THE LONG SHADOW OF JUDICIAL REVIEW

MARK SEIDENFELD*

I. INTRODUCTION

This Symposium, *Environmental Law Without Courts*, is meant to complement the symposium held at Florida State University in Fall 2014, *Environmental Law Without Congress*.[1] Consistent with the structure of *Environmental Law Without Congress*, most principal articles focus on agency programs or functions that are not directly affected by the courts because they are either not subject to judicial review or subject to such deferential review that such review is seen as inconsequential to agency decisionmaking with respect to those tasks. One might therefore surmise that, as suggested by this year's symposium title, courts do not and cannot affect these agency tasks in any meaningful ways. My contribution to this symposium, which is a Comment on the entire symposium theme as reflected in several of the principal articles, suggests that such a conjecture may not be justified—that, in fact, all of the articles to which I am responding focus on functions affected by courts via judicial review of other aspects of agency decisionmaking. In short, my thesis is that judicial review can cast a long shadow that has effects (perhaps even profound effects) on actions that are not meaningfully subject to such review.

This Comment begins by considering Emily Bremer and Sharon Jacobs' article,[2] which explores how agencies choose procedures within the expanse left vacant by *Vermont Yankee*'s holding that courts are not to supplement explicit constitutional or statutory procedural requirements. I argue that, although discretion to make such choices is best left with the agency, there is a need to constrain

* Patricia A. Dore Professor of Administrative Law, The Florida State University College of Law.

1. Symposium, *Environmental Law Without Congress*, 30 J. LAND USE & ENVTL. L. 1 (2014).

2. Emily Bremer & Sharon Jacobs, *Agency Innovation in* Vermont Yankee*'s White Space*, 32 J. LAND USE & ENVTL. L. 523 (2017) [hereinafter Vermont Yankee*'s White Space*].

such discretion, and the best way to do so may be by substantive review of the final agency action.

Next I proceed to consider the article by Rob Glicksman and Emily Hammond discussing agency reactions to judicial remands.[3] The action this article considers is a bit different from that in the first article I discuss because courts have already influenced the agency action at issue by reversing and remanding the matter. In fact, in many instances, the remand order includes specific instructions to the agency about how to proceed. Hammond and Glicksman, however, look at those remands in which the court has not significantly constrained the agency discretion about how to react. Factors that might influence how the agency proceeds are myriad, but I contend that the prospect of judicial review to any action the agency takes in following up on the remand is an important influence on how the agency is likely to proceed.

Finally, I turn to Christopher Walker's article discussing agency participation in drafting legislation that bears on areas within the agency jurisdiction.[4] Walker concludes that agency drafting is more likely to reflect what Congress prefers if the agency legal staff that engages in drafting rulemaking gets involved in legislative drafting—that is if legislative input comes from those lawyers in counsel's office that are involved in enacting rules, not just an isolated cadre of lawyers dedicated to interacting with Congress. Legislative drafting is the function perhaps most removed from judicial influence. One would suspect that constraints on agency participation in legislative drafting would be entirely political given that Congress must still vote whether to enact any bill and, if passed by both houses, the President would have to decide whether to sign it for approval. Hence, judicial influence on legislative drafting would seem to be both inappropriate and unnecessary. Nonetheless, I suggest that even for this function, courts matter. I speculate that arbitrary and capricious review of rulemaking, as currently practiced by courts, has been responsible for the inclusion of a variety of professional perspectives in agency rulemaking teams, and that this structure of rulemaking teams would influence agency legislative drafting toward a broader conception of the public interest.

3. Robert Glicksman & Emily Hammond, *Agency Behavior and Discretion on Remand*, 32 J. LAND USE & ENVTL. L. 483 (2017).

4. Christopher Walker, *Lawmaking Within Federal Agencies and Without Judicial Review*, 32 J. LAND USE & ENVTL. L. 551 (2017).

II. THE RECORD ON JUDICIAL REVIEW AND AGENCY PROCEDURAL AND STRUCTURAL DISCRETION

Bremer and Jacobs begin their contribution to this symposium with a description and defense of *Vermont Yankee*'s basic holding that agencies should have discretion to determine procedures for the actions that they are authorized to take over and above procedures explicitly required by the constitution and statutes.[5] Vermont Yankee's *White Space* insightfully notes that discretion has two meanings: the freedom to negotiate the bounds of standards free from hard and fast rules, but also "exercise of sound judgment."[6] Bremer and Jacobs argue that giving agencies discretion over procedures in the former sense will encourage the exercise of discretion in the latter sense because (i) outcomes often depend on the procedures used to reach them; (ii) agencies operate under extreme resource constraints, which require trading off the benefits derived from adding procedure against those lost due to investment of resources better devoted to another action; and (iii) agencies have far more "complete, systemic information" about the industry that they regulate than do the courts.[7] Bremer and Jacobs concede that giving agencies greater control over procedures may have some negative impacts, such as proliferation of administrative procedures that vary from agency to agency, or even decision to decision—variety that can decrease regulatory transparency, and procedures that may reflect agency parochialism, which can interfere with interests that fall outside the agencies perceived purview.[8]

An aside, but one that is potentially relevant to my ultimate proposal about how courts might constrain agency procedural discretion, addresses Bremer and Jacobs' contention that judicial review of agency process has been accused of ossifying agency decisionmaking processes.[9] Regardless whether that is true, the review that has most often been accused of ossifying agency action is what most scholars would deem substantive review under the reasoned decisionmaking standard laid out in *State Farm*.[10] One might characterize that review as process based in the sense that

---

5. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 543–45 (1978); Bremer & Jacobs, *supra* note 2, at 523–25.

6. Bremer & Jacobs, *supra* note 2, at 540.

7. *Id.* at 541–42.

8. *Id.* at 542.

9. *Id.* at 536.

10. *See* Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983); Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1019–57 (2000) (attributing "discrete pathological effects" including ossification, to judicial review); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1410–16 (1992) (arguing that judicial review has ossified the agency rulemaking process).

the agency can often correct problems that cause courts to reverse their actions by some process, such as further reasoning, added fact-finding, or modifications of the action to avoid problems at the margins.[11] But, such review is not the requirement of procedures in the sense *Vermont Yankee* understood that term, because the courts simply consider whether the substance of the agency decision under review is adequate, and leave the agency discretion about how to cure any such inadequacy if an action is reversed. The very history of *Vermont Yankee* demonstrates quite clearly, that the case did not mean to cut off potentially exacting review of an agency's reasons for its actions because the Supreme Court case reviewed a split *en banc* decision of the D.C. Circuit, in which the debate was not about the outcome of the case, but whether reversal was to be based on failure to provide adequate procedures in the eyes of the court (Judge Bazelon's long held preferred approach to review) rather than a judicial determination, after much delving into the substance of the decision, that the agency had failed to adequately explain the substance of its decision (Judge Levanthal's "hard look" approach).[12] The Supreme Court clearly rejected the Bazelon approach, but also left open on remand whether the court should apply Leventhal's hard look test. Hence, this Comment accepts hard look review as substantive rather than procedural review, and hence not within *Vermont Yankee*'s "white space" that Bremer and Jacobs defend from judicial interference.

I agree wholeheartedly with Bremer and Jacobs' arguments for why agencies are better suited than courts to choose procedures by which they will act so long as those procedures comply with the floor set by the Constitution, the Administrative Procedure Act (APA), and the statute authorizing agency action. Agencies' needs to weigh resource constraints, and agencies' superior institutional capacity, vis-à-vis courts, to recognize the incentives stakeholders in their regulatory processes may have to abuse procedures and, more generally, the ramifications of choosing specific procedures on

---

11. *See* Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS U. L. REV. 313, 318–19 (1996) (noting that reasoned decision requirement relates to agency process); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL. L. REV. 486, 518 (2002) (explaining that "the 'hard-look' or 'relevant factors' rubric, is almost entirely a process-based evaluation").

12. *See* Ronald J. Krotoszynski, Jr., *"History Belongs to the Winners": The Bazelon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 996–99 (2006); Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. CHI. L. REV. 1389, 1407–08 (1996) (describing the "fundamental disagreement about appropriate judicial function" that set the stage for *Vermont Yankee*); Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 225–26, 228–29 (1996) (reviewing the "well-publicized debate between Judges Bazelon and Leventhal").

substantive outcomes, render agencies far better suited to design their decisionmaking procedures.[13] Agencies have a much closer connection to the stakeholders affected by their regulatory actions, and are more likely to know whether a position taken by a participant in a proceeding reflects a valid concern rather than, for instance, a strategic effort to delay action that is not in the participant's interest.[14] Therefore, it is important to leave decisionmaking discretion to the expert agencies. Moreover, in an insightful article written by Justice Scalia when he was a mere administrative law professor shortly after *Vermont Yankee* was decided, he argued that procedures are not always intended to facilitate the agency reaching the most justifiable substantive outcome.[15] In fact, Scalia claimed Congress often includes administrative procedural requirements in authorizing statutes to bias future administrative outcomes.[16] And Scalia's intuitions are well supported by Positive Political Theory, which explains how control over procedures can favor of groups in the prevailing legislative coalition.[17] Hence, choice of procedure should be left to those actors that are politically accountable, such as Congress and agencies, rather than the courts.

That said, however, I do think that Bremer and Jacobs' assessment of *Vermont Yankee*'s "white space" ignores the potential for agencies to abuse procedural discretion—essentially allowing an agency to adopt a rule or take other action that it cannot legitimately justify. Although agencies hold the potential for flexibility to reach regulatory outcomes that better serve the

13. *See* Adrienne Vermeule, *Essay: Deference and Due Process*, 129 HARV. L. REV. 1890, 1895 (2016).(stating "the law now takes into account the interdependence of procedure and substance, and understands that agency choice of procedures is an exercise in system design, which must allocate risks of error and determine the marginal benefits and costs of decisionmaking in light of administrative goals").

14. *Cf.* Edward Rubin, *Essay: The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2128–29 (2005) ("Specifying procedures demands extensive knowledge on the supervisor's part, because the results that the procedures will produce will now depend on an ongoing interaction between the agency and outside parties who are capable of strategic action.").

15. Antonin Scalia, Vermont Yankee*: The APA, The D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 404–08.

16. *Id.* at 404–05 (stating "one of the functions of procedure is to limit power—not just the power to be unfair, but the power to act in a political mode, or the power to act at all").

17. Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 253–55 (1987) (describing how Congress can use agency procedure to ensure fidelity to the congressionally preferred outcomes); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 440–41 (1989) ("If the best policy from the perspective of the winning coalition depends on arcane information or is uncertain because of frequent changes in the state of knowledge about the problem that the policy is supposed to ameliorate . . . [a] means of achieving the policy outcome that the coalition would have adopted in the absence of uncertainty is to constrain an agency's policies through its structure and process by enfranchising the constituents of each political actor . . . that is a party to the agreement to [control agency] policy.").

public than do the courts, they might also have competing incentives. Perhaps the agency has "gone native," and seeks to pursue the policy preferences of its staff members rather than the balance of interests it authorizing statute meant to promote.[18] Perhaps the agency has been given a mandate by a political principal—the President or the Chair of congressional committees that oversees the agency's programs—that the agency would have difficulty justifying in light of its statutory responsibilities or the state of the matters it regulates.[19] Or, more likely, the agency simply finds procedural shortcuts to be attractive means of reducing the burdens it faces in order to adopt a rule or otherwise implement a policy. Recent academic commentary is rife with discussion of how agencies sometimes use their discretion to choose modes of decisionmaking to avoid public participation, shield themselves from judicial review, and even to fly under the radar of executive branch or congressional review.[20]

What Bremer and Jacobs elide is that, although agencies have the capacity to choose procedures that best serve the public interest, simultaneously they often do not have the incentives to choose those optimal procedures. The challenge for administrative law is to structure the administrative state to permit the agency discretion to deliver on its promise of superior expertise and accountability vis-à-vis the courts, while constraining the agency from responding to any perverse incentives it may have to deviate from that promise.

I would like to suggest a strategy to meet this challenge that both affords the agency sufficient space free from judicial review, and aligns agency incentives to avoid encouraging agencies to abuse procedures to facilitate illegitimate substantive decisions. The key

---

18. *See* E. Donald Elliott, *TQM-ing OMB: Or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It*, 57 LAW & CONTEMP. PROBS. 167, 176 (1994); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 700–01 (2000).

19. *See* Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1453–54 (2013) (describing problems with allowing the president to dictate agency policy).

20. *See, e.g.*, Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 408 (2007) (concluding that agencies can use guidance documents to "obtain a rule-like effect while minimizing political oversight and avoiding the procedural discipline, public participation, and judicial accountability required by the APA"); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 343–44 (2011) (discussing how guidance documents can allow an agency to avoid judicial review); James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, 57 LAW & CONTEMP. PROBS. 111, 130–32 (1994) (conjecturing that agencies will use informal rulemaking to avoid judicial oversight and political cost); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1771 (2013) ("resource-constrained agencies can choose among various regulatory forms and strategies to achieve their desired results while at the same time making it more difficult for the institutional President to review and reverse them").

to this strategy, oxymoronically, is judicial review of the substance of agency decisionmaking, not the procedure the agency used to reach that substantive decision.

Let me illustrate how this might work with the following conundrum with which courts have struggled regarding agency notice and comment rulemaking. Courts have recognized that if comments in agency rulemaking are to be meaningful, the agency must provide interested persons with access to information and analyses on which the agency relies to justify the ultimate rule it adopts.[21] When the agency relies on data or analyses to develop a notice of proposed rulemaking (NOPR), there is consensus that the agency must cite studies or make available data on which that development relies.[22] That is an easy case because once the NOPR is developed, the agency knows on what information it relied, and can cite the relevant studies or make the relevant data available to potential commenters as part of the NOPR. Providing access to the relevant information is relatively costless and allows for meaningful participation by commenters.

Courts, however, have not reached consensus about how to address the situation where an agency relies on data or analyses in response to comments.[23] In that situation, if the agency relies on the

---

21. *See, e.g.*, United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392–93 (D.C. Cir. 1973) (discussing the EPA's testing standards and disclosures); *see also* Chamber of Comm. v. SEC, 443 F.3d 890, 899 (D.C. Cir. 2006) (noting that technical studies must be made available to the public for evaluation); Conn. Light & Power Co. v. Nuclear Reg. Comm'n, 673 F.2d 525, 530–31 & n.6 (D.C. Cir. 1982).

22. *See* Cass R. Sunstein, *"Practically Binding": General Policy Statements and Notice-and-Comment Rulemaking*, 68 ADMIN L. REV. 491, 509 (2016).

23. The *Nova Scotia* court suggested that an agency cannot rely on data to support its final rule if that data was not subjected to an opportunity for comment. United States v. Nova Scotia, 568 F.2d 240, 252 (1977). Other courts have ruled that an agency can rely on such information, but usually only if the petitioner was not prejudiced by the agency failure to reveal the information. *See, e.g.*, Am. Coke & Coal Chems. Inst. v. EPA, 452 F.3d 930, 939–41 (D.C. Cir. 2006) (holding that the agency need not reopen the comment period when "the agency gave adequate notice of the procedures it intended to use, the criteria by which it intended to select data, and the range of alternative sources of data it was considering," and the agency ultimately relied on data available to the petitioner but which it had declined to rely in developing its NOPR); Kern County Farm Bureau v. Allen, 450 F.3d 1072, 1078–79 (9th Cir. 2006) (not requiring the agency to issue a supplemental NOPR when new studies were not claimed to be inaccurate and did "not provide the sole, essential support for the listing decision," but instead "provid[ed] additional grounds for the well-supported conclusions in the Proposed Rule"). But in *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1403–04 (9th Cir. 2007) the Ninth Circuit rejected the listing of an endangered species because the post–comment report on which the agency relied was the only scientific information supporting the listing, the report was a provisional draft, and the report was "central" to the agency decision. And in *Ober v. EPA*, 84 F.3d 304 (9th Cir. 1996), the court reopened the comment period to allow comments on supplemental material provided by California in a rulemaking considering approval of an SIP for Phoenix, Arizona. The court reasoned that the supplemental information was critical to the EPA's approval, and was information submitted by Arizona rather than information developed by the EPA itself. *Id.* at 314-15.

information after the comment period has closed, as usually is the case, then stakeholders would have no opportunity to comment on the agency response. It will first learn about the new information only after the agency adopts a final rule and indicates its reliance on the data or analyses. To pose the matter most starkly, suppose that the agency conducts its own studies that generate data in response to comments critical of the agency reasoning in its NOPR. In that case, one cannot fault commenters for failing to address the data that is relevant to their comments because the data did not even exist. One might surmise that the agency obligation to provide meaningful opportunity to comment would require that the agency renotice the rule, including any additional data and analyses on which it relied and providing an opportunity for comment on the new information.

But, whether a court should require such renoticing for inadequacy of the NOPR in such a situation is no longer an easy question. On the one hand, if the new data is never subjected to meaningful comment, the data may be inaccurate or the agency analyses of it may be flawed. The agency might even strategically wait until after comments to indicate reliance on data that is suspect, to avoid scrutiny of that data. Moreover, in *Citizens to Protect Overton Park*, the Supreme Court held that generally the record on judicial review is the record that was before the agency when it made its decision.[24] Were courts to follow that holding, opponents of the final agency rule would never have an opportunity to present their critique of the information on which the agency relied. On the other hand, those who oppose any final rule have every incentive to delay the issuance of the rule even if they do not have a legitimate substantive basis for challenging the rule.[25] Hence, one can bet that virtually anytime an agency relies on information never subject to comment, opponents of the rule would proffer some critique of the new information to trigger any renotice requirement recognized by the courts. And this scenario invites the prospect of multiple renotice periods: the agency relies on new information; in their second round of comments, opponents proffer critiques of such reliance; the agency reanalyzes the second round of comments and responds with new data or information; the opponents proffer critiques of the agency response to the second round of comments; and on it goes. [26] In fact, if an agency is required

24. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

25. *Cf.* Matthew T. Wansley, *Regulation of Emerging Risks*, 69 VAND. L. REV. 401, 409 (2016) ("Firms that seek to avoid regulation can strategically use the informational demands of notice and comment rulemaking to delay or prevent new rules.").

26. "Courts, however, are loathe to require 'perpetual cycles of new notice and comment periods,' and accordingly will not require new information to be subject to comment unless it

to renotice any additional information on which it relies to justify its final rule, one can envision regulated entities revealing just enough information in each round of subsequent comments to raise questions about the new information, withholding from the agency relevant information that may be useful to respond to the agency response to the first round of objections. The incentive of rule opponents to strategically proffer objections that prove unfounded thus threatens to delay adoption of the final rule greatly, or even to stymie it altogether if the agency determines that the rulemaking effort is not worth it given the added costs of procedure and the lost value from not having the rule apply during the delay.

This seems like a situation for which potential for agency abuse justifies judicial intervention into *Vermont Yankee*'s "white space," but also for which arguments for procedural white space resonate. But judicial review of the substance of the agency rule, if properly structured, can ameliorate this conundrum. Courts should, as a matter of course, allow a rule challenger to include in the record on judicial review information that was only made relevant by agency post-comment data or analyses.[27] Courts should not automatically credit such extra-agency-record information, but instead should decide, whether the information indicates a significant probability that the agency's data or justification for its rule is inaccurate or fundamentally incomplete. The parties will essentially have the

---

is dramatically and qualitatively different from information available at the start of the rulemaking." Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 894 (2007).

27. Courts have purported to recognize exceptions to the record on review as defined by *Overton Park*, allowing judges to consider extra-record evidence when an agency has " ignored relevant factors," or for scientific and technical evidence, when the extra-record evidence "may illuminate whether an [environmental impact statement] has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism . . . under the rug." Lee v. U.S. Air Force, 354 F.3d 1229, 1242 (10th Cir. 2004) (internal quotation marks omitted). But courts rarely find such exceptions warranted. In fact, in most cases that recognize an exception to *Overton Park*'s limitation on judicial consideration of extra-record evidence in the abstract, the court declines to find that the exception applies. *See, e.g.*, *id.* at 1242 (neither the record nor preliminary review of proffered extra-record evidence convinced the court that admission of that evidence was warranted); Or. Nat. Res. Council v. Lowe, 109 F.3d 521 (9th Cir. 1997) (rejecting petitioner's proffer of studies more recent than those relied on by the Forest Service in developing an Environmental Impact Statement because the studies relied on by the Forest Service were not so outdated as to render the reliance arbitrary and capricious). Courts are more apt to apply exceptions to *Overton Park*'s definition of the judicial record to cases seeking review of an EIS under NEPA, and even then, only in the most clear-cut cases where the agency seems to have ignored information of which it should have been aware independent of comments. *Cf.* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 551–55 (1978) (holding that the Nuclear Regulatory Commission (NRC) did not have to consider conservation as an alternative to licensing a nuclear power plant even when comments mentioned this alternative but did not signal its significance, and essentially refusing to consider documents raising conservation as a serious alternative to licensing because those documents did not exist until after the agency completed hearings on the licensing, albeit before the agency issued the license).

opportunity to litigate before the reviewing court whether the challengers' proffered information is relevant and material to the agency decision under review.

Creating an opportunity for interested persons to have the court consider information potentially made relevant by the agency's introduction of data or analyses post-comments still leaves the decision whether to renotice with the agency. But it creates an opportunity for those opposed to an agency substantive decision to elevate their concerns to a point where they show up on Congress's political radar screen.[28] It also creates an incentive for the agency to take seriously interested persons' potentially relevant information and to avoid responding to comments with sloppy or knowingly flawed data or analyses.[29] Of course, the agency would have to be aware of the extra-agency-record information when it decides whether to renotice because of such information. But an agency could ensure such awareness by requiring that anyone challenging a rule petition for reconsideration of the adoption of the rule, and holding the rule in abeyance until the time for such petitions passes.[30] And, once aware of the information that the challenger would put before a reviewing court, the agency could use its expertise to decide whether the criticism of its rule, supported by the petitioner's information, posed a sufficiently serious threat to affirmance on review to warrant renoticing. If the agency was comfortable that the added petitioner information was just an effort to delay the rule for no good reason, and that it could explain why its decision was well-reasoned and sound despite not considering that information, it could simply deny the petition for reconsideration. If instead the agency felt that it would itself need to add more data and analyses to justify the rule given the petitioner's information, it could grant the petition for reconsideration and renotice the rule with the data and analyses the agency thought crucial in the updated NOPR.

The advantage of substantive review, properly structured, to cabin agency procedural choices is that it leaves the agency

---

28. *Cf.* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 176 (1984).

29. *Cf.* Seidenfeld, *supra* note 20, at 390–92 (arguing that judicial review of guidance documents using extra-record considerations will encourage agency staff to encourage informal participation by stakeholders to shield the agency from surprises raised for the first time on judicial review).

30. *See* 5 U.S.C. § 704 (2012) (implying that an agency decision is not final if the agency requires a petition for reconsideration and meanwhile holds the rule inoperative). This would not necessarily delay the effective date of the rule. For example, the agency could require petitions for reconsideration to be filed within fifteen days of the publication of the final rule, which would give the agency fifteen more days to decide whether the petition warrants noticing before the rule would take effect under the APA. *See* 5 U.S.C. § 553(d) (2012) (a rule shall be published at least thirty days before its effective date).

procedural discretion formally unfettered, while providing an incentive for agencies to avoid procedures that allow sloppy or illegitimate substantive outcomes to survive political and judicial review.

III. THE THREAT OF SUBSTANTIVE REVERSAL AFTER REMAND

Glicksman and Hammond consider agency discretion in responding to a judicial remand of an agency action. As Glicksman noted in his presentation at the symposium, it is a bit strange to be focusing on cases in which the courts have remanded an action because petitioners were successful on judicial review in a symposium on environmental law without the courts. It is perhaps even stranger in light of the fact that in many cases when a court remands a challenge to agency action, the court will retain jurisdiction and provide fairly explicit instructions about how the agency is to proceed.[31] But Glicksman and Hammond omit these cases from their consideration, leaving cases on remand in which the agency does retain discretion about how to proceed. They then ask what factors bear on how an agency will proceed. I contend that one of the factors agencies are almost certainly likely to consider is the likelihood that they will be successful on judicial review if they persist in taking the action that the court rejected the first time.

I am not going to perform an empirical analysis of the factors that are likely to influence an agency post-remand. But, I will look at some cases, including perhaps some that Glicksman and Hammond discuss to try to develop a convincing story that the threat of subsequent judicial review is an important factor in the agency decision. Before I do so, however, I draw attention to several distinctions that are likely to change an agency calculation of how to proceed after remand. One important distinction is whether the remand is after review of an affirmative agency action, rather than of agency refusal to grant a petition requiring the agency to take an action the agency would prefer not to take. In Glicksman and Hammond's terminology, whether the remand is of an agency action or refusal to act reflects the valence of the underlying action: that is whether the agency favors or opposes the action.[32]

Remands of affirmative action by the agency are relevant only when the reversal is not dispositive of the ultimate outcome of the agency action, such as when the court has found the action to be arbitrary and capricious or there was a procedural flaw in its

31. *See, e.g.*, Sullivan v. Hudson, 490 U.S. 877, 887–88 (1989) (noting "the remanding court continues to retain jurisdiction over the action . . . and may exercise that jurisdiction to determine if its legal instructions on remand have been followed . . . .").

32. Glicksman & Hammond, *supra* note 3, at 496–97.

promulgation. Within those categories of cases, whether the court has vacated the decision, or instead remanded without vacatur,[33] is another distinction that Glicksman and Hammond find material.[34]

When a court vacates and remands an affirmative agency action such as adoption of a rule, the agency essentially is in a similar position as when deciding whether to promulgate a rule in the first place. In the remand context, the agency will already have developed a record; this will also be true when an agency decides whether to adopt a rule after conducting a notice and comment proceeding. Usually after going through notice and comment the agency does decide to adopt a rule, but there are rulemaking proceedings for which the agency does not promulgate a rule following notice and comment.[35] In such situations, the agency can formally decide not to issue a rule, or simply allow the rulemaking record to lie moribund. An important distinction between an agency decision whether to proceed with a rule after a notice and comment proceeding and a decision whether to proceed after remand and vacatur is that the agency has a signal from the court about the precise problems the court found with the rule, and the probability that the court will affirm repromulgation of it.[36]

Given the similarity of the agency discretion whether to try to repromulgate a rule that has been remanded, and the agency discretion whether to promulgate a rule in the initial instance, one would suspect that the probabilities of both actions would be similar. And, in fact, just as the agencies usually adopt rules once they have gone through the rulemaking process, they also usually repromulgate rules that have been vacated and remanded as arbitrary and capricious. According to the 2000 study by Bill Jordan, after remand agencies not only tried, but usually were able to reenact the same or very similar rules to ones that were reversed.[37]

---

33. For an overview and evaluation of remand without vacatur, *see* Kristina Daugirdas, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 297 (2005) (discussing the D.C. Circuit's application of the remand without vacatur); Ronald M. Levin, "*Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 298–99 (2003) (explaining why many courts elect to remand agency rules found to be unlawful under section 706(2) of the APA while allowing the rule to remain in force).

34. Glicksman & Hammond, *supra* note 3, at 489–90.

35. *See, e.g.*, Prof'l Pilots Fed'n v. FAA, 118 F.3d 758**,** 770 (affirming the FAA decision not to amend its rule prohibiting individuals over the age of sixty from piloting commercial flights).

36. "The decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (quoting International Union, UMW v. FMSHA, 920 F.2d 960, 967 (D.C. Cir. 1990)).

37. *See* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 418 tbl.3, 436, 438–39 (2000) (determining that

Nonetheless, there are exceptions to agency repromulgation of rules that have been reversed and remanded. For example, in *Corrosion Proof Fittings*, after EPA spent ten years on rulemaking virtually banning asbestos in manufacturing and products imported into the U.S., the Fifth Circuit reversed and remanded the EPA rule for, among other reasons, being arbitrary and capricious.[38] The court's ultimate conclusion stated:

> In summary, of most concern to us is that the EPA has failed to implement the dictates of TSCA and the prior decisions of this and other courts that, before it impose a ban on a product, it first evaluate and then reject the less burdensome alternatives laid out for it by Congress. While the EPA spent much time and care crafting its asbestos regulation, its explicit failure to consider the alternatives required of it by Congress deprived its final rule of the reasonable basis it needed to survive judicial scrutiny . . . .
>
> Finally, the EPA failed to provide a reasonable basis for the purported benefits of its proposed rule by refusing to evaluate the toxicity of likely substitute products that will be used to replace asbestos goods. While the EPA does not have the duty under TSCA of affirmatively seeking out and testing all possible substitutes, when an interested party comes forward with credible evidence that the planned substitutes present a significant, or even greater, toxic risk than the substance in question, the agency must make a formal finding on the record that its proposed action still is both reasonable and warranted under TSCA.[39]

The message to the agency was clear: meeting the reviewing court's arbitrary and capricious standard would be extremely difficult, and the court was unlikely to uphold a similar rule should EPA adopt one after remand. As far as I know, EPA never tried.

The situation changes when the reviewing court remands an agency rule without vacatur. *Michigan v. EPA*,[40] discussed by Glicksman and Hammond,[41] is a good example of a case in which an agency is expected to repromulgate a rule that the courts have held unlawful but have not vacated. EPA promulgated a rule regulating

---

remand prevented the agency from pursuing its objective in only twelve of forty-eight rulemakings remanded by the D.C. Circuit between 1985 and 1995, and even most of those twelve remands did not represent reversals of significant agency policies).

38. Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991).
39. *Id.* at 1229–30.
40. Michigan v. EPA, 135 S.Ct. 2699 (2015).
41. Glicksman & Hammond, *supra* note 3, at 484, 492, 498.

mercury emissions from power plants under the Clean Air Act's hazardous pollutants program.[42] The Supreme Court held that EPA erred when it interpreted the Clean Air Act to allow it to ignore costs in finding regulation of power plants under the program to be "appropriate and necessary."[43] By most accounts, EPA already had the data to justify regulation even considering costs prior to deciding to regulate.[44] On remand to the D.C. Circuit, that court refused to vacate the rule, and EPA indicated that it intended to provide the cost consideration justifying mercury regulation by April 15, 2016.[45] The rule remains in effect while the case winds its way back through the D.C. Circuit.[46]

Allowing a rule to stay in place maintains the operation of the rule while the agency considers the remand. This might be thought to encourage the agency to use its rulemaking resources to address other matters. But remand without vacatur is also a signal that the court believes the agency will be able to justify the rule once the agency responds to the remand. Also, until the agency responds to the remand, the rule is vulnerable to being rescinded by a subsequent administration. Given the signal that the court is likely to affirm the rule if the agency takes care of the particular problems identified by the court when it remanded the rule, usually it will make sense for the agency to respond to the remand and obtain a final affirmance of the rule from the reviewing court. This is supported by the fact that for the three cases Glicksman and Hammond identify involving interstate air pollution regulation in which the D.C. Circuit had remanded without vacatur, the agency readopted something similar to the rule that had been remanded shortly before the following presidential election.[47]

In the context of remand of an agency refusal to act, I would surmise that the agency reaction would again depend on the signal given by the judicial reversal of the agency decision. If the remand is grounded on a determination that the agency did not have freedom to refrain from acting, that would signal that the court is not likely to accept any rationale for continued failure to act. In the face of such a threat that the agency will never legally prevail, one would expect the agency to delay any decision, thereby

42. *Id.* at 2705.

43. *Id.* at 2706.

44. EPA acknowledged that benefits from reducing mercury air pollution were small compared to the costs of the regulation, but ancillary benefits from regulating other air pollutants greatly exceeded the costs of regulation. *Id.* at 2705–06.

45. White Stallion Energy Center, LLC v. EPA, No. 12-1100, 2015 WL 11051103, at *1 (D.C. Cir. Dec. 15, 2015) (per curiam).

46. It remains to be seen whether the election of Donald Trump as President will prompt EPA to abandon its efforts to support this rule.

47. Glicksman & Hammond, *supra* note 3, at 492–93 (citing cases).

maintaining the status quo that resulted from the lack of regulation. This seems borne out by the Bush Administration's reaction to the Supreme Court's decision in *Massachusetts v. EPA*.[48] Facing a Court from which the agency had essentially lost trust because it had asserted, among other things, that anthropomorphic climate change had not yet been proven, EPA dawdled and did not even try to respond to the Court's instruction: that "EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."[49] It was only after President Obama was elected that EPA focused on climate change and began to regulate greenhouse gas emissions.[50]

The incentives are not as clear if the court seems solicitous of the agency control over its regulatory resources, and open to the agency giving more persuasive reasons or additional facts that support a refusal to regulate. There is little advantage to an agency obtaining an affirmance of this exercise of discretion because a judicial affirmance of agency discretion not to regulate does not prevent a subsequent administration from using its discretion to regulate. Hence, I would still expect an agency not to bother addressing a remand of a decision holding that the agency abused its discretion, or factually failed to support a discretionary decision not to regulate. There are two possible exceptions to this conclusion. First, an agency might proceed to respond to the remand if it believes that it can obtain a judicial decision that it had no authority to regulate, which would preclude a subsequent administration with a different view of such regulation from moving forward. But, it will be the rare case in which a reviewing court remands an agency failure to justify a decision to regulate when the court believes that regulation is prohibited by statute. Second, the agency might actually choose to regulate to relieve political pressure that might allow a subsequent administration to impose stricter regulation than the current administration would prefer to adopt. But, for matters of significant political import, this too will often be unlikely because the time necessary for the agency to adopt substantive regulations may be so great that the agency could not be sure of completing the task prior to the next presidential election.[51]

---

48. Massachusetts v. EPA, 549 U.S. 497 (2007).

49. *Id.* at 533.

50. 40 C.F.R. § 60.5515 (2016).

51. Sidney A. Shapiro, *Rulemaking Ossification and the Debate over Reforming Hard Look Review*, 41 FALL ADMIN. & REG. L. NEWS 13, 13 (2015) ("controversial and complex rules take anywhere from four to ten or more years to complete, not taking into account the additional delays associated with judicial review"); *see also* REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION (Cary Coglianese ed., 2012).

Overall, I think Glicksman and Hammond have identified an interesting set of decisions in which agencies exercise discretion whether to address a judicial remand or instead to pay it at most feigned attention. And they have identified most of the factors likely to influence that decision. My point, however, is that judicial review of any substantive decision is likely to affect the agency reaction to a remand, sometimes in crucial ways. Again, while the courts may not meaningfully review decisions whether to act affirmatively after a remand, such decisions are made in the shadow of potential substantive judicial review.

IV. AGENCY PARTICIPATION IN DRAFTING LEGISLATION

Walker addresses perhaps the agency activity most distant from the prospect of judicial review: agency participation in drafting legislation. In a prior article, *Legislating in the Shadows*, Walker reports an empirical study that demonstrates that, for most statutes addressing an agencies regulatory program, the agency is heavily involved in legislative drafting.[52] Congressional staff turn to agencies for technical advice on how to draft statutes to achieve the ends desired by Congress.[53] Perhaps even more significantly, congressional staff rely on agency staff to inform them of how statutes will affect agency regulatory programs, and seem to accept agency input to prevent disruption of such programs, at least where that is not the purpose of the statute being drafted.[54] *Legislating in the Shadows* argues that the participation of agency lawyers in statutory drafting gives credence to the work of Peter Strauss and others who argue that agencies should have greater leeway than courts to deviate from textual interpretation, because the agency is more familiar with the underlying purposes of the statute.[55]

Legislating in the Shadows identifies one interesting and potentially problematic aspect of the relationship between agency lawyers who are most involved in drafting legislation and those who work with agency staff to write regulations to implement agency-authorizing legislation. Those agency lawyers who draft regulations in which the agency often interprets its authorizing statute may not be as aware of the statutory purposes underlying the legislation as those who interact with the legislature.[56] This can undercut the

52. Christopher J. Walker, *Legislating in the Shadows*, 165 UNIV. OF PA. L. REV. (forthcoming 2017).

53. *Id.*

54. *Id.*

55. *Id.* (manuscript p.24) (commenting on the implications of Peter Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990)).

56. *See supra* note 51.

argument for allowing agencies greater leeway than courts for non-textual interpretation, and ultimately for the *Chevron* standard of review. But, Walker downplays his concern on this score because his surveys of agency lawyers involved in legislative drafting indicate that they consult with non-legal agency staff in the process. The agency lawyers who draft legislation indicate that, after all, it is the staff members in the agency program offices that are their clients, and who actually have the knowledge about how various interpretations of the statute at issue will affect the agency program.

In his article in this symposium, Walker argues nonetheless that increasing the involvement of agency lawyers who draft regulations in the legislative process as well will allow coordination of the agency's regulatory goals with the purposes of its authorizing statutes.[57] Furthermore, based on his prior survey, Walker suggests that agencies would do well to structure their counsels' offices so that legislative and rulemaking counsel are not isolated from each other (and perhaps even overlap) to implement involvement of those responsible in drafting regulations in the legislative process.

At first blush, one might conjecture that Walker has identified an agency function that is, and should be, entirely independent of judicial review. There already is a check on the agency in the form of the legislative process that ensures that the agency does not seize the statutory drafting process to promote its own idiosyncratic values. One can be sure, at least for legislation enacted in the ordinary course of the legislative process,[58] that members of Congress and their staffs will allow the various interest groups that are affected to vet the statutory language.[59] If the agency slips language into a statute that upsets the constituents or groups that provide campaign funding to the senators and representatives, such language is unlikely to be enacted without awareness by the staff of some potential opposing legislator.

But I contend that even legislative drafting is affected by judicial review, albeit indirectly. Back before Judge Leventhal and his D.C. Circuit brethren developed the "hard look" test under the APA's arbitrary and capricious grounds for review,[60] the structure of agency staffs were simpler. In line with the process envisioned by

57. Walker, *supra* note 4, at 560–61.

58. *See* Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015) (noting that the process of enacting legislation often deviates from the paradigm of committee consideration and thorough vetting before a statutory provision is voted on).

59. *See* Mark Seidenfeld, *A Process Failure Theory of Statutory Interpretation*, 56 WM. & MARY L. REV. 467, 518 (2014).

60. Judge Leventhal developed the doctrine in his opinion in *Greater Boston Television v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970). Since then, it is the dominant method by which courts review agency action challenged as arbitrary and capricious. *See* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE (5th ed. 2010).

the APA when initially enacted, agency program offices took primary responsibility for developing regulations, and the role of agency staff outside the program offices was limited to technical advice on how to implement the program office vision.[61] Starting in the 1970s, however, reviewing judges took greater prerogative to evaluate whether the agency had considered all factors that they found "relevant" to the adoption of the regulation under review.[62] At the same time, agency staffs become more complex as they employed experts in disciplines other than those versed in the central concerns of their program offices. Thus, even agencies engaged in economic regulation hired biologists and medical experts to evaluate potential effects on health, environmentalists to evaluate effects on the environment, and statisticians to determine the effects of regulations on the likely usage of regulated products, while the newly created EPA hired economists and experts in policy analysis to consider the effects of environmental regulation on the economy and the markets directly subject to environmental regulations.[63]

It is likely that both the complexity of agency rulemaking teams and the rise of judicial review reflected a reaction to public choice theory critiques of agency regulation. Both the politics of the early 1970s and the judicial view of agency regulatory processes reacted to the belief that focused special interest groups maintained an advantage in the regulatory process and skewed it from the public interest.[64] And the enactment of social legislation such as the

61. *See* Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 L. & CONTEMP. PROBS. 57, 57–58 (1991) (noting that even though Congress recognized the interdisciplinary nature of the EPA regulatory mandate, "the first round of the technology-based standards under the Clean Water Act [] were largely products of single offices within the growing EPA bureaucracy, and they reflected very little input from professionals in the other programs"); *see also* Seidenfeld, *supra* note 11, at 528 ("When time or resources are scarce, or the need for input from the various offices within the agency is perceived as less important, agencies tend to use a more hierarchical model for formulating rules."); CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 58–60 (2d ed. 1999).

62. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (indicating that courts should ensure that agencies considered relevant factors when evaluating whether an agency action was arbitrary and capricious).

63. *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 their decisionmaking process); *cf.* Jennifer Nou, *Intra-Agency Coordination*, 129 HARV L. REV. 421, 454–57 (2015) (claiming that the importance of economists in EPS rulemaking increased in response to President Reagan's Executive Order 12,291, which required a cost-benefit analysis for major rules).

64. *See* Jerry L. Mashaw & David L. Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443, 445–49 (1990) (describing how the rise of the culture of legal constraint in the 1970s resulted in a shift of power in the rulemaking process from engineers to lawyers and economists); Richard Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 L. & CONTEMP. PROBS. 311, 317 (1991) (noting how fears of various

National Environmental Policy Act (NEPA) and Federal Trade Commission (FTC) consumer protection statutes were probably motivated by objections to special interest politics and agency capture.[65] More significantly for this Comment, it is quite likely that both political demands and those imposed by hard look review provided incentives for agencies to create staff offices with experts in various disciplines different from those that populated the agency program offices, and that responded to different constituencies than agency program offices.[66]

If so, then hard look review plays a role in changing the dynamic between agencies and Congress. Traditionally, the institutional interactions underlying regulatory legislation were described as an iron triangle: representatives of a particular special interest group, agency staff, and relevant congressional committee members control the legislative process to provide for regulatory mechanisms that allow that interest group to "capture" the agency and thereby reap regulatory rents.[67] For many agency programs, the iron triangle description has been replaced by that of the "issue network" in which more fragmented interest groups offer particular expertise to agency staff members and congressional staff, and thereby influence regulation to obtain their desired outcome over a narrower realm of agency authority.[68] Essentially, in part because of judicial review as

---

capture scenarios "affected EPA's organization within the executive branch, its internal structure, the structure and focus of the federal environmental laws under its jurisdiction, and the amount and character of judicial review of its actions").

65. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1298–99 (1986) (explaining how both NEPA and hard-look review developed from an expectation that agencies broaden their regulatory perspectives).

66. *See* Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 509–10 (1997) (explaining that "[h]ard look review encourages agencies to obtain and coordinate input from various professional perspectives").

67. *See* Reeve T. Bull, *Market Corrective Rulemaking: Drawing on EU Insights to Rationalize U.S. Regulation*, 67 ADMIN. L. REV. 629, 631–32 (2015) (describing the "iron triangle"); Michael A. Livermore, *Political Parties and Presidential Oversight*, 67 ALA. L. REV. 45, 101–02 (2015).

68. *See* Livermore, *supra* note 67, at 78. Additionally:

> Some have questioned the current relevance of iron triangles, believing that much of American politics is characterized by 'issue networks'—open, fragmented and complex interactions between government decision makers and interest groups. *See* Hugh Heclo, *Issue Networks and the Executive Establishment*, in THE NEW AMERICAN POLITICAL SYSTEM 87, 102 (Anthony King ed., 1978). More accurately, iron triangles and issue networks represent competing idealized images of the interaction of interest groups and decisionmakers within a policy subsystem. *See* James A. Thurber, *Dynamics of Policy Subsystems in American Politics*, in INTEREST GROUP POLITICS [319, 323 (Allan J. Cigler & Burdett A. Loomis eds., 3d ed. 1991)] ; A. Grant Jordan, *Iron Triangles, Woolly Corporatism and Elastic Nets: Images of the Policy Process*, 1 J. PUB. POL'Y 95, 99–103 (1981).

Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 484 n.227 (1999).

it exists today, it is less likely that regulatory statutes promote agency capture writ large. Thus, Walker's proposal that agency regulatory staff be involved more generally with advising Congress about legislation at least arguably depends on indirect effects of substantive judicial review of agency policy.

V. CONCLUSION

This *Environmental Law Without Courts* Symposium has proven interesting because, in many respects, the articles discuss the role of courts in a world devoid of them. Perhaps that is a function of our focus as legal scholars: we can only talk about areas of great agency discretion, functionally if not formally free from judicial review, in comparison to the norm of judicial review that prevails in the U.S.'s system of administrative law. But, my Comment tries to make a point that goes further than merely noting legal scholars' propensity to discuss the role of courts. In my remarks above, I posit that judicial review casts a shadow over all that administrative agencies do, even while admitting, at least for the sake of argument, that such review does not apply to the actions discussed by several of the principal articles for the symposium.

The shadow of judicial review that I have identified involves three different effects of such review. First, even if agencies are free from meaningful review in choice of procedures beyond those specified by statute or required by the Constitution, this Comment demonstrated that substantive review over the ultimate agency action can have a significant impact on agency choice of procedure that can increase agency accountability for such a choice. Second, in those cases where courts have remanded an agency action while failing to provide any explicit instruction whether the agency should continue to pursue the action, the threat of further substantive review is one of the most important factors in the agency decision whether to do so. Finally, even for an action clearly not subject to any direct judicial review—in particular, agency participation in drafting statutes authorizing or defining the scope of agency action—judicial review has affected the administrative-legislative interaction by influencing the way that agencies staff their regulatory teams. My thesis is thus broad but easy to state: judicial review of agency action casts a long shadow over all that agencies do, and one cannot really talk in a meaningful way of environmental law (or any regulatory law) in the absence of courts.