>27</sup> Although these laws did not invariably contain precise directives to the agencies charged with implementation,<sup>28</sup> they generally imposed greater constraints on agency discretion than did the waves of regulatory legisla-

of cost/benefit analysis violates nondelegation doctrine); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring).

24. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 132-34 (1980); J. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 93-94 (1978); T. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 93 (2d ed. 1979); Aranson, Gellhorn & Robinson, *supra* note 21, at 63-67; Gregory, *The Congressional Response to NLRB v. Bildisco and the Constitutional Subtleties of the Nondelegation Doctrine*, 62 U. DET. L. REV. 245, 271-72 (1985); Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*, 1986 DUKE L.J. 948, 967; Wright, Book Review, 81 YALE L.J. 575, 582-83 (1972) (reviewing K. DAVIS, *supra* note 22).

25. The doctrine interprets the constitutional provision that vests the authority to legislate in Congress alone, U.S. CONST. art. I, § 1 ("All legislative powers . . . shall be vested in a Congress of the United States"); see, e.g., *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power . . . is a principle universally recognized"), to require that Congress set standards clearly delimiting the scope of agencies' authority to regulate. See, e.g., *United States v. Grimaud*, 220 U.S. 506, 517 (1911).

26. See, e.g., *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (three-judge court) (Leventhal, J.). See generally R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 19, § 3.4.3 (citing post-New Deal cases refusing to invalidate legislation under nondelegation doctrine). The last time the Supreme Court used the doctrine to strike down a statute was in *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

27. See, e.g., Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678 (1982)); Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)).

28. See, e.g., 29 U.S.C. § 652(8) (1982) (occupational safety and health standard defined as standard that requires "conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment").

tion enacted during the Progressive Era and the New Deal.<sup>29</sup> The reasons for this narrowing of agency discretion are not entirely clear, but it may be that the progressive ideal of agencies operating as expert tribunals free from the political pressures that influence legislatures has lost most of its force.<sup>30</sup>

The trend toward increased congressional control over agency discretion noticeably increased in the late 1970s and early 1980s. In particular, Congress developed alternative models for supervising the Environmental Protection Agency (EPA), responding to a growing perception that the traditional discretionary model was not working well. Congressional investigations into the EPA's implementation of the Superfund program<sup>31</sup> convinced many legislators that traditional methods of supervising agency discretion needed change.<sup>32</sup> Despite the impe-

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29. Compare Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. at 1590 (Secretary of Labor subject to statutory limitations on authority to issue new regulations and to inspect employers and issue complaints) and Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. at 1676 (requiring EPA to set emission standards for new stationary sources, sources of hazardous air pollutants, and motor vehicles) with Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (1982)) (FTC authorized to bring action against any firm practicing unfair methods of competition) and Federal Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-610 (1982)) (FCC given broad power to determine prices for telephone service, to define requirements for radio licenses and radio tower construction permits, and to promulgate new regulations).

30. See Shapiro & Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons For Agency Decisions*, 1987 DUKE L.J. 387, 394-95; Yellin, *Science, Technology, and Administrative Government: Institutional Designs for Environmental Decisionmaking*, 92 YALE L.J. 1300, 1303 n.15 (1983).

31. The Hazardous Substance Response Trust Fund (popularly known as the Superfund) was created in 1980 to assist in the cleanup of leaking, abandoned, or inactive hazardous waste disposal sites. See Pub. L. No. 96-510, 94 Stat. 2767, 2801 (1980) (codified at 42 U.S.C. § 9631 (1982)) (\$44,000,000 per year granted to agency for specified purposes related to hazardous waste disposal), superseded, Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, §§ 204, 517, 100 Stat. 1613, 1696, 1773-74 (\$250,000,000 per year granted to agency for specified purposes related to hazardous waste disposal). See generally Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9657 (1982), amended, Pub. L. No. 99-499, 100 Stat. at 1613.

32. See, e.g., H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 1, at 55 [hereinafter H.R. REP. NO. 99-253], reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2837 (noting EPA's "gross mismanagement" of Superfund program); *id.* at 262, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 2937 ("The entire history of the Superfund program definitively refutes the argument that the EPA can be completely trusted to manage any discretionary Superfund cleanup schedule effectively."); *id.* at 251, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 2927 (statement of Rep. Markey) (describing "the dismal five-year history of the Superfund program" as "a relief etched with incompetence, mismanagement, and negligence"); H.R. REP. NO. 890, 98th Cong., 2d Sess., pt. 1, at 26 (1984) [hereinafter H.R. REP. NO. 98-890] (discussing mismanagement during early years of Superfund); 131 CONG. REC. H11,074 (daily ed. Dec. 5, 1985) (statement of Rep. Florio) ("If someone is not performing up to expectations, there is no alternative but to establish requirements for them to meet."); *id.* at H11,115 (remarks of Rep. Mineta) (disagreeing with view that matters such as scheduling of Superfund cleanups should be left to administrative discretion). See generally SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS, HOUSE COMM. ON ENERGY

tus provided by the Superfund investigations, this dissatisfaction was not limited to any particular Administrator or program;<sup>33</sup> instead, legislators leveled two recurring charges at the EPA. First, Congress believed that the EPA was not acting when it should have been, or was acting too slowly.<sup>34</sup> Second, legislators expressed a widespread concern that even when the EPA did act, it did so in a manner inconsistent with the objectives of its authorizing legislation.<sup>35</sup> These and other similar regulatory

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AND COMMERCE, 98TH CONG., 2D SESS., INVESTIGATION OF THE ENVIRONMENTAL PROTECTION AGENCY: REPORT ON THE PRESIDENT'S CLAIM OF EXECUTIVE PRIVILEGE OVER EPA DOCUMENTS, ABUSES IN THE SUPERFUND PROGRAM AND OTHER MATTERS 17-18 (Comm. Print 1984); Florio, *supra* note 14, at 367-75 (reviewing steps taken by Congress to limit EPA's discretion in choosing standards for hazardous waste cleanup).

33. Congressional concern with the breadth of the EPA's discretion predated Anne Gorsuch-Burford's controversial tenure as the EPA Administrator. *See, e.g.*, H.R. REP. NO. 294, 95th Cong., 1st Sess. 194 [hereinafter H.R. REP. NO. 95-294], *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 1077, 1272-73 (describing EPA's discretion to list categories of stationary sources and hazardous air pollutants under Clean Air Act §§ 111-112, 42 U.S.C. §§ 7411-7412 (1982), and criticisms generated by EPA's exercise of that discretion).

34. *See* H.R. REP. NO. 198, 98th Cong., 1st Sess., pt. 1, at 34-36 [hereinafter H.R. REP. NO. 98-198], *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5576, 5593-95 ("EPA has not been able to comply with past statutory mandates and timetables . . . for virtually all of its programs."). The EPA was criticized for its excessive delay in issuing regulations to implement the Safe Drinking Water Act (SDWA). *See, e.g.*, S. REP. NO. 56, 99th Cong., 1st Sess. 5-6 [hereinafter S. REP. NO. 99-56], *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 1566, 1570-71 ("The greatest problem with implementation of the program established by the [SDWA] is the failure of EPA to issue standards for most contaminants known or anticipated to be found in drinking water."); H.R. REP. NO. 168, 99th Cong., 1st Sess. 17 (1985) [hereinafter H.R. REP. NO. 99-168] ("EPA has set few standards and has not yet regulated the many chemicals increasingly found in drinking water supplies."); 132 CONG. REC. S6291 (daily ed. May 21, 1986) (statement of Sen. Baucus) ("It is clear that a discretionary approach of having EPA choose what and when to regulate contaminants is not working."). The EPA was also criticized for slow implementation of CERCLA, *see* H.R. REP. NO. 99-253, *supra* note 32, pt. 1, at 255, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 2930 (Superfund site cleanups move "at a snail's pace"), and of the Resource Conservation and Recovery Act (RCRA), *see, e.g.*, H.R. REP. NO. 98-198, *supra*, pt. 1, at 70, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5629 ("Incredibly, . . . almost nothing has been done to fulfill" the EPA's statutory responsibilities concerning use of recycled materials by federal agencies.); S. REP. NO. 284, 98th Cong., 1st Sess. 4 (1983) [hereinafter S. REP. NO. 98-284] (EPA's process of listing hazardous wastes "has been virtually stalled for several years."). Congress has also attacked the EPA's implementation of the CAA, *see, e.g.*, H.R. REP. NO. 95-294, *supra* note 33, at 187, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 1266 (discussing need to rectify EPA's "failure to establish adequate initial or revised standards for all categories of major stationary sources and for certain unregulated pollutants"), and of the Toxic Substances Control Act (TSCA), *see, e.g.*, 15 U.S.C. § 2641(a) (Supp. IV 1986) (citing lack of EPA regulatory guidance and standards as reason for continued existence and possible worsening of asbestos hazards in schools and other public and commercial buildings).

35. For example, the EPA's regulations allegedly created unintended loopholes and exclusions. *See, e.g.*, H.R. REP. NO. 98-198, *supra* note 34, pt. 1, at 25, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5583-84 (describing "unwarranted" exclusion of small generators from RCRA's hazardous waste program); *id.* at 39, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5598 (exemption from RCRA regulation of facilities that burn hazardous waste for energy recovery "has led to direct threats to human health and the environment"); *id.* at 44, *reprinted in* 1984 U.S. CODE

deficiencies cost the EPA much of its credibility. Amid charges that the EPA "has consistently abused the public trust,"<sup>36</sup> legislators working on environmental matters began to anticipate abuses of whatever discretion Congress delegated to the EPA.<sup>37</sup>

As the EPA's regulatory responsibilities came up for reauthorization in the 1980s, a consensus developed in Congress to impose two kinds of more effective legislative controls on the EPA. In certain areas, to combat the agency's failure to act, or failure to act promptly, Congress removed some of the agency's regulatory discretion by mandating that regulation meet legislatively imposed deadlines or schedules.<sup>38</sup> To combat the EPA's proclivity for implementing statutes in a manner contrary to congressional intent, Congress prescribed more detailed substantive

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CONG. & ADMIN. NEWS at 5603 (describing exclusion of certain land disposal facilities from corrective action and ground water monitoring requirements as "one of the most serious deficiencies" in EPA's implementation of RCRA); *id.* at 63, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5622 (EPA's exemption of hazardous waste disposal facilities from ground water monitoring requirements is "entirely inappropriate"). The regulations were attacked for other deficiencies in coverage as well. *See, e.g.*, S. REP. NO. 99-56, *supra* note 34, at 5, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 1570 (noting absence of any national primary-drinking-water regulations for all but one class of synthetic organic chemicals); S. REP. NO. 98-284, *supra* note 34, at 4 (EPA's RCRA regulations listing hazardous wastes do not fully address fact that some wastes are "composed of numerous hazardous constituents"); H.R. REP. NO. 98-198, *supra* note 34, pt. 1, at 56, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5615 (wastes hazardous to human health and the environment are not listed as hazardous under EPA's RCRA regulations). In some instances, legislators charged that the agency reversed previous regulatory decisions, exacerbating already severe environmental problems. *See, e.g.*, S. REP. NO. 98-284, *supra* note 34, at 2 (noting mistaken, damaging, and abrupt suspension of previous EPA ban on placing drums of liquid hazardous waste in landfills). Finally, legislators complained that the agency failed to enforce its existing regulations. *See, e.g.*, H.R. REP. NO. 99-168, *supra* note 34, at 26 (The General Accounting Office found that, despite nearly 150,000 violations of the SDWA requirements, "the enforcement actions in the EPA offices . . . included in the review ranged from none to minimal, followed no pattern, and were not as timely as they could have or should have been."); *id.* at 17; H.R. REP. NO. 98-890, *supra* note 32, pt. 1, at 26 (EPA's enforcement efforts under CERCLA have lagged); H.R. REP. NO. 98-198, *supra* note 34, pt. 1, at 20, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5579 (EPA's "inadequate effort" to enforce RCRA is "distressing"); *id.* at 50-51, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5609 (describing "a truly egregious example" of EPA's failure to enforce RCRA in timely manner).

36. H.R. REP. NO. 99-253, *supra* note 32, pt. 1, at 257-58, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 2932; *id.* at 55, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 2837; ENVIRONMENTAL & ENERGY STUDY INST. & ENVTL. LAW INST., STATUTORY DEADLINES IN ENVIRONMENTAL LEGISLATION: NECESSARY BUT NEED IMPROVEMENT iii, 41 (1985) [hereinafter STATUTORY DEADLINES] (Congress sets deadlines for EPA action because "[i]t doesn't trust [the] EPA.>").

37. *See* H.R. REP. NO. 99-253, *supra* note 32, pt. 1, at 278-79, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 2953-54; *see also* S. REP. NO. 98-284, *supra* note 34, at 23 (statutory amendments prohibit temporary suspensions of regulations during further revisions or reviews by EPA); H.R. REP. NO. 98-198, *supra* note 34, pt. 1, at 38, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5597 (statutory amendment prohibits Administrator from attempting to circumvent Committee's intent to restrict land disposal).

38. *See infra* notes 43-49 and accompanying text.

criteria to guide the agency in implementing its regulatory responsibilities.<sup>39</sup> In short, in recent statutory reauthorizations of environmental programs, Congress has rejected the traditional discretionary model for the EPA in favor of the coercive, prescriptive, and ministerial models of control.<sup>40</sup>

1. *The Coercive Model.* Under the coercive model, as described above, Congress mandates agency regulation by removing an agency's discretion to regulate, but permits the agency to choose the appropriate method of regulation.<sup>41</sup> Congress has resorted to the coercive model frequently in recent amendments to the EPA's authorizing statutes.<sup>42</sup> This model typically forces the agency to regulate by mandating some kind of agency action—such as listing chemicals as hazardous or issuing regulations applicable to industrial polluters—before a set deadline. The substantive delegation, however, is couched in general terms characteristic of delegations under the traditional discretionary model.

39. See *infra* notes 85-88, 97, and accompanying text.

40. See, e.g., 132 CONG. REC. S6285-86 (daily ed. May 21, 1986) (statement of Sen. Durenberger):

It is unusual for the Senate to include a specific list of pollutants with specific deadlines for standards in the language of a bill. Choosing contaminants and scheduling the regulatory process is not normally a legislative function. But the history of the [SDWA] program more than justifies the use of lists and deadlines by the Congress to assure that standards are actually established and at the earliest possible date.

But see H.R. REP. NO. 98-198, *supra* note 34, pt. 1, at 117, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5633 (Congress should not become regulatory rather than legislative body).

41. See *supra* note 18 and accompanying text; see, e.g., H.R. REP. NO. 98-198, *supra* note 34, pt. 1, at 39, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5598 (House Energy and Commerce Committee "wants to assure that EPA will exercise its authority"); *id.* at 57, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5616 (1984 amendment to RCRA concerning listing of hazardous wastes "leaves EPA the discretion as to which toxicants and which concentration levels should be used as a basis for developing characteristics or listing but mandates that EPA begin doing so promptly.").

Not all of the recent statutory provisions delegating authority to the EPA fit easily into one of the four models of control. A "coercive" statute, for example, forces the agency to regulate, but defines the substance of regulation in only the most general of terms. A "ministerial" statute involves both a deadline to regulate and detailed substantive criteria. See *infra* notes 87-88 and accompanying text. Obviously, there may be statutes that compel agency action by set deadlines and contain substantive standards that are neither very general nor very specific. Such statutes would fall between the coercive and ministerial models.

42. The use of statutory deadlines to force action by a sluggish EPA preceded the mid-1980s reauthorizations, however. Congress took a similar approach, for example, during the 1977 enactment of "mid-course corrections" to the CAA. See, e.g., Clean Air Act Amendments of 1977, Pub. L. No. 95-95, sec. 120, § 122(a), 91 Stat. 685, 720 (codified at 42 U.S.C. § 7422(a) (1982)) (requiring EPA to decide within one year of the 1977 amendments whether to list four pollutants as hazardous); H.R. REP. NO. 564, 95th Cong., 1st Sess. 129 (1977) [hereinafter H.R. REP. NO. 95-564] (statutory schedule for EPA's issuance of new source standards of performance intended "to provide a check on the Administrator's inaction or failure to control emissions adequately"); H.R. REP. NO. 95-294, *supra* note 33, at 36, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 1114 (expressing dissatisfaction with EPA's failure to impose adequate controls on unregulated pollutants).

The 1984 amendments to the Resource Conservation and Recovery Act (RCRA),<sup>43</sup> the 1986 amendments to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>44</sup> the Safe Drinking Water Act (SDWA),<sup>45</sup> and the Toxic Substances Control Act (TSCA),<sup>46</sup> the 1987 amendments to the Clean Water Act (CWA),<sup>47</sup> and the 1988 amendments to the Federal Insecticide, Fungicide, and Rodenticide Act<sup>48</sup> all include examples of coercive control devices that force

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43. *See, e.g.*, 42 U.S.C. § 6924(c)(2) (1982 & Supp. IV 1986) (setting deadline for EPA promulgation of regulations to minimize disposal of containerized liquid hazardous wastes in landfills); *id.* § 6924(g) (setting schedule for reviewing listed hazardous wastes and determining methods of land disposal protective of human health and the environment); *id.* § 6924(w) (setting deadline for EPA to promulgate final standards for issuing permits for underground storage tanks that cannot be entered for inspection); *id.* § 6923(c) (setting deadline for EPA promulgation of standards applicable to transporters of fuel produced from hazardous waste); *see also* H.R. REP. NO. 98-198, *supra* note 34, pt. 1, at 57, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5616 (proposed amendment to RCRA § 3001(b)(1), 42 U.S.C. § 6921(b)(1) (1982), would leave EPA “discretion as to which toxicants and which concentration levels should be used as a basis for developing characteristics or listing but mandates that EPA begin doing so promptly”).

44. *See, e.g.*, 42 U.S.C. § 9605(b)-(c) (1982 & Supp. IV 1986) (deadlines for President to revise National Contingency Plan and promulgate amendments to hazard ranking system); *id.* § 9604(i)(6)(A) (deadlines for performance of health assessments by Administrator of Agency for Toxic Substances and Disease Registry for each facility on National Priorities List (NPL)); *id.* § 9604(i)(2)-(3) (deadlines for issuing list of at least 100 hazardous substances most commonly found at facilities on NPL, for adding more hazardous substances to that list, and for preparing toxicological profiles of listed substances); *id.* § 9602(a) (deadline for EPA regulations establishing reportable quantities for hazardous substances); *id.* § 9616(b)-(e) (schedules for evaluating facilities listed in Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS), for commencing remedial investigations and feasibility studies for facilities on NPL, and for commencing remedial actions at such facilities); 29 U.S.C. § 655(a) (1982 & Supp. IV 1986) (deadline for Secretary of Labor to issue standards for health and safety protection of employees engaged in hazardous waste operations). The EPA issued a five-page timeline listing EPA tasks subject to deadlines in the five years following the enactment of the 1986 amendments to CERCLA. *See* Env't Rep. (BNA) 1197 (Nov. 14, 1986).

45. *See, e.g.*, 42 U.S.C. § 300g-1(b)(1) (1982 & Supp. IV 1986) (setting schedule for EPA promulgation of national primary drinking water regulations for specific contaminants); *id.* § 300g-1(b)(7)(C)(i) (setting deadline for EPA promulgation of “criteria under which filtration . . . is required as a treatment technique for public water systems supplied by surface water sources”); *id.* § 300h-5(a) (setting deadline for EPA modification of ground water monitoring regulations for Class I injection wells).

46. *See* 15 U.S.C. § 2643(a) (Supp. IV 1986) (deadlines for EPA promulgation of regulations for removal of asbestos from schools).

47. *See, e.g.*, Pub. L. No. 100-4, § 301(f), 101 Stat. 7, 30 (1987) (setting deadlines for EPA issuance of regulations establishing effluent limitations for certain categories of point sources discharging toxic pollutants); 33 U.S.C.A. § 1314(m) (West Supp. 1988) (schedule for EPA publication of plan for annual review and revision of effluent guidelines); *id.* § 1342(p)(4) (deadlines for EPA issuance of regulations setting forth permit application requirements for storm water discharges); *id.* § 1342(p)(6) (deadline for EPA issuance of regulations establishing program to regulate designated sources of storm water discharges); *id.* § 1345(d)(2)(A)(i) (deadline for EPA identification of toxic pollutants whose presence in sewage sludge may adversely affect public health or the environment).

48. Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No.

the EPA to make decisions within a specified time.<sup>49</sup> Proposed changes in the Clear Air Act (CAA)<sup>50</sup> would also have imposed deadlines for EPA regulatory action.

Congress intends coercive statutes to accelerate the pace of regulation<sup>51</sup> by making it easier for an agency to issue regulations and to facilitate legislative oversight. Deadlines can assist agency decisionmaking by mitigating outside pressures to avoid reaching a decision<sup>52</sup> and giving the agency a reason to end its analysis and make a difficult, but necessary decision.<sup>53</sup> The agency may also feel more comfortable in delaying an

100-532, sec. 102(a), § 3A, 102 Stat. 2654, — — — (setting deadlines for re-registration of pesticides' active ingredients).

49. An alternative way to coerce agency action is to authorize private persons to petition for the initiation of agency action, such as rulemaking proceedings. Statutes that authorize private petitions typically provide for judicial review of agency decisions denying petitions. If a reviewing court overturns an agency's denial, the result may be a court-imposed deadline for agency action. Recent environmental statutes contain examples of this kind of coercive device. *See, e.g.*, 33 U.S.C.A. § 1311(g)(4) (West Supp. 1988) (authorizing EPA, upon petition of any person, to add any pollutant to the list of nontoxic, non-conventional pollutants for which modified effluent limitations are appropriate); Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 11,023(e) (Supp. IV 1986) (any person may petition EPA to add or delete chemical from list of toxic chemicals subject to reporting requirements; upon receiving such petition, EPA must, within specified time, either initiate rulemaking or publish explanation why petition denied).

50. *See, e.g.*, H.R. 967, 99th Cong., 1st Sess. § 3(a), *introducdd*, 131 CONG. REC. H327 (daily ed. Feb. 6, 1985) (deadlines for EPA classification of substances to determine whether they are hazardous air pollutants and for issuance of national emission standards for categories of stationary sources emitting such pollutants); *id.* § 201 (deadline for EPA publication of list of motor vehicle hazardous air pollutants and issuance of emission standards for such pollutants).

51. *See, e.g.*, S. REP. NO. 99-56, *supra* note 34, at 2, 5, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 1567, 1570-71 (primary objective of Senate Committee on Environment and Public Works is to expedite EPA's issuance of national primary drinking water regulations under SDWA); H.R. REP. NO. 98-890, *supra* note 32, pt. 1, at 28 ("The timetables set forth in this legislation will serve as insurance against a repetition of the mismanagement and lax enforcement that plagued the program [previously]"); *id.* at 51; 132 CONG. REC. S6292 (daily ed. May 21, 1986) (statement of Sen. Stafford) (statutory deadlines will require EPA to accelerate pace of issuing standards for drinking water contaminants); 131 CONG. REC. H11,078 (daily ed. Dec. 5, 1985) (statement of Rep. Roe) (statutory deadlines "are designed to assure that EPA actions are taken in a timely and responsive manner"); *see also* H.R. REP. NO. 98-198, *supra* note 34, pt. 1, at 23, 45, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5582, 5604 (deadlines needed to accelerate EPA's issuance of permits for hazardous waste treatment, storage, and disposal facilities); *id.* at 42, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5601 (legislative objective in setting statutory schedule is "to accelerate the Agency's rulemaking to close a major gap in the present regulations" governing burning of hazardous waste).

52. *See* STATUTORY DEADLINES, *supra* note 36, at ii. Pressures from OMB to cut back on resources, for example, can be countered better if deadlines have identified a problem as a legislative priority. *Id.* at 27. For example, Congress has used deadlines to prevent OMB from holding up the issuance of EPA regulations on the grounds that they are not cost-justified. *See* 132 CONG. REC. S6286 (daily ed. May 21, 1986) (statement of Sen. Durenberger); *see also* 42 U.S.C. § 300g-1(b)(1) (Supp. IV 1986) (1986 amendments to SDWA, setting deadlines for EPA's issuance of national primary drinking water regulations).

53. Without a deadline, agencies tend to delay difficult decisions in the hope that additional evidence will be forthcoming or the necessity for a decision will disappear. *See* STATUTORY DEAD-

attempted resolution of other problems than it would absent action-forcing deadlines.<sup>54</sup> Deadlines improve legislative oversight because Congress can easily determine whether a statutory deadline has been met.<sup>55</sup> Moreover, Congress is more likely to demand compliance with such deadlines than with open-ended statutory obligations, because a deadline represents a public commitment to achieve a certain end.<sup>56</sup> The coercive model also permits Congress to narrow an agency's discretion even when Congress lacks the expertise to prescribe substantive standards for regulation<sup>57</sup> or is unable to agree on detailed legislation.

Statutory deadlines also speed regulation because statutory beneficiaries can enforce deadlines in the courts. The Administrative Procedure Act (APA) authorizes courts to "compel agency action . . .

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LINES, *supra* note 36, at 30-31; McGarity & Shapiro, *OSHA Rulemaking Procedures*, in ADMINISTRATIVE CONFERENCE OF THE U.S., RECOMMENDATIONS AND REPORTS 79, 187 (1987) (agencies tend to delay decisions by citing need for more information).

54. Statutory deadlines, by sending signals to the agency that certain problems have a higher legislative priority than others, may make it easier for the agency to isolate those problems for immediate attention. See, e.g., CONGRESSIONAL QUARTERLY, INC., THE FEDERAL REGULATORY DIRECTORY 111 (5th ed. 1986) ("Many of EPA's difficulties over the years can be traced to the fact that Congress loaded the agency with far more statutory responsibilities within a brief period of time than perhaps any agency could effectively perform." (quoting Russell Train, former EPA Administrator)); Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 791-93 (1983) (describing "administrative overload" that made EPA unable to translate CAA's goals into concrete results). Moreover, a recent study of statutory deadlines in federal pollution control legislation concluded that deadlines attract the attention of agency management, enhance prospects for agency funding of the matter addressed by the deadline, and may even prompt development of new and effective regulatory approaches. See STATUTORY DEADLINES, *supra* note 36, at 27, 30.

55. See Ogden, *Reducing Administrative Delay: Timeliness Standards, Judicial Review of Agency Procedures, Procedural Reform, and Legislative Oversight*, 4 U. DAYTON L. REV. 71, 85 (1979) (legislative imposition of standards for timeliness indicates legislature's commitment to timely agency decisionmaking). A statutory deadline also provides "a clear, articulable substantive standard easily used by oversight committees at agency and budget review time." *Id.* But cf. STATUTORY DEADLINES, *supra* note 36, at 31 ("Congressional committees, particularly in the Senate, reportedly lack the staff to conduct thorough, regular oversight"). If the agency in question has missed its deadline, legislators in oversight or appropriations hearings can require the agency to explain what has impeded its progress. If the legislators find the agency's explanation convincing, they can shift legislative priorities or increase the agency's budget to facilitate resolution of the problem.

56. See Ogden, *supra* note 55, at 85.

57. See, e.g., H.R. REP. NO. 98-198, *supra* note 34, pt. 1, at 65, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5624 (1984 RCRA amendment requiring EPA to determine whether certain used oils should be listed as hazardous wastes "mandat[es] an outside date for final EPA action, but leav[es] the Agency with the discretion to make the necessary technical decisions"); H.R. REP. NO. 95-294, *supra* note 33, at 41, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 1119 (Although the House Committee on Interstate and Foreign Commerce felt that "some impetus for EPA to act to regulate . . . unregulated pollutants was needed," the Committee did "not intend to specify the degree of emission reduction which should be required . . . [T]he Administrator should apply the appropriate means and extent of regulation under the existing statutory criteria . . .").

unreasonably delayed."<sup>58</sup> A review of the cases interpreting this APA requirement indicates that statutory deadlines increase the likelihood that a court will find an agency's delay unreasonable and will force the agency to remedy that delay.

The Court of Appeals for the District of Columbia Circuit has applied a three-factor<sup>59</sup> "rule of reason"<sup>60</sup> to determine when to mandate agency action.<sup>61</sup> First, a court must consider the context of the statutory scheme authorizing the agency to act.<sup>62</sup> If the statute includes a deadline for agency action, the agency has no regulatory discretion at all; it must act according to the legislative timetable.<sup>63</sup> Judicial relief to redress action "unreasonably delayed" is therefore more likely in a case involving a statutory deadline. Second, a court must examine the consequences of the agency's delay. Delays that might be deemed "reasonable" in the context of economic regulation are less likely to be tolerated "when human lives are at stake."<sup>64</sup> Third, a court must consider the agency's

58. 5 U.S.C. § 706(1) (1982); *cf. id.* § 555(b) (requiring agencies to "proceed to conclude a matter presented to" them "within a reasonable time"). Under the All Writs Act, 28 U.S.C. § 1651 (1982) (federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions"), the federal courts may issue a writ of mandamus compelling an agency to take any action that has been "unreasonably delayed." *See* *Sierra Club v. Thomas*, 828 F.2d 783, 795-96 (D.C. Cir. 1987); *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 76-77 (D.C. Cir. 1984); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983).

59. *See Telecommunications Research*, 750 F.2d at 80 (describing "hexagonal contours" of standard for unreasonable delay); *Public Citizen Health Research Group v. Commissioner of FDA*, 740 F.2d 21, 35 (D.C. Cir. 1984) (listing relevant considerations).

60. *See Telecommunications Research*, 750 F.2d at 80; *see also Oil, Chem. & Atomic Workers Int'l Union v. Zeeger*, 768 F.2d 1480, 1487 (D.C. Cir. 1985).

61. These efforts have focused on distinguishing good faith justifications that have some "ground[ing] in the purposes of the" statute in question from "the foot-dragging efforts of a delinquent agency." *NRDC v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1975); *see* *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987); *National Congress of Hispanic Am. Citizens (El Congreso) v. Marshall*, 626 F.2d 882, 888 (D.C. Cir. 1979); *Sierra Club v. Thomas*, 658 F. Supp. 165, 171 (N.D. Cal. 1987); *Sierra Club v. Gorsuch*, 551 F. Supp. 785, 787 (N.D. Cal. 1982).

62. *Cutler*, 818 F.2d at 897; *Health Research Group*, 740 F.2d at 35. In particular, the court must ascertain the degree of discretion that Congress has delegated to the agency. *Cutler*, 818 F.2d at 897; *see also Zeeger*, 768 F.2d at 1487 (congressional indications of pace at which agency should proceed are relevant).

63. *See, e.g., Train*, 510 F.2d at 704; *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566, 569 (D.D.C. 1986) (statutory deadline creates nondiscretionary duty to act); *New York v. Gorsuch*, 554 F. Supp. 1060, 1064 (S.D.N.Y. 1983); *see also Sierra Club v. Thomas*, 828 F.2d 783, 794 (D.C. Cir. 1987) (express statutory deadline imposes duty of timeliness); *Telecommunications Research*, 750 F.2d at 80 (if Congress provides timetable, statute itself may supply content for "rule of reason"); *cf. In re Center for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986) (agency's failure to comply with statutory deadline is "not in accordance with law," violating 5 U.S.C. § 706(2) (1982)). *But see infra* notes 69-76 and accompanying text (courts retain equitable discretion to refrain from ordering agencies to comply with statutory deadlines).

64. *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983), *overruled*, *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479 (D.C. Cir. 1986); *see Cutler*, 818 F.2d at 898; *Telecommunications Research*, 750 F.2d at 80; *Health Research Group*, 740

justification for delay.<sup>65</sup> Courts have sometimes accepted an agency's claim that the technical complexity of the issue involved justified its decision to delay action in order to accumulate and analyze more information.<sup>66</sup> In addition, courts have displayed some sympathy for claims that an order requiring an agency to expedite its decisionmaking process could disrupt agency priorities by requiring a diversion of scarce resources<sup>67</sup> from other, more important projects.<sup>68</sup>

When agencies have ignored statutory deadlines, though, courts are less likely to accept these justifications. Equitable discretion allows

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F.2d at 32; *cf.* *Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 628 (D.C. Cir. 1987) ("With lives hanging in the balance, six years [of delay] is a very long time.").

65. *Health Research Group*, 740 F.2d at 35.

66. *See, e.g., Sierra Club v. Thomas*, 828 F.2d at 798 (refusing to expedite EPA's issuance of CAA regulations involving "complex scientific, technological, and policy questions"); *United Steelworkers of Am. v. Rubber Mfrs. Ass'n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (denying unions' petition for mandamus to compel OSHA to undertake rulemaking to protect workers from benzene on expedited basis, because complex scientific and technical issues involved made judicial imposition of "an overly hasty timetable" contrary to public interest); *Zeeger*, 768 F.2d at 1487-88 (refusing to order Mine Safety and Health Administration (MSHA) to expedite rulemaking to protect underground miners from radon gas, in light of complex scientific and technical issues involved). In these circumstances, the courts have pointed out, insistence upon expedited agency action can be counterproductive: a court might force an agency to issue a decision without enough evidentiary support to withstand an attack on the merits. *See Sierra Club v. Thomas*, 828 F.2d at 798 (EPA must be given sufficient time to analyze questions and reach "considered results . . . that will not be arbitrary and capricious or an abuse of discretion"); *United Steelworkers*, 783 F.2d at 1120 (refusing to expedite agency decision because agency's rule and its underlying rationale "must be constructed carefully and thoroughly if the agency's action is to pass judicial scrutiny this time around"); *Train*, 510 F.2d at 712 (delay that permits EPA to understand relative merits of available control technologies might speed abatement of pollution by obviating need for time-consuming corrective measures).

67. The courts have recognized that budgetary and manpower constraints can support a conclusion that an agency's delay is "reasonable." *See, e.g., Cutler*, 818 F.2d at 898; *Health Research Group*, 740 F.2d at 34; *Train*, 510 F.2d at 712. The courts have sometimes imposed timetables for agency action notwithstanding such contentions by the agency, however, even in the absence of statutory deadlines. *See, e.g., Nader v. FCC*, 520 F.2d 182, 205-07 (D.C. Cir. 1975).

68. *See Sierra Club v. Thomas*, 828 F.2d at 791, 797-98 (refusing to order expedited EPA rulemaking, since EPA's broad statutory framework "will almost necessarily place competing demands upon the agency's time and resources," and EPA should be afforded discretion in reconciling competing priorities); *Brock*, 823 F.2d at 629 (noting that OSHA "must juggle competing rulemaking demands on its limited scientific and legal staff" and that courts should override agency priorities and timetables "only in the most egregious of cases"); *Telecommunications Research*, 750 F.2d at 80 (court should consider how expediting delayed activities affects activities with higher or competing priority); *Health Research Group*, 740 F.2d at 34 (court must consider "the constraints on the agency in allocating its investigatory and enforcement resources"); *National Congress of Hispanic Am. Citizens (El Congreso) v. Marshall*, 626 F.2d 882, 889 (D.C. Cir. 1979) (agency has better perspective on competing demands; thus, court should defer to agency's prioritization and allocation of resources); *Public Citizen Health Research Group v. Auchter*, 702 F.2d at 1158 (expressing hesitation to require expedited action if it would disrupt matters of higher priority, but finding no such situation in case). *But cf. Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1035 (D.C. Cir. 1983) (setting deadlines for long-delayed agency rate decisions "despite the possible displacement of agency resources or the possible effect on other proceedings").

courts to refrain from ordering agencies to comply with statutory deadlines when compliance is impossible,<sup>69</sup> but courts impose a heavy burden of justifying impossibility claims,<sup>70</sup> and regularly require agencies to comply with statutory deadlines despite such claims.<sup>71</sup>

Although courts recognize the need for judicially enforceable deadlines as a remedy for unreasonable delay,<sup>72</sup> they frequently seem uncomfortable enforcing such deadlines. Some courts believe that they must solicit a revised timetable from the agency and must accept it if the agency proceeds in good faith.<sup>73</sup> While other courts deny any obligation to solicit the agency's views in drafting a timetable,<sup>74</sup> most nevertheless do so.<sup>75</sup> And judicial ire is greatest when an agency misses its own timetable.<sup>76</sup> Thus, coercive statutes authorizing agencies to set initial dead-

69. See, e.g., *Train*, 510 F.2d at 712-13; *Sierra Club v. Thomas*, 658 F. Supp. 165, 171 (N.D. Cal. 1987); *New York v. Gorsuch*, 554 F. Supp. 1060, 1064-65 (S.D.N.Y. 1983). Issuance of a contempt citation, for example, would be inappropriate in these circumstances. *Train*, 510 F.2d at 713; see also *Brock*, 823 F.2d at 628 (contempt citation "would be a draconian and disproportionate remedy" when agency has made "good faith" effort to comply); cf. *Illinois v. Costle*, 12 Env't Rep. Cas. (BNA) 1597, 1599 (D.D.C. 1979) (stating that "[t]here is little a court of equity can do" to enforce statutory deadlines against agencies that plead impossibility, and suggesting that plaintiffs turn to the political forum to accomplish their goals), *aff'd sub nom.* *Citizens for a Better Env't v. Costle*, 617 F.2d 851 (D.C. Cir. 1980).

70. See *Sierra Club v. Thomas*, 658 F. Supp. at 171-72; *New York v. Ruckelshaus*, 21 Env't Rep. Cas. (BNA) 1721, 1723 (D.D.C. 1984); *New York v. Gorsuch*, 554 F. Supp. at 1064 (citing *Alabama Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979)).

71. See *Train*, 510 F.2d at 714; *Sierra Club v. Thomas*, 658 F. Supp. at 175; *New York v. Gorsuch*, 554 F. Supp. at 1065; *Sierra Club v. Gorsuch*, 551 F. Supp. 785, 788-89 (N.D. Cal. 1982). For other cases requiring compliance with statutory deadlines, see *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986) (holding that OMB could not invoke its authority to delay issuance of EPA regulations beyond deadline established in 1984 amendments to RCRA); *Illinois v. Gorsuch*, 530 F. Supp. 340 (D.D.C. 1981), *aff'd*, 684 F.2d 1032 (D.C. Cir. 1982) (denying EPA's request for extension to comply with deadlines set in RCRA). The courts may be more receptive to the argument in deadline cases that a failure to force the agency's hand could subvert the purposes of the regulatory scheme. See, e.g., *In re Center for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986) (NHTSA's persistent failure to meet statutory deadline "eviscerates the very purpose of the regulation"); *Environmental Defense Fund*, 627 F. Supp. at 572 (injunctive relief forcing compliance with deadlines "is necessary to ensure compliance with the clearly expressed will of Congress"); *Sierra Club v. Gorsuch*, 551 F. Supp. at 789 ("To accept EPA's proposal for further, indefinite, and virtually open-ended extension of the time for compliance . . . would be to, in effect, repeal the Congressional mandate.").

72. See *Train*, 510 F.2d at 705 (judicially enforceable deadlines "vindicate the public interest").

73. E.g., *Environmental Defense Fund*, 627 F. Supp. at 569-70; *Illinois v. Costle*, 12 Env't Rep. Cas. (BNA) at 1597.

74. See, e.g., *Sierra Club v. Thomas*, 658 F. Supp. at 171 & n.6 (when agency misses statutory deadline, judicial deference to agency inappropriate).

75. See, e.g., *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987); *MCI Telecomm. Corp. v. FCC*, 627 F.2d 322, 345 (D.C. Cir. 1980); *National Congress of Hispanic Am. Citizens (El Congreso) v. Marshall*, 626 F.2d 882, 891 (D.C. Cir. 1979); *Nader v. FCC*, 520 F.2d 182, 207 (D.C. Cir. 1975); *Train*, 510 F.2d at 705.

76. See, e.g., *Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987); *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1153 (D.C. Cir. 1983),

lines are more likely to be strictly enforced than those imposing statutory deadlines on the agency.

That the courts prefer agencies to set their own timetables for accelerated action illustrates one disadvantage of statutory deadlines—they place courts in the awkward position of second-guessing how an agency should use its resources. Moreover, since deadlines do not simplify the agency's substantive task,<sup>77</sup> they can create unrealistic time pressures or more deadlines than an agency can realistically meet.<sup>78</sup> In such circumstances, the agency is likely to take regulatory action that is hasty, without adequate evidentiary support, and thus unable to withstand judicial review,<sup>79</sup> or to divert its resources to litigation in an effort to justify its

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*overruled*, Public Citizen Health Research Group v. Tyson, 796 F.2d 1479 (D.C. Cir. 1986); AARP v. EEOC, 655 F. Supp. 228, 238-41 (D.D.C.), *rev'd*, 823 F.2d 600 (D.C. Cir. 1987); *see also* Oil, Chem. & Atomic Workers Int'l Union v. Zegeer, 768 F.2d 1480, 1488 (D.C. Cir. 1985) (denying order to compel action where agency appeared to be proceeding toward completion in reasonable time); *cf. In re American Fed'n of Gov't Employees*, 837 F.2d 503 (D.C. Cir. 1988) (refusing to issue writ of mandamus where agency apparently attempted to comply with its own goals for accelerated action); *In re American Fed'n of Gov't Employees*, 790 F.2d 116 (D.C. Cir. 1986) (same).

77. In a coercive statute, the legislature forces the agency to act, but leaves the question of how to regulate in the agency's hands. Thus, a deadline on action pursuant to a vague substantive mandate may not significantly narrow the most difficult and time-consuming choices required of the agency—choices among competing values, policies, or goals. *See* Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1278-80 (1985) (arguing that Congress should not delegate regulation to agencies, but rather could use agency as "expert" when drafting regulations); Schoenbrod, *supra* note 54, at 753-54 ("goals statutes" such as the CAA "leave key value choices to low visibility decisionmakers fearful of making controversial choices").

78. One author has described the deadlines that require the EPA to regulate hazardous air pollutants as "ludicrous." Graham, *The Failure of Agency-Forcing: The Regulation of Airborne Carcinogens Under Section 112 of the Clean Air Act*, 1985 DUKE L.J. 100, 123. A recent study indicates that the EPA has met few of its deadlines. *See* STATUTORY DEADLINES, *supra* note 36, at 12. According to deadline critics, Congress is insensitive to agencies' resource constraints and priority conflicts, Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 182 (1987), is unfamiliar with the details of the regulatory process, SENATE COMM. ON GOV'T AFFAIRS, STUDY ON FEDERAL REGULATION, VOLUME 4—DELAY IN THE REGULATORY PROCESS, S. DOC. NO. 72, 95th Cong., 1st Sess. 147 (1977) [hereinafter S. DOC. NO. 95-72], or fails to appreciate that proceedings with difficult degrees of complexity require different deadlines, Tomlinson, *Report on the Experience of Various Agencies with Statutory Time Limits Applicable to Licensing or Clearance Functions and to Rulemaking*, in ADMINISTRATIVE CONFERENCE OF THE U.S., RECOMMENDATIONS AND REPORTS 119, 122 (1978).

79. *See* H.R. REP. NO. 99-253, *supra* note 32, pt. 1, at 56, 71, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 2838, 2853; *see also* STATUTORY DEADLINES, *supra* note 36, at 35 (state official says that "EPA has sacrificed a lot of quality to meet deadlines. Deadlines have served to degrade performance."); 6 Env't Rep. (BNA) 2051-52 (1986) (criticisms by OMB officials). Strict time limits make it more difficult for the agency to obtain useful input from the regulated community, interested members of the public, and other government agencies such as the OMB. Abbott, *supra* note 78, at 196-97. A recent study of deadlines imposed on the EPA, however, indicates that attempts to meet congressional deadlines have only rarely compromised the quality of EPA actions. *See* STATUTORY DEADLINES, *supra* note 36, at 34, 37 (EPA frequently ignores deadlines or seeks extensions if it needs more time to act); *id.* at 35 ("Our findings clearly negate the common argument that the EPA sacrifices quality of workmanship to meet deadlines.").

failure to meet the deadlines.<sup>80</sup> The agency's failure to meet its deadlines may also increase public pressure for more deadlines that the agency cannot meet.<sup>81</sup> Even if the agency manages to comply with some deadlines, doing so may force it to misallocate its resources by shifting them from tasks it deems important to others it considers subsidiary.<sup>82</sup>

Perhaps the most important problem with using coercive delegations to reduce agency discretion is that even if an agency acts on time, a coercive statute requires only that the agency act, not that it act in a particular way.<sup>83</sup> Thus, the coercive model's success in preventing an agency from subverting a congressional mandate may depend on a court's willingness to scrutinize the substance of the agency's decision. However, as discussed below, the courts have become increasingly reluctant to second-guess agencies' statutory interpretation and implementation.<sup>84</sup> In response to these problems, Congress might prefer to constrain agency discretion by using the two models characterized by more specific substantive guidance.

2. *The Prescriptive and Ministerial Models.* The prescriptive model of controlling agency discretion reverses the two components of

80. See H.R. REP. NO. 99-253, *supra* note 32, pt. 1, at 56, 71, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 2838, 2853; Graham, *supra* note 78, at 124, 126.

81. When the agency misses these deadlines, congressional and public disrespect and distrust of the agency increases, causing a clamor for even more stringent deadlines, which also cannot be met. STATUTORY DEADLINES, *supra* note 36, at 41, 43-44, 50. Former EPA Administrator William Ruckelshaus, an opponent of statutory deadlines, charges that unrealistically short deadlines "undermine[ ] confidence in EPA managers, cause[ ] the public to measure them against unrealistic goals, and to think we've failed and obscure the successes we've made. Deadlines reinforce the sense that we (EPA) are not getting anywhere, to the detriment of public sense of confidence in government." *Id.* at 48; see also H.R. REP. NO. 99-253, *supra* note 32, pt. 1, at 311, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 2985 (statement of Rep. Dingell) ("[E]xcessively rigid clean up schedules [under CERCLA] are self-defeating and actually encourage the kind of misfeasance and malfeasance that has crippled the Superfund program to date.").

82. See 16 Env't Rep. (BNA) 1975-76 (1986) (EPA Administrator Lee Thomas states that meeting deadlines in 1984 RCRA amendments may prevent EPA from carrying out such essential work as ensuring that unpermitted hazardous waste disposal facilities are safely closed down); see also STATUTORY DEADLINES, *supra* note 36, at 44 (deadlines limit EPA's ability to manage its own priorities); Graham, *supra* note 78, at 124-27 (EPA's relatively fruitless attempt to comply with statutory deadlines for regulating hazardous air pollutants diverted effort from development of emission standards for new sources). One study concluded that statutory deadlines have "undermined OSHA's efforts to determine its own priorities by forcing it to concentrate its resources on rulemaking proceedings that are subject to statutory deadlines." Tomlinson, *supra* note 78, at 201. The counterargument, of course, is that although resources have been reallocated, they have not been misallocated, since the statutory deadlines reflect Congress's policy choice that issues governed by deadlines are more important.

83. As one court noted, once a court orders compliance with a deadline, "the issue of any shortfall in performance by the agency will become a matter for discussion within the . . . legislature." NRDC v. Train, 510 F.2d 692, 714 (D.C. Cir. 1975).

84. See *infra* notes 175-203 and accompanying text.

the coercive model: an agency retains its regulatory discretion, but, if it chooses to regulate, it must do so in accordance with relatively detailed substantive criteria.<sup>85</sup> Although Congress has on occasion resorted to the prescriptive model,<sup>86</sup> it has more frequently used the ministerial model.

Under the ministerial model, Congress removes or limits the agency's discretion over both whether and how to regulate. The typical ministerial statute couples a deadline with a detailed substantive standard defining the appropriate manner of regulation. In their most extreme form, ministerial statutes operate as inalterable rules of law; no agency has the authority to modify them or affect their implementation.<sup>87</sup> Congress has applied the ministerial model frequently in recent amendments to or proposals to amend many of the environmental statutes.<sup>88</sup>

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85. An example of the prescriptive model is section 112 of the CAA, which authorizes the EPA to control emissions from hazardous air pollutants. The EPA has discretion to decide whether a pollutant is sufficiently hazardous to warrant emissions limitations, but once it makes such a decision, the factors it may consider in setting a limitation on allowable emissions are limited by statute. 42 U.S.C. § 7412 (1982); see *supra* note 17 and accompanying text.

86. The 1984 amendments to the RCRA contain some examples of the prescriptive model. See, e.g., 42 U.S.C. § 6921(e)(2) (Supp. IV 1986) (obligating EPA to decide "fifteen months after November 8, 1984" whether to list 17 chemical substances or classes of substances as hazardous wastes); *id.* § 6935(b) (requiring EPA to decide "twelve months after November 8, 1984" whether to list automobile and truck crankcase oil as hazardous waste under RCRA); see also H.R. REP. NO. 95-294, *supra* note 33, at 36, reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS at 1114 (requiring EPA to regulate four cancer causing pollutants unless new evidence found that pollutants are safe for humans at foreseeable levels of exposure). Once the EPA lists a substance as hazardous, under the statute the EPA must require leak detection and other measures in handling that substance. E.g., 42 U.S.C. § 6924(o)(4)(A) (Supp. IV 1986).

87. The 1984 RCRA amendments, for example, simply prohibit the placement of bulk or non-containerized liquid hazardous wastes or free liquids contained in any hazardous waste in any landfill. 42 U.S.C. § 6924(c)(1) (Supp. IV 1986); *cf. id.* § 6924(c)(2) (requiring EPA to issue regulations "prohibit[ing] the disposal in landfills of liquids that have been absorbed in materials that biodegrade or that release liquids when compressed during routine landfill operations"). In response to the environmental disaster at Times Beach, Missouri, see S. REP. NO. 98-284, *supra* note 34, at 23, the amendments also bar the use of waste or used oil contaminated by dioxin or another listed hazardous waste for dust suppression or road treatment. 42 U.S.C. § 6924(l) (Supp. IV 1986). These prohibitions take effect without the need for agency implementation. However, Congress must still rely on the agency to enforce such rules.

88. See, e.g., 42 U.S.C. § 300g-6 (Supp. IV 1986) (banning use of lead in repairs to public water systems); *id.* § 6921(d)(8) (specifying standards for small-quantity generators of hazardous waste unless EPA adopts alternative standards); *id.* § 6924(b) (banning placement of certain hazardous wastes in salt dome formations, salt bed foundations, underground mines, and caves until EPA determines that such placement can be conducted in manner protective of health and the environment and adopts protective standards); *supra* note 82; *infra* notes 96-97; see also H.R. REP. NO. 1133, 98th Cong., 2d Sess. 113 (1984) [hereinafter H.R. REP. NO. 98-1133] (amended SDWA provision authorizing regulation of used oil contaminated with hazardous waste "sets new deadlines for promulgation of standards and provides more detailed direction for the standards than is contained in the current" statute).

By reducing an agency's discretion concerning what type of regulation to adopt,<sup>89</sup> a prescriptive statute helps the agency to craft a regulatory program consistent with legislative intent<sup>90</sup> and, because of the specificity of the agency's substantive mandate, assists judicial review of the agency's adherence to that mandate.<sup>91</sup> The ministerial approach has a different advantage. When legislators are concerned about agencies that seem reluctant to regulate at all, mandating deadlines addresses the problem. In fact, the predominance of the ministerial model over the prescriptive seems to indicate that whenever Congress has felt competent and has mustered the collective will to enact prescriptive standards, it has also thought it necessary to reduce the risk that agencies would circumvent the legislature's specific directives by choosing not to regulate at all.<sup>92</sup>

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89. Congress has used the prescriptive model to prevent the EPA from providing unintended regulatory exemptions, *see, e.g.*, S. REP. NO. 98-284, *supra* note 34, at 32-33 (amended RCRA will "prescribe in greater detail the responsibilities of the Agency with respect to listing and identifying hazardous wastes and granting exemptions from regulations"); *id.* at 64 (ending certain precisely described facilities' exemptions from groundwater monitoring requirements); H.R. REP. NO. 98-198, *supra* note 34, pt. 1, at 63, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5622 (same), from improperly taking cost/benefit or risk/benefit considerations into account, *see, e.g., id.* at 62-63, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5621-22, and from weakening environmental protection measures despite contrary legislative intent, *see, e.g.*, H.R. REP. NO. 99-253, *supra* note 32, pt. 1, at 272, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 2947 (specific standards necessary to prevent EPA from undermining Superfund program through site-by-site decisions); S. REP. NO. 50, 99th Cong., 1st Sess. 4 (1985) [hereinafter S. REP. NO. 99-50] (proposed Clean Water Act amendments responded to EPA efforts "to significantly weaken water quality standards regulations").

90. Prescriptive delegations provide more guidance to the agency, *see, e.g.*, H.R. REP. NO. 99-253, *supra* note 32, pt. 1, at 273, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 2948 (CERCLA should require EPA to choose relatively well-defined permanent remedies at Superfund sites rather than relying upon "open-ended and discretionary exhortation" "to choose permanent treatment only 'to the maximum extent practicable'"), promote more consistent administration of statutory programs, *see, e.g.*, H.R. REP. NO. 98-890, *supra* note 32, pt. 1, at 45 (criticizing EPA's inability to develop uniform, consistent standards to determine appropriate extent of cleanup of Superfund sites), and prevent agencies from acting on the basis of factors considered irrelevant or consciously rejected by Congress, but pressed upon the agency by the regulated community or by those sympathetic to it, *see* Jaffe, *The Illusion of Ideal Administration*, 86 HARV. L. REV. 1183, 1188-89 (1973) (the more elaborately defined the legislative delegation, the less likely that agency decisions will be dictated by political pressures).

91. *See supra* note 63 and accompanying text.

92. *See, e.g.*, H.R. REP. NO. 98-198, *supra* note 34, pt. 1, at 64, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5623 (Because the EPA has failed to comply with previous statutory deadlines to issue regulations covering management of used oil, "a further prod to the Agency is needed. The Committee also believes it is necessary to provide EPA with more detailed direction[s] than are contained in the [current statute] as to how to proceed with its regulatory task."); H.R. 967, 99th Cong., 1st Sess. § 2, *introduced*, 131 CONG. REC. H327 (daily ed. Feb. 6, 1985) (proposal to amend CAA provisions that authorize regulation of hazardous air pollutants is intended to "provide a timetable for decisions by the Administrator whether to regulate substances known to be emitted into the atmosphere and known or suspected to be hazardous air pollutants [and] provide for the protection of the public health should the Administrator fail to abide by the timetable for decision").

The ministerial model, however, is by no means problem-free. The establishment of a statutory deadline does not ensure that the agency will actually meet it. Judicial discomfort with the deadlines in coercive statutes may hamper the enforcement of ministerial statutes as well.<sup>93</sup> In addition, because a ministerial statute contains detailed legislative standards, to pass such a statute, Congress must overcome the same institutional and political hurdles that have traditionally induced it to rely on the discretionary model.<sup>94</sup>

To minimize these difficulties, recent environmental statutes use two innovative techniques. First, in a series of provisions sometimes called statutory "hammers,"<sup>95</sup> Congress has given the EPA a certain period of time to regulate; if at the end of the specified time the agency has failed to act, the "hammer" falls, and the regulatory result set forth in the statute automatically goes into effect.<sup>96</sup> Second, in other ministerial statutes, Congress has established specific substantive criteria that go into effect unless and until the agency issues regulations changing the legislatively specified standard.<sup>97</sup>

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93. See *supra* notes 69-76 and accompanying text. The establishment of a multitude of deadlines poses these problems under ministerial and coercive legislation as well. Multiple deadlines are likely to reduce the clarity of the signals Congress is seeking to send to the agency and to impose unachievable tasks on the agency. Ineffective statutory implementation, increased agency frustration, and renewed legislative distrust of the agency are the probable results. See *supra* notes 78-83 and accompanying text.

94. See *supra* notes 19-22 and accompanying text.

95. See Ottinger, *Strengthening of the Resource Conservation and Recovery Act of 1984: The Original Loopholes, the Amendments, and the Political Factors Behind Their Passage*, 3 PACE ENVTL. L. REV. 1, 22 & n.146 (1985). The "hammer" label is appropriate: Congress adopts these provisions to beat the agency into submission to the legislative will.

96. For example, the 1984 RCRA amendments list in minute detail a series of substances considered hazardous wastes, including liquids containing arsenic, cadmium, chromium, lead, mercury, nickel, selenium, or thallium at or above certain concentrations, 42 U.S.C. § 6924(d)(2) (Supp. IV 1986), as well as specified dioxin-containing materials, *id.* § 6924(e)(2). The EPA has up to 32 months to determine that prohibiting the land disposal of these wastes is not necessary to protect human health and the environment, but if the agency fails to make that determination on time, the prohibition goes into effect automatically. *Id.* § 6924(d)(1); see also H.R. REP. NO. 98-198, *supra* note 34, pt. 1, at 36 (if EPA fails to make determination on the wastes listed by specified time, waste is prohibited from all methods of land disposal until determination is made); 131 CONG. REC. H11,232 (daily ed. Dec. 6, 1985) (statement of Rep. Florio) (if EPA fails to comply with proposed CERCLA amendment that gives it 18 months to publish list of acute toxic chemicals, it will have to "live with" congressionally prescribed list); 42 U.S.C. § 6924(f)(3) (Supp. IV 1986) (banning disposal of certain hazardous wastes by deep well injection if EPA fails to make determination concerning need for such a ban). Congress has enacted similar hammer provisions under the TSCA as well. See 15 U.S.C. § 2644 (Supp. IV 1986) (detailed specification of appropriate manner of removing asbestos from schools if EPA fails to issue regulations in a timely manner).

97. The 1984 RCRA amendments, for example, require the EPA to issue regulations to force the owners of new landfills or surface impoundments to install two liners. 42 U.S.C. § 6924(o)(1)(A) (Supp. IV 1986). Until the effective date of those regulations, the requirement for a lower liner is deemed satisfied by the construction of "at least a 3-foot thick layer of recompacted clay or other

These innovations address some of the key deficiencies in the coercive and prescriptive models of legislation. The statutes have an automatic, built-in response to the agency regulatory discretion that weakens the coercive model as a device for controlling agency discretion.<sup>98</sup> In addition, by giving agencies the opportunity to act before legislative solutions become law, these statutory innovations allow agencies to override erroneous congressional judgments or misplaced legislative emphasis.<sup>99</sup> Finally, legislators may find it easier to make decisions concerning technical matters if they know that an agency has the authority to bail Congress out of any mistaken judgments.<sup>100</sup>

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natural material with a permeability of no more than  $1 \times 10^{-7}$  centimeter per second." *Id.* § 6924(o)(5)(B). Similarly, Congress has in at least one instance ordered the EPA to regulate a specific list of substances, while permitting the agency to substitute a limited number of substances that it considers more worthy of regulation. *See id.* § 300g-1(b)(2) (Supp. IV 1986). In still another variation, ministerial statutes give the regulated community the burden of proving that a regulation is unnecessary or inappropriate instead of giving the agency the burden of proving the need for regulation. *See, e.g., id.* § 6924(c)(3) (placement of any liquid in landfills licensed for hazardous waste disposal prohibited unless landfill owner or operator demonstrates to EPA that alternative disposal methods are unsatisfactory and that landfill disposal will not present risk of groundwater contamination).

98. If an agency fails to comply with statutory deadlines, the substantive rule favored by Congress takes effect without the need for further action by either Congress or the agency. Moreover, a hammer provision may actually facilitate the issuance of agency rules in two ways. First, an agency subject to a hammer provision is aware that if it fails to meet a statutory deadline, Congress will make the decision. The agency thus has an incentive to meet the deadline in order to avoid losing regulatory control. In at least one instance, Congress has imposed a hammer that has transferred EPA's regulatory authority to another agency as a penalty for missing a deadline. *See* 42 U.S.C.A. § 2022(b)(1) (West Supp. 1988) (transferring control of mill tailings at uranium and thorium mines from EPA to NRC); *see also* STATUTORY DEADLINES, *supra* note 36, at 61 (discussing various sanctions used in hammers). A coercive statute would not give the agency the same incentive to act. *See, e.g.,* Central States Enters. v. ICC, 780 F.2d 664, 672 n.8 (7th Cir. 1985) (agency's failure to meet statutory deadline does not necessarily strip it of jurisdiction if statute fails to specify sanction for missing deadlines). Second, the regulated community also has an incentive to cooperate with an agency operating subject to a hammer—an incentive absent in many rulemaking contexts. Typically, those subject to proposed new regulations seek to delay agency action, since delay preserves the status quo of no regulation. But the threat posed by a draconian legislative hammer may prompt industry to work with the agency to enact a rule that industry considers easier to live with. *See* STATUTORY DEADLINES, *supra* note 36, at 60-61.

99. *See, e.g.,* 131 CONG. REC. H11,231 (daily ed. Dec. 6, 1985) (statement of Rep. Carper) (proposed CERCLA amendment gives EPA 18 months to enact list of acutely toxic materials before congressional list automatically takes effect; EPA is involved in "the 'king of the mountain' scenario, almost, revisited").

100. Further, legislators may more willingly make difficult political choices if they can later shift responsibility for correcting (or failing to correct) ill-informed decisions to the agency. *Cf. Graham, supra* note 78, at 142 n.280 (legislators who oppose environmental regulation may vote in favor of regulatory legislation that they know is unworkable in order to reap benefit of supporting a popular objective while being able to blame agency for failing to achieve it).

### C. *The Future of Legislative Control of Delegated Powers.*

Congress has only recently begun to resort to the alternative models of controlling delegated agency discretion, and it is not yet clear whether the movement away from the discretionary model in the environmental area will be a short-lived phenomenon or part of a broader trend in administrative law. Congress has the ability to use the alternative models more extensively in other substantive areas, but may find it more difficult to muster the political will to employ the alternative models in non-environmental contexts. Moreover, these models will not be an appropriate means of controlling agency discretion in all situations. They are subject to abuse if not applied carefully. Even if used appropriately, they will not, and should not, eliminate agency discretion.

The recent wave of highly detailed environmental statutes demonstrates Congress's ability to develop the necessary information and expertise to pass narrow and specific legislation. One reason why Congress has been able to pass such specific statutes is that important policy decisions often do not involve issues of fact and thus require no scientific expertise for their resolution.<sup>101</sup> Congress may be as well equipped to make those kinds of judgments as any agency. Moreover, even when a regulatory decision involves a factual issue, Congress has substantial resources, including the expertise of its members and staff,<sup>102</sup> its hearing process,<sup>103</sup> the advice of the agency itself,<sup>104</sup> and of other outside organi-

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101. If, for example, there is no level below which adverse effects will not occur in people exposed to a given toxic substance, then promulgating anything other than a no-discharge standard for that substance necessarily requires a policy determination as to what is an "acceptable" level of exposure to the substance. See McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729, 733-36 (1979); Schoenbrod, *supra* note 54, at 807-08; Stenzel, *Toxic Substance Regulation: A Compelling Situation for Revival of the Delegation Doctrine*, 24 AM. BUS. L.J. 1, 1-2 (1986).

102. See Aranson, Gellhorn & Robinson, *supra* note 21, at 23. See generally Hill, *The Third House of Congress Versus the Fourth Branch of Government: The Impact of Congressional Committee Staff on Agency Regulatory Decisionmaking*, 19 J. MARSHALL L. REV. 247 (1986) (discussing growth and development of informal committee staff bureaucracy).

103. See, e.g., H.R. REP. NO. 99-168, *supra* note 34, at 17 (hearings on SDWA amendments provided House Committee on Energy and Commerce with "a tremendous amount of valuable information"); H.R. REP. NO. 95-294, *supra* note 33, at 38, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 1116.

104. See, e.g., S. REP. NO. 98-284, *supra* note 34, at 18 (provision in 1984 RCRA amendments requiring EPA to decide whether or not to ban land disposal of specified hazardous wastes should be based on "information from the years of work EPA and others have devoted to developing a degree of hazard system"); *id.* at 22 (statutory meaning of liquid wastes banned from landfill disposal based on definitions already in EPA's regulations); *id.* at 23 (landfill disposal of hazardous waste by lab pack must be in accordance with EPA specifications issued in 1981); H.R. REP. NO. 95-294, *supra* note 33, at 174-77, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 1253-56 (House Committee on Interstate and Foreign Commerce's decision to require program for preventing significant deterioration of clean air based on 30 EPA studies of need for such a program). See generally

zations,<sup>105</sup> to obtain and evaluate the technical information necessary to make that decision. Since the same resources are available in non-environmental fields,<sup>106</sup> Congress should be able to legislate more specifically in those areas as well.

In non-environmental regulatory fields, however, Congress may not be as capable of overcoming the political obstacles to detailed legislation. Although the same political motivations that led Congress to change the nature of its environmental regulation apply to other fields,<sup>107</sup> three additional factors that explain the recent wave of more detailed legislation are somewhat unique to the environmental context. First, congressional dissatisfaction with agency performance in the environmental area has been extremely high, particularly with the EPA under Administrator Burford;<sup>108</sup> second, the environmental interest groups pressing for new congressional efforts to achieve statutory objectives are relatively strong; and third, public opinion continues to strongly support stringent environmental regulation.<sup>109</sup>

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Aranson, Gellhorn & Robinson, *supra* note 21, at 51 ("Most major regulatory agencies . . . represent the principal source for Congress of information about regulatory problems."); Schoenbrod, *supra* note 77, at 1278 (Congress "can request data from agencies before legislating.").

105. Congress relies on organizations like the Office of Technology Assessment, *see, e.g.*, S. REP. NO. 98-284, *supra* note 34, at 3; H.R. REP. NO. 98-198, *supra* note 34, pt. 1, at 31, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5590, and the National Academy of Sciences, *see, e.g.*, H.R. REP. NO. 99-168, *supra* note 34, at 23; H.R. REP. NO. 95-294, *supra* note 33, at 36-37, 39-40, 181, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS at 1114-15, 1117-18, 1260. The 1984 RCRA amendments were in many instances based on determinations made by state regulatory agencies engaged in the management of hazardous waste. *See* S. REP. NO. 98-284, *supra* note 34, at 17-18 (list of hazardous wastes for which EPA must consider banning land disposal based on California's restrictions of those wastes); H.R. REP. NO. 98-198, *supra* note 34, pt. 1, at 36, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5595 (citing California and Illinois statutory restrictions on land disposal); *id.* at 70-71, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5630 (referring to successful recycled paper procurement programs in Maryland, California, and Oregon).

106. *See, e.g.*, Gewirtz, *The Courts, Congress and Executive Policy-making: Notes on Three Doctrines*, LAW & CONTEMP. PROBS., Summer 1976, at 46, 60 (Congress has passed detailed legislation in tax field); Jaffe, *supra* note 90, at 1189-90 (same). *But cf.* K. DAVIS, *supra* note 22, at 41 ("Even the Internal Revenue Code, said to be our most detailed federal legislation, contains more than a thousand express delegations, and through vague or inadequate language perhaps thousands more."); McGowan, *A Reply to Judicialization*, 1986 DUKE L.J. 217, 224 (legislative efforts to regulate in detail have generally failed); Stewart, *supra* note 21, at 1695 n.127 (strong political incentives for detailed legislation rare outside the tax field).

107. One such motivation has been OMB supervision of the EPA. *See* STATUTORY DEADLINES, *supra* note 36, at 32 (recent survey of attorneys, agency officials, and others involved in making and implementing environmental policy attributed "the increasing specificity of congressional directives to EPA [to] a desire to limit OMB's role in EPA policy making"); *see also* Environmental Defense Fund v. Thomas, 627 F. Supp. 566, 568-71 (D.D.C. 1986) (description of OMB's review of EPA proposed rules). The same supervision applies to other regulatory agencies as well. *See* Exec. Order No. 12,291 (1981), 3 C.F.R. 127, *reprinted in* 5 U.S.C. § 601 note (1982).

108. *See supra* notes 31-37 and accompanying text.

109. These factors have allowed formation of the political consensus necessary for enactment of detailed environmental legislation, even in areas, such as the choice of a new mechanism for financ-

Nevertheless, Congress will likely continue to replace discretionary statutes with alternative models of delegation in a variety of substantive contexts. While the politics of regulation vary, situations comparable to the one that prompted the EPA reforms have already arisen. For example, Congress in 1987 rejected Reagan administration plans to relax or repeal many of the federal regulations that govern nursing home services, by promulgating a statute to protect nursing home patients<sup>110</sup> that is "written in extraordinary detail, like an agency regulation."<sup>111</sup> Similarly, when Congress decided to mandate health warnings for smokeless tobacco, it required the Federal Trade Commission (FTC) to promulgate regulations according to precise instructions in the legislation.<sup>112</sup> When the FTC promulgated a regulation inconsistent with those instructions, a district court declared the regulation invalid on the ground that the FTC's function under the statute is "largely ministerial" and the agency does not have discretion to deviate from the legislative mandate.<sup>113</sup> Moreover, legislators and groups interested in substantive reform will look to Congress's experience with the environmental laws for guidance. This will probably lead Congress to apply legislative innovations such as "hammers" to other agencies.<sup>114</sup>

Although Congress has the capacity to broaden its use of the alternative models of delegated authority, it will not be able to replace the traditional discretionary model in all situations in which it seeks to confine agency discretion. In certain contexts, Congress may be incapable of accumulating the information necessary to adopt one of the alternative models. In other situations, an inability to reach a consensus on detailed legislation will thwart any attempt to use the alternative models. Thus, although the conventional wisdom that institutional and political hurdles make it impossible for Congress *ever* to legislate specifically has proven erroneous, the conventional view undoubtedly remains accurate in some

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ing Superfund, *see* 26 U.S.C. § 4611 (Supp. IV 1986), that have involved clear potential for significant redistribution of regulatory benefits and burdens. *See, e.g.,* Shabecoff, *Toxic Waste Bills: Unrelated Issues Snarl Resolution*, N.Y. Times, Feb. 12, 1986, at A22, col. 1 (proposed excise tax for Superfund financing stalled by alliance of administration officials fearing administrative burdens and rejection of "polluter should pay to clean up" principle, and liberal members of Congress opposed to regressive nature of tax).

110. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, §§ 4201-4218, 101 Stat. 1330, 1330-160 to -221 (codified in scattered sections of 42 U.S.C.A. (West Supp. 1988)).

111. Pear, *New Law Protects Rights of Patients in Nursing Homes*, N.Y. Times, Jan. 17, 1988, at 1, col. 1.

112. Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, § 3, 100 Stat. 30, 30-32 (codified at 15 U.S.C. § 4402 (Supp. IV 1986)).

113. *Public Citizen v. FTC*, 688 F. Supp. 667, 669 (D.D.C. 1988).

114. *Cf. McGarity & Shapiro, OSHA Regulation: Regulatory Alternatives and Legislative Reform*, in ADMINISTRATIVE CONFERENCE OF THE U.S., RECOMMENDATIONS AND REPORTS 1987, at 999, 1124-25 (discussing possible application of hammers to OSHA).

situations.<sup>115</sup>

And Congress should not be blind to the alternative models' deficiencies. While the coercive model is the easiest of the three for Congress to employ,<sup>116</sup> it is also the easiest to abuse. Burying an agency under a mountain of deadlines will not help the agency to prioritize its regulatory functions, and may reduce the quality of the agency's decisionmaking. Imposing deadlines may enable legislators to strike a posture in favor of regulation while avoiding the difficult policy choices that regulation entails. Finally, coercive legislation can shift policymaking responsibility from elected legislators to unelected agency officials. Therefore, Congress must use the coercive model with restraint if it is to become an effective and productive method of controlling agency discretion.

Increased legislative specificity is also an appropriate means of confining agency discretion, but it, too, can be abused. A specific substantive mandate can reduce an agency's problem-solving flexibility. Reduced flexibility can impair the agency's ability to provide optimal solutions to regulatory problems, particularly in areas of limited information, or when regulatory issues undergo rapid change.

Finally, although the new models reduce agency discretion, they usually do not eliminate it. A coercive statute, for example, forces an agency to act, but leaves it with discretion to determine the content of regulation. Prescriptive legislation specifies the manner of regulation but leaves the agency free to decide whether to regulate at all. Even ministerial legislation is likely to leave the agency with a range of regulatory options, though that range will be narrower than under a discretionary delegation.

The shortcomings of the alternative models should not force Congress to choose between two evils: Congress need not either resort to the alternative models, even if they are ill suited to the problem at hand, or abandon any attempt to confine agencies operating under discretionary delegations. There is another option: Congress can leave an agency with some discretion, under any of the four models, and rely on the courts to police whatever discretion the agency retains. As we discuss below, however, the Supreme Court's recent decisions have made it less likely that the courts will police agency discretion in a meaningful and effective fashion. We therefore suggest that Congress supplement its use of the alternative models with a series of statutory amendments to bolster the

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115. See *supra* notes 19-26 and accompanying text.

116. Imposing statutory deadlines requires relatively little expertise and may not provoke as much opposition as an attempt to dictate detailed legislative solutions to regulatory problems. For these reasons, there are many more examples of coercive than prescriptive or ministerial control devices in recent environmental legislation.

courts' obligation and ability to assist in holding agencies accountable to Congress's intent.

## II. THE SHIFT FROM ACTIVISM TO RESTRAINT IN JUDICIAL REVIEW

While Congress has been moving to increase its control of administrative discretion, the Supreme Court has been moving in the opposite direction. In the last ten years, the Court has redefined the nature of judicial review of agency decisions by replacing the earlier judicial activism of the federal courts with judicial restraint. In so doing, the Court has substituted an "executive implementation" approach to judicial review for the "checks and balances" model used in previous years. This change has significantly reduced the role of the federal courts in limiting delegated administrative discretion.

### A. *Comparing Checks and Balances to Executive Implementation Review.*

The following chart indicates the parameters of the two approaches to judicial review.

SUBJECT	CHECKS AND BALANCES	EXECUTIVE IMPLEMENTATION
<i>Legislative Authority for Oversight</i>	Maximum availability	Minimum availability
<i>Procedural Protections</i>	Maximum availability	Minimum availability
<i>Standing and Jurisdiction</i>	Broad interpretation	Narrow interpretation
<i>Statutory Interpretation</i>	Minimum deference	Maximum deference

The Court's earlier approach emphasized the need to control administrative discretion by supporting legislative and judicial limitations on such discretion.<sup>117</sup> This approach, which this Article labels checks and balances review, had four aspects. First, the Court construed relevant constitutional limitations to maximize Congress's authority to oversee administrative decisionmaking, even when such limitations were not for-

117. See generally Glicksman, *A Retreat From Judicial Activism: The Seventh Circuit and the Environment*, 63 CHI.-KENT L. REV. 209 (1987) (describing attributes of activist and restraint-oriented review).

mally recognized by the Constitution.<sup>118</sup> Second, the Court used the due process clause to maximize the procedural protections available to statutory beneficiaries.<sup>119</sup> Third, the Court broadly interpreted standing doctrine and jurisdictional limits to maximize the number of beneficiaries eligible to contest unfavorable agency decisions in court.<sup>120</sup> Finally, the Court gave only minimal deference to agencies' statutory interpretation and implementation, in an effort to hold agencies more accountable to legislative intent.<sup>121</sup>

An entirely different conception of the relationship of the three branches animates the Court's current restraint-oriented approach. This view, which this Article labels the executive implementation approach, values agency flexibility and executive autonomy, and decries judicial intrusion into executive-branch affairs. The view reverses all four of the canons of activism. First, relevant constitutional limitations are construed to maximize executive autonomy, freeing administrative decisions from legislative encumbrances not formally recognized by the Constitution.<sup>122</sup> Second, the due process clause and the APA are construed to minimize the procedural protections available to statutory beneficiaries, a construction that speeds agency decisionmaking.<sup>123</sup> Third, standing doctrine and jurisdictional limitations are used to minimize the number of beneficiaries eligible to contest unfavorable agency decisions, which also reduces judicial oversight of agency decisions.<sup>124</sup> Finally, deference to agencies' statutory interpretation and implementation is maximized,<sup>125</sup> thus extending executive autonomy and agency flexibility. The next section will outline this reversal of judicial activism in administrative law and discuss the trend's merits.

## B. *The Rise of Executive Implementation Review.*

1. *Separation of Powers Limitations.* The Supreme Court's shift in judicial philosophy is nowhere more apparent than in the Court's interpretation of how the Constitution limits congressional control of administrative discretion. The checks and balances approach interprets the

118. See *infra* notes 129-34 and accompanying text.

119. See *infra* notes 135-42 and accompanying text. Statutory beneficiaries were able to use these procedural opportunities to build a more complete record before the agency, thereby increasing the chance that they could convince a reviewing court that agency decisions clashed with the history and policy goals of applicable statutes.

120. See *infra* notes 149-58, 169, 173 and accompanying text.

121. See *infra* notes 188, 196-97 and accompanying text.

122. See *infra* notes 126-34 and accompanying text.

123. See *infra* notes 138-48 and accompanying text.

124. See *infra* notes 150-55, 159-68, 171-74 and accompanying text.

125. See *infra* notes 175-95, 198-203 and accompanying text.

separation of powers doctrine to increase legislative oversight; the executive implementation approach reaches the opposite result.

Following the executive implementation approach, the Court in *INS v. Chadha*<sup>126</sup> curtailed a vigorous effort by some members of Congress to establish a legislative veto provision for all administrative regulations.<sup>127</sup> By insisting that Congress exercise its policymaking authority before, rather than after, agencies act, the *Chadha* Court limited Congress's authority to control agency decisionmaking.<sup>128</sup>

Some proponents of executive implementation review would also strike down another postdelegation technique for limiting executive authority—restrictions on the President's authority to fire administrators.<sup>129</sup> Congress has limited the President's authority to dismiss some

126. 462 U.S. 919 (1983). The Court held that a one-House veto violates the constitutional requirement of bicameralism (two-House approval of legislation). *Id.* at 951. Moreover, the Court's later summary affirmation of a lower-court decision made it clear that a two-House veto violates the constitutional requirement of presentment (opportunity for President to veto legislation). *United States House of Representatives v. FTC*, 463 U.S. 1216 (1983), *aff'g mem.* *Consumers Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (two-House veto of regulation issued by Federal Trade Commission (FTC) held unconstitutional); *see also* *Process Gas Consumers Group v. Consumers Energy Council*, 463 U.S. 1216 (1983), *aff'g mem.* *Consumers Energy Council v. FERC*, 673 F.2d 425 (D.C. Cir. 1982) (one-House veto of FERC natural gas pricing regulations held unconstitutional).

127. *See* B. CRAIG, CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE 56 (1988) (House Judiciary Committee voted to favorably report generic legislative veto provision that would have given either House right to review and possibly veto any new rule promulgated by nearly every executive and independent agency). Individual veto provisions had been established for some regulatory agencies, such as the FTC, *see* *United States House of Representatives v. FTC*, 463 U.S. at 1216, and the Federal Energy Regulation Commission (FERC), *see* *Process Gas Consumers Group*, 463 U.S. at 1216.

128. *Chadha* affects Congress's ability to influence regulatory discretion because without a veto (or the ability to threaten one), members of Congress will have less leverage to direct administrators concerning congressionally favored policy outcomes. *See* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1419 (1977) (legislative veto gives members of Congress political leverage over agency decisions). For that reason, *Chadha* has been criticized for needlessly invalidating an innovative and useful method of policing agency discretion. *See, e.g.,* Elliot, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 150; Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 491 (1984); Strauss, *Was There a Baby in the Bathwater?: A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 791. Other commentators have argued that the Court's action was appropriate because the veto exacerbated Congress's tendency to avoid difficult policy decisions whenever possible and to allow committee and subcommittee chairpersons, or their staffs, to have a disproportionate role in the design of agency policies. *See, e.g.,* Bruff & Gellhorn, *supra*, at 1417-18; Pierce & Shapiro, *supra* note 19, at 1207-09; Scalia, *The Legislative Veto: A False Remedy for System Overload*, REGULATION, Nov./Dec. 1979, at 24-25.

129. *See, e.g.,* *Synar v. United States*, 626 F. Supp. 1374, 1397-1400 (D.D.C. 1986) (per curiam) (recommending that *Humphrey's Executor* be overruled), *aff'd sub nom.* *Bowsher v. Synar*, 478 U.S. 714 (1986); Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 96-97 (arguing that independent agencies violate separation of powers); Scalia, *Historical Anomalies in Administrative Law*, 1985 SUP. CT. HIST. SOC'Y Y.B. 103, 106-10 (questioning distinction between executive and independent agencies and contending that *Humphrey's Executor* should be limited to its factual and historical con-

administrators to cases in which he has "cause," usually limited to "inefficiency, neglect of duty, or malfeasance in office."<sup>130</sup> The Supreme Court seems to have rebuffed criticisms of these restrictions in *Morrison v. Olson*, which upheld as constitutional the independent counsel provisions of the Ethics in Government Act of 1978.<sup>131</sup> The Court in *Morrison* rejected the argument that the President's inability to fire the independent prosecutor except for cause was unconstitutional, relying on earlier decisions upholding similar restrictions on the President's authority to fire agency officials.<sup>132</sup>

Thus, although Congress has lost the legislative veto, it can apparently influence agency decisionmaking by using "for cause" firing restrictions.<sup>133</sup> Although both the legislative veto and "for cause" restrictions increase Congress's authority over agency discretion, the Court has ac-

text); see also Gifford, *The Separation of Powers Doctrine and the Regulatory Agencies After Bowsher v. Synar*, 55 GEO. WASH. L. REV. 441, 467 (1987) ("As room for policy formulation increases, congressional limitations upon presidential influence become problematic.").

130. *E.g.*, 15 U.S.C. § 41 (1982) (limitation on presidential authority to fire Federal Trade Commissioners). See generally S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 123-24 (2d ed. 1985) (listing agencies whose administrators cannot be fired except for cause). In addition, the Supreme Court has indicated that administrators who engage in adjudication cannot be fired except for "cause" even if Congress has not established such a restriction. See *infra* note 132 and accompanying text. Such agencies would include the Federal Maritime Commission (FMC), the FCC, and the Securities and Exchange Commission (SEC). See S. BREYER & R. STEWART, *supra*, at 123-24.

131. 108 S. Ct. 2597 (1988).

132. The Court analogized the Ethics in Government Act's removal provisions to the removal provisions declared constitutional in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (upholding legislative restriction on President's authority to remove FTC Commissioners), and *Wiener v. United States*, 357 U.S. 349 (1958) (upholding legislative restriction on President's authority to remove member of War Claims Commission). 108 S. Ct. at 2616. The Court interpreted those cases as holding removal restrictions constitutional as long as they do not impede the President's authority to perform his constitutional duties. *Id.* at 2619-20. The Ethics in Government Act did not impede the President from carrying out those duties because an independent prosecutor is an inferior officer (as defined by the appointments clause, U.S. CONST. art. II, § 2, cl. 2), with limited jurisdiction and tenure, and without either policymaking or significant administrative authority. 108 S. Ct. at 2619.

133. Although the Court endorsed its prior cases holding "for cause" restrictions constitutional, see *supra* note 132 and accompanying text, it did indicate some limitations on Congress's use of "for cause" restrictions. It warned that *Myers v. United States*, 272 U.S. 52 (1926) (holding legislative restriction on President's authority to remove postmaster unconstitutional), was "undoubtedly correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." 108 S. Ct. at 2618. This limitation, however, would not generally affect agency administrators, who, in view of their rulemaking and/or adjudicatory power, are not "purely executive" officials. The Court also stated that the restriction on firing the independent prosecutor was constitutional because the President's need to control the independent prosecutor's exercise of discretion was not "so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." *Id.* at 2619. Although it is unlikely that controlling regulatory officials' discretion is "central to the functioning of the Executive Branch," the Court did not tell what types of officials cannot be subject to a "for cause" removal restriction under that test.

cepted only the weaker of the two postdelegation techniques, the firing restrictions, as constitutional.<sup>134</sup> The Court's rejection of the stronger technique in *Chadha* shows the Court's general commitment to an executive implementation approach in its application of constitutional limitations.

2. *Hearing Rights.* By interpreting procedural rights, the Court influences the ability of *individuals* to conform agency decisionmaking to congressional intent. According to the checks and balances approach, if statutory beneficiaries enjoy greater procedural protections, they can develop a more complete record before administrative agencies, which facilitates meaningful judicial review and makes agencies more accountable for their decisions. The executive implementation approach, in contrast, holds that additional procedures slow agency decisionmaking and do little to improve the quality of agency decisions. Following the executive implementation approach, the Court has recently minimized the procedures to which statutory beneficiaries are entitled under both the due process clause and the APA.

The Supreme Court's expansion of due process rights in the 1970s was tied to a broad definition of the property<sup>135</sup> and liberty interests<sup>136</sup> protected by the fourteenth amendment. Expanded procedural entitlements were seen as an appropriate means of preventing agency decisions inconsistent with legislative intent.<sup>137</sup> Since that time, the Court has made a sporadic, but clear retreat from its earlier positions. It has im-

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134. When an agency is "independent," in the sense that the President cannot fire the agency's administrator over a policy disagreement, the administrator is less likely to subordinate congressional demands to the White House's position on particular issues, and Congress thus enjoys greater authority. See SENATE COMM. ON GOV'T AFFAIRS, STUDY ON FEDERAL REGULATION, VOLUME 5—REGULATORY ORGANIZATION, S. DOC. NO. 91, 95th Cong., 2d Sess. 25, 28-43 (1977) (Congress establishes independent agencies to insulate them from executive control and to make them more susceptible to congressional control). This device, however, is weaker than the legislative veto, which gives Congress, or one of its Houses, direct authority to reverse an agency's decision.

135. See, e.g., *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9-12 (1978) (discontinuance of municipal utility services subjected to due process limitations); *Goss v. Lopez*, 419 U.S. 565, 572-76 (1975) (expulsion from public schools must be carried out consistently with due process when school attendance mandatory); *Goldberg v. Kelly*, 397 U.S. 254, 263-64 (1970) (withdrawal of welfare benefits subject to due process when recipient originally considered eligible for benefits).

136. See, e.g., *Goss*, 419 U.S. at 574 (individual's interest in good reputation is liberty interest); see also *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (when person's honor or reputation is impugned, opportunity to defend one's character is essential).

137. See Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1252 (1965) (agency decisions influenced by public opinion may reach conclusions at variance with legislative intent and therefore should be subjected to procedural safeguards); Reich, *The New Property*, 73 YALE L.J. 733, 783 (1964) ("government largess should be subject to scrupulous observance of fair procedures").

posed limitations on what constitutes a property<sup>138</sup> or liberty<sup>139</sup> interest for due process purposes. The Court has also applied a balancing test to determine what procedures an agency must provide,<sup>140</sup> and, using this test, has minimized hearing requirements.<sup>141</sup> This retraction of due process rights was motivated by concerns that elaborate procedures were inefficient and did little to make agencies' decisions more accurate.<sup>142</sup>

The expansion and contraction of procedural rights under the APA reflect the same trend. A series of D.C. Circuit opinions in the 1970s in effect imposed a paper hearing requirement for informal rulemaking.<sup>143</sup> Several judges on the court also required agencies engaged in informal rulemaking to use adjudicatory procedures that the APA does not ex-

138. See, e.g., *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 785-90 (1980) (nursing home patients' property interest in receiving care not violated by forced relocation to another facility).

139. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 672 (1977) (freedom from corporal punishment is liberty interest, but Court will not require procedural safeguards when state "common-law remedies are fully adequate to afford due process"); *Meachum v. Fano*, 427 U.S. 215, 223-29 (1976) (prisoner not deprived of liberty interest when transferred involuntarily from one prison to another; state statute provided no right to remain in first prison).

140. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (to determine what procedures are necessary, court must consider nature of private interest affected, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards").

141. See, e.g., *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978) (only an informal meeting necessary before utility can terminate services for nonpayment of bills); *Mathews*, 424 U.S. at 343-49 (only an opportunity to contest decision in writing necessary before government can terminate social security disability benefits); *Goss v. Lopez*, 419 U.S. 565, 581 (1975) (only an informal meeting necessary before public school can suspend student). The Court previously required more extensive procedures. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970) (hearing similar to civil trial necessary before welfare recipient can be denied benefits).

142. See, e.g., Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (analyzing elements of fair, efficient, and flexible administrative hearings and proposing a process for review of agency decisions); Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974) (arguing that normal adjudicatory processes are poorly suited to social welfare context and that "quality assurance system" would more efficiently ensure due process).

143. The D.C. Circuit broadly interpreted the APA's requirements of "adequate notice." See, e.g., *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (agency must give new notice if it significantly changes data or methodology on which it will base a rule); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) (agency must reveal in notice of rulemaking the data and methodologies on which it intends to rely), *cert. denied sub nom. Portland Cement Ass'n v. Train*, 423 U.S. 1025 (1975). The court also broadly interpreted the APA's requirement of a "concise general statement of . . . basis and purpose," 5 U.S.C. § 553(c) (1982). See *Nova Scotia*, 568 F.2d at 252 (quoting *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)); *Portland Cement Ass'n*, 486 F.2d at 393 (agency's failure to respond to public comments in its statement of basis and purpose was ground for reversal); *Boyd*, 407 F.2d at 338 (statement of basis and purpose must allow court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did").

pressly require for that purpose.<sup>144</sup> Advocates of expanded procedural entitlements argued that courts could better control agency discretion by mandating procedures that parties could use to clarify disputed contentions.<sup>145</sup>

The Supreme Court halted the D.C. Circuit's efforts in *Vermont Yankee Nuclear Power Corp. v. NRDC*, by reversing a decision that compelled the Nuclear Regulatory Commission (NRC) to employ formal rulemaking procedures more demanding than those required by the APA.<sup>146</sup> The Court held that federal courts could not impose procedural requirements beyond those required by the APA "[a]bsent constitutional constraints or extremely compelling circumstances."<sup>147</sup> The Court regarded additional procedures as unnecessary and counterproductive because they hindered agency flexibility.<sup>148</sup>

3. *Appeal Rights.* The checks and balances approach regards the right to appeal adverse agency decisions as a crucial means of policing

144. See, e.g., *NRDC v. NRC*, 547 F.2d 633, 653-54 (D.C. Cir. 1976) (suggesting numerous procedural devices to enable agency to generate more developed factual record), *rev'd*, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978); *Ethyl Corp. v. EPA*, 541 F.2d 1, 66-68 (D.C. Cir.) (en banc) (Bazelon, C.J., concurring) ("In informal rule-making, the record should clearly disclose when each piece of new information is received and when and how it was made available for comment. If information is received too late for comment, the agency must at least clearly indicate how the substance of its consideration would be affected."), *cert. denied*, 426 U.S. 941 (1976); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1251-54 (D.C. Cir. 1973) (concluding that existence of APA procedures does not preclude use of other adjudicatory procedures); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, C.J., concurring) (submission of pre-screened written questions would illuminate factual disputes without unduly burdening process with inappropriate adjudicative procedures).

145. See, e.g., *NRDC v. NRC*, 547 F.2d at 646 (additional procedures necessary to generate record sufficient to allow court to determine whether agency action was arbitrary and capricious). See generally Shapiro & Levy, *supra* note 30, at 404-07 (tracing evolution of proceduralism and describing APA as compromise tolerating broad discretion checked by extensive procedural safeguards).

146. 435 U.S. 519, 548 (1978).

147. *Id.* at 543. The Court gave no indication what would constitute "compelling circumstances." *Id.* The lower federal courts have interpreted *Vermont Yankee* as discouraging the expansive use of 5 U.S.C. § 553 (1982) to require paper hearings. See, e.g., *Association of Data Processing Serv. Orgs. v. Board of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984) (Scalia, J.) (notice requirement in informal rulemaking requires disclosure only of "most critical factual material" that agency will rely on).

148. See, e.g., Scalia, *Vermont Yankee: The APA, the D.C. Circuit and the Supreme Court*, 1978 SUP. CT. REV. 345, 387; see also *Vermont Yankee*, 435 U.S. at 547 (adequacy of record not directly linked to extensiveness of procedures employed; requiring additional procedures disrupts agency enforcement); *cf.* *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 241 (1973) (procedures beyond those required for informal rulemaking unnecessary to adequately consider evidence presented). See generally Bezanson, *The Myths of Formalism: An Essay on Our Faith That Formalism Yields Fairness and Effectiveness in Public Administration*, 69 IOWA L. REV. 957, 973 (1984) (overindulgent and indiscriminate use of formalism eliminates individual judgment, reason, and discretion from decisionmaking).

agency discretion. The executive implementation approach interprets this right narrowly, minimizing the number of decisions appealed. Recent cases involving standing, jurisdiction, and private rights of action also illustrate the Court's shift toward an executive implementation approach.

a. *Standing.* In the 1960s and early 1970s, the Court broadly interpreted constitutional and statutory standing requirements, enabling a wide variety of statutory beneficiaries to seek judicial review.<sup>149</sup> The Court has since restricted standing in two ways.<sup>150</sup> First, it has made it more difficult to satisfy the constitutional requirement that a case or controversy exist. A plaintiff must now show not only an injury in fact, but also a causal relationship between that injury and the agency action challenged.<sup>151</sup> The Court actively uses this requirement to deny standing when it doubts that a favorable verdict will alleviate a plaintiff's injury.<sup>152</sup> Second, even when a case and controversy does exist, the Court endorses the use of prudential standing limitations, with their restrictive effect.<sup>153</sup>

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149. For example, in *Association of Data Processing Service Organizations v. Camp*, the Court held that a plaintiff could satisfy the article III case or controversy requirement by alleging that the "challenged action caused him injury in fact, economic or otherwise." 397 U.S. 150, 152 (1970). In subsequent cases, the Court extended *Data Processing's* expansive definition of injury in fact: the required injury could be environmental or aesthetic, *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972), and the causal chain between the government decision at issue and the plaintiff's injury could be quite attenuated, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 685-90 (1973). The Court also held that a plaintiff would have standing, even when Congress had made no specific provision for it, if she sought to protect an interest that was "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, 397 U.S. at 153. Prior to *Data Processing*, standing doctrine required a plaintiff to allege injury of a legal interest derived from statutory or common law. See, e.g., *Alexander Sprunt & Son v. United States*, 281 U.S. 249 (1930); *The Chicago Junction Case*, 264 U.S. 258 (1924). See generally R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 19, § 5.4.1 (describing Supreme Court's early standing cases).

150. See generally Buruham, *Injury for Standing Purposes When Constitutional Rights Are Violated: Common Law Public Value Adjudication at Work*, 13 HASTINGS CONST. L.Q. 57 (1985) (describing Court's cycle of expansion and contraction of standing); Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988) (same).

151. See, e.g., *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72 (1978).

152. See, e.g., *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 43 (1976) (dismissing challenge to IRS ruling allowing hospitals to retain tax-exempt status even if they regularly turned away poor people seeking non-emergency care: even if plaintiffs won the case, "it is just as plausible that the hospitals to which [plaintiffs] may apply for service would elect to forego favorable tax treatment to avoid the undetermined financial drain of any increase in the level of compensated services"); *Warth v. Seldin*, 422 U.S. 490, 504 (1975) (dismissing equal protection challenge to suburban New York community's restrictive zoning because plaintiffs failed to establish that unavailability of low-priced housing was result of zoning practices at issue); see also *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 (1983) (holding that victim of police choke-hold lacked standing to enjoin the practice because it was entirely speculative that he would again be subjected to it).

153. See, e.g., *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347-48 (1984) (consumers lack standing to seek judicial review of pricing orders issued by Secretary of Agriculture under Agricul-

The Court's earlier expansion of standing rights permitted statutory beneficiaries to raise additional legal challenges to agency decisions.<sup>154</sup> The Court's present standing restrictions increase executive autonomy and agency flexibility by freeing agencies from judicial review and relegating disappointed statutory beneficiaries to the political system for relief.<sup>155</sup>

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tural Marketing Agreement Act of 1937 because consumer suits would prevent "equitable and expeditious . . . testing [of] the validity of orders"). In *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), the Court specified that a plaintiff can claim standing based only on his "own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* at 474 (quoting *Warth*, 422 U.S. at 499). The Court also indicated that a plaintiff's claims should not involve "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches," *id.* at 474-75 (quoting *Warth*, 422 U.S. at 499-500), and noted that a plaintiff's complaint should fall within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question," *id.* at 475 (quoting *Data Processing*, 397 U.S. at 153). Although the Court has shown an increased willingness to restrict standing, not all of its standing opinions reflect this willingness. In *Clarke v. Securities Industry Association*, for example, the Court made it easier for plaintiffs to satisfy the prudential requirement that a complaint fall within the zone of interests to be protected or regulated by the statute in question. 479 U.S. 388, 400 & n.16 (1987) (in applying zone of interests test, court not limited to considering statute under which plaintiff sues, but may also consider any related statutory provision that helps to determine Congress's overall intent in enacting regulatory scheme). Nevertheless, in recent years the Court has more often restricted standing than it has expanded it. See generally Burnham, *supra* note 150 (giving principled explanation for Court's apparently inconsistent approach to standing); Winter, *supra* note 150 (suggesting underlying conceptual structure based on "human cognition" concepts to explain Court's apparently incoherent positions on standing).

154. See, e.g., E. HANKS, A. TARLOCK & J. HANKS, *CASES AND MATERIALS ON ENVIRONMENTAL LAW & POLICY* 214 (1974) (viewing removal of obstacles to standing as "the divorce of judicial review from the core of common law jurisprudence and the recognition of a rather broad public interest in the functioning of government"); Rosenbaum & Roberts, *The Year of Spoiled Pork: Comments on the Court's Emergence as an Environmental Defender*, 7 *LAW & SOC'Y REV.* 33, 41 (1972) (more expansive view of standing has permitted public interest litigation against government agencies); Stewart, *supra* note 21, at 1723 (expansion of standing allows affected interest groups to participate effectively in creation and review of agency decisions); Winter, *supra* note 150, at 1409 (describing Court's acceptance in early 19th century of public rights model of litigation).

155. See *United States v. Richardson*, 418 U.S. 166, 179 (1974) ("[T]he absence of any particular individual or class to litigate [certain] claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process."); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 *YALE L.J.* 425, 496 (1974) (critics of liberalization of standing rules argued that Court had invited "practically boundless interferences with agency decisionmaking"); Comment, *Judicial Review of Agency Action: The Unsettled Law of Standing*, 69 *MICH. L. REV.* 540, 547 & n.36 (1971) (liberal standing rules may impede administrative efficiency); Note, *Standing and the Propriety of Judicial Intervention: Reviving a Traditional Approach?*, 52 *NOTRE DAME LAW.* 944, 944-45 (1977) (liberal standing rules invite unelected, nonexpert judges to interfere with policymaking role of elected branches). *But see* Winter, *supra* note 150, at 1503 (When issues raised by government decisions are not amenable to resolution through the political process, standing law undermines the notion of accountability and becomes "an undemocratic tool of exclusion.").

b. *APA exclusions.* The APA forbids judicial review when "statutes preclude judicial review" or when "agency action is committed to agency discretion by law."<sup>156</sup> In interpreting the exclusions, the Court once presumed that judicial review was available<sup>157</sup> and adhered to the view that Congress intended to preclude review only "in those rare instances" where there was "no law to apply."<sup>158</sup> In *Heckler v. Chaney*,<sup>159</sup> however, the Court held that agency enforcement decisions are presumptively unreviewable as actions "committed to agency discretion by law."<sup>160</sup> That presumption, said the *Heckler* Court, can only be rebutted when a substantive statute provides guidelines for an agency to follow in exercising its discretion.<sup>161</sup>

*Heckler* touched off a continuing struggle over the proper categorization of hundreds of administrative actions. Courts have denied review for a variety of enforcement<sup>162</sup> and other related decisions,<sup>163</sup> including

156. 5 U.S.C. § 701(a)(2) (1982).

157. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967) (judicial review of Food and Drug Administration (FDA) regulation would not be precluded by 5 U.S.C. § 701(a) unless there was "clear and convincing evidence" of congressional intent to prevent review).

158. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (construing 5 U.S.C. § 701(a)(2)).

159. 470 U.S. 821 (1985) (appeal of FDA decision not to take enforcement action against use of lethal drugs for capital punishment).

160. *Id.* at 834-35.

161. *Id.*

162. See, e.g., *Clementson v. Brock*, 806 F.2d 1402, 1404 (9th Cir. 1986) (Secretary of Labor's decision to forego enforcement action under Veterans' Readjustment Act held immune from review); *Doherty v. Meese*, 808 F.2d 938, 943 (2d Cir. 1986) (Attorney General has complete discretion to detain alien if he believes deportation would be prejudicial to United States); *Dina v. Attorney General of the United States*, 793 F.2d 473, 476 (2d Cir. 1986) (no review of Attorney General's denial of application for waiver of requirements for immigrants applying for permanent citizenship); *International Union, UAW v. Brock*, 783 F.2d 237, 244-45 (D.C. Cir. 1986) (decision not to enforce Labor-Management Reporting and Disclosure Act against employer not reviewable); *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1265-66 (7th Cir. 1985) (Board of Immigration Appeals has complete discretion to refuse to reopen deportation hearings); *Rush v. Macy's New York, Inc.*, 775 F.2d 1554, 1558 (11th Cir. 1985) (FTC decision not to intervene in private dispute not reviewable).

163. These include decisions to settle a matter, see, e.g., *Schering Corp. v. Heckler*, 779 F.2d 683, 685-87 (D.C. Cir. 1985) (FDA settlement of claim against company marketing unapproved "new" drug held unreviewable); *NAACP v. Meese*, 615 F. Supp. 200, 203 (D.D.C. 1985) (no review of Attorney General's decision to seek modification of consent decrees in civil rights actions), decisions to deny a government benefit, see, e.g., *Falkowski v. EEOC*, 764 F.2d 907, 910-11 (D.C. Cir. 1985) (Department of Justice has unreviewable discretion whether to provide counsel for government employee), *cert. denied*, 478 U.S. 1014 (1986), decisions to use property for government purposes, see, e.g., *Florida Dep't of Business Regulation v. United States Dep't of the Interior*, 768 F.2d 1248, 1257 (11th Cir. 1985) (Secretary of Interior's acquisition of land for Indian use unreviewable), *cert. denied*, 475 U.S. 1011 (1986), and decisions to deny a license, see, e.g., *Electricities of North Carolina v. Southeastern Power Admin.*, 774 F.2d 1262, 1266-67 (4th Cir. 1985) (no review of Southeastern Power Administration's marketing decisions); see also *Greenwood Utils. Comm'n v. Hodel*, 764 F.2d 1459, 1464-65 (11th Cir. 1985).

refusals to initiate rulemaking proceedings.<sup>164</sup> In a smaller number of cases, courts have held either that *Heckler* did not apply to the enforcement decision at issue<sup>165</sup> or that it applied, but the presumption against review was rebutted.<sup>166</sup>

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Other courts have not applied *Heckler* outside the enforcement context, however. *See, e.g.,* Getty v. FSLIC, 805 F.2d 1050, 1057-61 (D.C. Cir. 1986) (review of FSLIC's rebidding procedures); Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation, 792 F.2d 782, 792 (9th Cir. 1986) (review of claim that Secretary of the Interior acted outside his authority by unlawfully delegating authority to place oil and gas wells on Indian land); Rainbow Navigation, Inc. v. Department of the Navy, 783 F.2d 1072, 1078-80 (D.C. Cir. 1986) (review of Secretary of Navy's decision to abolish preference for U.S. vessels to carry military cargo under Cargo Preference Act); Robbins v. Reagan, 780 F.2d 37, 46-49 (D.C. Cir. 1985) (review of Health and Human Services department's action rescinding its commitment of funds to convert federal building into shelter for homeless).

164. *See, e.g.,* National Wildlife Fed'n v. Secretary of Health and Human Servs., 808 F.2d 12, 15 (6th Cir. 1986) (FDA decision not to promulgate tolerance level for dioxin in sports fish not reviewable); Bethlehem Steel Corp. v. EPA, 782 F.2d 645, 654-55 (7th Cir. 1986) (EPA failure to initiate regulation governing coke emissions under CAA not reviewable because of its discretionary nature). *But see* American Horse Protection Ass'n v. Lyng, 812 F.2d 1, 4 (D.C. Cir. 1987) ("[R]efusals to institute rulemaking proceedings are distinguishable from other sorts of nonenforcement decisions insofar as they are less frequent, more apt to involve legal as opposed to factual analysis, and [are] subject to special formalities, including a public explanation."); Iowa *ex rel.* Miller v. Block, 771 F.2d 347, 351 (8th Cir. 1985) (refusal of Secretary of Agriculture to promulgate general regulation implementing federal disaster program following state's request), *cert. denied*, 478 U.S. 1012 (1986).

Courts seem to agree that *Heckler's* presumption of nonreviewability does not apply to promulgated rules, or to rulemaking proceedings that are abandoned. *See, e.g.,* Farmworker Justice Fund v. Brock, 811 F.2d 613, 625 (D.C. Cir.) (Secretary of Labor went beyond scope of authority in relying on his notions of federalism to justify abandonment of proposed rule), *vacated*, 817 F.2d 890 (D.C. Cir. 1987); Oil, Chem. & Atomic Workers Int'l Union v. Zegeer, 768 F.2d 1480, 1488 (D.C. Cir. 1985) (undue delay in rulemaking schedule set by MSHA held reviewable); Humane Soc'y v. Lyng, 633 F. Supp. 480, 486 (W.D.N.Y. 1986) (allowing review of USDA regulation to determine if hot-iron branding cruel to animals). *But see* Olympus Corp. v. United States, 792 F.2d 315, 320 (2d Cir. 1986) (Congress's long-standing acquiescence implied acceptance of Customs regulations that were exercise of enforcement discretion), *cert. denied*, 108 S. Ct. 2033 (1988).

165. *See, e.g.,* Doe v. Casey, 796 F.2d 1508, 1517 n.29 (D.C. Cir. 1986) (CIA director's decision to fire gay employee is reviewable), *aff'd in part, rev'd in part*, 108 S. Ct. 2047 (1988); Northern Ind. Pub. Serv. Co. v. FERC, 782 F.2d 730, 745 (7th Cir. 1986) (FERC refusal to investigate abusive understatement of gas needed by pipeline customers under supply contract reviewable); Cardoza v. CFTC, 768 F.2d 1542, 1549 (7th Cir. 1985) (CFTC's decision not to review exchange disciplinary actions reviewable); MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1191 (D.C. Cir. 1985) (review of FCC mandatory order requiring MCI to forbear from filing tariffs reviewable); Heterochemical Corp. v. FDA, 644 F. Supp. 271, 273-74 (E.D.N.Y. 1986) (allowing review of FDA refusal to enforce Food, Drug and Cosmetic Act against violator of statute); Bresgal v. Brock, 637 F. Supp. 280, 284 (D. Or. 1986) (Secretary of Labor enjoined from refusing to apply Migrant and Seasonal Agricultural Worker Protection Act to forestry workers), *aff'd in part, modified in part*, 833 F.2d 763 (9th Cir. 1987); Horizons Int'l, Inc. v. Baldrige, 624 F. Supp. 1560, 1571 (E.D. Pa. 1986) (Attorney General's grant of immunity under Exchange Trading Company Act not an enforcement action and thus reviewable), *rev'd*, 811 F.2d 154 (3d Cir. 1987).

166. *See, e.g.,* Graham v. Teledyne-Continental Motors, 805 F.2d 1386 (9th Cir. 1986) (code sections limiting National Transportation Safety Board's inspection powers provided standards to review Board's denial of plaintiff's participation in inspection of plane crash), *cert. denied*, 108 S. Ct. 67 (1987); Shelley v. Brock, 793 F.2d 1368 (D.C. Cir. 1986) (intent of Labor-Management Reporting and Disclosure Act was not to preclude review of union members' complaints); Abourezk v. Reagan,

The *Heckler* Court thought it improper for courts to limit executive authority over enforcement decisions without a clear legislative declaration in favor of such judicial review.<sup>167</sup> Such sentiments demonstrate the Court's rejection of its prior checks and balances approach.<sup>168</sup>

*c. Private rights of action.* The expansion of implied statutory private rights of action followed the Supreme Court's decision in *J.I. Case Co. v. Borak*, in which the Court described a judicial responsibility "to adjust . . . remedies so as to grant the necessary relief" when federally secured rights are invaded."<sup>169</sup> The lower federal courts followed *Borak* by "generously conferr[ing] rights of action on private litigants."<sup>170</sup> In *Cort v. Ash*, however, the Court enunciated a new test for determining when private rights of action are available in the absence of express statutory authorization.<sup>171</sup> The Court applied the *Cort* test in a way that made it clear that *Cort* had "simply done away with implied rights of action *sub silentio*."<sup>172</sup>

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785 F.2d 1043 (D.C. Cir. 1986) (Immigration and Nationality Act lists 33 distinct categories that provide standards to guide Executive in its exercise of powers to exclude aliens), *aff'd*, 108 S. Ct. 252 (1987); *Lorion v. NRC*, 785 F.2d 1038, 1040 (D.C. Cir. 1986) (NRC decision not to suspend license of nuclear plant after investigation); *DuBois v. EPA*, 646 F. Supp. 741, 744-45 (W.D. Mo. 1986) (adopting view that EPA is bound to enforce Clean Water Act once a violation has been brought to its attention), *rev'd*, 820 F.2d 943 (8th Cir. 1987); *Doyle v. Brock*, 632 F. Supp. 256 (D.D.C. 1986) (intent of Labor-Management Reporting and Disclosure Act was not to preclude review of union members' complaints), *aff'd*, 821 F.2d 778 (D.C. Cir. 1987); *Save Our Dunes v. Pegues*, 642 F. Supp. 393 (M.D. Ala. 1985) (Coastal Zone Management Act and National Environmental Policy Act provided guidelines delineating enforcement powers of Office of Ocean and Coastal Resource Management), *rev'd*, 834 F.2d 984 (11th Cir. 1987); *Sierra Club v. Block*, 615 F. Supp. 44 (D. Colo. 1985) (decision reviewable because act specified that secretary "shall" act upon certain events).

167. The Court argued that because enforcement decisions involve a difficult balancing of various factors, judicial review should not be lightly invoked. *Heckler*, 470 U.S. at 831. Moreover, the Court noted, since decisions to indict are considered the special province of the executive branch, judicial review of enforcement decisions, which have the same characteristics as decisions to indict, raises a separation of powers problem. *Id.* at 832.

168. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (APA requires judicial review of any agency action). See generally R. CASS & C. DIVER, ADMINISTRATIVE LAW: CASES AND MATERIALS 578 (1987) (*Heckler* "effectively creates an island of presumptive unreviewability in a sea of presumptive reviewability.").

169. 377 U.S. 426, 433 (1964) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)) (stockholder of corporation involved in merger had implied right to damages and injunctive relief for violations of section 14 of Securities Exchange Act of 1934).

170. *Community & Economic Dev. Ass'n v. Suburban Cook County Area Agency on Aging*, 770 F.2d 662, 664 (7th Cir. 1985).

171. 422 U.S. 66, 78 (1975).

172. *Agency on Aging*, 770 F.2d at 664; see, e.g., *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 527 (1984) (no private cause of action for derivative suits under section 36(b) of Investment Company Act of 1940); *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 21 (1982) (union has no federal claim for contract violation by employer who receives Urban Mass Transportation Act funds); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981) (no private cause of action for back pay under Davis-Bacon Act);

The Court originally endorsed implied private rights of action as a means of enhancing checks and balances on agency enforcement decisions.<sup>173</sup> More recently, however, the Court has emphasized that implied private rights of action create rights not recognized by the legislature, disrupt an agency's ability to administer its programs in a centralized and coordinated manner, and invite judges to make technical policy decisions that would be better made by expert administrators.<sup>174</sup>

4. *Scope of Review.* Judicial review of agencies' statutory interpretation and implementation is the final area in which the Court has shifted to an executive implementation approach. A checks and balances approach to these functions minimizes deference to agency decisions in order to hold agencies more accountable to legislative intent. An execu-

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Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 148-50 (1980) (no private cause of action to redress violations of Federal Records Act); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 21-24 (1979) (strictly limited legal remedy, and no equitable relief, available under Investment Advisors Act of 1940); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (no private cause of action under section 17(a) of Securities Exchange Act of 1934); Chrysler Corp. v. Brown, 441 U.S. 281, 294 (1979) (no private cause of action under Freedom of Information Act to enjoin releases of properly disclosable documents); Piper v. Chris-Craft Indus., 430 U.S. 1, 41 (1977) (tender offeror has no standing to sue offeree for damages under section 14(e) of Securities Exchange Act of 1934); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 424 (1975) (no private cause of action under Securities Exchange Act of 1934).

In the cases following *Cort*, the Court focused almost exclusively on one of the four factors enunciated in *Cort* as the new test—whether Congress intended to create a private right of action. See, e.g., *Transamerica*, 444 U.S. at 24 (“The dispositive question remains whether Congress intended to create any such remedy.”); *Touche Ross*, 442 U.S. at 568 (“our task is limited solely to determining whether Congress intended to create the private right of action”). This change in emphasis has effectively eliminated the availability of implied private remedies, since “legislative history is unlikely to reveal affirmative evidence of a congressional intent to authorize a specific procedure that the statute itself fails to mention.” *National Sea Clammers*, 453 U.S. at 25 (Stevens, J., concurring in part and dissenting in part).

173. Private rights of action, it was believed, would augment agency resources, correct agencies' failures to regulate, and protect statutory beneficiaries. See *Borak*, 377 U.S. at 432-33; Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1214-15, 1226-28, 1289-90, 1313, 1315 (1982) (summarizing arguments of supporters of implied private rights of action); see also *Allen v. State Bd. of Elections*, 393 U.S. 544, 556-57 (1969) (private litigants may seek relief under section 5 of Voting Rights Act of 1965). See generally Noyes, *Implied Rights of Action and the Use and Misuse of Precedent*, 56 U. CIN. L. REV. 145, 147 n.12 (1987) (citing numerous articles concerning private rights of action).

174. See, e.g., *National Sea Clammers*, 453 U.S. at 14-15, 18 (federal courts not authorized to ignore congressional judgments on appropriate nature and extent of statutory enforcement); *Touche Ross*, 442 U.S. at 578 (The issue whether a statute creates private enforcement rights is solely “one of congressional intent, not . . . whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law.”); see also O'Reilly, *Deregulation and Private Causes of Action: Second Bites at the Apple*, 28 WM. & MARY L. REV. 235, 261 (1987) (marginal benefits from private rights of action offset by high cost of less predictable regulatory outcomes). See generally Stewart & Sunstein, *supra* note 173, at 1199, 1207-12, 1218, 1221, 1290-93, 1301-02, 1317 (summarizing arguments of critics of implied private rights of action).

tive implementation approach increases such deference in order to maximize agency flexibility and executive autonomy.

a. *Statutory interpretation.* In *Chevron U.S.A. Inc. v. NRDC*, the Court announced a new two-part test for judicial review of administrative agencies' statutory interpretations.<sup>175</sup> Under *Chevron* a court must first inquire, by "employing traditional tools of statutory construction,"<sup>176</sup> whether "Congress has directly spoken to the precise question at issue."<sup>177</sup> If it has, the court must simply "give effect to the unambiguously expressed intent of Congress," regardless of the agency's views.<sup>178</sup> If not, the court must determine whether the agency's interpretation "is based on a permissible construction of the statute."<sup>179</sup> If it is, the court has no choice but to defer to that interpretation.<sup>180</sup>

*Chevron* created the same general approach for judicial review of rulemaking that the Court has long followed for judicial review of adjudication.<sup>181</sup> The *Chevron* framework, however, contains two subtle, but

175. 467 U.S. 837 (1984) (upholding validity of EPA regulation interpreting term "stationary source" under CAA).

176. *Id.* at 843 n.9.

177. *Id.* at 842.

178. *Id.* at 843.

179. *Id.*

180. In *Chevron*, the Court accepted the EPA's conclusion that Congress did not have a specific intention concerning whether the owner of a plant could alter a source of air pollution without obtaining an operation and construction permit as long as the alteration would not result in a net increase in pollution emissions from the entire plant. *Id.* at 857-58. Accordingly, the Court resolved the case under the second prong of the two-part test. The definition of a "stationary source" in this context required the EPA to reconcile Congress's desire to clean up the nation's air with its concern that pollution control measures not prevent reasonable economic growth. *See id.* at 863. Because the agency's interpretation of the statute reflected "a reasonable accommodation of manifestly competing interests," it was "entitled to deference." *Id.* at 865.

181. When courts review agency adjudication, if Congress's intent is clear, the issue is a pure question of law, appropriate for judicial resolution without resort to the agency's views. *See Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947) (affirming judicial enforcement of NLRB order requiring employer to bargain with union); *see also NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951) (definition of "union" is issue of law; thus, NLRB decision is open to judicial inquiry). When Congress's intent is not clear, the issue becomes a mixed question of fact and law, and courts must defer to the agency's views. *See NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

Under *Chevron*, the inquiry whether the statute at issue is clear, which involves "traditional tools of statutory construction," *see, e.g., Chevron*, 467 U.S. at 843 n.9; *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 113 (D.C. Cir. 1987), is a pure question of law on which no deference to the agency's views is necessary or appropriate. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-44 (1987); *Union of Concerned Scientists*, 824 F.2d at 113. *But see Cardoza-Fonseca*, 480 U.S. at 452-55 (Scalia, J., concurring). If, owing to congressional silence or ambiguity on the precise issue, the statute is not deemed clear, then the agency's interpretation will involve either (1) resolution of a mixed question of fact and law, or (2) application of broader statutory purposes to resolve a question that the legislature never envisioned or chose to ignore. In either case, the court must defer to the agency's views in resolving the question. *See Chevron*, 467 U.S. at 843-45, 865-66 (courts must defer to agencies' resolution of conflicting statutory policies within realm of agencies' expertise); *Cardoza-*

important departures from traditional principles of judicial review; these changes have reduced judicial control of agency discretion in the rulemaking context.

First, *Chevron* effectively creates a presumption of statutory ambiguity—a presumption that is difficult to rebut.<sup>182</sup> A case satisfies the first part of the *Chevron* test only if Congress's intent is "unambiguously" clear.<sup>183</sup> As a result, a court can treat a question of statutory interpretation as a pure question of law, resolvable without reference to the agency's views, only if there is no ambiguity involved.<sup>184</sup> Since few statutes are absolutely clear, courts will likely move to the second part of the *Chevron* test in most cases.<sup>185</sup>

Second, if a court decides that Congress's intent is unclear, and that the case must therefore be decided under *Chevron*'s second step, it will be more difficult to convince the court that the agency's interpretation is impermissible.<sup>186</sup> More than three years after *Chevron*, the Court "has

*Fonseca*, 480 U.S. at 448 (courts must defer to agencies' case-by-case application of ambiguous statutory terms to different factual situations, a process that agencies must perform to fill legislative gaps).

182. Professor Sunstein has described *Chevron* as placing "a thumb on the scales in favor of the agency." *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 371 (1987) (Panel Discussion) [hereinafter *Judicial Review*] (remarks of Prof. Sunstein).

183. See, e.g., *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 129 (1985); *Chevron*, 467 U.S. at 843.

184. *Judicial Review*, *supra* note 182, at 360 (remarks of Judge Starr); see, e.g., *Young v. Community Nutrition Inst.*, 476 U.S. 974, 980-81 (1986) (federal Food, Drug, and Cosmetic Act found ambiguous; FDA's interpretation "sufficiently rational to preclude a court from substituting its judgment for that of the FDA").

185. In cases citing *Chevron*, the Court has found about twice as many statutes ambiguous as unambiguous. For cases ruling statutes ambiguous, see *Lukhard v. Reed*, 107 S. Ct. 1807, 1814 (1987); *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 425 (1987); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403 (1987); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 233 (1986); *Atkins v. Rivera*, 477 U.S. 154, 167 (1986); *Young*, 476 U.S. at 980; *United States v. City of Fulton*, 475 U.S. 657, 667 (1986); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985); *Cornelius v. Nutt*, 472 U.S. 648, 657 (1985); *Connecticut Dep't of Income Maint. v. Heckler*, 471 U.S. 524, 530 (1985); *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. at 129; *United States v. Boyle*, 469 U.S. 241, 246 n.4 (1985).

For cases ruling statutes not ambiguous, see *Amoco Prods. Co. v. Village of Gambell*, 107 S. Ct. 1396, 1409 (1987); *Cardoza-Fonseca*, 480 U.S. at 446-48; *CFTC v. Schor*, 478 U.S. 833, 841-43 (1986); *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 431 (1986); *Board of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986); *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 666 (1985); *Securities Indus. Ass'n v. Federal Reserve Sys.*, 468 U.S. 137, 150-51 (1984).

186. The core of the *Chevron* opinion is the Court's lecture to the courts of appeals to refrain from second-guessing legitimate policy choices made by agencies charged with implementing statutes. See *Chevron*, 467 U.S. at 865-66; see also *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 540-41 (1981) ("The judicial function does not extend to substantive revision of regulatory policy. That function lies elsewhere—in Congressional and Executive oversight or amendatory legislation.") (quoting *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 663 (1980) (Burger, C.J., concurring)).

[never] cast a vote against an agency under *Chevron* Step Two."<sup>187</sup> The *Chevron* test compels this result. The second step requires a court to determine whether an agency's decision reflects a permissible construction of the statute at issue. Since a court applying step two will already have found under step one that Congress has expressed no specific intent on the particular issue, the court can implement step two only by comparing the agency's decision to Congress's general intent in passing the statute. Before *Chevron*, when statutes were vague or ambiguous, courts would also compare the agency's decision to Congress's general intent, but considered the inquiry a purely legal one and thus accorded the agency no deference.<sup>188</sup> Under *Chevron*, courts perform the same function as before, but must defer to the agency's interpretation.<sup>189</sup>

Because *Chevron* represents a new approach to statutory interpretation, the Court has not yet determined how much deference *Chevron* requires. The Court has given conflicting signals regarding when a court

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187. *Judicial Review*, *supra* note 182, at 366 (remarks of Judge Starr); see *Lukhard*, 107 S. Ct. at 1816; *Wright* 479 U.S. at 431-32; *Clarke*, 479 U.S. at 409; *Schor*, 478 U.S. at 841-43; *American Cetacean Soc'y*, 478 U.S. at 239-40; *Atkins*, 477 U.S. at 162; *Young* 476 U.S. at 981; *City of Fulton*, 475 U.S. at 668; *Riverside Bayview Homes*, 474 U.S. at 134; *Cornelius*, 472 U.S. at 662; *Connecticut Dep't of Income Maint. v. Heckler*, 471 U.S. at 538; *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. at 129-30.

188. See, e.g., *NLRB v. Brown*, 380 U.S. 278, 292 (1965) (NLRB's ruling that National Labor Relations Act prohibited lockout of members of striking union overturned because court interpreted Act differently). The Warren Court warned that "[t]he deference owed to an [agency's] expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965); see also *Wilderness Soc'y v. Morton*, 479 F.2d 842, 865-66 (D.C. Cir. 1973) (court will not defer to agency interpretations of statutes unless good reasons for deference exist), *cert. denied*, 411 U.S. 917 (1973). Even in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), when the Court generally deferred to agency resolutions of mixed questions of fact and law, the Court performed its own analysis of statutory purposes and inquired whether the agency's definition of the statutory term "employees" was consistent with those purposes. See *id.* at 123-29.

189. Justice Scalia interprets the first branch of *Chevron* as an even more significant departure from traditional principles of judicial review. In *Cardoza-Fonseca*, 480 U.S. at 453-55, (Scalia, J., concurring) (reviewing INS's interpretation of its authority to grant asylum to aliens), Justice Scalia disputed the majority's position that "courts may substitute their interpretation of a statute for that of an agency whenever, '[e]mploying traditional tools of statutory construction,' they are able to reach a conclusion as to the proper interpretation of the statute." *Id.* at 454 (quoting *id.* at 442 (majority opinion)). Since the Court has indicated that courts must use these "traditional tools" in determining whether a statutory interpretation case is governed by step one or step two of *Chevron*, 467 U.S. at 843 n.9, Justice Scalia must be arguing that courts must defer to the agencies even on the question whether a statutory provision is clear. This reading of Justice Scalia's opinion is borne out by his insistence that the *Chevron* Court drew no distinction between pure questions of law (which include the question whether a statute is clear) and mixed questions of law and fact, and that judicial deference is just as necessary in resolving the former kinds of questions as the latter. See 480 U.S. at 454-55 (Scalia, J., concurring). The majority in *Cardoza-Fonseca*, however, seems to have rejected Justice Scalia's position. Justice Stevens described INS's argument that its interpretation deserved deference as "misconstru[ing] the federal courts' role in reviewing an agency's statutory construction." *Id.* at 443.

should move to step two of the analysis. In some cases, the Court asks whether Congress has directly and unambiguously addressed the precise question at issue.<sup>190</sup> In others, it inquires only whether Congress has expressed an "intent" on the question in general.<sup>191</sup> Under the first interpretation, a court would move to step two if there is any ambiguity concerning legislative intent. Under the second interpretation, a court would move to step two if it could not resolve any ambiguity by employing traditional tools of statutory construction. The first approach would result in greater deference to agencies' statutory interpretation, by making it more likely that a court would move to step two of *Chevron*.<sup>192</sup> Moreover, the Court has not fully identified what factors courts should take into account in applying step two.<sup>193</sup> For example, the Court has not indicated how much weight courts should give traditional factors that pre-*Chevron* decisions considered as weighing for or against defer-

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190. See, e.g., *Young*, 476 U.S. at 974. In *Young*, the FDA asserted that 21 U.S.C. § 346 (1982) was ambiguous because it contained a dangling participle. 476 U.S. at 979. The court of appeals rejected the FDA's claim and decided that the statute was unambiguous under step one of *Chevron*. Although the Court admitted that the court of appeals' reading "may seem to be the more natural interpretation," it made no attempt to develop its own interpretation of the statute by resorting to the legislative history or other methods of interpretation. *Id.* at 980-81. Instead, it agreed that the dangling participle created an ambiguity, and, having identified an ambiguity, moved immediately to step two of *Chevron*. *Id.* at 981.

191. See, e.g., *NLRB v. United Food and Commercial Workers Union, Local 23*, 108 S. Ct. 413, 421 (1987) ("On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.'").

192. The lower federal courts have expressed considerable confusion concerning step one. Judge Edwards contends that courts should resolve a question of statutory interpretation under the first step of *Chevron* as a pure question of law, even if "the provision at issue admits of some ambiguity," unless the court cannot discern congressional intent after employing traditional tools of statutory construction. *International Union, UAW v. Brock*, 816 F.2d 761, 765 n.5 (D.C. Cir. 1987). On the other hand, Judge Mikva, relying on *Cardoza-Fonseca*, 480 U.S. at 421, interprets *Chevron* as requiring a court to move to step two only if the issue is one of mixed law and fact. If the issue is a pure legal question, an agency is not entitled to deference, even if congressional intent is unclear. *American Mining Congress v. EPA*, 824 F.2d 1177, 1183 n.5 (D.C. Cir. 1987); *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 113 (D.C. Cir. 1987). But see *id.* at 121 (Williams, J., concurring) (protesting Judge Mikva's "unceremonious[ ] dumping [of] our rule of deference to reasonable agency interpretations in areas of statutory ambiguity").

193. *Chevron* merely provided examples of the factors to be considered: the complexity and technical nature of the regulatory scheme, whether the agency considered the matter in a detailed and reasonable fashion, and whether the interpretation involved reconciling conflicting policies. 467 U.S. at 865. *Chevron* also indicated that the substantive reasonableness of the program in question was a factor. *Id.* at 845 (issue under step two is whether the "Administrator's view that [the interpretation or regulation] is appropriate in the context of this particular program is a reasonable one"). In other cases, the Court has under step two considered whether the agency had relevant expertise, see, e.g., *Bowen v. American Hosp. Ass'n*, 476 U.S. 618, 643 n.30 (1986) (suggesting that deference accorded EPA's interpretation in *Chevron* was "predicated on expertise"); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985), and whether the agency properly considered the factors that it should have considered, see, e.g., *Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys.*, 468 U.S. 137, 143-44 (1984).

ence to agencies' interpretations.<sup>194</sup> The range of factors that a court can consider plays a major role in determining how much deference an agency's statutory interpretation will receive.

While *Chevron's* effect is not yet fully known, it seems clear that the Court has adopted the executive implementation approach by substantially narrowing the instances in which a court should refuse to defer to an agency's interpretation of a statute,<sup>195</sup> and that the Court has done so to maximize agency flexibility and autonomy. *Chevron* amounts to a rejection of the checks and balances approach, which considers independent review of an agency's interpretation necessary to ensure that the agency's actions are consistent with legislative intent.

*b. Statutory implementation.* The Court has rejected its earlier approach to statutory implementation as well. Under that approach, once a court determined a statute's meaning, it vigorously applied the statute to the facts at issue, according little deference to agency decision-making. In a 1971 decision, *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Court signaled a willingness to scrutinize carefully how agencies applied statutes in particular factual contexts.<sup>196</sup> Prompted by *Overton Park*, lower federal courts used this new, heightened scope of judicial review in a variety of ways, which became known collectively as the "hard look doctrine."<sup>197</sup>

Although the Court has retained some elements of the hard look doctrine, in recent years it has applied the doctrine in a more restrained

194. These factors would include "whether the agency's interpretation was adopted contemporaneously with the enactment of the statute; whether the Congress had rejected measures to modify the agency's interpretation . . . ; and whether the agency's interpretation was a consistent and longstanding one or whether the agency ha[s] vacillated in its interpretation." Hochberg, *Two-Step Method of Analysis: Still in Transition After Chevron*, Nat'l L.J., May 16, 1988, at 26, col. 3.

195. See *Chevron*, 467 U.S. at 844.

196. 401 U.S. 402, 415 (1971) (stating that "the generally applicable standards of [5 U.S.C.] § 706 require the reviewing court to engage in a substantial inquiry" and that, while an agency's action enjoyed a presumption of regularity, that presumption would not "shield [agency] action from a thorough, probing, in-depth review").

197. The task, said some courts, was to ensure that the agency had engaged in "reasoned decisionmaking." *E.g.*, *American Meat Inst. v. EPA*, 526 F.2d 442, 453 (7th Cir. 1975) (citing *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 434 (D.C. Cir. 1973), *cert. denied sub nom. Appalachian Power Co. v. EPA*, 416 U.S. 969 (1974)); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). Others referred to the courts' obligation to inspect agency decisions pursuant to "a more searching standard" or "a more penetrating inquiry." *E.g.*, *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973). The "hard look" label originated in a case in which Judge Leventhal described hard look review as judicial review of agency reasoning "with vigilance." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); see *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 597-98 (D.C. Cir. 1971); see also Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511 (1974).

fashion. In *Baltimore Gas & Electric Co. v. NRDC*, the Court gave extreme deference to an NRC decision that storage of nuclear wastes would not pose a serious long-term environmental hazard. It noted that when an agency "is making predictions, within its area of special expertise, at the frontiers of science . . . [the judiciary] must generally be . . . 'most deferential'."<sup>198</sup> In *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*,<sup>199</sup> the Court afforded less deference to a decision by the National Highway Traffic Safety Administration (NHTSA) to revoke a regulation that would have required automatic seatbelts or airbags in every passenger automobile.<sup>200</sup> The Court established guidelines for hard look review that limited the scope of such review. It stated that an agency rule is

arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>201</sup>

The Court emphasized that it intended hard look review to be deferential, and, calling its scope of review "narrow," the Court indicated that it would not "substitute its judgment for that of the agency"<sup>202</sup> and would "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."<sup>203</sup>

### C. *The Merits of Judicial Review.*

The Supreme Court has reversed much of its prior judicial activism. Area by area, it has abandoned, or at least reduced, judicial control of administrative discretion. Those who support the Court's movement toward restraint-oriented review argue that such review is superior to judicial activism both as a normative and as an instrumental matter. Although these arguments deserve serious consideration, they do not justify several aspects of executive implementation review.

Supporters of judicial restraint argue as a normative matter that because agencies are more politically accountable than federal judges, deference to agency decisions promotes a more democratic system of

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198. 462 U.S. 87, 103 (1983).

199. 463 U.S. 29 (1983).

200. *Id.* at 43-46.

201. *Id.* at 43.

202. *Id.*

203. *Id.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

decisionmaking.<sup>204</sup> Some carry this argument one step further, arguing for the outright elimination of judicial review in some contexts. Justice Scalia, for example, supports a restrictive interpretation of standing because such an interpretation would increase agencies' political discretion.<sup>205</sup>

These arguments contain three fallacies. Supporters of restraint erroneously assume, first, that if the representative branches decide a matter, the decision will be democratic; second, that applying the same scope of review to legislative and administrative decisions will satisfy the principle of separation of powers; and third, that the arguments for restraint-oriented review also justify a narrow conception of jurisdiction.

Commentators who favor judicial restraint stress that agencies are more politically accountable than federal judges because the political system can influence agency decisions. The goal of activist review, however, is not to give the power to make policy decisions, which are inherently political, to unelected judges. The checks and balances approach to judicial review allows courts to determine whether agencies' policy decisions are consistent with legislative intent.<sup>206</sup> This serves a democratic purpose, because the other branches of government often fail to ensure an agency's compliance with legislative objectives. Agencies do respond to legislative oversight, but that oversight is usually unsystematic and superficial.<sup>207</sup> Further, although agencies are subject to supervision by the Office of Management and Budget (OMB), OMB may seek to implement policies that contradict congressional goals. In any case, since presidential oversight is normally carried out by unelected bureaucrats whom the President does not directly supervise, OMB's actions present the same

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204. See, e.g., Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 520-21 (1985). Supporters of judicial restraint applaud *Chevron* because it requires deference to an agency's statutory interpretation, *id.* at 505-06, and criticize *State Farm* because it requires heightened scrutiny of an agency's policy decisions. See, e.g., Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 472 (1986) (requiring agencies to prove deliberate decisionmaking "is nothing less than a hymn to substantive economic due process"). But see Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372-94 (1986) (arguing that while *Chevron* gives too much deference to agencies, *State Farm* gives too little).

205. See Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881, 889 (1983); Scalia, *Rulemaking As Politics*, 34 ADMIN. L. REV. v, v-vi (1982) (agency decisions should reflect "manifestations of the popular will through the political process" and not agencies' interpretation of "goals no more specific than 'the public interest, convenience, and necessity'" as interpreted by "some isolated think-tank without regard to what the public wants").

206. See *supra* note 188 and accompanying text.

207. Pierce & Shapiro, *supra* note 19, at 1200-03; see also Levin, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith*, 1986 DUKE L.J. 258, 272-73; McGarity & Shapiro, *supra* note 53, at 159 (while Congress has closely monitored EPA, from 1982 to 1987, Senate has conducted only two oversight hearings concerning OSHA's failure to regulate).

accountability problem as decisions by unelected administrators.<sup>208</sup>

Once one thinks of judicial review as a way to compensate for limitations in the other branches' performance, it becomes clear that the debate over the function of judicial review is not about whether courts should make policy decisions. It is about the degree of deference that courts ought to afford an agency's decisions. Over-deferential judicial review can leave agencies free to ignore legislative policy.<sup>209</sup> At the same time, review can become so nondeferential that judges substitute their policy preferences for the agencies'. The difficult problem facing courts that review agency decisions is how to find a middle ground between those two undesirable alternatives.

Those who would cut back judicial review also believe that the principle of separation of powers demands highly deferential review.<sup>210</sup> *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.* rejected this argument precisely because agencies are not Congress and are not entitled to the presumption of correctness that Congress enjoys.<sup>211</sup> Because agencies are not directly subject to the same checks and balances as an elected Congress, judicial review of agency decisions cannot be as deferential. Courts must apply stricter scrutiny to the decisions of nonelected officials.<sup>212</sup>

Some might object, however, that *State Farm's* application of heightened scrutiny to agencies' policy decisions conflicts with *Chevron's*

208. See Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064 (1986); Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 456-59 (1987).

209. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 75 (1985); see "Judicial Review of Informal Rulemaking." Address by Clark Byse, ABA Section of Administrative Law (Oct. 10, 1980), quoted in S. BREYER & R. STEWART, *supra* note 130, at 273 ("If our independent judiciary is to perform this role of keeping the agency within its statutory limits, surely the court—not the agency—must decide what the statute means. . . . [A]ccepting the view of one of the litigants concerning the meaning of the statute so long as the meaning is not irrational or unreasonable, is, it seems to me, an abdication of judicial responsibility.").

210. See, e.g., Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427, 430; Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 300-01 (1986).

211. In *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983), the Court rejected the argument that the "arbitrary and capricious" standard of review is equivalent to the rational relation test applied to statutes: "We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate." See *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 627 (1986) (plurality opinion) (*State Farm* rejected application of the minimum rationality test because the "recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision . . .").

212. See Shapiro & Levy, *supra* note 30, at 429 (courts promote democratic values by "recognizing that legislators and agency bureaucrats occupy different positions in our scheme of government and therefore must be treated differently for purposes of judicial review").

requirement of considerable deference to agencies' legal conclusions.<sup>213</sup> Supporters of judicial restraint would modify *State Farm* to require deference to agencies' statutory implementation.<sup>214</sup> But it is *Chevron*, not *State Farm*, that requires modification. When construed to require extreme deference to an agency's statutory interpretation,<sup>215</sup> *Chevron* gives administrators the power to decide the scope of their own authority. Allowing such a practice violates the idea of separation of powers.<sup>216</sup>

Finally, interpreting standing doctrine restrictively to bring about judicial deference is also inappropriate. Unless persons adversely affected by an agency's decision have standing to seek review, the decision may go unchallenged. In such circumstances, courts have no opportunity to examine the decision for consistency with the substantive and procedural limitations that Congress has imposed on the agency.<sup>217</sup> Proponents of restrictive standing respond that statutory beneficiaries can always take their complaints to the political system,<sup>218</sup> but that system often ignores such complaints.<sup>219</sup> In sum, restrictive standing clashes with the legitimating principle of agency government—that agencies operate according to legislative intent.<sup>220</sup>

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213. See, e.g., Breyer, *supra* note 204, at 397 (*State Farm* and *Chevron* produce anomaly because courts required to defer to agency's legal decisions, but not to its factual ones); Shapiro, *supra* note 204, at 478-79 (aggressive judicial review of policy choices inconsistent with deferential review of agency interpretations of law).

Professor Strauss suggests that *Chevron* and *State Farm* are complementary if one thinks of Supreme Court review as a management function. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1130 (1987). He explains that because deference to an agency's statutory interpretation is likely to produce nationwide uniformity in the administration of statutes, *Chevron* reduces the need for the Court to use its scarce resources to police circuit court decisions for accuracy. *Id.* at 1121. In contrast, the legal effect of remand under *State Farm* is limited to the particular proceeding at issue; *State Farm* remands thus cannot generate the kind of conflict among the circuit courts produced by disagreements over statutory interpretation. *Id.* at 1131. These facts notwithstanding, Professor Strauss is uncomfortable with the degree of deference created by *Chevron* and generally supports the approach indicated in *State Farm*. *Id.* at 1131-35. Professor Strauss' insight, however, does suggest that our proposal that Congress modify *Chevron* might create a management problem for the Supreme Court.

214. See, e.g., Shapiro, *supra* note 204, at 478-79.

215. See *supra* note 189 and accompanying text.

216. Sunstein, *supra* note 208, at 467.

217. See *supra* notes 154-55 and accompanying text.

218. See *supra* note 205.

219. See T. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* 85-97 (1969) (government policy decisions will favor the few persons represented in policymaking process by interest groups and disfavor the many who are not); M. OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 125-31 (2d ed. 1971) (groups will not be formed to represent all citizens affected by public policy decisions).

220. See Winter, *supra* note 150, at 1513. Winter argues that the current, narrow conceptions of standing are inconsistent with democratic principles of self-governance in that "the Court inevitably decides what rights citizens have to demand that government behave according to the general will.

Yet, even if supporters of judicial restraint acknowledge the democratic shortcomings of agency government, they oppose checks and balances review on instrumental grounds. They argue that activist review impedes the formulation of good public policy in two ways. First, they say, courts are prone to demand a higher degree of rationality from agencies than is necessary or appropriate for making public policy decisions. Second, the critics of judicial activism assert, judges tend to replace agencies' viewpoints about what constitutes appropriate public policy with their own.

Supporters of judicial restraint consider the heightened scrutiny mandated by *State Farm* a mistake. They claim that the courts are likely to confuse the "fits, starts, and reversals of real decision-making" with "the fumbblings of an incompetent or misguided administrator."<sup>221</sup> Moreover, in their view, courts may not appreciate an agency's need to make decisions under conditions of uncertainty, may misunderstand the technical information contained in an agency record, or may fail to realize that an agency has compromised in a way that is difficult to explain logically.<sup>222</sup>

Even if these dislocations occur, they do not justify eliminating *State Farm*. In our system, agencies may respond to political influence, as long as their decisions comport with applicable statutory constraints. When a statute expresses those constraints in broad and vague terms, *State Farm* allows courts to determine whether the agency is acting in a manner authorized by Congress under the statute. If the agency cannot articulate a policy that justifies its action or demonstrate the consistency of its action with existing agency policy, Congress has not authorized the action.<sup>223</sup> Instead of eliminating *State Farm*, a more promising response to the difficulties created by judicially imposed rationality requirements is to vary the intensity of review depending on the nature of the agency

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Yet, the Court does so without accounting to the public for its reasoning. This system is more undemocratic than adjudicative norm-making; it takes control of government out of the hands of government's constituents." *Id.*

221. Mashaw & Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 294 (1987). These critics also argue that *State Farm* is self-defeating because administrators will prepare elaborate rational-analytical accounts of their decisions in an effort to withstand judicial review rather than to reveal the agency's real process of decision. *See, e.g., id.* at 294; Shapiro, *supra* note 204, at 478.

222. Breyer, *supra* note 204, at 389; DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399, 441-44 (1986).

223. Levin, *supra* note 207, at 271; Shapiro & Levy, *supra* note 30, at 428-30; Sunstein, *supra* note 208, at 471, 473; *cf.* Strauss, *supra* note 213, at 1133 (Denying the appropriateness of a court's role in requiring an agency to articulate a policy reason for its actions results in "an impoverished judicial role, indeed.").

decisionmaking at issue.<sup>224</sup>

Furthermore, when supporters of judicial restraint argue that *State Farm* ignores the reality of administrative decisionmaking, they overlook the similar problems created by *Chevron*. *Chevron*'s attempt to reduce statutory interpretation to a simple verbal formula ignores the reality that statutory interpretation involves many different statutes and applications of those statutes to different substantive problems in different legal postures that statutory beneficiaries raise in seeking judicial review.<sup>225</sup> Unless courts take these differences into account, they will reach counterproductive or senseless results.<sup>226</sup> The Supreme Court appears to have recognized this problem; indeed, it sometimes interprets *Chevron* to require a more complex inquiry into the appropriateness of deferring to an agency's interpretation.<sup>227</sup>

Even if supporters of judicial restraint admit the problems with executive implementation review, they contend that whenever courts engage in less deferential review, judges will inevitably imbue their decisions with their own policy preferences.<sup>228</sup> However, the evidence concerning the judges' failure to defer to agency decisions is mixed. Courts affirm almost ninety percent of agency decisions, and *State Farm* has not changed this overall affirmance rate.<sup>229</sup> Nevertheless, any administrative law commentator can point out numerous instances of judicial overreaching.<sup>230</sup> In the most recent year measured, the D.C. Circuit,

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224. See, e.g., Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 431-33 (1981) (rationality test should be applied in stable regulatory environments, when small errors in policy can cause catastrophic harm, and in policy regimes that involve egregious and irredeemable misallocations of political power); Pierce, *supra* note 204, at 525 (decisions by agencies under direct supervision of President should receive greater deference). But see Murchison, *Moments of Silence in Administrative Law: Notes on Judicial Method in the Deregulation Cases*, 60 TUL. L. REV. 697, 746-49 (1986) (criticizing judges who vary intensity of review based on political environment in which agency operates).

225. Breyer, *supra* note 204, at 373.

226. *Id.*; Sunstein, *supra* note 208, at 466.

227. Note, *Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC*, 87 COLUM. L. REV. 986, 999 n.104 (1987) (citing Supreme Court cases that have invalidated agency interpretations of statutes without relying on *Chevron*).

228. See, e.g., Shapiro, *supra* note 204, at 478 (judges applying rationality tests "have tended to confuse their own policy preferences with deliberative truth").

229. Shapiro & Levy, *supra* note 30, at 438 n.242 (citing rates of reversal in 1982-1986 Annual Reports of the Director of the Administrative Office of the United States Courts); see also Cass, *Looking With One Eye Closed: The Twilight of Administrative Law*, 1986 DUKE L.J. 238, 254 (courts affirm "overwhelming majority" of administrative decisions they review); McGowan, *A Reply to Judicialization*, 1986 DUKE L.J. 217, 235 (indicating little evidence that courts have used *State Farm* to reverse agency decisions at higher rate than normal).

230. See, e.g., McGarity & Shapiro, *supra* note 114, at 1082-83 (criticizing Forging Indus. Ass'n v. Secretary of Labor, 748 F.2d 210 (4th Cir. 1984), *rev'd en banc*, 773 F.2d 1436 (4th Cir. 1985) (reversal for failure to give any deference to OSHA policy decision)); Schroeder & Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation, and Information*, 72 GEO. L.J.

which hears one-quarter of all appeals from agency decisions, affirmed agencies only thirty percent of the time.<sup>231</sup> In addition, the composition of panels in the D.C. Circuit tends to determine the outcome in concrete cases.<sup>232</sup> Judges appointed by Democratic presidents are more likely to reverse agency policies at the behest of individuals,<sup>233</sup> while judges appointed by Republican presidents are more likely to reverse agency policies challenged by business interests.<sup>234</sup> Commentators assert that this pattern shows how judges use activist techniques to serve ideological purposes.<sup>235</sup>

The state of affairs in the D.C. Circuit is disquieting, but it does not justify rejecting an activist approach to judicial review. The D.C. Circuit often fails to give *any* deference to agencies. In contrast, activist review, when properly applied, is deferential. *Chevron's* two-step test is in principle unobjectionable; the problem is that courts sometimes interpret *Chevron* in ways that cause them to ignore relevant legislative intent. In such cases, reviewing courts fail to enforce applicable legislative restraints; as a result, the agencies determine their own power to act. Activist review would interpret *Chevron* to require a more complex inquiry into the appropriateness of deferring to an agency's interpretation. Activist review would not, however, give courts a license to find legislative intent where none exists.

In addition, the Court in *State Farm* stressed that a court should remand an agency decision only if the agency has committed a fundamental error in its reasoning process.<sup>236</sup> D.C. Circuit judges, and to a lesser extent, judges in the other circuits, sometimes seize on inconsequential defects in an agency's reasoning process as a reason for remanding a case to the agency.<sup>237</sup> This probably occurs because the Supreme Court has sent confusing signals about the degree of scrutiny that *State Farm* requires.<sup>238</sup> The Court can resolve this confusion by overruling

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1231, 1261 n.260 (1984) (criticizing *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) (plurality opinion), for misunderstanding nature of risk assessment).

231. Pierce, *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 304-05 (1987 data).

232. *See id.* at 306-07.

233. *Id.* at 302.

234. *Id.* at 302, 305.

235. *See, e.g., id.* at 304-07.

236. *See Levin, supra* note 207, at 265 (*State Farm* is intended to "intercept the most blatantly irrational agency decisions—ones that fail to display even minimal regard for facts, logic, agency precedent, etc."); *supra* notes 199-203 and accompanying text.

237. *See Pierce, supra* note 231, at 304-06.

238. The *State Farm* Court found NHTSA's rescission of a regulation requiring manufacturers to install passive restraints—either airbags or automatic seatbelts—arbitrary and capricious because the agency failed to consider amending the regulation to require only airbags, even though it acknowledged that their presence in automobiles would save many lives. 463 U.S. 28, 48-49 (1983).

circuit court opinions that fail to apply *State Farm* according to its limits.<sup>239</sup>

Critics think it "idealistic" to believe courts can perform activist review in a manner that would prevent judges from being influenced by their policy preferences.<sup>240</sup> If judges will inevitably manipulate activist doctrines in order to implement their own policy preferences, the only choice may be to abandon *State Farm*.<sup>241</sup> But the fault may not lie with activist review. Judges driven to implement their policy preferences can manipulate restraint-oriented doctrines to the same end.<sup>242</sup> Moreover, whether or not activist doctrines are used, the amount of deference judges will accord agency decisions will vary with judicial perceptions about the nature of a problem and an agency's degree of expertise.<sup>243</sup> Inevitably, these perceptions are influenced by a judge's ideology.<sup>244</sup>

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This conclusion is consistent with the Court's statement that it will remand a case only when an agency's reasoning process shows a fundamental flaw. *Id.* at 42. An alternate holding, however, reflects less deference to NHTSA. The Court also rejected NHTSA's conclusion that evidence of safety benefits from automatic seatbelts was too inconclusive to support the regulation. *Id.* at 52. To reach this conclusion, the Court engaged in an in-depth analysis of the reasoning offered by NHTSA. *Id.* at 52-56. Thus, the Court appears to have rejected its own admonition in *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983), that courts should defer to an agency that is making a decision "within its area of special expertise, at the frontiers of science." For a possible way to reconcile *State Farm* and *Baltimore Gas & Electric*, see Shapiro & Levy, *supra* note 30, at 432 n.215.

239. See *supra* notes 200-03 and accompanying text.

240. See, e.g., Shapiro, *supra* note 204, at 470; Smith, *supra* note 210, at 454.

241. Cf. Strauss, *supra* note 213, at 1134 ("It may indeed be that agency inaction is the price of hard-look review, and a higher one than we should choose to pay.").

242. See Levy & Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. — (forthcoming, 1989) (arguing that ideas of judicial restraint have not prevented Supreme Court from pursuing a pro-development environmental policy).

243. See Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833, 1833 (1978) ("I believe that, in practice, the reviewing standards courts apply often reflect unarticulated assumptions about, or attitudes toward, the substantive aspects of the subject matter being reviewed."); Cass, *supra* note 229, at 252-56; Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 224 ("I am not bothered overmuch by the undoubted truth that a reviewing court is more likely to take a charitable view toward error in subsidiary findings when it sympathizes with the agency's end result, than when it does not."); Shapiro & Levy, *supra* note 30, at 439; cf. Posner, *What Am I? A Potted Plant? The Case Against Strict Constructionism*, NEW REPUBLIC, Sept. 28, 1987, at 23 ("At no time have the courts behaved consistently with the idea that there is a political sphere, where the people rule, and there is a domain of fixed rights, administered but not created or altered by judges.").

244. Spaeth & Teger, *Activism and Restraint: A Cloak for the Justices' Policy Preferences*, in SUPREME COURT ACTIVISM AND RESTRAINT 277, 296-97 (S. Halpern & C. Lamb eds. 1982) (statistical study reveals that Supreme Court Justices are inconsistent in application of restraint and activism depending on issue in each case and identity of the parties); see Note, *All The President's Men?: A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766, 789 (1987) (statistical analysis indicates that Republican judicial appointees take liberal side in 36% of civil cases and Democratic judicial appointees take liberal side in 63% of civil cases); Karpay, *Bork or No Bork, GOP Bloc a Force on D.C. Circuit*, Legal Times, Jan. 18, 1988, at 10 (statistics indicate that when Republican and Democratic D.C. Circuit judges disagree, they tend to vote with

One final problem caused by the adoption of executive implementation review relates to Congress's adoption of alternative models of delegation. If Congress becomes fully aware of the Court's shift to executive implementation review,<sup>245</sup> it may conclude that the only way to limit agency discretion is to abandon the discretionary model of delegated power, since the courts will no longer actively ensure that agencies adhere to congressional intent. On the surface, then, executive implementation review seems well-designed to create incentives for desirable legislative changes, such as adopting more detailed statutes. But, as already demonstrated,<sup>246</sup> the alternative models will not always provide appropriate solutions to the problem of administrative discretion. If the Supreme Court continues to favor executive implementation review, Congress may feel compelled to resort to the alternative models even when those models are clearly ill-advised (such as when Congress lacks the expertise to fashion detailed legislation). Congress may feel that the only, and unacceptable, alternative to the new models is delegating uncontrollable discretion to the agency.

Congress need not allow the Court to paint it into such a corner. Instead, Congress can, through a series of statutory amendments, force the courts to readopt some elements of checks and balances review. This selective reinvigoration of checks and balances review will leave Congress with a full set of options. Congress can resort to one of the alternative models when appropriate, while employing discretionary delegations when the alternative models seem ill-advised. By reestablishing some of the components of checks and balances review, Congress can feel confident that the courts will apply constraints to agency discretion when

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other judges of their party affiliation). *But cf. id.* (83% of decisions in D.C. Circuit were unanimous).

245. Some indirect evidence of such a connection does exist. Congress was painfully aware, for example, of the effect of *Chadha* on its authority to control agency discretion. See Biden, *Who Needs the Legislative Veto?*, 35 SYRACUSE L. REV. 685, 686 (1984) (Congressional response to *Chadha* was "near panic."). After *Chadha*, legislators considered various alternatives, including a constitutional amendment authorizing the veto, see, e.g., S.J. Res. 135, 98th Cong., 1st Sess., reprinted in *Constitutional Amendment to Restore the Legislative Veto: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S.J. Res. 135*, 98th Cong., 2d Sess. 3-4 (1984); H.R.J. Res. 313, 98th Cong., 1st Sess., introduced, 129 CONG. REC. H4895 (daily ed. June 30, 1983), and legislation requiring that no major regulation become law until Congress has had an opportunity to pass a law overriding it, see, e.g., S. 1650, 98th Cong., 1st Sess. § 4(a), 129 CONG. REC. S10,474 (daily ed. July 20, 1983). These approaches have died out, however, and have been replaced by the use of stricter models of delegating authority. Finally, one can speculate that, even if members of Congress did not focus on the effects of the Court's adoption of restraint-oriented review, the Court's efforts prompted environmental interest groups to support legislation delegating less discretion to the EPA.

246. See *supra* notes 101-16 and accompanying text.

Congress is unable to provide them.<sup>247</sup>

#### D. *Reform of Judicial Review.*

This section will outline a series of recommendations for legislative reestablishment of checks and balances review. These recommendations affect hybrid rulemaking, standing, jurisdiction for review of agency decisions, private rights of action, and the scope of judicial review.

1. *Hybrid Rulemaking.* The debate over the merits of hybrid procedures has been raging for years<sup>248</sup> and has split the Congress. A few years ago the Senate passed legislation that would have effectively reversed the Supreme Court's judgment that the APA does not require hybrid rulemaking, but the proposal died in the House.<sup>249</sup> Congress can evaluate the arguments made in that debate by reviewing the experiences of the agencies now required to use hybrid rulemaking. On this basis, it can determine whether hybrid procedures help to clarify a rulemaking record on the resolution of specific questions of fact. If hybrid procedures have this clarifying effect, they will facilitate both legislative over-

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247. Some commentators have opposed any return to judicial activism because it would reduce the pressure on Congress to control agency discretion. *See, e.g., Pierce, supra* note 204, at 484-85. We recommend, however, that only some aspects of restraint-oriented review be changed. The aspects retained would continue to provide incentives for Congress to enact specific legislation. A return to more active judicial review poses another problem, however. As Professor Strauss has demonstrated, the Supreme Court has a more difficult time policing lower-court decisions when courts engage in activist review. *See Strauss, supra* note 213, at 1126-29. He argues that the Court's preference for restraint-oriented review reflects a desire to eliminate the potential for circuit court conflicts, which impede the national application of agency decisions. *Id.* at 1105. Professor Strauss seems to admit, however, that this problem does not seem like an adequate reason to retain the objectionable aspects of restraint-oriented review. *See id.* at 1114 (it is misleading to fault agencies, in view of Supreme Court's limited resources, for not securing a prompt national resolution of problems.).

248. Critics contend that hybrid procedures create delay and costs without improving the quality of decisionmaking. *See, e.g., McGarity, supra* note 101, at 732 (formal procedures generally inappropriate to resolve scientific issues that are resolved on a policy basis); Williams, "Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401, 436 (1975). Supporters counter that hybrid rulemaking is appropriate where agency decisions require the evaluation of particular and specific data. *See, e.g., Shapiro, Scientific Issues and the Function of Hearing Procedures: Evaluating FDA's Public Board of Inquiry*, 1986 DUKE L.J. 288, 298. The Administrative Conference has opposed any across-the-board requirement of hybrid procedures, but it has endorsed the use of hybrid rulemaking when there is a "special reason" for its adoption. Procedures for the Adoption of Rules of General Applicability, 1 C.F.R. § 305.72-5 (1988).

249. Regulatory Reform Act of 1982, S. 1080, 97th Cong., 2d Sess. §§ 2-3, 128 CONG. REC. 2374-75 (1982) (proposing to amend 5 U.S.C. §§ 551, 553 (1982)). The bill, which passed the Senate by a 94-0 vote, 128 CONG. REC. 5297 (1982), but was not voted upon by the House, called for "informal public hearings," including direct and cross-examination of witnesses, for any rule having a substantial economic effect. *See id.* § 3, 128 CONG. REC. at 2374.

sight and judicial review of agency decisions, and thus will make agencies more accountable for their decisionmaking.

2. *Standing Rights.* Congress should also consider amending section 702 of the APA to modify or eliminate the Court's prudential limitations on standing. The Constitution does not compel these limitations,<sup>250</sup> and the Court has indicated that it will not apply them when Congress clearly indicates that certain persons who satisfy the minimum constitutional requirements have standing.<sup>251</sup> Congress could therefore endorse the zone of interest test, but prohibit the courts from applying the other prudential limitations. This step would increase the number of persons eligible to challenge agency action and thus would expand opportunities for judicial supervision of agencies' adherence to legislative constraints.

Statutory reduction or elimination of the prudential limitations would increase the number of challenges to agency decisions that courts must decide on the merits. For two reasons, this potential increase in litigation should not cause Congress to refrain from amending section

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250. The Court currently limits standing by applying several prudential tests that are not constitutionally compelled. *See, e.g.,* *Clarke v. Securities Indus. Ass'n*, 497 U.S. 388, 400 & n.16 (1987) (zone of interest test created by *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970), is gloss on 5 U.S.C. § 702 (1982)); *see also supra* notes 150-53 and accompanying text. Professor Winter has convincingly argued that the entire doctrine of standing is inappropriate. He argues that the so-called constitutional component of standing is a relatively recent judicial invention because the Framers, the first Congresses, and Supreme Court until the 20th century were "oblivious to the modern conception . . . that standing is a component of the constitutional phrase 'cases or controversies.'" Winter, *supra* note 150, at 1374. Winter also asserts that when the Court adopted its present approach to standing, it misconceived the doctrine as an extension of "private" law, in which typically one party has caused some harm to another. As he points out, the Court once broadly conceptualized standing to include a "public rights model." *See id.* at 1395. This model allowed any citizen with information about allegedly unlawful government action to challenge that action even if it injured no person more than another. *See id.* at 1394-95. Unless the Court revises its reading of article III, however, Congress can enlarge standing only by removing the existing prudential limitations that courts have imposed.

251. *See, e.g.,* *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) (Fair Housing Act, 42 U.S.C. § 3612 (1982), which allows enforcement of rights by private persons, extended standing to the limits of article III, with the consequence that "courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section."). The lower courts have interpreted these decisions as eliminating, or at least limiting, prudential limitations on standing for persons specifically designated in an agency's enabling act as having a right to seek judicial review of the agency's decisions. *See, e.g.,* *Center for Auto Safety v. NHTSA*, 793 F.2d 1322, 1336 (D.C. Cir. 1986) (broad standing established by EPCA removes need to limit judicial review for prudential reasons); *Consumers Union v. FTC*, 691 F.2d 575, 576 (D.C. Cir. 1982) (en banc) (FTCIA permits standing to extent permitted by article III), *aff'd mem.*, 463 U.S. 1216 (1983). Moreover, the Supreme Court itself has applied some of the prudential limitations in a manner less restrictive of standing rights when it has been able to *infer* congressional intent to authorize specific persons to seek review of agency decisions. *See Clarke*, 497 U.S. at 399-40 & n.14.

702.<sup>252</sup> First, article III-based standing requirements, which would still apply, would filter out suits not presenting a case or controversy. Second, the judiciary would retain its power to eliminate nonmeritorious claims by summary judgment. Congress ought to require the courts to hear cases that survive summary judgment, because judicial review under those circumstances promotes agency accountability to legislative limitations.

3. *Jurisdiction for Review.* Congress may also want to clarify its intent concerning the federal courts' jurisdiction to review cases of agency inaction. The best solution would be to repeal the APA's "committed to agency discretion" provision.<sup>253</sup> Under this approach, all agency decisions would be reviewable unless the congressional mandate to the agency in question prohibited review.<sup>254</sup> *Heckler* itself provides arguments against such an amendment,<sup>255</sup> but, as Professor Sunstein has argued, the *Heckler* Court's analysis is generally unpersuasive.<sup>256</sup> Elimi-

252. Critics of prudential limitations argue that courts need not use the limitations to manage their workload. These critics contend that litigation costs are normally so high that no person will challenge an agency decision unless she has a sincere and significant interest in reversing the decision. *See, e.g.,* Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 673-74 (1973) (plaintiff must feel strongly enough to pay the bills, and in magnitude of bills reduces flood of litigation and gives partial measure of plaintiff's "stake" in outcome). Supporters of the limitations counter that the limitations are important in controlling access to the courts by public interest groups. They contend that while such groups may represent persons injured by an agency's decision, they are often motivated by ideological concerns that far outweigh the actual injury as a reason for mounting a lawsuit. *See, e.g.,* Nichol, *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915, 1927 (1986). *But see* Winter, *supra* note 150, at 1508 (arguing that Court should apply multi-faceted conception of standing that includes public rights model of adjudication).

253. 5 U.S.C. § 7021(a)(2) (1982).

254. Under the law prior to *Heckler*, the Court immunized agency decisions from review whenever statutes were "drawn in such broad terms that in a given case there is no law to apply." Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 657 (1985) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (in turn quoting S. REP. NO. 752, 79th Cong. 1st Sess. 26 (1945))). Professor Sunstein has pointed out that the "committed to agency discretion" test creates a needlessly confusing threshold inquiry into whether there is "law to apply," which requires courts to use a multifactor balancing test that can easily lead to erroneous results. *See* Sunstein, *supra* note 208, at 478. Eliminating section 701(a)(2) would lead to the same substantive result as applying the pre-*Heckler* interpretation of the section. Where Congress has established legislative constraints relevant to an agency's decisions, courts would review the decisions for compliance with those constraints. If there is "no law to apply," there would be no applicable statutory constraint on the agency and its decisions, which, if otherwise lawful, would be affirmed. *See id.*

255. The *Heckler* Court asserted that decisions not to prosecute or enforce are generally unsuitable for review because they involve significant agency expertise, they do not involve coercive powers over an individual's liberty or property rights, and they share the characteristics of a decision whether to indict a person, which has always been considered the special province of the executive branch. 470 U.S. at 831-32.

256. *See, e.g.,* Sunstein, *supra* note 254, at 665-75. Professor Sunstein argues that the Court's "analogy to the discretion of the criminal prosecutor is largely unavailing" because review to con-

nating APA section 701(a)(2) would elevate the value of checks and balances review over the Court's preference for executive implementation review.<sup>257</sup>

4. *Express Private Rights of Action.* Congress should also consider whether to overrule, on an agency-by-agency basis, the Supreme Court's elimination of implied private rights of action.<sup>258</sup> Congress has established express private rights of action in most pollution control statutes<sup>259</sup> and it could create similar private rights of action in other statutes.<sup>260</sup> If Congress chose this reform, it would need to assess, statute by statute, whether private rights of action would produce more benefits than detriments.<sup>261</sup> In general, however, such rights may have a place in

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sider whether the executive is acting in accordance with noncriminal laws promotes rather than contradicts the separation of powers. *Id.* at 674. He finds the "coerciveness" distinction unpersuasive because "unlawful governmental failure to act can be as harmful as unlawful action and is equally subject to judicial review under APA standards." *Id.* at 674-75. Finally, he argues that "while inaction may not involve traditional property or liberty interests, the existence of a constitutionally protected interest is not a necessary predicate for the invocation of judicial review." *Id.* at 675.

Professor Davis argues that *Heckler* was incorrect because even if Congress has not established statutory constraints on agency action, the APA requires a court to determine whether a decision is an "abuse of discretion" by applying "such ever present standards as 'justice,' 'fairness,' and 'reasonableness' that necessarily guide all judicial action." Davis, "No Law to Apply," 25 SAN DIEGO L. REV. 1, 4 (1988). He contends that "the question whether the agency has abused its discretion is a matter for judicial discretion, in whole or in part," *id.* at 9 (emphasis in original deleted), and, for that reason, "law to apply is not generally a prerequisite to judicial review of administrative action," *id.* at 10 (emphasis in original deleted). This interpretation serves the purposes of checks and balances review by requiring that every agency action, unless Congress has expressly immunized it from review, be subject to a requirement of "reasonableness." *See id.* at 7. If Congress amends the APA, it can determine whether to endorse Professor Davis's understanding of its intent.

257. If Congress does not want to broadly overrule *Heckler* by legislation, it should consider whether to establish judicial review of some agency decisions not to act. Congress can overcome the *Heckler* presumption by enacting substantive guidelines for the exercise of enforcement powers or by rulemaking on an agency-by-agency basis.

258. *See supra* notes 171-74 and accompanying text.

259. *See, e.g.*, 42 U.S.C. § 7604 (1982) (CAA's authorization of private actions against polluters under specified conditions). *See generally* Timbers & Wirth, *Private Rights of Action and Judicial Review in Federal Environmental Law*, 70 CORNELL L. REV. 403, 405-06 (1985) (discussing other private rights of action under environmental laws).

260. These provisions, like those in the environmental laws, could authorize suits both against persons alleged to have violated statutes and against agencies alleged to have breached nondiscretionary duties. Both categories of suits could enhance legislative control over the agencies. By authorizing private suits directly against individual violators, Congress would provide a vehicle for augmenting agency enforcement resources and protecting statutory beneficiaries whom agencies have failed to protect. These private suits would augment agency appropriations as a way to implement substantive statutory requirements. By authorizing private suits against a recalcitrant agency, Congress could provide a direct mechanism for redressing the agency's failure to comply with its legislative mandate. *See supra* note 173 and accompanying text.

261. *See* Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975) (offering economic analysis of choice among exclusive private enforcement, exclusive public enforcement,

solving the problem of accountability under the discretionary model of legislative delegation.

5. *Substantive Protections.* A final reform would involve amending the APA's scope of review requirements. If the courts construe *Chevron* to require extreme deference to agencies' interpretations of statutes, Congress should reestablish a checks and balances approach for the reasons set forth above.<sup>262</sup> Congress could enact the *Restatement of Scope-of-Review Doctrine* endorsed by the American Bar Association's Section of Administrative Law. This restatement provides that "[t]he court is the primary authority" concerning statutory interpretation, but "it shall give appropriate weight to an agency's views concerning those issues."<sup>263</sup> In determining "whether and to what extent an agency interpretation deserves weight," a court would be "guided by such factors as the timing and consistency of the agency's position and the nature of the agency's expertise."<sup>264</sup>

Congress might likewise find it useful to amend the APA to clarify the scope of review for agency policy decisions. Again, the ABA Restatement would be a good basis for such legislation. The Restatement requires a court to set aside an agency's action if the action satisfies any of eight specific criteria, which are designed to indicate fundamental failures in the agency's evidence or reasoning process.<sup>265</sup> Several of these

and shared public and private enforcement); Stewart & Sunstein, *supra* note 173, at 1289-322 (discussing benefits and detriments of private rights of action).

262. See *supra* notes 225-27 and accompanying text (*Chevron* may be too deferential to agency interpretation of statutes); see also Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 268 (1986) (opposing relegation of courts to "a decidedly secondary position even on purely legal issues").

263. Section of Admin. Law, ABA, *A Restatement of Scope-of-Review Doctrine* (Feb. 8, 1986), reprinted in 38 ADMIN. L. REV. 235, 236 (1986).

264. *Id.*, reprinted in 38 ADMIN. L. REV. at 236.

265. Under the ABA interpretation, agency action should be set aside when:

- (1) The action exceeds the authority by, or violates limitations imposed by—
  - (A) the Constitution;
  - (B) a federal statute;
  - (C) an agency rule having the force of law;
  - (D) federal common law;
  - (E) any other source of law that is binding upon the agency.
- (2) The agency has relied on factors that may not be taken into account under, or has ignored factors that must be taken into account under [the Constitution, federal statutes, agency rules, or federal common law].
- (3) The action rests upon a policy judgment that is so unacceptable as to render the action arbitrary.
- (4) The action rests upon reasoning that is so illogical as to render the action arbitrary.
- (5) The asserted or necessary factual premises of the action do not withstand scrutiny under the [scope of review applied to formal or informal proceedings].
- (6) The action is, without good reason, inconsistent with prior agency policies or precedents.
- (7) The agency arbitrarily failed to adopt an alternative solution to the problem addressed in the action.

factors resemble the criteria adopted in *State Farm* to determine whether an agency's decision is supported by adequate reasons.<sup>266</sup>

Amending the APA to indicate specifically when agency action is arbitrary and capricious would also respond to the charge that heightened scrutiny invites judges to replace agencies' policy views with their own. An APA amendment would clarify the deferential nature of the standards of review.<sup>267</sup> Most importantly, the amendment would make clear that the proper focus for review is not the *result* reached by an agency, but the *reasons* supporting that result.<sup>268</sup>

### CONCLUSION

Congress has recently done what many observers thought impossible. It has imposed a variety of constraints on the EPA and, in a few instances, on other agencies, by adopting approaches to legislation that vary from the traditional vague agency mandate. At the same time, the Supreme Court has swung away from activist review of agency decisions and has adopted a more restrained approach. Congress's movement away from discretionary delegations is a rational legislative reaction to the Court's shift. If the judiciary is no longer willing to control agency discretion through activist review, Congress may have little choice but to narrow the agencies' discretion by changing the nature of statutory delegations.

Remarkably, there may be no connection between these judicial and congressional trends. Very little evidence exists that Congress has acted in response to the Court's recent decisions. Instead, Congress seems to have been motivated by the EPA's failure to meet legislative expectations.<sup>269</sup> Congress apparently has not yet realized the connection be-

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(8) The action fails in other respects to rest upon reasoned decisionmaking.

*Id.*, reprinted in 38 ADMIN. L. REV. at 235.

266. Compare *supra* text accompanying notes 201-03 (*State Farm* criteria) with *supra* note 265 (ABA Committee's criteria).

267. Although the Supreme Court has indicated that *State Farm* requires deferential review, the Court's analysis in that and other cases has garbled the message. See *supra* notes 236-38 and accompanying text. Amending the APA would send a clear signal that agency decisions cannot be overturned except when there is a clear failure in the agency's evidence or reasoning process.

268. This distinction is important because it reminds judges that they may not substitute their policy choices for an agency's and that an agency's reasoning may withstand scrutiny even if a judge disagrees with the result. Moreover, the focus on the agency's reasoning process allows judges to acknowledge agency expertise where appropriate. Shapiro & Levy, *supra* note 30, at 437.

269. See *supra* notes 31-37 and accompanying text. But see Muskie, *supra* note 14, at 10,083 ("Congress has even anticipated the judicial disinclination to interfere with administrative discretion, enacting 'hammer' provisions to force [the] EPA to carry out congressional policy."); see also Florio, *supra* note 14, at 378 (Judicial oversight of hazardous waste legislation in the early 1980s "fell short.").

tween its recent innovations and the Court's new restraint-oriented review.

When Congress realizes this connection, it may reassert control over agencies through adoption of coercive, prescriptive, or ministerial legislation. Such control is beneficial, provided Congress is aware of the alternative models' limitations. Rather than blindly abandoning discretionary delegations in all situations, Congress should impose constraints on agency discretion through selective reestablishment of checks and balances judicial review, which will permit Congress to enact discretionary legislation when necessary without losing control over agencies.