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Articles

Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking

Mark Seidenfeld*

Articles lamenting the recent “ossification” of notice and comment rulemaking seem to be the fashion in administrative law scholarship today.¹ The term “ossification” refers to the inefficiencies that plague regulatory programs because of analytic hurdles that agencies must clear in order to adopt new rules.² To a large extent, developments in administrative law over the past two decades that were meant to expand public

* Associate Professor of Law, Florida State University College of Law. B.A. 1975, Reed College; M.A. 1979, Brandeis University; J.D. 1983, Stanford University. I would like to thank Rob Atkinson, Jim Chen, Dan Gifford, Adam Hirsch, Lars Noah, and Jim Rossi for insightful comments on earlier drafts of this Article, and Bill Clague and Kathy Johnson for their dedicated research.

1. See, e.g., JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 225-54 (1990); JOHN M. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION* 7-16 (1988); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7 (1991); Terrence M. Scanlon & Robert A. Rogowsky, *Back-Door Rulemaking: A View from the CPSC*, REG., July/Aug. 1984, at 27; see also Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 764, 764-65 (citing studies expressing concern that judicial review has “deterred systematic policymaking” at numerous agencies).

2. Don Elliot appears to have been the first to apply the phrase “ossification” to the resulting burdens on the rulemaking process. See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385-86 (1992) (citing E. Donald Elliot, Remarks at the Symposium, *Assessing the Environmental Protection Agency After Twenty Years: Law, Politics and Economics*, at Duke University School of Law (Nov. 15, 1990)).

participation and influence in administrative decisionmaking have unintentionally put these hurdles in place.³ Much of the current academic literature on administrative law has focused on identifying ways to lower these hurdles.⁴

When Congress passed the Administrative Procedure Act⁵ (APA) in 1946, notice and comment rulemaking was meant to allow an agency to adopt rules quickly and easily.⁶ The procedures were suited to the legislative-type action of prospectively setting standards;⁷ they allowed the public to know about and participate in the formulation of the standards, but left the agency free to act without having to convene formal, trial-type hearings.⁸ To distinguish this mechanism for rulemaking from trial-type procedures, scholars have even referred to notice and comment procedures as "informal rulemaking."⁹

Over the past two decades, the process of adopting rules has become more complex.¹⁰ Although judges are not free to add procedures to those Congress requires under the APA and an agency's enabling statute,¹¹ courts remain free to demand exacting explanations for agency action under the arbitrary and capricious standard of judicial review.¹² Such judicial demands create great uncertainty for an agency seeking to adopt a rule

3. See MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 44-54 (1988); see also Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1295-1315 (1986) (detailing how judicial concerns about public access to and influence in agency regulatory processes developed into a requirement of stringent explanation standards).

4. See, e.g., Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, LAW & CONTEMP. PROBS., Winter & Spring 1994, at 185; McGarity, *supra* note 2, at 1436-62; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

5. Administrative Procedure Act, ch. 324, §§ 2-10, 12, 60 Stat. 237, 237-44 (1946), amended by Pub. L. No. 89-554, 80 Stat. 381, 383-88, 392-93 (1966) (current version at 5 U.S.C. §§ 551-559, 701-706 (1994)).

6. See Rabin, *supra* note 3, at 1265 ("[T]he APA rulemaking scheme is notable primarily for the absence of constraint it places on agency officials."); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452-54 (1986) (noting that the rulemaking provisions of the APA predominantly reflect the New Deal belief in unfettered agency discretion).

7. See Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, 364 (1986) (noting that the APA's rulemaking procedure "loosely resembles the legislative process"); cf. Shapiro, *supra* note 6, at 453 (contending that although rulemaking is quasi-legislative in nature, the APA does not require as many formal safeguards for rulemaking as Congress usually provides as part of its own legislative process).

8. See 5 U.S.C. § 553 (1994) (specifying that, to enact legislative rules, agencies need only publish notice in the Federal Register, allow written comments, publish final rules at least 30 days before they take effect, and provide "a concise general statement of their basis and purpose"); see also Shapiro, *supra* note 6, at 453 (contrasting formal adjudicatory and informal legislative rulemaking procedures).

9. See PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 159 (1989).

10. See McGarity, *supra* note 2, at 1385.

11. See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978).

12. See *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

because the agency cannot know in advance what issues and arguments a reviewing court will deem to warrant extended analysis and explanation.¹³ According to several scholars, judicial demands for such explanations, and the attendant uncertainty these demands create, have caused agencies to perform detailed analyses even of matters the agency considers peripheral to the decision at hand.¹⁴

The literature recognizes that the judiciary is not alone in demanding more rigorous analysis of agency rulemaking than was envisioned at the inception of the APA.¹⁵ Congress has demanded that agencies prepare environmental impact statements before taking any action that threatens significantly to affect any aspect of the human environment.¹⁶ Statutes also require agencies to analyze regulations to ensure that they do not impose undue burdens on small businesses.¹⁷ In the past decade, the White House has taken a prominent place alongside Congress and the courts, demanding that agencies perform "regulatory impact analyses"—that is, detailed cost-benefit studies—for every rule that has a major impact on the American economy.¹⁸

Nonetheless, several scholars seem to lay most of the blame for ossification on judicially created administrative law doctrines.¹⁹ Judicial review

13. See R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 247 (1992); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 302-03 (both asserting that the risk of reversal of rulemakings due to reasons an agency cannot predict or control will deter rulemaking generally).

14. As Tom McGarity so aptly put it: "Because [agencies] can never know what issues dissatisfied litigants will raise on appeal, [agencies] must attempt to prepare responses to all contentions that may prove credible to an appellate court, no matter how ridiculous they may appear to agency staff." McGarity, *supra* note 2, at 1412 (emphasis added); see also E. Donald Elliot, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492-93 (1992) (asserting that the primary purpose of notice and comment proceedings is to allow agencies to develop a record for judicial review, not to collect relevant information from interested parties); Melnick, *supra* note 13, at 247 (asserting that agencies accumulated information and responded to comments primarily to defend against the uncertainty of judicial review).

15. See, e.g., Mashaw, *supra* note 4, at 204-07; McGarity, *supra* note 2, at 1397; Pierce, *supra* note 4, at 62-65.

16. See National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(C) (1994).

17. See Regulatory Flexibility Act, 5 U.S.C. §§ 601-603 (1994).

18. Executive oversight and some sort of cost analysis of regulations date back to President Nixon's "Quality of Life" review program under the auspices of the Office of Management and Budget (OMB). See GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA 46-48 (1984). President Reagan greatly increased the scope of White House oversight of agency rulemaking by requiring that all agencies except the independent commissions perform regulatory impact analyses (RIAs) on their proposed rules and refrain from issuing rules that the analyses concluded were not cost justified. See Exec. Order No. 12291, 3 C.F.R. 127 § 3 (1981). Reagan's Executive Order authorized the OMB to review agency RIAs of rules. *Id.* Although President Clinton substantially modified the scope and procedure of White House review of rules, he retained the requirement of cost-benefit analyses for major rules, and for OMB oversight of those analyses. See Exec. Order No. 12866, 3 C.F.R. 638 §§ 2-4 (1993), reprinted in 5 U.S.C.A. § 601 (West 1996).

19. See Mashaw, *supra* note 4, at 200-04; Patricia M. Wald, *The 1993 Justice Lester W. Roth Lecture—Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L.

under the hard look test magnifies the regulatory inertia created by analytic or substantive requirements imposed on the rulemaking process by statute or executive order.²⁰ Even if required analyses, such as environmental and regulatory impact statements, are not subject to substantive judicial review,²¹ by providing detailed data and reasons for an agency decision, they can fuel a more exhaustive effort by a court reviewing the ultimate agency action under the APA or the agency's substantive statute. Hence, such review encourages an agency to perform more thorough analyses than it otherwise might. For example, the authority of reviewing courts to enforce the ostensibly procedural requirement that an environmental impact statement (EIS) consider all reasonable alternatives to a proposed action has resulted in comprehensive consideration of some alternatives that the agency otherwise might never have considered.²² In addition, courts have used the information uncovered by the EIS process to question the overall validity of agency action under the hard look standard.²³

Scholars have bemoaned the ossification of rulemaking primarily for two reasons. First, agencies' belief that they must devote an inordinate amount of their resources to each rulemaking proceeding hampers their willingness and ability to issue regulations to the extent warranted by the problems within their jurisdictions. In fact, agencies such as the

REV. 621, 626 (1994); *see also, e.g.*, Melnick, *supra* note 13, at 246 (arguing that "judicial intervention has had an unfortunate effect on policy-making," burdening agencies with "delay and uncertainty"); Pierce, *supra* note 13, at 327 (attributing agency reticence in adopting rules to the effects of judicial review and the polarity of the D.C. Circuit); Paul R. Verkuil, *Comment: Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453, 457-59 (1995) (arguing for fast-track legislative oversight as a method to overcome ossification in rulemaking).

20. The hard look test is described at *infra* notes 41-52 and accompanying text.

21. *See* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980) (*per curiam*) (holding that the National Environmental Policy Act (NEPA) does not authorize a reviewing court to reallocate the substantive balance between environmental impacts and other factors made by an agency); Exec. Order No. 12866, 3 C.F.R. 638 § 10 (1994) (specifying that the Executive Order on Regulatory Planning and Review does not create any right of judicial review).

22. *See* City of Tenakee Springs v. Clough, 915 F.2d 1308, 1312 (9th Cir. 1990) (remanding the National Forest Service's issuance of a five-year operating plan for harvesting timber because the Service failed to consider amending timber contracts as an alternative in its environmental impact statement (EIS)); California v. Block, 690 F.2d 753, 767-68 (9th Cir. 1982) (ordering the National Forest Service to consider allocating more land to wilderness in its EIS).

23. *See, e.g.*, Audubon Soc'y v. Dailey, 761 F. Supp. 640, 649-50 (E.D. Ark. 1991) (enjoining any action on a fill permit issued by the Army Corps of Engineers because the Corps's conclusion regarding the impact of the project on traffic flatly contradicted information gathered as part of the environmental assessment), *aff'd* 977 F.2d 428 (8th Cir. 1992); United States v. 27.09 Acres of Land, 760 F. Supp. 345, 353 (S.D.N.Y. 1991) (enjoining the construction of a post office because the environmental assessment indicated that the building was totally out of character with its surroundings and observing that the Postal Service's conclusion that the building's environmental impact would not be significant because it was "designed and landscaped to soften its visual impact" . . . amount[ed] to putting a tutu on an elephant and calling it a ballerina"); City of Romulus v. County of Wayne, 392 F. Supp. 578, 592, 592-94 (E.D. Mich. 1975) (enjoining federal participation in building a new airport runway because the EIS's assumption that 85dB(A) is an acceptable noise level failed to "conform to what is scientifically known about the effect of noise on humans").

Environmental Protection Agency (EPA) do not even have sufficient resources to enact the rules that their authorizing statutes mandate.²⁴ Several studies of the regulatory process purport to show how, in particular instances, agencies have shied away from highly beneficial regulations because of a fear that the regulations will not pass judicial muster.²⁵ At least one prognosticator has gone so far as to predict a regulatory catastrophe because he sees current administrative law doctrines as creating insurmountable barriers to agencies setting standards by any means.²⁶

Second, the ossification of the rulemaking process leads agencies to favor setting standards by means regarded as less appropriate than rule-making.²⁷ Agencies can set standards within adjudicatory proceedings.²⁸ By doing so, however, agencies lose the insights that come from allowing affected entities to comment on the standards. The parties also may find themselves unexpectedly subject to standards that they have not prepared

24. See GENERAL ACCOUNTING OFFICE, HAZARDOUS WASTE: NEW APPROACH NEEDED TO MANAGE THE RESOURCE CONSERVATION AND RECOVERY ACT 74-75 (1988) (reporting that as of April 1988, the EPA had met only 15 of 66 Resource Conservation and Recovery Act (RCRA) statutory deadlines); see also ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 667-69 (1992) (explaining why the EPA could not complete rulemakings required by RCRA until 12 years after some of the statutory deadlines had passed).

25. See MASHAW & HARFST, *supra* note 1, at 10-11 (summarizing the National Highway Traffic Safety Administration's (NHTSA) avoidance of timely rulemaking and its resulting abdication of automobile safety design regulation); R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 192, 190-92 (1983) (concluding that "the greater the burdens placed on the EPA in its formal dealing with states and sources, the greater the agency's incentives to develop informal agreements" with industry regarding industry's compliance with the Clean Air Act); Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 13-14 (1989) (arguing that OSHA's slow pace of regulating chemicals in the workplace has resulted in large part from the burdens imposed on it by judicial review).

26. See Pierce, *supra* note 1, at 10-11 (predicting electricity shortages due to the Federal Energy Regulatory Commission's (FERC) unwillingness to engage in rulemaking to restructure the electric utility industry).

27. See McGarity, *supra* note 2, at 1386 ("[A]gencies are beginning to seek out alternative, less participatory regulatory vehicles to circumvent the increasingly stiff and formalized structures of the informal rulemaking process."); see also Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387, 413-18 (1995) (describing how the National Labor Relations Board's (NLRB) practice of setting policy by adjudication, along with disingenuous factfinding, makes judicial control over that policy more difficult); MASHAW & HARFST, *supra* note 1, at 149-65 (detailing NHTSA's focus on recalls as an alternative to its failed rulemaking attempts). *But cf.* Rossi, *supra* note 1, at 793, 803-06 (questioning whether aggressive judicial review is responsible for FERC's use of adjudication to move towards deregulation of electricity generation, and noting that FERC's adjudicatory approach in this context might be effective).

28. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947). In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), the Supreme Court held that an agency's choice to develop a general standard by adjudication was reviewable for abuse of discretion. The Court, however, did not require the agency to explain its choice, and the Court's analysis of circumstances surrounding the use of adjudication in *Chenery* and *Bell Aerospace* indicates that, practically speaking, the agency's choice of procedural mode is unfettered. *Id.*

to meet. Worse yet, agencies can use even more informal means than notice and comment rulemaking to specify new standards.²⁹ Agencies today frequently issue policy statements announcing the circumstances under which they intend to enforce statutes and existing regulations.³⁰ Such announcements can have the practical effect of coercing compliance with the policy statements by entities eager to ensure that they will not be subject to enforcement proceedings and potential penalties for statutory or regulatory violations.³¹ Although the APA requires that an agency publish such statements before relying on them to the detriment of private entities,³² the APA mandates no procedures to ensure opportunity for any public participation in the formulation of such statements. No formal provision for political oversight of announcements of intended agency policy exists, and because such announcements frequently address detailed issues that affect select classes of entities, the White House and Congress tend merely to glance over them.³³ Similarly, because a policy statement, unlike a legislative rule, has no legal impact in its own right, a court is less likely to entertain challenges to the substance of such a statement prior to the agency's application of the policy in an adjudicatory context.³⁴ In

29. See Robert A. Anthony, "Well, You Want the Permit, Don't You?" *Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31, 31-33 (1992) (describing the use of policy statements and guidelines to set practically, although not legally, binding norms); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 383-84 (noting that the distinction between legislative rules and nonlegislative rules is hazy because both have coercive impact on those subject to them); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1466 (1992) (noting that the APA recognizes and governs the adoption of a class of rules that, although not legally binding, can adversely affect those subject to them).

30. See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1332-55 (1992) (reporting numerous instances of agencies using nonlegislative rules purportedly to bind the public).

31. See Anthony, *supra* note 29, at 33, 32-33 (noting that the statements may constitute "government by intimidation").

32. 5 U.S.C. § 552(a) (1994). This requirement has led Peter Strauss to label policy statements and other rules not subject to the APA's notice and comment procedures as "publication rules." STRAUSS, *supra* note 9, at 157.

33. Cf. Strauss, *supra* note 29, at 1472 (noting that hard look and political review have focused on "high-consequence" rulemaking, and that this restricted focus gives agencies an avenue to escape onerous review by using "publication rules").

34. See Asimow, *supra* note 29, at 390 n.44. Because rules are final agency decisions, they are presumptively reviewable immediately after they are issued. Under the administrative law doctrine of ripeness, however, an agency rule will not be subject to review unless the issues raised in a challenge are appropriate for judicial review prior to enforcement, and delaying review until after enforcement will impose a hardship on those potentially subject to the rule. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). Courts frequently are not in a good position to review the substance of a publication rule prior to its application because they do not have before them any record or explanation by the agency justifying the rule or explaining precisely how it will operate. See Asimow, *supra* note 29, at 422 & n.213. Entities potentially subject to the rule also do not face the same hardship as those subject to a legislative rule because the rule is not legally binding. In light of the rule's nonbinding nature, the entity can argue that the agency should not apply the rule as written, because factors not envisioned by the rule render its application to the entity inappropriate. In other words, the agency can change the rule in response to arguments by the entity, and hence it is uncertain that the rule will apply

short, by using policy statements to coerce compliance with a desired standard, an agency can circumvent the safeguards the three branches of government have developed to ensure that the agency's policy is legally, economically, and politically justified.

Recent scholarship on administrative law's propensity to discourage agency rulemaking contains numerous suggestions about how to modify the law to "deossify" the rulemaking process.³⁵ Given the blame for ossification laid at the judiciary's feet, not surprisingly much of this literature focuses on judicial review of agency rules. Several commentators have suggested relaxing the hard look test that courts use in evaluating whether agency decisions are arbitrary and capricious.³⁶ Another scholar advocates delaying judicial review of agency rules, which would significantly reduce the incentives of regulated entities to challenge rules without first trying to comply.³⁷

Although I agree with the general thrust of the literature that the rulemaking process has become unnecessarily cumbersome, I fear that many of the proposed solutions will do more harm than good. In looking for solutions to the ossification of rulemaking, commentators have given short shrift to the original concerns that prompted the administrative law doctrines that they would abandon.³⁸ So long as the administrative state remains such a pervasive and coercive force in society,³⁹ one should think

to the entity. *See Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 163 (1967) (holding a legislative rule unripe for judicial review because future circumstances might lead the agency not to apply the rule to the petitioner). Hence, under existing doctrine, many publication rules would not be ripe for review until applied in a particular case. *See, e.g., Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 920 (5th Cir. 1993); *American Gas Ass'ns v. FERC*, 888 F.2d 136, 152 (D.C. Cir. 1989); *American Trucking Ass'ns v. ICC*, 747 F.2d 787, 790 (D.C. Cir. 1984); *see also Strauss, supra* note 29, at 1479 ("[Judicial] relief from the impact of publication usually will be after-the-fact in character" (emphasis in original)). *But cf. Atchison, Topeka & Santa Fe Ry. v. Peña*, 44 F.3d 437, 441 (7th Cir. 1994) (en banc) (holding a Federal Railroad Administration interpretative rule subject to judicial review), *aff'd sub nom. Brotherhood of Locomotive Eng'rs v. Atchison, Topeka & Santa Fe Ry.*, 116 S. Ct. 595 (1996).

35. *See, e.g., Mashaw, supra* note 4, at 249-54; McGarity, *supra* note 2, at 1436-62; Pierce, *supra* note 4, at 59-60.

36. *See, e.g., McGarity, supra* note 2, at 1453; Pierce, *supra* note 1, at 29.

37. *See Mashaw, supra* note 4, at 254.

38. Richard Pierce has stated that he is pessimistic that judicial review bestows any significant benefits on the regulatory process and that he therefore considers "all deossifying changes in doctrine good." Pierce, *supra* note 4, at 67, 66-68. Jerry Mashaw acknowledges the need for agencies to give reasons for their decisions, but, like Pierce, does not believe that the judiciary is the best institution to review such reasons. *See Mashaw, supra* note 4, at 251-52. Mashaw bows to hard look review only because the legal culture in the United States appears to demand it. *See id.* at 208, 252. Of the three major proponents of judicial-review reform to alleviate ossification of rulemaking, only Tom McGarity explicitly acknowledges the benefits of judicial review. *See McGarity, supra* note 2, at 1451-52. Nonetheless, McGarity asserts that "[i]t may be time for courts to replace the 'hard look' metaphor with a more deferential image" without describing how courts might create that new image or analyzing precisely how that image is likely to affect the quality of agency decisionmaking. *Id.* at 1453.

39. *See JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 3-12 (1978) (relating the history of the growth of the administrative state to

very hard before eliminating legal doctrines that provide checks on the arbitrariness of agency action. Changes in judicial review suggested of late by numerous scholars deserve close attention, but I believe that such attention must not divert the focus entirely away from the need to ensure that agencies act not only within acceptable legal and political bounds, but also exercise their discretion in a deliberative manner.⁴⁰

This Article carefully explores proposals for deossification without losing sight of the need for checks on agency action. Part I begins by describing how hard look review creates three kinds of uncertainty about how courts will treat agency decisions, and how this uncertainty in turn discourages agencies from adopting legislative rules. It then summarizes recent proposals to relax the hard look standard and identifies potential detrimental effects that might flow from these proposals. Part II analyzes in detail the impact that easing hard look review would have on the three types of uncertainty that contribute to agencies' propensities to avoid notice and comment rulemaking. In doing so, however, it considers both the positive and negative impacts of judicial review on agency policymaking, and therefore does not assume that avoiding ossification is the only parameter by which to evaluate these proposals. The Article concludes that calls for relaxing judicial review may be premature and suggests instead particular operational changes in the manner in which courts engage in such review as alternatives that can ease the ossification of rulemaking without forfeiting the benefits of aggressive judicial review.

I. Hard Look Review and Regulatory Paralysis

The literature on ossification identifies the hard look doctrine of judicial review as the culprit most responsible for discouraging agency rulemaking.⁴¹ Courts have imposed this doctrine under the rubric of the traditionally deferential arbitrary and capricious standard of review.⁴²

the sense of crisis engendered by this growth); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 273-74 (2d ed. 1979) (characterizing Congress's delegation of lawmaking authority to administrative agencies as contributing to the expansion of government's coercive powers over citizens); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1295 (1984) (asserting that "[b]ureaucracy [in both the public and private sectors] is the primary form of organized power in America today, and is therefore a primary target for those who seek liberation from modern forms of human domination").

40. Elsewhere, I have argued that deliberative democracy is the best justification for granting agencies policymaking discretion, and noted the relationship of judicial review to this deliberative function. See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1570 (1992); see also Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61-62 (1985) (explaining how hard look judicial review attempts to implement the goals of deliberative democracy).

41. See, e.g., McGarity, *supra* note 2, at 1412; Pierce, *supra* note 4, at 65.

42. See KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 7.4, at 311-13 (3d ed. 1994) (detailing how the notice and comment procedures for informal rulemaking have led courts to increase demands for agency reasoning greatly under the arbitrary and capricious standard of review).

The doctrine helps to ensure that agency decisions are determined neither by accommodation of purely private interests⁴³ nor by surreptitious commandeering of the decisionmaking apparatus to serve an agency's idiosyncratic view of the public interest.⁴⁴ Instead of merely looking at whether a regulation is within bounds acceptable under the statutory prescriptions governing agency discretion, the courts focus on the agency decision-making process.⁴⁵ Essentially, under the hard look test, the reviewing court scrutinizes the agency's reasoning to make certain that the agency carefully deliberated about the issues raised by its decision.⁴⁶

The operational demands of the hard look doctrine reflect this focus on the administrative decisionmaking process. Courts require that agencies offer detailed explanations for their actions.⁴⁷ The agency's explanation must address all factors relevant to the agency's decision.⁴⁸ A court may reverse a decision if the agency fails to consider plausible alternative measures and explain why it rejected these for the regulatory path it chose.⁴⁹ If an agency route veers from the road laid down by its prece-

43. See Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671, 675 (1992) (arguing that rationality review and rigorous ends-means analysis help prevent agency capture); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 412-13 (noting that substantive judicial review provides a check against agencies serving purely private interests at the expense of broader public interests); Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 183 (explaining that a dominant theme of hard look review is that "agency decisions should not be merely responses to private interests equipped with preexisting preferences").

44. Such commandeering might occur because agency staff is not politically accountable and staff members' control of information that flows to agency heads allows the staff to bias agency rulemaking toward an outcome that staff members desire. See Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1085 (1986); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 6 (1994). To the extent that hard look review forces agency staff explicitly to address arguments and data submitted by those outside the agency, it encourages the development of alternative avenues for agency heads to obtain information about a rule. Because agency heads are somewhat politically responsive, the hard look test can discourage an internal agency dynamic that contributes to rules that are out of sync with the public's notion of what is good.

45. See Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 316-19 (1996) (describing the difference between outcome- and process-based judicial review and noting that the arbitrary and capricious standard focuses on the agency decisionmaking process).

46. See Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511 (1974).

47. See, e.g., *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1216 (D.C. Cir.), modified, 713 F.2d 795 (D.C. Cir. 1983).

48. See, e.g., *Beno v. Shalala*, 30 F.3d 1057, 1073-74 (9th Cir. 1994); *Maryland People's Counsel v. FERC*, 761 F.2d 780, 785-86 (D.C. Cir. 1985).

49. See, e.g., *Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73, 78 (1st Cir. 1993) (holding that the EPA acted arbitrarily and capriciously by failing to explain why it refused to allow a "mixing zone" analysis in a water pollution control permit); *ILGWU v. Donovan*, 722 F.2d 795, 815 (D.C. Cir.

dents, it must justify the detour in light of changed external circumstances or a changed view of its regulatory role that the agency can support under its authorizing statute.⁵⁰ The agency must allow broad participation in its regulatory process and not disregard the views of any participants.⁵¹ In addition to these procedural requirements, courts have, on occasion, invoked a rigorous substantive standard by remanding decisions that the judges believed the agency failed to justify adequately in light of information in the administrative record.⁵²

A. *Hard Look Review's Propensity to Freeze Agency Regulatory Action*

From the agency's perspective, hard look review has become an icy stare that freezes action; no matter how much care the agency believes it has given to a decision, the agency faces uncertainty about whether the reviewing court will find that the agency performed its decisionmaking task adequately.⁵³ This uncertainty falls into three principal categories.

First, there is uncertainty about whether a court will appreciate "the problems the agency faces in setting technical standards in complex areas."⁵⁴ The agency regulates with a keen eye to "the interrelationships of issues and the impacts of alternative approaches within the framework of statutes specifically under [its] charge."⁵⁵ For a regulatory scheme to

1983) ("[T]he Secretary's failure to consider such alternatives and to explain why such alternatives were not chosen, was arbitrary and capricious . . .").

50. See, e.g., *Wichita Bd. of Trade*, 412 U.S. at 808; *Citizens Awareness Network v. NRC*, 59 F.3d 284, 291 (1st Cir. 1995); *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1385 (11th Cir. 1983).

51. See, e.g., *NRDC v. EPA*, 824 F.2d 1258, 1284-86 (1st Cir. 1987); *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530 (D.C. Cir. 1982).

52. See, e.g., *California v. FCC*, 905 F.2d 1217, 1231-38 (9th Cir. 1990) (concluding that the rulemaking record did not support the FCC's determination that the benefits of eliminating structural separations for the Bell Operating Companies justified the harm that might result from such elimination); *Building & Constr. Trades Dep't, AFL-CIO v. Brock*, 838 F.2d 1259, 1270 (D.C. Cir. 1988) (holding that OSHA's ban on the spraying of asbestos products was not supported by the rulemaking record), *enforced in part sub nom. Building & Constr. Trades Dep't, AFL-CIO v. Dole*, No. 86-1359, 1989 WL 418934 (D.C. Cir. Oct. 30, 1989); see also Sunstein, *supra* note 43, at 183 (noting that, although courts on occasion have remanded agency decisions that the judges found unjustified in light of the evidentiary record, judges prefer "procedurally" based remands).

53. See *DAVIS & PIERCE*, *supra* note 42, § 7.4, at 317 (stating that an agency cannot know the level of discussion necessary for a court to determine that the requirement of reasoned decisionmaking has been satisfied); Mashaw, *supra* note 4, at 203 ("[T]he real impediment created by judicial review is uncertainty . . ."); Thomas O. McGarity, *Regulatory Analysis and Regulatory Reform*, 65 *TEXAS L. REV.* 1243, 1290 (1987) (arguing that the nature of issues an agency must address in rulemaking and the nature of judicial review place the agency "awash in a sea of uncertainties").

54. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 *ADMIN. L. REV.* 363, 388 (1986); see also Mashaw, *supra* note 4, at 203 (noting that the judiciary's lack of technical and scientific sophistication contributes to uncertainty about whether courts will consider an agency rule to be reasonable).

55. Peter L. 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, 1126 (1987).

succeed, the agency must look beyond the impact of its decision on the immediate parties to the proceeding. The agency must also deal, on a day-to-day basis, with the issues left open by its decision. It must consider how it will enforce its standards and what problems implementation of the standards will cause. A reviewing court need not concern itself with any of these matters;⁵⁶ instead, the court brings to the reviewing process perceptions of legally educated, but not technically educated, judges.⁵⁷ Hence the reviewing court often emphasizes fairness to the parties in the particular proceeding and is apt to find pragmatic compromises made by agencies to be "irrational."⁵⁸ In short, the reviewing judge is an outsider to the agency process; her perspective frequently diminishes technical or practical constraints that the agency faces. By applying her sense of law and logic to an agency decision, the judge instead views the decision-making process from a legal vantage point that accentuates concerns that the agency not abuse the coercive power it wields by virtue of its authorizing statute.

In order to identify and understand the concerns of judges better, and to convince courts of the merits of their decisions, many agencies have included, in their internal rulemaking mechanisms, professionals from disciplines outside those that traditionally have dominated each particular agency.⁵⁹ The EPA has economists, engineers, chemists, and health sci-

56. See *id.* at 1126-27 (arguing that judges should defer to agency interpretations of indeterminate statutory language in order to promote the coherency of the agency's programs); see also *Pierce*, *supra* note 13, at 315 (summarizing Strauss). Shep Melnick has pointed out numerous instances in which the courts' role as occasional intermeddlers in the Clean Air Act's regulatory scheme resulted in the EPA's adoption of stringent standards that were impossible for the agency to enforce or for targeted entities to meet. MELNICK, *supra* note 25, at 190-91, 295. Jerry Mashaw and David Harfst reported a somewhat opposite direct effect of judicial review on NHTSA's regulatory program under the Motor Vehicle Safety Act of 1966. Mashaw and Harfst contend that judges' lack of understanding regarding the measurement of the crashworthiness of automobiles, along with their propensity to cast issues in terms of fairness, led a reviewing court to remand NHTSA's crashworthiness safety rules because of uncertainty about the agency's specification of crash test dummies. Despite the opposite influence of judicial review in the auto safety context, the ultimate result was the same: NHTSA adopted a regulatory strategy that satisfied the reviewing courts but resulted in no meaningful increase in safety. MASHAW & HARFST, *supra* note 1, at 89-91.

57. See Strauss, *supra* note 55, at 1126 (noting that the courts' lack of responsibility for the success of a statutory scheme causes them to focus on fundamental individual rights rather than the functioning of the regulatory system).

58. Breyer, *supra* note 54, at 389.

59. FERC's need for biologists and environmental scientists, for example, traces back to *Udall v. Federal Power Commission*, 387 U.S. 428 (1967). The *Udall* Court demanded that the Federal Power Commission (FPC) explore issues including the preservation of wild rivers and wilderness areas, the preservation of anadromous fish, and the protection of wildlife, before authorizing a dam on the Snake River. *Id.* at 450. This demand presaged the need for the Commission to study biological and ecological factors even before NEPA required consideration of the environmental impacts of federal projects. In fact, NEPA's demands for an EIS, and the statute's general expectation that agencies will take a broader perspective than they had traditionally, arose out of environmental cases in which courts developed what later became known as hard look review. See Rabin, *supra* note 3, at 1298-99; see

entists who analyze the various technical issues presented by a proposed regulation.⁶⁰ Even the structure of the independent commissions, whose primary responsibility remains the pricing and allocation of utility services, has changed to include health and environmental scientists who help perform environmental reviews.⁶¹ For issues involving scientific methodology, some agencies voluntarily submit proposed regulations to panels of outside experts with whom the agencies have contracted.⁶² These added internal checks provide assurance that the agency has not missed something that the court will find crucial to the decision. Unfortunately, they greatly delay the issuance of regulations.⁶³ The checks also tend to "water down" those regulations that the agency does adopt, because only regulations acceptable to a broad array of experts with varying perspectives receive approval from all the panels and offices that internally review them.⁶⁴

The history of the State Implementation Plan (SIP) process for implementing National Ambient Air Quality Standards (NAAQS) under the Clean Air Act⁶⁵ illustrates how skeptical courts can interfere with the

also THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 204-05 (1991) [hereinafter RATIONALITY] (describing the roles of various professionals on the FAA staff in the regulatory analyses required to support rules); Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, LAW & CONTEMP. PROBS., Autumn 1991, at 57, 58 [hereinafter *Internal Structure*] (noting that the "exigencies of external review" have greatly contributed to the structure of the EPA's rulemaking process).

60. See McGarity, *Internal Structure*, *supra* note 59, at 60-61.

61. See CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES: THEORY AND PRACTICE 588-95 (3d ed. 1993) (asserting that Public Utility Commissions now must address environmental issues in their decisionmaking); see also FRANCIS E. ROURKE, BUREAUCRACY, POLITICS, AND PUBLIC POLICY 121, 120-25 (2d ed. 1976) (noting the "expanding role of outsiders in the internal deliberations of executive agencies").

62. See McGarity, *Internal Structure*, *supra* note 59, at 88 (noting the EPA's use of outside scientists to review rules prior to their promulgation); Richard A. Merrill, *Federal Regulation of Cancer-Causing Chemicals*, 2 ADMIN. CONF. U.S.: RECOMMENDATIONS & REP. 21, 127-28 (1982) (explaining how agency use of a panel of outside scientists can enhance technical decisionmaking); Richard B. Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1256, 1354-57 (1981) (discussing the FDA's use of technical advisory committees).

63. See ALFRED A. MARCUS, PROMISE AND PERFORMANCE: CHOOSING AND IMPLEMENTING AN ENVIRONMENTAL POLICY 111 (1980) (noting that researchers hired by the EPA complained that the deadlines in the 1970 Clean Water Act and the 1972 Water Pollution Control Act were unrealistic); McGarity, *Internal Structure*, *supra* note 59, at 91, 101 (discussing the propensity of the "team model" and "adversarial model" to create delay in adopting rules); see also Merrill, *supra* note 62, at 134 (noting that agencies incur delays even in forming an advisory committee to review their regulations).

64. See GEORGE C. EDWARDS III & IRA SHARKANSKY, THE POLICY PREDICAMENT: MAKING AND IMPLEMENTING PUBLIC POLICY 128 (1978) (underscoring that "efforts to produce an appearance of unanimity can reduce experts' recommendations to broad generalizations" and disguise potential problems); see also MASHAW & HARFST, *supra* note 1, at 75-77 (demonstrating how the need for scientific and industry acceptance watered down NHTSA's initial auto safety standards); McGarity, *Internal Structure*, *supra* note 59, at 92 (arguing that the "team approach" to scientific decisionmaking may "steer the group away from the best solutions").

65. 42 U.S.C. §§ 7401-7671q (1994). The Clean Air Act mandates that the EPA establish NAAQS required to protect public health and welfare. *Id.* § 7409(b)(1) (stipulating that the primary

operation of a regulatory program. The NAAQS program requires the EPA to set air quality standards without regard for the cost of meeting those standards.⁶⁶ The Act calls upon states to adopt implementation plans, which are to specify enforceable standards that ensure that the NAAQS will be met by statutorily imposed deadlines.⁶⁷ In formulating a plan, a state can consider the feasibility and costs of achieving emission standards for particular pollution sources only to the extent that such consideration will not result in a violation of the NAAQS.⁶⁸ In addition, permits for new sources in "dirty air" areas are to impose emissions limitations that force the use of the best emission reduction technology either in use or deemed feasible by any SIP.⁶⁹ The EPA is responsible for ensuring that state permits and standards will achieve the NAAQS within statutorily specified deadlines.⁷⁰

In reviewing an EPA approval of a SIP, the Supreme Court affirmed the agency view that costs and feasibility were to be secondary to meeting clean air standards.⁷¹ It is the more locally oriented federal district courts, however, that review EPA decisions enforcing state plans, and these courts are more solicitous of industry concerns about the impact of SIP compliance costs.⁷² In response to complaints that the EPA was demanding compliance with standards that sources could not meet, these courts often deferred to state court determinations that the SIP provisions

NAAQS must be set to protect public health); *id.* § 7409(b)(2) (stipulating that secondary NAAQS shall be set to protect public welfare). The Act requires each state to adopt a State Implementation Plan that provides enforceable standards necessary or appropriate to meet the NAAQS. *Id.* § 7410(a).

66. *See, e.g.,* NRDC v. EPA, 902 F.2d 962, 973 (D.C. Cir. 1990), *vacated in part by* 921 F.2d 326 (D.C. Cir. 1991); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1148-49 (D.C. Cir. 1980); George Eads, *The Confusion of Goals and Instruments: The Explicit Consideration of Costs in Setting National Ambient Air Quality Standards*, in *TO BREATHE FREELY: RISK, CONSENT, AND AIR 222, 222* (Mary Gibson ed., 1985); *see also* MARC K. LANDY ET AL., *THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS 65* (1990) (implying that, despite the Clean Air Act's sole focus on health effects, the EPA could not set a NAAQS without implicitly taking costs into account).

67. 42 U.S.C. § 7410(a) (1994).

68. *See* *Union Elec. Co. v. EPA*, 427 U.S. 246, 264, 264-65 (1976) (holding that, in setting air quality standards, a state may choose to force technology and risk losing an industry if attainment is not possible, but may not choose to set a standard below the "minimum conditions" of the Clean Air Act).

69. *See* 42 U.S.C. § 7502(a)(2) (1994) (requiring new sources in nonattainment areas to comply with the lowest achievable emissions rate (LAER)); *id.* § 7501(3) (defining LAER). LAER is the strictest requirement imposed on stationary sources by the Clean Air Act, and is viewed as a means of encouraging use of new pollution-reduction technology without imposing an impossible burden on air pollution sources. *See* FREDERICK R. ANDERSON ET AL., *ENVIRONMENTAL PROTECTION: LAW AND POLICY 268* (2d ed. 1990); 1 WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW: AIR AND WATER* § 3.12(2).

70. 42 U.S.C. § 7410(k) (1994).

71. The Court, however, stated that the Clean Air Act did not prevent sources from challenging a SIP in state courts on grounds that the SIP imposed infeasible emissions standards. *Union Electric*, 427 U.S. at 266.

72. *See* MELNICK, *supra* note 25, at 236-37.

were infeasible.⁷³ Some even used their equitable powers of relief in enforcement actions to read into the provisions governing permit-based emission standards the requirement that such standards be feasible.⁷⁴ Moreover, because district court judges did not share the EPA's professional optimism about the progress of technology, their concern for their communities and their sense of fairness disinclined them to hold local businesses to standards that might prove impossible to meet.⁷⁵

The reticence of district courts to enforce EPA emissions standards, and the willingness of these courts to respond to the pleadings of industry and states, leave the agency with a Hobson's choice: Either compromise with the states and industry and try to reduce pollution as best it can with industry cooperation, or spend scarce resources to fund demonstration projects and hire engineers and scientists to prove convincingly the feasibility of the emissions standards it seeks to enforce.⁷⁶ The first choice gives the states and even the regulated entities something akin to a veto of the EPA's technology-forcing emissions standards. The second choice increases the delay and expense of setting such standards. In addition, by imposing on the EPA the burden of having to prove the feasibility of standards, the district courts undercut the EPA's ability to impose aggressive technology-forcing measures even when the EPA does not settle with the polluter. Either choice by the EPA has contributed to delays that have come to plague the air quality program of the Clean Air Act.

The second aspect of uncertainty introduced by hard look review concerns the significance of particular issues raised by an agency's regulatory action.⁷⁷ The hard look doctrine purports to require agencies to consider

73. See, e.g., *Sierra Club v. Indiana-Kentucky Elec. Corp.*, 16 Env't Rep. Cas. (BNA) 1511, 1512 (S.D. Ind. 1981) (refusing to enforce a SIP requirement that the state courts had held invalid because the state agency had failed to consider the technological feasibility of the requirement (referring to *Indiana Env'tl. Management Bd. v. Indiana-Kentucky Elec. Corp.*, 393 N.E.2d 213, 222 (Ind. 1979))); *Kennecott Copper Corp., Nev. Mines Div. v. Train*, 424 F. Supp. 1217, 1230-31 (D. Nev. 1976) (upholding a state court's grant of an injunction on grounds of economic infeasibility), *rev'd on other grounds*, 572 F.2d 1349 (9th Cir. 1978) (noting in dicta that even if the lower court had properly exercised jurisdiction, intervention by the district court was still improper because the Administrator could not be bound by a state's finding of economic infeasibility).

74. See *Union Elec. Co. v. EPA*, 450 F. Supp. 805, 815 (E.D. Mo. 1978) (holding that a court may use its equitable powers to prevent irreparable harm when a party in good faith seeks a variance from a SIP), *rev'd*, 593 F.2d 299 (8th Cir. 1979); see also, e.g., *United States v. Interlake, Inc.*, 429 F. Supp. 193, 197 (N.D. Ill. 1977) (observing that the feasibility of SIP requirements can be raised as a defense to an EPA enforcement proceeding, but abstaining from deciding whether the SIP is unconstitutionally vague until the state interprets the SIP); *Friends of the Earth v. Potomac Elec. Power Co.*, 419 F. Supp. 528, 535 (D.D.C. 1976) (stating in dicta that although infeasibility is not a defense to an EPA proceeding to enforce a SIP requirement, courts have equitable powers to refrain from ordering a violating source to shut down).

75. For a general description of the barriers courts erected to EPA enforcement of SIP requirements, see MELNICK, *supra* note 25, at 193-238.

76. See *id.* at 195 (noting how courts' reticence to impose sanctions for SIP violations results in greater expenditures of EPA resources and encourages the EPA to make concessions to polluters).

77. See Mashaw, *supra* note 4, at 203 (noting the uncertainty that results because judges are relatively uninformed about which of the issues raised in a challenge to a rule are important); Pierce,

all relevant factors.⁷⁸ But an enormous number of factors inevitably have some relevance to the agency decision,⁷⁹ though not necessarily enough to warrant the time and effort called for by the hard look test. The question for the agency seeking to promulgate a rule is: Which factors or issues will the reviewing court consider sufficiently important to have merited rigorous analysis by the agency?

This question arises in virtually every case of agency rulemaking. Every agency rule in a complex regulatory scheme will have ancillary impacts and raise issues other than the primary controversies that the agency decision resolves. Nonetheless, such issues may be significant enough that the wisdom of the agency action hinges on their resolution. It is very difficult for a reviewing court to appreciate the significance of ancillary issues that an agency decision may raise. A court is often left with a choice between deferring totally to the agency's characterization of an issue as tangential and insisting that the agency take the utmost care in resolving every aspect of every problem raised by a proposed rule. Demanding the utmost care on ancillary issues can have the perverse effect of precluding agency regulation altogether.⁸⁰

For example, early on in its regulatory agenda, the National Highway Traffic Safety Administration decided to require crashworthy cars, and its first step in this program was adoption of its passive restraint standard.⁸¹ This standard, expressed as a performance standard,⁸² represented a major break with regulations of the past, which had imposed modest design requirements on individual components of automobiles.⁸³ The crashworthiness program, in contrast, threatened to create uncertainty about manufacturers' ability to meet NHTSA standards and to impose major costs on the auto industry.⁸⁴ Despite these threats, and in the face of aggressive

supra note 4, at 74 (asserting that an "agency cannot predict which . . . issues a court will consider so important as to justify detailed treatment").

78. See Breyer, *supra* note 54, at 383; see also, e.g., *Beno v. Shalala*, 30 F.3d 1057, 1073-74 (9th Cir. 1994); *Central Ill. Pub. Serv. Co. v. FERC*, 941 F.2d 623, 627 (7th Cir. 1991); *Iowa Terminal Ry. v. ICC*, 853 F.2d 965, 969 (D.C. Cir. 1988); *Maryland People's Counsel v. FERC*, 761 F.2d 780, 785-86 (D.C. Cir. 1985).

79. See Pierce, *supra* note 4, at 69 ("[A]ny competent lawyer with access to sufficient resources can identify issues that an agency arguably discussed inadequately.").

80. See Mashaw, *supra* note 4, at 203 (arguing that uncertainty about the significance courts will attach to issues "produces defensive rulemaking, if not abandonment of the rulemaking process").

81. For a comprehensive history of NHTSA's attempt to adopt a crashworthiness auto safety program, and the impact of judicial review on this program, see MASHAW & HARFST, *supra* note 1, at 87-105.

82. The standard provided that "anthropomorphic test devices" (i.e., crash test dummies) with specified measuring devices had to register lower than certain allowable levels of force and deceleration. Occupant Crash Protection, 35 Fed. Reg. 16927, 16929 (1970).

83. See MASHAW & HARFST, *supra* note 1, at 74-83.

84. See *id.* at 86 (describing the controversies over feasibility and costs of Standard 208, the agency's first standard pursuant to its crashworthiness program).

challenges on judicial review, NHTSA was able to support its overall judgment that its passive restraint standard was a reasonable response to the statutory mandate to improve auto safety.⁸⁵

Nevertheless, the regulatory program adopted by NHTSA depended on testing crashworthiness using crash test dummies, and the agency had not specified the requirements for such dummies in sufficiently "objective" terms to guarantee that tests under identical conditions would yield identical results.⁸⁶ By most accounts, the objectivity of the specifications for crash dummies was not a major bone of contention in the agency proceeding.⁸⁷ The reviewing court, however, thought the issue of dummy specification to be sufficiently significant that it reversed and remanded the regulations until the agency issued specifications for dummies that would satisfy the court's requirement of identical results.⁸⁸ By the time the agency issued specifications that addressed the objections of the industry, the political window that had allowed NHTSA to adopt the entire regulatory scheme had closed.⁸⁹ Thus, the ancillary issue of the design of crash test dummies essentially precluded NHTSA from adopting crashworthiness rules for auto safety that virtually all agreed would have provided significant net social benefits.

The third sort of uncertainty engendered by hard look review involves the question of how much analysis is enough. Even when the agency has explained its resolution of an issue, courts sometimes remain unsatisfied that the agency has performed an adequate analysis.⁹⁰ To meet the hard look test an agency must persuade the court that it gave reasoned consideration to the administrative record, yet the test provides no objective formula for an agency to evaluate whether it has given sufficient care to an issue.⁹¹

To the extent the hard look doctrine has imparted any message to agencies, it is that agencies must collect data and provide analyses to

85. See *Chrysler Corp. v. Department of Transp.*, 472 F.2d 659, 674-75 (6th Cir. 1972).

86. *Id.* at 676.

87. See *MASHAW & HARFST*, *supra* note 1, at 90 (noting that airbag suppliers and some automobile manufacturers found the standard sufficiently objective to state that they would be able to comply with it).

88. *Chrysler*, 472 F.2d at 681.

89. See *MASHAW & HARFST*, *supra* note 1, at 92 (explaining that "*Chrysler* lent political support to the manufacturer's basic criticism of NHTSA's new performance-based approach"); *id.* at 123 (detailing the change in the "overall political climate" surrounding auto safety regulation).

90. See *Pierce*, *supra* note 4, at 69 ("Agencies can predict neither the scope nor the intensity of the duty [to explain rulemaking decisions] as it is ultimately applied by a reviewing court.").

91. *Compare, e.g.*, *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1993) (refusing to second-guess the agency's crediting of experts' opinion about technical facts), *with* *Foundation for N. Am. Wild Sheep v. Department of Agric.*, 681 F.2d 1172, 1180 (9th Cir. 1982) (rejecting the agency's conclusions about the reaction of wild sheep to a road because the data on which the agency relied involved a road below the sheep's habitat, while the proposed road would be above the sheep's habitat).

support their rejection of every reasonable alternative to the approach they took and to respond to every plausible argument against their approach. Agencies have reacted in part by performing costly and time-consuming studies to support their rules to the neglect of other parts of their statutory mandates.⁹² They have also reacted in part by shying away from issuing regulations for which the evidentiary support would be too expensive or time consuming for the agency to obtain.⁹³ Either response chills the setting of regulatory standards.

Moreover, when a court reverses and remands a decision to an agency on the grounds that the decision is not sufficiently supported by data and reasoning, the court often imposes an impossible task on the agency. For example, in the celebrated *State Farm* decision,⁹⁴ the Supreme Court rejected NHTSA's determination that auto owners would disable automatic seatbelts.⁹⁵ At the outset, the Court accepted NHTSA's conclusion that data from automobiles with automatic belts were not a reliable predictor of usage of such belts because owners of these cars had voluntarily purchased the automatic seatbelt option and the cars were equipped with a device inhibiting detachment.⁹⁶ The Court, however, found problems with the agency's reliance on data about seatbelt use in automobiles equipped with manual belts because NHTSA had failed adequately to take into account that the same inertia that might discourage an automobile occupant from buckling a manual belt would also discourage the occupant from disabling an automatic belt.⁹⁷ This left NHTSA in the unenviable position of having data with only marginal relevance to the critical issue of predicted usage of automatic seatbelts. By remanding the agency's factual judgment concerning this data, the Court implicitly imposed on NHTSA the task of collecting additional data from a representative population of automobiles that did not exist. Not surprisingly, NHTSA chose to wait for Congress to provide a political solution to this regulatory quandary.

B. *The Call for Turning Hard Looks into Soft Glances*

The uncertainties and demands for prohibitively expensive analyses engendered by the hard look test have prompted numerous calls for an

92. See, e.g., MELNICK, *supra* note 25, at 347 (concluding that the court-initiated prevention of a significant deterioration program under the Clean Air Act diverted scarce administrative resources from other programs).

93. See, e.g., MASHAW & HARFST, *supra* note 1, at 121-22 (reporting a colloquy between Senator Hartke and NHTSA's chief counsel, during which the chief counsel indicated that judicial review was preventing NHTSA from promulgating certain regulations); McGarity, *supra* note 2, at 1414-19 (reporting that overly aggressive judicial review contributed to the abandonment of rulemakings by the EPA and the Consumer Products Safety Commission).

94. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

95. *Id.* at 46.

96. *Id.* at 52-53.

97. *Id.* at 54.

easing of judicial oversight of agency decisionmaking.⁹⁸ For the most part, commentators have advocated a change in the hard look metaphor, suggesting instead that courts act as judicial “nursemaids” to agency decisionmaking or, alternatively, as professors evaluating the agency on whether its decision merited a passing grade.⁹⁹ I am skeptical, however, whether a more deferential attitude toward agency decisionmaking will relieve the problems created by hard look review without forfeiting the benefits that flow from such review.¹⁰⁰

First, calls for a new metaphor, such as “pass/fail” review, do not take into account judges’ motivations in establishing administrative law doctrine. According to a leading model, judges tend to balance their ability to dictate outcomes consistent with their own values against the impact that deviating from existing doctrine will have on their judicial reputations and pride in their judicial abilities.¹⁰¹ Increasing the indeterminacy of administrative law doctrine allows judges to pursue their preferred outcomes without paying a reputational price.¹⁰² If that is so, then the replacement of one fuzzy metaphor with another that sounds more deferential is unlikely to have any significant impact on the outcome of challenges to particular rules.¹⁰³ In the end, calls for pass/fail review, without any operational guidelines constraining how courts should decide what passes and what fails are unlikely to alter the actual operation of judicial review.

Second, raising the level of deference to agency rulemaking may not reduce an agency’s incentives to engage in excessive data collection and analysis. Simply making review more “agency friendly” will not tell the agency how to perform its analyses in a manner sufficient to pass judicial review. Moreover, without delving into the details of a rulemaking record and questioning the agency’s rationale in light of data and arguments submitted by challengers of the rule, most judges lack the expertise with the

98. See, e.g., Mashaw, *supra* note 4; McGarity, *supra* note 4; Pierce, *supra* note 4.

99. See McGarity, *supra* note 2, at 1453 (suggesting the pass/fail metaphor); Patricia M. Wald, *Making “Informed” Decisions on the District of Columbia Circuit*, 50 GEO. WASH. L. REV. 135, 138 (1982) (suggesting the nursemaid metaphor).

100. Cf. Mark V. Tushnet, *Judicial Review*, 7 HARV. J.L. & PUB. POL’Y 77, 77 (1984) (asserting that there is an inescapable tension between allowing meaningful judicial review and limiting the discretion of judges to invalidate political decisions of the legislature and the executive).

101. See Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1055-57 (1995). Although Shapiro and Levy’s model of judicial motivation is not without controversy, it is the only model of which I am aware that analyzes the motivations of judges in reviewing agency decisions, and captures at least some of the influences on judges in that context.

102. See *id.* at 1058-62.

103. Cf. Nicholas S. Zeppos, *Judicial Review of Agency Action: The Problems of Commitment, Non-Contractibility, and the Proper Incentives*, 44 DUKE L.J. 1133, 1150 (1995) (arguing that, accepting Shapiro and Levy’s theory of judicial motivation, their proposed reform of the APA is unlikely to alter judicial review because their proposed standards are little more determinate than existing doctrine).

substantive areas of agency regulation to know whether the agency, in adopting the rule, has reached a reasonable decision. Hence, even under a more deferential standard of review, courts will have to consult the record and ensure that it is consistent with the agency's reasoning.¹⁰⁴ This in turn sends a message to the agency that its chances of success on review increase if it collects additional data and performs more analysis. Thus, significant incentives remain for an agency to overtax its scarce regulatory resources.

Third, easing of judicial review may have a detrimental impact on the agency deliberative process.¹⁰⁵ For example, courts could dramatically reduce the uncertainty created by judicial review simply by eliminating meaningful review; they could affirm any rule that was not wholly irrational.¹⁰⁶ That would still leave congressional and presidential review to ensure against unwise agency rulemaking.¹⁰⁷ But both congressional and

104. *Cf. Leventhal, supra* note 46, at 528 (contending that, in order to determine whether an agency has given good faith consideration to environmental impacts under NEPA, a court must engage in "an analysis of the environmental consequences sufficient to convince [the] court that these impacts have been considered").

105. The Department of Health and Human Services' (HHS) rulemaking on funding of family planning projects that support abortion, ultimately upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991), illustrates how easing the requirement that agencies support their rules with detailed reasons can have perverse effects on agency policymaking. *See* HHS Regulations Regarding Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a Method of Family Planning, 53 Fed. Reg. 2922 (1988). Because the second step of the *Chevron* doctrine requires courts to defer to an agency's interpretation of a statute if that interpretation is reasonable, HHS never bothered to analyze the policy implications of its interpretation challenged in *Rust*. Instead, the agency took advantage of the leeway granted by *Chevron* to reduce its role (as opposed to that of the reviewing court) to one of determining whether a politically driven interpretation was permissible. *See* Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEXAS L. REV. 83, 109-11 (1994) (describing *Chevron's* influence on HHS's view of its regulatory task); *see also* Zeppos, *supra* note 103, at 1147-49 (noting that the Department of Justice's focus on *Chevron's* step one in litigating administrative matters for agencies may have had perverse effects on the ability of agency staff to dictate regulatory policy).

106. If courts deferred to all but irrational agency decisions, that would reduce uncertainty about the level of analysis agencies would have to perform by informing them that they need perform *no analysis*. Although this might encourage rulemaking, it is also almost certain to encourage lack of care by the agency in adopting a rule as well. *See* Breyer, *supra* note 54, at 395 (noting that the overall impact of judicial review might be to encourage more reasonable agency decisions). Courts could also alleviate uncertainty about the required level of agency analysis by going to the opposite extreme and simply reversing any rule if the record left any doubt about its wisdom. *Cf. Zeppos, supra* note 103, at 1143 ("[I]t is possible to have what appear[s] to be more determinate . . . judicial review but have power taken away from administrative agencies."). Such an approach would encourage deliberation when the agency decided to adopt a rule, but would impose such an extreme requirement of collection and analysis of information that the costs of deliberation would almost certainly exceed the benefits. Under such a strict approach to review, agencies would adopt standards by any means other than rulemaking whenever they could. Not surprisingly, no commentator has suggested increasing the stringency of judicial review as a means of decreasing uncertainty.

107. *See* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1248-51 (1989).

presidential review increase the propensity for agency rules to benefit groups with narrow interests.¹⁰⁸ By demanding that agencies publicly justify their rules, however, judicial review can discourage the adoption and interpretation of rules preferred by special interest groups.¹⁰⁹ Increasing the likelihood that a rule will be upheld by relaxing the requirements that an agency explain its decision to a court might, by the same token, increase the proportion of rules driven by pressure from special interest groups or an agency agenda that is at odds with the general public's desire for regulation.

To the extent that a more deferential sounding metaphor will raise affirmance rates for agency rules, one would expect agencies to increase their willingness to resort to rulemaking to set policy. For some who bemoan the flight from rulemaking, this alone justifies easing the overall standard of judicial review.¹¹⁰ But, increased use of rulemaking is not always appropriate;¹¹¹ sometimes judicial rejections of rules reflect circumstances that make incremental, case-by-case policymaking a preferable alternative to rulemaking.¹¹² Moreover, benefits from encouraging rulemaking must be offset by any detrimental impact easing review will have on the quality of agency decisionmaking and judicial filtering of bad rules from good ones. Hence, before accepting or rejecting proposals to ease the strictness of arbitrary and capricious review, one should carefully analyze how proposed modifications of the hard look test will affect both

108. See Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 10-12, 21 (1994); see also Breyer, *supra* note 54, at 395 ("One can still argue in favor of [judicial review] by claiming that the President's efforts will be affected greatly by the politics of the day and that Congressional efforts may be incoherent." (footnote omitted)).

109. See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 256 (1986) (arguing, in the context of agency interpretation of statutes, that courts' focus on public justifications for statutory provisions tends to increase the likelihood of public-interest-oriented interpretations of statutes); Seidenfeld, *supra* note 105, at 136 & n.261 (remarking that a requirement that agencies publicly provide detailed reasons for their decisions, as required by hard look review, reduces the costs of monitoring against special-interest-oriented agency decisions).

110. See, e.g., Pierce, *supra* note 1, at 27.

111. See Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 535 (1970) (analyzing the history of two uses of rulemaking in FCC and CAB proceedings and concluding that "rulemaking procedures are inherently no more productive of effective policy-making than are adjudicatory proceedings"); see also Daniel J. Gifford, *Discretionary Decisionmaking in the Regulatory Agencies: A Conceptual Framework*, 57 S. CAL. L. REV. 101, 129-31 (1983) (explaining how agencies can use adjudication to avoid constraining their future actions while they gain information from experience with particular cases).

112. For example, with respect to the very issue for which Richard Pierce found judicial review had discouraged needed rulemaking, another commentator argued that FERC's resort to adjudication in concrete cases to set the parameters for deregulating wholesale electric power may have allowed the agency to "decide which policies are [best] suited to current technological, regulatory and market conditions." Rossi, *supra* note 1, at 805.

the quality of agency decisionmaking as well as the agency's willingness to resort to rulemaking to set regulatory standards of conduct.

II. The Impact of Easing Hard Look Review on Agency Uncertainty

To evaluate the overall benefit of easing hard look review, one must balance the effects such an easing will have on the quality of agency decisionmaking against the benefits of increasing the flexibility of the regulatory process.¹¹³ Crucial to such an evaluation is consideration of how courts might structure more deferential review to avoid the three types of uncertainty that the hard look test introduces into the rulemaking process.¹¹⁴ Having courts implement *operational* changes in the way they engage in hard look review, instead of altering the overall level of deference they accord agency decisions, may be more likely to affect judicial review in a manner that will deossify the rulemaking process. Operational changes can be structured to specify with particularity how courts should sift through a rulemaking record to minimize uncertainty without forfeiting the benefits of hard look review. Moreover, the specificity of operational criteria would increase the reputational cost to judges who ignored them, thereby increasing the likelihood that courts, in individual cases, would conform to these changes rather than pursue a particular outcome.¹¹⁵ Thus, in analyzing the likely impacts of altering stan-

113. See Strauss, *supra* note 29, at 1473, 1473-74 (arguing that easing judicial review to facilitate rulemaking might compromise the "important good" of controlling government discretion).

114. For a description of these three types of uncertainty, see *supra* notes 54, 77, and 90, and accompanying text.

115. I have assumed the courts themselves would adopt any operational changes in judicial review, rather than the legislature imposing those changes on the courts. First, I do not believe that the current Congress is likely to adopt these changes as amendments to the APA. Cf. Richard J. Pierce, Jr., *Legislative Reform of Judicial Review of Agency Actions*, 44 DUKE L.J. 1110, 1127-28 (1995) (expressing skepticism about the suggested legislative reforms proposed by Shapiro and Levy, *supra* note 101, at 1073-75). Second, I am somewhat optimistic that individual judges will recognize that they are in a repeated prisoner's dilemma situation: All would be best off if they would not pursue outcomes in particular cases, but each needs a mechanism to monitor and enforce that her brethren will not pursue outcomes. See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 33-35, 165-67 (1994) (describing the prisoner's dilemma and repeated games); cf. Zeppos, *supra* note 103, at 1138 (describing the Supreme Court's decision in *Chevron* as motivated by the desire to gain benefits from cooperating in such a repeated game). The specificity of my suggested operational changes facilitates such monitoring, allowing enforcement by a threat of a tit-for-tat or trigger strategy. See BAIRD ET AL., *supra* at 167-72 (noting that for a repeated prisoner's dilemma in which the number of repetitions is unknown, cooperative strategies backed by threats of retaliation for deviations by the other players can form stable equilibria); cf. Zeppos, *supra* note 103, at 1140-41 (noting that the problem the Supreme Court has had in enforcing the *Chevron* game stems from the Justices' inability to agree whether any one of them has breached the agreement to apply the *Chevron* doctrine). Finally, even if lower-court judges do not press for such doctrinal changes themselves, the Supreme Court has a great incentive to do so because the number of cases the Justices hear is so limited that they derive little benefit, compared to judges on the lower courts, from the occasional ability to alter outcomes in particular cases. See Strauss, *supra* note 55, at 1101-02 (noting that the Supreme Court's limited

dards of judicial review, one must consider particular changes in how courts go about performing such review as alternatives to merely changing the overall deference of review.¹¹⁶

A. *Uncertainty About How Reviewing Courts Will Treat Agency Expertise*

To alter the level of deference of judicial review as a means of easing uncertainty about the significance judges might attach to agency expertise in a particular context, courts would have to refrain from questioning the assumptions underlying technical assessments when an agency invokes its expertise to justify those assumptions. Such assumptions, however, often make or break the agency's explanation for the standard it imposes.¹¹⁷ Often there are no data that prove the effectiveness or feasibility of a standard directly. Instead, the agency is faced with data in related situations that may support or undermine its standard, and the agency must assess the extent to which such data relate to the situation covered by the standard.¹¹⁸ Faced with such a situation, applying a deferential pass/fail standard of review precludes the court from delving into agency decisions that the agency asserts flow from its experience in dealing with such matters.

How such added deference might ease rulemaking burdens can be illustrated by returning to the example of EPA decisions regarding emission

ability to review administrative law cases encourages it to send clear signals to the lower courts about how to apply standards on review rather than to correct their particular misapplications of law).

116. I am not the first to venture down the path of suggesting a solution that focuses on particular operational criteria for channelling judicial review. Recently, Richard Pierce began to forge this trail with his article evaluating judicial modifications to traditional doctrines of judicial review as means of deossifying rulemaking. Pierce, *supra* note 4, at 71-93. In addition, Sidney Shapiro and Robert Levy have proposed a detailed statutory amendment to the review provisions of the APA that they believe reduces the indeterminacy of the existing standard of review. Shapiro & Levy, *supra* note 101, at 1074, 1077. *But see* Ronald M. Levin, Comment, *Judicial Review and the Uncertain Appeal of Certainty on Appeal*, 44 DUKE L.J. 1081, 1087 (1995) (questioning whether Shapiro and Levy's suggested standards for review are not merely calls for increased judicial deference to agency decisions).

117. The EPA's setting of the allowed ambient air concentration for lead, under the Clean Air Act's NAAQS program, is a classic example of a regulation that crucially depended on the agency's expert judgement about the significance of existing data. The statute required the Administrator to set the standard at the level necessary to protect the public health, allowing for an adequate margin of safety. The Administrator relied on studies showing that blood levels of 40 $\mu\text{g}/\text{dl}$, the level that the Center for Disease Control (CDC) considered the threshold of undue exposure as evidenced by increased levels of EPP, would provide the adequate margin of safety required by the statute. The EPA had no data that clearly distinguished the 30 $\mu\text{g}/\text{dl}$ level from any other level, but simply used its expert judgment, informed perhaps by that of the CDC, to choose this level. National Primary and Secondary Ambient Air Quality Standards for Lead, 43 Fed. Reg. 46246, 46252-53 (1978).

118. Again the setting of the NAAQS for lead provides an apt example. The EPA methodology for setting the NAAQS required the agency to determine how lead in the air contributes to levels of lead in the blood. The EPA had data showing that every 1 $\mu\text{g}/\text{m}^3$ of lead in the air tended to increase lead by 1.5 $\mu\text{g}/\text{dl}$ in the blood of adults. Some studies indicated, however, that children are more sensitive than adults to exposure to lead. The EPA thus translated this data into a finding that every 1 $\mu\text{g}/\text{m}^3$ of lead in the air tended to increase lead by 2.0 $\mu\text{g}/\text{dl}$ in the blood of children. *Id.* at 46250.

standards in permits for new sources in "nonattainment" areas for a criteria pollutant.¹¹⁹ Suppose the EPA had based a standard on a breakthrough in the basic chemistry involving a pollutant. Theory and laboratory tests suggest that this breakthrough will enable industry to improve its techniques for removing the pollutant from the exhaust of manufacturing plants. The EPA "experts," schooled in these disciplines, find the optimistic outlook of the pure scientists compelling. The lay courts, however, perhaps remembering other salient instances in which technology did not fulfill its promise, might not find the data as conclusive.

Under the hard look test, in the face of strong denials of effectiveness or feasibility by the industry, a court might demand that the EPA point to prototypes of the new technique, have engineers perform studies showing that such prototypes can work in the context and on the scale at which the standard will apply, and have economists conduct studies of the costs of the technique and the impact of such costs on the industry or even particular sources.¹²⁰ To ease these administrative burdens, a pass/fail test would have to mandate that the reviewing court accept the EPA's assertion that the technology can be developed within a time frame that will allow the source to meet the emission standard. The EPA presumably would meet the pass/fail test as long as its explanation for its standard explicitly addresses this prediction. Thus, the test would obviate the need for the EPA to delay the rulemaking while it performed studies or commissioned prototypes in order to pass judicial review.

It is highly questionable, however, that relaxing the standard of judicial review at this point in time will greatly reduce agencies' propensity to seek reinforcement from diverse professional perspectives for the technical assumptions it makes in reaching a decision. Even if the law relaxed its requirements, the politics of regulation has become accustomed to environ-

119. Criteria pollutants are those for which the Clean Air Act requires the EPA to set NAAQS. See 42 U.S.C. § 7409(a)(1) (1994). Nonattainment areas are those regions of the country for which the ambient concentrations of the pollutant in the air exceed the NAAQS set by the EPA. See *id.* § 7407(d)(1)(A)(i).

120. See, e.g., *United Steelworkers v. Marshall*, 647 F.2d 1189, 1293-99 (D.C. Cir. 1980) (rejecting OSHA's findings that permissible exposure levels for lead were technologically feasible in part because the agency had not developed data quantifying the extent to which the promising technological innovations it identified would reduce workers' exposure to lead); *National Lime Ass'n v. EPA*, 627 F.2d 416, 434 (D.C. Cir. 1980) (remanding a new source performance standard for cement plants because the EPA had not demonstrated that the plants at which the EPA had tested the technology were representative of those used by the industry); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 641-47 (D.C. Cir. 1973) (rejecting the EPA Administrator's prediction that the auto industry could comply with technology-forcing emissions limitations because the agency had not collected data over the useful lives of vehicles and questioning the agency's assumptions about the reliability of predictions made from data over shorter periods of use); cf. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1366 (4th Cir. 1976) (cautioning the agency that it had not adequately considered industry arguments that backfitting power plants with controls on thermal water pollution was not economically feasible).

mental impact statements and regulatory impact analyses. The affected public has come to expect agencies to double-check their assumptions with others who have a less direct stake in adopting given regulations,¹²¹ and the politically responsive branches of government in the White House and the Capitol probably would not tolerate off-the-cuff agency decision-making.¹²² If anything, recent legislative proposals regarding administrative regulations hint that the political process will demand more agency analyses and outside checks before an agency adopts a rule.¹²³

There is, moreover, a fundamental reason for encouraging an agency to seek diverse professional perspectives from within its staff when developing rules. Staff members play a crucial role by filtering information and analyses that get to the agency head—the commission or secretary ultimately responsible for adopting the rule.¹²⁴ Based on this information, the decisionmaker may well conclude that alternatives to the staff's proposed rule are untenable. To the extent that the channelled information reflects an idiosyncratic regulatory perspective of a subgroup of the agency staff, it can lead the agency head to adopt a rule that advances a parochial vision of the public interest or that is downright unwise.¹²⁵

121. See Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, LAW & CONTEMP. PROBS., Autumn 1991, at 311, 335-36 (describing how distrust of the EPA led the courts to impose burdens on the agency that it could not meet, which in turn contributed to the perception of regulatory failure). At some level, the distrust of agencies and the preference for judicial constraints on agency action seems to be a fundamental part of the American political and legal culture. See Mashaw, *supra* note 4, at 231 ("As a nation we are committed to judicial control of agency action.").

122. Competition between the White House and the Capitol for influence over the federal bureaucracy has led to increased oversight and micromanagement by both branches. See Shapiro, *supra* note 44, at 24-26. Such oversight has manifested itself in requirements that agencies provide detailed analysis of their policies to OMB or the courts. See Lazarus, *supra* note 121, at 330-40 (noting how distrust of the EPA by both the President and Congress has led to increased oversight by both branches).

123. See, e.g., H.R. 926, 104th Cong. (1995) (proposing that agencies be required to prepare flexibility and regulatory impact analyses for all major rules, subjecting flexibility analyses to judicial review and regulatory impact analyses to OMB review, and providing minimum time periods for comments to proposed rules and an opportunity for response to comments); S. 291, 104th Cong. (1995) (proposing similar measures regarding flexibility and impact analyses and requiring that agencies prepare risk assessments prior to adopting rules); S. 592, 104th Cong. § 4 (1995) (increasing the substantive burden OSHA would be required to meet in order to promulgate workplace health standards).

124. See B. GUY PETERS, *THE POLITICS OF BUREAUCRACY* 139 (3d ed. 1989) (noting subordinates' ability to control and distort the information they pass on to their superiors); Wallace S. Sayre, *Dilemmas and Prospects of the Federal Government Service*, in *THE FEDERAL GOVERNMENT SERVICE* 1, 2 (Wallace S. Sayre ed., 2d ed. 1965); see also DOUGLAS YATES, *BUREAUCRATIC DEMOCRACY: THE SEARCH FOR DEMOCRACY AND EFFICIENCY IN AMERICAN GOVERNMENT* 132 (1982) (asserting that the "force of [guild-like] professionalism is diminished by conflict among various professional groups over the shape and substance of policy").

125. The outcome of the regulatory process may also be skewed by an agency staff's identification of a particular interest group as its "client." See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 36 (1984) (characterizing bureaucrats' relationships with client interest groups as a resource that an agency staff can manipulate to influence policy); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 84-86 (1989) (contending that recent

The rulemaking process at the EPA illustrates how, without the influence of aggressive judicial review, proposed rules and the analyses that accompany them to the agency head tend to reflect the perspective of the program office within the agency responsible for the substantive regulatory area governed by the rule.¹²⁶ This "lead office" provides the impetus for internal development of a rule, and writes the first draft of a proposed rule.¹²⁷ Other offices at the agency then become involved in the rule-making by participating in a "working group" responsible for developing the proposed rule that will be forwarded to heads of the various offices and ultimately will be published in the *Federal Register*.¹²⁸ Because these offices are not directly responsible for the rule, however, they have little inherent institutional interest in ensuring that the rule that the Administrator ultimately adopts is sound.¹²⁹ And, without the need to convince an outside reviewer, like a judge, of the rule's wisdom in light of data available to the agency, a lead agency has little reason to slow down the rulemaking process to address the concerns raised by a working group.¹³⁰ Thus, without the threat of aggressive judicial review, one would expect rules to reflect the lead office's perceived need for the regulation.

The perspective of the lead office, however, may be very parochial or biased towards special interests. In traditional regulatory agencies, which regulate a single industry, staff members in the lead office may come

efforts to grant a multitude of interest groups access to agency staff makes capture by a single interest group more difficult).

126. Although the internal procedures leading to a rule differ from agency to agency, focusing on EPA procedures allows one to get a good feel for how rules can reflect an office's idiosyncratic perspectives. First, the team model of rulemaking that is prevalent at the EPA is not unique to that agency. See McGarity, *Internal Structure*, *supra* note 59, at 90 (describing the team model as a general procedural approach to rulemaking). Second, the commentary deriding judicial review for its ossifying impact has identified the EPA as an agency for which the costs of ossification have been considerable. See McGarity, *supra* note 2, at 1414 (noting that the EPA's rulemaking efforts were among those most frequently "hamstrung" by hard look review). Thus, if relaxing the hard look test is of questionable net value for deossifying EPA rulemaking, it is unlikely to be of great value in other contexts.

127. See Sanford E. Gaines, *Decisionmaking Procedures at the Environmental Protection Agency*, 62 IOWA L. REV. 839, 843 (1977); cf. McGarity, *Internal Structure*, *supra* note 59, at 72 (noting that the creation of a working group occurs after approval of the lead office's "start action request," and that at this stage "the ball is in the program [*i.e.*, lead] office's court").

128. See Gaines, *supra* note 127, at 843; McGarity, *Internal Structure*, *supra* note 59, at 73-76. My analysis focuses on the "team model" of rulemaking. Agencies may use other models, but these are not any more likely to result in efficient procedures that lead to wise rules. See McGarity, *Internal Structure*, *supra* note 59, at 94-107 (reviewing the strengths and weaknesses of various internal rulemaking models).

129. See William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 56 (1975) (quoting a senior EPA official who wrote in a memo to the author that "[w]orking [g]roups really do very little except carp, and protect what they perceive to be their interests"); cf. Gaines, *supra* note 127, at 843 (noting that the lead agency has primary responsibility for a rule and performs most of the work on the rule even after the working group is formed).

130. See Pedersen, *supra* note 129, at 59.

directly from employment in the industry, or at least share the professional background of their industry compatriots.¹³¹ Rules coming out of such offices are prone to further the interests of the regulated industry. Such capture poses less of a threat within agencies created to protect the public against harms that cut across industries. Staff members in lead offices at such agencies, however, may still share a unique regulatory ethic.¹³² Such an ethic may take root because most of the staff in the lead office come from a similar professional background.¹³³ It may arise because the office attracts individuals zealously committed to alleviating harms that fall within the office's regulatory jurisdiction.¹³⁴ Or, the ethic might derive from the office's institutional role within the agency.¹³⁵ Regardless of how the lead office's ethic is created, if unchecked by other staff it can lead to rules that do not reflect a consensus view of the public interest.

A study of the EPA's water effluent standards for corn wet milling plants illustrates the propensity for an agency to ignore input from staff members outside the lead office. The EPA initiated the corn wet milling

131. See Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 103 (1992) (noting that an agency's need for expertise leads the agency to draw regulators from industry); cf. PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* 19 (1981) (asserting that administrative agencies may be biased towards special interests because agency officials hope "to seek industry employment and will therefore be inclined to use the office to build a store of goodwill with industry").

132. See Seidenfeld, *supra* note 40, at 1555; see also CHARLES T. GOODSSELL, *THE CASE FOR BUREAUCRACY: A PUBLIC ADMINISTRATION POLEMIC* 131-32 (2d ed. 1985) (noting that administrators follow professional norms); Carl J. Friedrich, *Public Policy and the Nature of Administrative Responsibility*, 1 PUB. POL'Y 3, 12-17 (1940) (pointing out that administrators have technical as well as legal and political standards of responsibilities).

133. See David Goetze, *The Shaping of Environmental Attitudes in Air Pollution Control Agencies*, 41 PUB. ADMIN. REV. 423, 428-29 (1981) (concluding that environmental attitudes exhibited by employees of state pollution control agencies are affected by the employees' professional backgrounds and internal agency processes); Macey, *supra* note 131, at 103-04 (noting that professional background and sources of information affect experts' perspectives on regulation); Charles Pruitt, *People Doing What They Do Best: The Professional Engineers and NHTSA*, 39 PUB. ADMIN. REV. 363, 366, 365-66 (1979) (noting that the numerical dominance of engineers at NHTSA resulted in a technical and mechanical research "independence" from the auto industry and from such politically crucial factors as "consumer acceptance and protection from unwarranted costs"). For an extensive discussion of how and why professional norms affect bureaucrats' behavior, see WILSON, *supra* note 125, at 59-65.

134. See Jeremy Rabkin, *Office for Civil Rights*, in *THE POLITICS OF REGULATION* 304, 333 (James Q. Wilson ed., 1980); WILSON, *supra* note 125, at 67 (both noting that the Office for Civil Rights's propensity to attract officials with considerable enthusiasm for the agency's mission contributed to its pushing activist interpretations of the civil rights statutes it enforces).

135. See MARCUS, *supra* note 63, at 107-12 (describing the different perspectives of various offices at the EPA); Errol Meidinger, *Regulatory Culture: A Theoretical Outline*, 9 LAW & POL'Y 355, 373-74 (1987) (observing that agency socialization may be more important than the regulator's background in determining her role in a regulatory culture); see also SAMUEL KRISLOV & DAVID H. ROSENBLUM, *REPRESENTATIVE BUREAUCRACY AND THE AMERICAN POLITICAL SYSTEM* 118-19 (1981) (noting that bureaucrats are often "socialized" to take on the viewpoint of the clientele they serve in their official capacities); WILSON, *supra* note 125, at 36-49 (demonstrating how immediate tasks facing government officials affect their attitudes and behavior).

rulemaking proceeding in 1972,¹³⁶ at which time most courts had not adopted the hard look gloss on arbitrary and capricious review.¹³⁷ The EPA contracted out the job of initially collecting data about water pollution from such plants, and the contractor drafted a preliminary standard that set limits on effluent averaged over one- and thirty-day periods.¹³⁸ The data to support the standard, however, were woefully inadequate; in particular the contractor had collected only long-term average effluent measurements for the entire industry, which indicated little about the ranges of such effluent over one- or thirty-day periods.¹³⁹ The project officer, who was from the lead office, lacked the expertise to recognize that the data did not support the preliminary standard, so he decided to proceed using the contractor's suggested standard as the basic rulemaking proposal.¹⁴⁰ The standard was then reviewed by a working group, which identified the difficulties with the standard, but the working group's concerns were ignored.¹⁴¹ In 1974, the EPA adopted a final standard very similar to the contractor's initial proposal.¹⁴² The appellate court applied hard look review to these rules and, not surprisingly, remanded for lack of sufficient support.¹⁴³

Of course one cannot be certain that EPA awareness of the hard look standard would have cured the problems with this rulemaking.¹⁴⁴ But at least the hard look test would have given the bureaucracy within the agency an incentive to take seriously criticisms of a proposed rule by staff

136. See Gaines, *supra* note 127, at 849.

137. In 1971, the Supreme Court had just laid the predicates for hard look review of informal action in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Only the D.C. Circuit had previously utilized the hard look test, which Judge Leventhal first announced in *Greater Boston Television v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970). In 1972, even the D.C. Circuit was struggling with the issue of whether the courts should merely specify agency procedures rather than demand that the substance of the agency decision be reasonable in light of the record on review. See Rabin, *supra* note 3, at 1306-08; Wald, *supra* note 99, at 138-39 (both describing the debate between Judges Leventhal and Bazelon regarding whether courts should engage in close substantive scrutiny of agency decisions or merely specify procedures for agencies to follow in particular cases).

138. See Gaines, *supra* note 127, at 852-53.

139. See *id.* at 852-53.

140. See *id.* at 855.

141. See *id.* at 855-56.

142. Grain Mills Point Source Category, 39 Fed. Reg. 10512 (1974).

143. See *CPC Int'l Inc. v. Train*, 515 F.2d 1032, 1049 (8th Cir. 1975).

144. McGarity alludes to the fact that the Eighth Circuit reversed the rule a second time even after the EPA had responded to the first remand by bolstering its record supporting the rule. McGarity, *supra* note 2, at 1416. He thus cites this rulemaking as an example of judicial overreaching that contributes to ossification. *Id.* at 1416-17. Another detailed account of this rulemaking, however, concludes that even after remand the position of the Agency was so entrenched that the Agency failed to correct the problems originally identified by the working group. Gaines, *supra* note 127, at 862-63. The key benefit of hard look review is its ability to get the agency to take concerns of perspectives outside the lead office seriously early in the development of a rule.

members outside the lead office.¹⁴⁵ Without such incentives, the ultimate decisionmaker may never be aware that a rule has problems, or what options she has in light of those problems.

This analysis thus reveals an intrinsic tension between the ossification of rulemaking stemming from judicial unwillingness to defer to agency expertise and the benefits that flow from judicial demands for comprehensive analysis of a rule. Relaxing hard look review of rulemaking can relieve uncertainty about whether a court will second-guess the agency's expertise and might help to deossify rulemaking by reducing an agency's propensity to obtain independent analyses by various staff offices or outside groups. But any such gain comes at a price: Hard look review encourages agencies to obtain and coordinate input from various professional perspectives.¹⁴⁶ By doing so, hard look review discourages rules that reflect a biased or parochial view of the public interest. Thus, relaxing hard look review to reduce uncertainty about attitudes towards agency expertise directly undercuts a significant benefit that flows from such review.

B. *Uncertainty About the Significance of Issues Raised in a Rulemaking Proceeding*

Lawyers thrive on applying critical reasoning skills to cases, and judges, who usually come from the ranks of successful lawyers, are therefore well qualified to spot logical weaknesses in arguments and gaps in reasoning.¹⁴⁷ But without the technical background of professionals within an agency, judges often cannot ascertain the extent to which such weaknesses and flaws undermine the efficacy of a complex regulatory program. This is especially true for agency rulemaking, for in the rulemaking context courts confront arguments about the impact of factors in the abstract. In judicial challenges to rules, unlike enforcement proceedings,

145. See Pedersen, *supra* note 129, at 60 (noting that judicial opinions inquiring into the minute details of rulemaking "give those who care about well-documented and well-reasoned decisionmaking a lever with which to move those who do not"); cf. James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION*, *supra* note 134, at 381 ("As outside groups . . . hired economists and scientists to challenge EPA decisions, the power of scientists and economists within EPA grew.").

146. See Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1711-12 (1993) (noting how NEPA's requirement that agencies identify and consider environmental impacts forced agencies to include environmental experts in the agency decisionmaking process).

147. See William Warfield Ross, *Components of an Adequate Record*, in *LAW AND SCIENCE IN COLLABORATION: RESOLVING REGULATORY ISSUES OF SCIENCE AND TECHNOLOGY* 23, 31 (J.D. Nyhart & Milton M. Carrow eds., 1983) (asserting that appellate judges can perform hard look review of scientific issues because the skill required is not "a working familiarity with . . . scientific fields" but rather "sufficient familiarity with scientific method to be able to follow and evaluate the analytic processes used by the agency in its decision"); Patricia M. Wald, *Judicial Review of Economic Analyses*, 1 YALE J. ON REG. 43, 54 (1983) (stating that ensuring that an agency's conclusions actually flow from technical data "requires primarily logic and legal skill, both of which are familiar home turf for judges").

neither agencies nor opponents of their rules have data reflecting direct experience with the agency standard.¹⁴⁸ Faced with conflicting assertions about whether an ancillary issue affects the efficacy or cost of a rule, a court applying the hard look requirement that the agency carefully consider all relevant factors has little choice but to assume that the issue is significant and to demand that the agency present studies showing that the rule is justified despite the concerns of the commenters.

So long as one retains a commitment to meaningful judicial review of agencies' reasoning processes, however, easing the stringency of the hard look test will not eliminate the prospect that a court will deem a marginal issue to be significant. Indiscriminately relaxing the standard of judicial review cannot affect a judge's ability to distinguish truly important issues from those that are not significant. To the extent that courts demand logical and factually supported reasoning as the basis for an agency decision, the agency will have to perform significant analyses even under a relaxed standard of review. Under a relaxed standard, an agency may attempt to argue that further analysis of a contested issue is unwarranted because the issue is not sufficiently important. But even allowing the agency this leeway will not relieve it of the burden of having to support its assertion that the issue is not significant.¹⁴⁹ An analysis of the importance of an issue will itself be costly. More significantly, a court might discredit this secondary analysis. Hence, the agency will still face uncertainty about what issues the reviewing court will find significant. A corollary to this conclusion is that courts cannot eliminate such uncertainty by merely increasing the level of deference to agency decisions without entirely abdicating their review of the agency reasoning process.

Courts could alleviate this uncertainty by abandoning meaningful review of the decisionmaking process altogether. Several commentators have advocated such abandonment, arguing for ex-post political oversight of agency decisionmaking instead.¹⁵⁰ Ex-post political oversight of agency decisions, properly structured, does provide an important check against runaway agencies and a partial check on agency capture.¹⁵¹ Congress or the White House is likely to react if the outcome of an agency

148. See MASHAW & HARFST, *supra* note 1, at 245-46 (advocating the delay of judicial review of rules until they are enforced in a particular context as a means of making judicial review less abstract and of giving the courts information about compliance costs and feasibility).

149. Justice Breyer made much the same point when he wrote: "The reason agencies do not explore all arguments or consider all alternatives is one of practical limits of time and resources. Yet, to have to explain and to prove all this to a reviewing court risks imposing much of the very burden that not considering alternatives aims to escape." Breyer, *supra* note 54, at 393.

150. See, e.g., Verkuil, *supra* note 19, at 457; Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEXAS L. REV. 469, 520-25 (1985).

151. See Seidenfeld, *supra* note 40, at 1568, 1572-74.

rulemaking imposes substantial burdens on any well-organized interest group. Experience with political oversight, however, suggests that one must temper any optimism about the capacity of political review to improve the agency decisionmaking process.¹⁵² Political checks that purport to seek a better rulemaking process are usually hidden means of influencing rulemaking outcomes.¹⁵³ Thus it is not surprising that under President Reagan, OMB in practice exempted rules aimed at deregulation from the rigorous requirements of Executive Order No. 12,291,¹⁵⁴ which mandated that rules be cost justified.¹⁵⁵ Similarly, the Republican Congress's efforts to require agencies to perform more analyses before adopting new rules or implementing existing ones is a thinly veiled attempt simply to hinder imposition of regulatory requirements that agencies might impose on industry.¹⁵⁶ The reason for the focus of political review on outcome is simple: Politics is driven by the bottom line. Although this focus on outcome is not inherently bad, it does limit the effectiveness of political oversight as a means of encouraging improved agency decisionmaking processes.

Reliance on political oversight alone also raises the prospect of agency rules driven by immediate political concerns. The hard look mandate that an agency think carefully about all relevant issues discourages an agency from rashly appeasing short term political pressures by cutting deals that ignore the interests of those without political clout.¹⁵⁷ Instead, the agency at least will have to consider all affected interests, even if only to provide some reason for treating each issue as it did. On occasion, decisions may arise that an agency cannot justify by acceptable rationales; for these, making the agency state reasons for its decision may prevent it from

152. Cf. Shapiro, *supra* note 44, at 39 (explaining political oversight as a competition between the White House and Capitol Hill for influence over agency policy that has not resulted in "more democracy or better regulatory policy").

153. See Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, LAW & CONTEMP. PROBS., Autumn 1991, at 127, 179-84, 189-94 (arguing that OMB oversight of EPA rulemaking cannot be explained as a means of coordinating or improving the process of agency decisionmaking); Seidenfeld, *supra* note 108, at 11-12, 21 (contending that congressional and presidential oversight facilitates outcomes that serve special interest groups).

154. 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 (1982), revoked by Exec. Order No. 12866, 3 C.F.R. 638 (1994).

155. See MCGARITY, RATIONALITY, *supra* note 59, at 69-70; Oliver A. Houck, *President X and the New (Approved) Decisionmaking*, 36 AM. U. L. REV. 535, 540 (1987); Percival, *supra* note 153, at 150.

156. See Verkuil, *supra* note 19, at 454 (noting that proposed legislation requiring agencies to perform risk assessment prior to adopting rules "seems designed as much to stymie as to refocus the rulemaking process").

157. See Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491, 517 & n.120 (1987); Seidenfeld, *supra* note 108, at 24-25; Sunstein, *supra* note 43, at 211 (all noting that, absent judicial review, agencies are likely to tailor their policies to serve the needs of powerful special interests).

reaching the regulatory outcome it initially favored.¹⁵⁸ In such cases, the hard look test might prompt the agency to think creatively about regulatory approaches that will adequately respect all affected interests.

For example, despite arguments that judicial review would paralyze FERC's deregulation of electric generation and transmission, hard look review of FERC deregulation may have stimulated FERC's use of a creative regulatory approach. Richard Pierce has vociferously criticized the District of Columbia Circuit for its repeated remand of FERC's rules that attempt to impose an open access to natural gas pipelines.¹⁵⁹ According to Pierce, the court's holdings that FERC failed adequately to address the costs of transition to a market based system were both unfounded and counterproductive.¹⁶⁰ Pierce predicted that these cases would discourage FERC from pushing the wholesale provision of electricity towards a competitive market system.¹⁶¹

Contrary to Pierce's prediction, FERC did not abdicate its responsibility to deregulate electricity. Its difficulty with persuading the courts that it had adequately addressed transition costs when deregulating natural gas, however, may have convinced FERC that deregulation of an entire industry is best begun using a case-by-case approach. Hence, FERC initially avoided rulemaking efforts to deregulate electric generation and transmission in favor of conditioning approval of utilities' applications for mergers and market-based rates on the applicants providing competing generators access to their transmission grids.¹⁶² Such conditions allow FERC to tailor transmission access and market-based rates to take into account the magnitude and distribution of transition costs in particular markets. In addition, by attaching mandates that utilities move to a competitive system as conditions on approvals desired by utilities, FERC has mollified the electric industry's opposition to deregulation. Finally, the judicial focus on transition costs presaged congressional concern about the same issue. Congress has even taken steps to prevent FERC from attaching deregulatory conditions on utility companies' applications for mergers and rate approvals when the transition costs created by those conditions are likely to fall heavily on these utilities' existing customers.¹⁶³ Had FERC issued

158. Cf. JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 35-36 (1983) (arguing that norms against asserting self-interest to justify political outcomes foster outcomes that serve some conception of the public interest).

159. Pierce, *supra* note 1, at 21-26.

160. *Id.* at 18-22.

161. *Id.* at 18-19.

162. See *Entergy Servs., Inc.*, 58 F.E.R.C. ¶ 61234 (1992), *rev'd on other grounds sub nom.*, *Cajun Elec. Power Coop. v. FERC*, 28 F.3d 173 (D.C. Cir. 1994); see also Rossi, *supra* note 1, at 794-99.

163. See Rossi, *supra* note 1, at 796 (noting that the Energy Policy Act of 1992 contained provisions "intended to protect native load customers"). For example, the Energy Policy Act of 1992

a rule ordering such deregulation across the board, it might have prompted a congressional response that would have scuttled deregulation entirely. Thus, by prompting FERC to take transition costs seriously, the D.C. Circuit encouraged the agency to use a regulatory approach that allowed for more flexible and acceptable means of allocating transition costs.¹⁶⁴

In short, hard look review performs a valuable function by encouraging agencies to think through the full implications of their policies. Abandoning meaningful judicial review altogether, in contrast, encourages policies that react to short term political preferences of powerful interest groups. Taking a middle course by relaxing hard look review while maintaining meaningful review would compromise the impact of hard look review without doing much to relieve the uncertainty about courts attaching significance to peripheral issues.

Ossification, however, is not a foregone conclusion. Some operational modifications to hard look review could reduce this uncertainty without forfeiting the hard look test's encouragement of careful consideration of important issues. Courts could rely on entities with greater knowledge or greater democratic legitimacy to flag those issues that merit the rigors of the hard look approach. To the extent that an agency can identify these flags before it makes its decision, it will have a better indication of the issues on which courts will press it.

Entities likely to have greater knowledge than the courts about the significance of issues raised by an agency-proposed rule include those that make the effort to get involved in the rulemaking proceeding.¹⁶⁵ Such entities usually are substantially affected by the proposed rule and therefore

requires FERC to terminate or modify an order requiring a utility to provide transmission for another generator of electricity if "the ordered transmission services require enlargement of transmission capacity and the transmitting utility subject to the order has failed, after making a good faith effort, to obtain the necessary approvals or property rights under applicable Federal, State and local laws." 16 U.S.C. § 824j(d)(1)(C) (1994). In effect, this provision allows state and local regulatory entities to block major FERC wheeling orders.

164. Cf. Rossi, *supra* note 1, at 809-10 (hypothesizing that hard look review may have played a part in prompting states and Congress to push for deregulation of the electric utility industry). Having gained some experience with issues relating to transition costs in particular markets, FERC recently adopted a rule governing open access to utilities' electric transmission facilities, in which it authorized utilities to recover "legitimate, prudent and verifiable standard costs" caused by their having to provide transmission for other power generation. See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21540, 21628 (1996) (to be codified at 18 C.F.R. pts. 35 & 385); see also Jim Rossi, *Can the FERC Overcome Special Interest Politics?*, PUB. UTIL. FORT., Oct. 15, 1995, at 31. FERC explicitly acknowledged that judicial concerns with transition costs caused by the agency's earlier deregulation of the natural gas industry and by FERC's decisions allowing particular power companies to charge market rates helped guide the agency's resolution of the stranded cost issue. See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 61 Fed. Reg. at 21630-32.

165. See CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 162 (1994) (noting that public participation in rulemaking provides the agency with substantive information as well as an indication of the acceptability of a proposed rule).

may have direct experience that bears on the rule's efficacy or cost.¹⁶⁶ That these entities have taken the trouble of contacting the agency prior to the development of a proposed rule or of submitting comments after the agency publishes the notice indicates that they have made some investment in becoming informed.¹⁶⁷ Courts can reduce uncertainty about the significance of issues relating to a rule by refraining from raising *sua sponte* issues that commenters in the rulemaking proceeding did not themselves squarely bring before the agency.

Psychologically, judges might have difficulty ignoring issues they believe to be germane to the validity of a rule: having envisioned a potentially detrimental effect of a rule, judges naturally would seek some reassurance from the agency that this effect will not ensue. If, however, the agency has no notice at the time of its decision that the court will consider the issue significant, and therefore glosses over the issue, the only opportunity for the agency to provide such reassurance is on remand. To avoid the risk of remand because the court, without warning, identifies an issue as significant, the agency must fully address every potentially relevant issue. Thus, allowing courts to quell their fears by identifying issues on which the agency was not asked to focus places a burden on the agency to analyze every issue relevant to its rule. To avoid ossification, reviewing courts must resist the temptation to raise problems that the interested parties did not bring to the agency's attention.

Interested parties, unfortunately, are just that; those parties opposed to an agency rule have every incentive to raise every issue and introduce every factor that undercuts the agency's decision.¹⁶⁸ Moreover, they have an interest in portraying every such issue as significant.¹⁶⁹ Hence, courts cannot blindly rely on commenters' characterizations of an issue as important; they need some reliable signal that the affected entities actually

166. See Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 LOY. L.A. L. REV. 791, 802-03 (1994) (noting that the EPA will need to enlist industry in generating data on pollution and the efficacy of particular regulatory mechanisms); Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 663 (noting that regulators depend on the industries they regulate for "reliable information about the effect of various regulatory policies on industry performance").

167. Public input into the rulemaking process generally is more important and influential when the agency is developing the proposed rule, prior to publication of the notice of rulemaking that technically "kicks off" the informal rulemaking proceeding. See Elliot, *supra* note 14, at 1495.

168. Interested persons who participate in a rulemaking have such incentives because they view rulemaking as an adversarial process and notice and comment proceedings as a means of creating a record to support their contentions in subsequent lawsuits challenging the rule. See Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 20-21 (1982) (noting that the adversarial nature of rulemaking leads parties to take positions in which they do not believe and to overstate their case); Robert B. Reich, *Regulation by Confrontation or Negotiation?*, HARV. BUS. REV., May-June 1981, at 82, 85 (contending that lawyers who represent interested parties in administrative proceedings manipulate procedures by raising contentions that are not central to the issues in controversy).

169. See Pierce, *supra* note 13, at 310.

do consider the issue to be as important as they say.¹⁷⁰ One such signal would be an investment by a commenter in that entity's own collection and analyses of data. Presumably, an entity would not decide to make such an investment unless it believed the resulting data would ultimately provide substantial support for its position. Without such a signal, courts should decline to credit a commenter's characterization of an issue as important. This limitation on the issues a reviewing court seriously considers would raise the cost to interested parties of commenting on each issue, and discourage them from merely submitting a laundry list of concerns about a proposed rule. The limitation would also encourage interested parties to submit comments that focus the agency's attention on those issues that the parties consider most significant, thereby preventing entities from "sandbagging" agencies by failing to emphasize a concern they have with a proposed rule until their brief on judicial review.

Chrysler Corp. v. Department of Transportation,¹⁷¹ which dealt with an early controversy generated by NHTSA's attempt to require airbags in automobiles, illustrates how courts might have used signalling by affected entities to determine whether an issue they raise in a rule challenge truly is significant.¹⁷² In *Chrysler*, the court upheld NHTSA's authority to promulgate an auto safety standard that, in effect, required automobile manufacturers to install airbags in new cars. The standard specified allowable effects of crashes on test dummies, and the court upheld the substantive standard.¹⁷³ The court, however, reversed the rule because the agency had failed to specify completely the standards regulating the construction of test dummies. The court agreed with auto manufacturers that test results might differ because of the variability of test dummies, and therefore that the standard did not comport with the statutory requirement that it be "objective."¹⁷⁴ In so doing, the majority's concern for fairness to manufacturers who faced potential liability for violating the standard led it to read into the statute a degree of objectivity that was neither pragmatic nor seemingly intended by Congress.¹⁷⁵

170. For a general discussion of the theory of signalling, see BAIRD, *supra* note 115, at 122-56.

171. 472 F.2d 659 (6th Cir. 1972).

172. For a general description of the airbag controversy that led to the *Chrysler* decision and the ramifications of the court's holding, see MASHAW & HARFST, *supra* note 1, at 87-95, 121-23.

173. *Chrysler*, 472 F.2d at 674-75.

174. *Id.* at 675-78.

175. According to the dissent, the majority ignored a distinction Congress drew between safety standards, which the statute required to be objective, and procedures for testing compliance with such standards, which did not have to be objective. The dissent believed that the specification of test dummies described a testing device rather than a specification of the standard itself. *Id.* at 683-88 (Miller, J., dissenting). Moreover, the dissent pointed out that the majority's restrictive definition of objectivity—requiring that tests be capable of decisively demonstrating conclusions without any necessity for human judgment—placed an unrealistic barrier in the way of NHTSA's adoption of safety standards generally. *Id.* at 688-89; see also MASHAW & HARFST, *supra* note 1, at 90-91 (commenting that "a performance test that requires no engineering judgment is an impossibility").

The court's focus on the objectivity of the standard took the agency by surprise, and it is readily accepted today that the issue of crash test dummy specification was not central to the industry's concerns about the rule.¹⁷⁶ Had the court looked for signals from the industry, it would have realized that the issue was tangential to the controversy. General Motors had indicated, in its comments, that it could comply with the standard by the deadline established in NHTSA's rule.¹⁷⁷ GM did so because it was farther along in developing airbags and felt that it could gain a competitive advantage from NHTSA's passive restraint standard. Had the specification of test dummies, however, actually been a significant impediment to development of an airbag system that would meet NHTSA's standard, GM would not have known it could meet the standard. In that case, GM would not have had any incentive to assert it could meet the standard, as this assertion would encourage NHTSA to adopt a standard that later might subject GM to significant liability. Thus, judicial sensitivity to the need for signals about which issues in a rulemaking are truly significant might have avoided the deleterious impact its remand had on the future of NHTSA's regulatory program.¹⁷⁸

Agency staff is another group likely to possess better information than the courts about whether an issue raised in a rulemaking truly is significant. If some staff members within an agency express concerns about the agency's cursory dismissal of an issue, that might indicate to a reviewing court that the issue is significant. For courts to make a practice of scrutinizing internal communications of agency staff in search of dissension, however, would almost certainly do more harm than good. On the one hand, such scrutiny would discourage the agency from allowing its staff to communicate openly and honestly among themselves for fear that a court would parlay discussion into a reason to doubt the agency resolution of an issue.¹⁷⁹ On the other hand, some disgruntled staff members could sabotage an agency rulemaking by voicing dissent, knowing that this would obligate the agency to perform full-fledged studies of any issues they raised. The result would then be increased ossification.

176. See MASHAW & HAREFT, *supra* note 1, at 90-91.

177. *Id.* at 90.

178. For a description of the impact of the *Chrysler* decision on NHTSA's efforts to set a passive restraint standard, and more generally on NHTSA's auto safety program, see *id.* at 92-93.

179. See McGarity, *supra* note 53, at 1327-28 (1987) (noting that allowing courts to use information in regulatory analyses as a basis to question agency decisions would deform the deliberative process of creating such analyses and may induce agencies to avoid preparing such analyses); *Regulatory Procedures Act of 1991: Hearings on H.R. 746 Before the Subcomm. on Administrative Law and Government of the House Comm. on the Judiciary, 97th Cong.* 891 (1981) (prepared statement of David A. Clanton, Acting Chairman, Federal Trade Commission) (stating that "analyses would be considerably less candid and, consequently, less useful for their intended purposes, if they were subject to adversarial attack in litigation").

If, however, the agency itself credited the staff's concern by addressing it seriously in an official decision, then the court should take note. In essence, a court could view an agency's expression of concern about the importance of an issue under a variant of the hard look requirement that the agency act consistently. An agency should not be free to deem an issue important in the context of one decision, and then claim it is insignificant in the context of another. The agency should have to consider the issue carefully in the second context as well, unless it could show that the differing context, changed circumstances, or new data support its contention that the issue was no longer of consequence.¹⁸⁰

The *State Farm* decision illustrates how courts can rely on signals from the agency itself to identify issues warranting analysis. In 1970, NHTSA amended its standard governing seatbelts in automobiles, adopting a passive restraint standard that in effect mandated that manufacturers install airbags.¹⁸¹ Seven years later, the agency explicitly allowed manufacturers the choice of using automatic seatbelts instead of airbags.¹⁸² In 1981, following the election of President Reagan, NHTSA reversed its position and concluded that detachable automatic seatbelts would not be effective because it predicted that car occupants frequently would disable them.¹⁸³ Instead of returning to the airbags-only requirement implicit in the 1970 standard, however, the agency simply revoked its passive restraint standard without even discussing the airbags-only option.¹⁸⁴ The Supreme Court reversed NHTSA's 1981 decision on the grounds that NHTSA's previous implicit conclusion that airbags provided an effective restraint system obligated the agency to consider the airbags-only option.¹⁸⁵ The Court properly found the agency's failure to address the issue to be arbitrary and capricious even though commenters appear not to have suggested this option to NHTSA.

Congress is a third group to which reviewing courts should look to determine whether an issue warrants detailed attention by the agency. Although members of Congress themselves may not have much more technical appreciation for a regulatory matter than do judges, congressional

180. See *supra* note 50 and accompanying text.

181. Federal Motor Vehicle Safety Standards; Occupant Crash Protection in Passenger Vehicles, Multipurpose Passenger Vehicles, Trucks, and Buses, 35 Fed. Reg. 16927 (1970); see also Inflatable Occupant Restraint Systems, 34 Fed. Reg. 11148 (1969) (proposing the passive restraint standard and explaining NHTSA's expectation that manufacturers would meet it by installing airbag restraint systems).

182. Federal Motor Vehicle Safety Standards; Occupant Restraint Systems, 42 Fed. Reg. 34289, 34296-97 (1977).

183. Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 46 Fed. Reg. 21172, 21176 (1981).

184. Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 46 Fed. Reg. 53419 (1981).

185. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983).

staff members tend to be knowledgeable about regulatory issues.¹⁸⁶ Hence, one should consider Congress, as an institution, to have some expertise about the significance of an issue. Moreover, the perceived significance of many regulatory issues often reflects political value judgments rather than technical assessments.¹⁸⁷ In fact, the legitimacy of the bureaucratic state as a source of regulatory standards depends on a presumption of legislative supremacy.¹⁸⁸ Thus, even if the legislature leaves resolution of the details of regulation to an agency, if the agency's authorizing statute prescribes that it look to certain factors to guide its decision, the agency has no legitimate power to give those factors short shrift.

*Brae Corp. v. United States*¹⁸⁹ provides a good illustration of how a court can use congressional direction to determine the relevance of issues raised by an agency decision. In *Brae*, the court first upheld an Interstate Commerce Commission (ICC) decision to deregulate all rates charged by a single railroad for freight transported by boxcar. The court relied on clear congressional intent to encourage the ICC to deregulate such rates to the extent possible.¹⁹⁰ The court, however, reversed the ICC decision also to deregulate joint rates—rates divided between two railroads. The ICC had relied on the same type of generic data to conclude that railroads would not overcharge shippers with such rates. The ICC, however, had failed to address the possibility that larger railroads would exploit their monopoly power over short-haul carriers with whom they participated in joint rates to appropriate the profits resulting from any efficiencies of such small carriers. The court suggested that the ICC's failure to address this possibility might not have been arbitrary and capricious in the abstract, but became so because of clear congressional concern about larger railroads' abilities to interfere with the financial well-being of smaller, spur railroads.¹⁹¹

186. According to one account, a congressional committee's "professional staff are [the] eyes and ears for the committee leadership in relations with the bureaucracy." JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 80 (1990); see also WILLIAM J. KEEFE & MORRIS S. OGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* 169 (6th ed. 1985) (noting the congressional staff's role in enabling Congress to deal with the executive branch without being dependent on agencies for information regarding regulatory programs).

187. See Seidenfeld, *supra* note 40, at 1520; Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 281 (1986).

188. See Seidenfeld, *supra* note 40, at 1548 ("[T]he Constitution grants [policymaking primacy] to Congress as the body of duly elected representatives of the people."). It is precisely the recognition that regulation was political as well as technical that led scholars of the administrative state to abandon the expertise model of agency decisionmaking. *Id.* at 1518-20.

189. 740 F.2d 1023 (D.C. Cir. 1984).

190. *Id.* at 1043.

191. *Id.* at 1051. In suggesting that courts follow congressional direction to determine which issues warrant full regulatory analysis, I have avoided discussing the evidence on which courts should

C. *Uncertainty About the Sufficiency of Agency Analyses*

The last type of uncertainty engendered by hard look review results from an agency's inability to predict the depth of analysis that a reviewing court will find sufficient. Many of the problems created by the other categories of uncertainty are greatly magnified because the agency does not know when it can stop collecting additional data and stop analyzing a particular issue and still satisfy a reviewing court.¹⁹² To ensure against the possibility of reversal, agencies engaged in rulemaking will collect data and perform studies even when they believe that the cost and delay stemming from these activities will exceed the value of the information the agencies will derive from them.¹⁹³ An agency engaged in rulemaking might even perform analyses that it considered entirely superfluous to the process of discovering how best to structure the rule. Alternatively, the agency might shun rulemaking altogether, hoping that resort to more informal means of setting standards will relieve it of the burden of performing costly studies.

rely to discern Congress's concerns. What evidence courts may appropriately consult presents a thorny question. Many scholars have discussed problems of legitimacy raised by judicial reliance on legislative history without supporting statutory language. See generally William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365 (1990) (outlining and critiquing scholars' views of the legitimacy and affect of judicial use of legislative history); see also, e.g., George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 60-72; Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 446-47 (1990). Such problems are compounded by the fact that legislative histories can contain so much conflicting evidence from which a court can pick and choose that such histories alone might be insufficient to put the agency on notice that the court will deem an issue to require extended analysis. See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (noting judges' ability to pick out parts of legislative history). The problems, however, are less crucial than for controversies centering on pure statutory interpretation because the court would be using the legislative history merely to identify significant controversial issues that warrant agency attention; the court would not be prescribing substantive statutory mandates using language on which the whole legislative body never voted. In any case, detailed analysis of this question lies beyond the scope of this more general inquiry into deossification.

192. For examples of remands under hard look review that essentially required the agency to collect additional factual support for its decision, see *Motor Vehicles Mfrs. Ass'n v. EPA*, 768 F.2d 385, 393, 402 (D.C. Cir. 1985) (holding that the EPA failed to support its waiver of a Clean Air Act provision because it did not have data on cars with 50,000 actual driving miles) and *North Carolina v. FERC*, 584 F.2d 1003, 1015, 1017 (D.C. Cir. 1978) (remanding for FERC to gather and analyze voluminous data to evaluate alternatives to FERC's natural gas priorities rule). For an example of a case in which the court went out of its way to avoid a remand that would have required the agency to collect additional data, see *Trailways Lines, Inc. v. ICC*, 766 F.2d 1537, 1544 n.13 (D.C. Cir. 1985) (noting that the Commission's experience regarding the conduct of long distance bus companies obviated its need to perform a study on the long-term effects of permitting Greyhound to serve additional routes). For additional examples of how the courts' current application of the arbitrary and capricious test creates uncertainty about the extent to which agencies can rely on data not precisely on point, see cases cited *supra* note 91.

193. See Harter, *supra* note 168, at 21 ("An agency . . . may feel compelled to compile a great amount of factual material to counter other positions and to build affirmative cases, although such information may be of only marginal value in making the ultimate decision.").

In either event, the agency is not acting efficiently to implement its regulatory mandate.

The very uncertainty that causes the agency to perform overly detailed studies, however, also provides a benefit. Judicial review may be the only occasion for anyone outside the agency to inquire critically into the agency's decisionmaking process.¹⁹⁴ The only other outside institution that looks at the details of this process is the Office of Management and Budget, which brings its own biases to regulatory review.¹⁹⁵ Under the Reagan and Bush administrations, OMB demonstrated a propensity to avoid serious inquiry into rules that reduced regulatory burdens on industry, and to veto by inaction rules that promoted social goals at the expense of industry regardless of whether they were cost justified.¹⁹⁶ Moreover, even if OMB were not institutionally biased, its cost-benefit-based review focuses more on the bottom line of what a rule does than on the process the agency uses to promulgate the rule.

Unlike the politically driven staff of OMB, judges are experienced in spotting weaknesses in factual support and soft spots in logical reasoning. Hence, courts are geared to ensure that an agency's decision is well thought out. Given the pivotal role of judicial review, the easing of such review is likely to give the agency flexibility, but only by allowing it to adopt rules that the agency might be unable to justify upon careful analysis. In short, the direct effect of easing the standard of review would likely be not only decreased ossification, but also increased agency sloppiness. Increasing the overall level of deference that courts give to agencies can only relieve ossification at the expense of assurances of careful agency deliberation.

There are, however, steps courts can take to reduce uncertainty about the appropriate level of analysis without jeopardizing careful agency deliberation. The best approach might be to facilitate meaningful dialogue between a court and an agency as part of the review process without imposing additional burdens of analysis on the agency. Critics might object that the original cause of ossification was the judicial propensity to seek a dialogue when the agency has neither the time nor the resources within its regulatory agenda to do so. The real cause of ossification, however, has not been simply too much dialogue, but rather unrealistic expectations by courts about what the agency must bring to that dialogue, and a concomitant perception by agencies that more dialogue implies more detailed

194. See Pedersen, *supra* note 129, at 59 (arguing that, without external review, industry concerns will not be given the attention they deserve).

195. See Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 552-53 (1989); Percival, *supra* note 153, at 181; Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 191-92 (1986).

196. See MCGARITY, RATIONALITY, *supra* note 59, at 282-83, 286-87.

analyses. The key to deossifying rulemaking without requiring courts to abdicate their traditional review responsibilities is for the judiciary to invite agencies to make their decisions about the extent of analysis that they perform a part of the review dialogue.

Operationally, courts can extend this invitation by clarifying that the hard look doctrine does not require the agency to collect data to support every substantive conclusion it reaches. Hard look review should require only that the agency carefully consider its decisions; in many cases, careful consideration will indicate to an agency that time-consuming collection of data and costly further analysis are unlikely to generate sufficient informational benefits to justify their costs. Of course, reviewing courts will have to take a hard look to ensure that the agency is not simply mouthing conclusions about the cost of further study as an excuse to avoid careful consideration of issues. Frequently, however, an agency will be able to make a strong case based on existing information that further inquiry is of dubious value. In such cases, allowing the agency the option of explaining why detailed analysis is unwarranted will go a long way toward relieving the delay and uncertainty generated by forcing the agency to collect all relevant data and perform all relevant analyses. Courts should stress that agencies have this option.

Judicial reversals that require agencies to collect more data and perform more studies are perhaps the major contributors to agency fears about judicial review. Such reversals thus greatly stimulate the appetites of lawyers on agencies' staffs for overly detailed analyses. Hence, courts should hesitate before remanding on grounds of insufficient factual support for an agency decision. In particular, courts should defer to an agency's determination that collection of additional data would be counter-productive unless those challenging a rule can point to hard data that undermine the agency's conclusion. Exceptions to such deference should be made only in two instances: (1) when the court knows that the agency failed to consider data that was available to it or that it could easily have obtained;¹⁹⁷ or (2) when the potential detrimental ramifications of an agency decision are so great compared to the potential harm that follows from not regulating that an agency acts unreasonably by proceeding in the face of admitted uncertainty.¹⁹⁸

197. *See, e.g.,* *Sierra Club v. United States Army Corps of Eng'rs*, 701 F.2d 1011, 1030-31 (2d Cir. 1983) (rejecting the Corps's EIS for failure adequately to compile information relating to the impact of a proposed highway and urban renewal project on fisheries).

198. Such a case might arise, for instance, if the National Institutes of Health (NIH) approved the release of newly developed genetically engineered bacteria knowing that the bacteria, once released into the environment, might cause catastrophic harm. The NIH decision would be unreasonable if the agency admitted the risk of uncertainty, but explained that further tests would be unable to determine whether the organism, if released, is likely to cause such harm. *Cf. Foundation on Econ. Trends v. Heckler*, 756 F.2d 143, 152-55 (D.C. Cir. 1985) (reversing the NIH's approval of the release of genetically engineered bacteria because the agency had not assessed the potential environmental impact of

The *Brae* decision again illustrates how this approach might operate. In *Brae*, petitioners challenged the ICC deregulation of all boxcar freight rates, contending, among other things, that the ICC had insufficient support for its decision.¹⁹⁹ The ICC had relied on general studies of the impact of trucking on the market for boxcar freight and a detailed Conrail study of boxcar shipping for classes of commodities in the northeastern United States. Petitioners argued that the study aggregated classes of commodities across goods that comprised separate shipping markets and that the market in the Northeast was not representative of the market in all parts of the country. Nonetheless, the D.C. Circuit upheld the ICC, finding that the data on which the agency relied, along with its general studies, were sufficient to support its conclusion that railroads generally lacked monopoly power over the shipment of goods by boxcar. Although the court recognized that the ICC data did not show the absence of such power for all markets throughout the country, the court noted that the petitioners had not identified any market for which freight rates manifested such monopoly power.²⁰⁰ In essence, the court credited the agency for drawing reasonable, albeit uncertain, conclusions from the data before it, and put the burden on the petitioners to come forward with more particular data showing that those conclusions were incorrect.

III. Conclusion

Critics of hard look review are on solid ground in concluding that aggressive judicial review of agency reasoning has contributed to ossification of the rulemaking process. Their assertion, however, that merely easing the standard of review will deossify this process is more tenuous.

Hard look review encourages rulemaking paralysis because such review creates three types of uncertainty about what agencies must do to satisfy reviewing courts. First, hard look review raises doubts about whether a court will defer to an agency's invocation of expertise to resolve a rulemaking issue. Second, meaningful review of agency reasoning creates the possibility that the reviewing court will inflate the importance of marginal issues in the rulemaking. Third, aggressive judicial review clouds the agency's vision of the depth of analysis it must perform on each rulemaking issue.

Merely instructing courts to take a more deferential attitude in reviewing agency reasoning in rulemaking, however, will not substantially reduce these three types of uncertainty. Moreover, increasing overall

the release other than to conclude that the small number of bacteria released and natural processes limiting the bacteria's survival made dispersal of the bacteria unlikely).

199. *Brae Corp. v. United States*, 740 F.2d 1023, 1039 (D.C. Cir. 1984).

200. *Id.* at 1042-43.

deference to agency rulemaking will forfeit many of the benefits of hard look review. A better approach to reforming judicial review would be to specify operational modifications to how courts perform hard look review. In particular, courts should look for signals from interested parties, the regulators themselves, and Congress about what issues raised by a challenge to a rulemaking are significant. Also, courts should hesitate to remand a rule for further development of data by the agency. If courts modified hard look review according to these criteria, they might increase the flexibility of the rulemaking process without encouraging sloppy or nondeliberative agency decisionmaking.