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The Pathology of Symbolic Legislation

John P. Dwyer*

INTRODUCTION

Most regulatory statutes instruct agencies to balance competing concerns in setting standards. Some regulatory statutes, however, impose short deadlines and stringent standard-setting criteria that are designed to address a single, overriding concern to the exclusion of other factors. Typically addressed to exotic and particularly dreaded health threats, this type of legislation reflects the public's urgent desire to avoid such risks. Well known examples include the Delaney Clause in the Food, Drug and Cosmetic Act1 (food additives, color additives, and animal drug residues), the original section 307 of the Clean Water Act2 (toxic pollutants), and section 112 of the Clean Air Act3 (hazardous air pollutants).

The programs mandated by such legislation are more symbolic than functional. Frequently, the legislature has failed to address the administrative and political constraints that will block implementation of the statute. By enacting this type of statute, legislators reap the political benefits of voting for "health and the environment" and against "trading lives for dollars," and successfully sidestep the difficult policy choices that must be made in regulating public health and the environment. Thus, while the statute, literally read, promises a risk-free environment, the hard issues involved in defining acceptable risk are passed on to the regulatory agency or to the courts. The actual regulatory program takes shape only after additional legislative, administrative, or judicial developments that transform symbolic guarantees into enforceable standards.

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* Acting Professor of Law, Boalt Hall School of Law, University of California, Berkeley. B.A. 1973, DePauw University; Ph.D. 1978, California Institute of Technology; J.D. 1980, Boalt Hall School of Law, University of California, Berkeley. I am indebted to several friends and colleagues for their helpful criticisms of earlier drafts of this Article, especially Jack Coons, Robert Kagan, Howard Latin, Paul Leder Paul Mishkin, Dan Rodriguez, Ed Rubin, Sprightley Ryan, Joseph Sax, Martin Shapiro, Michael Smith, Preble Stolz, and Steve Sugarman.


The enactment of symbolic legislation reflects a breakdown of the legislative policymaking machinery, a system that all too frequently addresses real social problems in an unrealistic fashion. It also creates a dilemma for regulators and judges. While they generally are reluctant to usurp the legislature's policymaking prerogatives by substituting their own version of appropriate public policy, they also are loath to implement and enforce a statute whose costs are grossly disproportionate to its benefits. The critical issue, then, is whether and how the agency or court should take the initiative to transform symbolic legislation into a functional regulatory program.

Believing that it would be irresponsible and politically mad to interpret and implement symbolic statutory provisions literally, the agency's usual response is to resist implementation. Although an agency may experiment with interpretations that moderate the stringent statutory standard-setting criteria, it will implement its reformulation slowly in order to delay judicial review. As a result, the agency adopts very few standards.4

The most significant problem with symbolic legislation, however, is not delay; it is the resulting distortions in the regulatory process. Symbolic legislation hobbles the regulatory process by polarizing public discussion in agency proceedings and legislative hearings. Environmental groups take the legislation's promise of a risk-free environment at face value and tend to refuse to compromise the "rights" inherent in such promises. Industry fears that regulators will implement the statute literally and, consequently, vigorously opposes the regulatory process at every stage. By making promises that cannot be kept, and by leaving no middle ground for accommodation, the legislature makes it more difficult to reach a political compromise (either in the agency or the legislature) that would produce a functional regulatory program.

The problems inherent in symbolic legislation can be seen by taking a detailed look at the legislative, regulatory, and judicial history of the hazardous air pollutant program under section 112 of the Clean Air Act.5 Under section 112, Congress requires the Environmental Protec-

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4. Even if the agency were to adopt the stringent standards required by the symbolic legislation, it would not vigorously enforce such standards. Polluters, as well as the legislature, the agency, and many public interest groups, understand that the commands in such statutes are "aspirational" and thus are "accompanied by a number of unstated, but very real and necessary qualifications—e.g., without unnecessary or unreasonable dislocation costs." Henderson & Pearson, Implementing Federal Environmental Policies: The Limits of Aspirational Commands, 78 COLUM. L. REV. 1429, 1451 (1978). Although supporters may argue that the statutory criteria are morally required or are necessary to "force" the development of technology, such standards are ultimately viewed by all as requiring the industrial firms' "best efforts."

5. 42 U.S.C. § 7412 (1982). There are, of course, important limitations to this approach. The circumstances studied may not be representative of most symbolic legislation. Agency and legislative behavior are the product of numerous factors, including environmental
tion Agency (EPA) to set “health-based” emission standards for hazardous air pollutants, but prohibits the Agency from considering evidence of implementation costs and technological feasibility in setting a “safe” or “acceptable” emission standard. EPA maintains that health-based standards are unrealistically stringent because most industrial facilities could not meet such standards without closing their doors.

Part I of this Article explains how section 112 exemplifies symbolic legislation. It suggests that, despite clear evidence that the statutory criteria have hindered the adoption of regulatory standards, Congress enacted and kept this provision for nearly two decades because of the political benefits of supporting legislation purporting to protect health regardless of costs, and because of the great political costs of appearing to sacrifice health benefits to lower regulatory costs.

Part II describes EPA's evolving strategies for implementing section 112. EPA's principal strategy was delay. EPA avoided identifying hazardous air pollutants and routinely and purposefully missed the one-year statutory deadline for adopting emission standards. In several instances, the Agency took more than six years to adopt final emission standards. On the few occasions EPA issued standards, it did so to comply with a court order—in one case a contempt citation against the EPA Administrator. Although not all of the delay in setting standards can be attributed to a conscious strategy, it is apparent that the language Congress used in section 112 magnified the Agency's tendency to go slowly by insisting on the need to “study the problem.”

EPA's other strategic response was to “rewrite” section 112 into a more palatable form that allowed the Agency to weigh costs and feasibility in setting standards. For more than a decade, EPA purposefully misconstrued the statutory language so that it could adopt relaxed emissions standards, the so-called best available technology (BAT) standards.

Although other authors have noted the ineffectiveness of symbolic legislation, they largely have ignored the consequent distortions of the crises, presidential and congressional elections, shifts of power within the legislature, and court decisions. As a result, precise predictions of agency and legislative responses to symbolic legislation would be unjustified. This Article, however, does not attempt to reach definitive conclusions about the behavior of political institutions. Rather, it uses the empirical material to identify the range of possible agency and legislative responses to symbolic legislation and suggests how agencies and courts should deal with symbolic legislation.

6. See infra notes 9-14, 21-29 and accompanying text.
Moreover, their prescription that Congress not enact such statutes is inadequate given Congress' propensity to send messages to constituents rather than instructions to agencies. Instead, we must begin to learn to deal with these statutes as they are.

Part III argues that EPA should reformulate symbolic legislation through its regulations and notes that the Agency's informal accommodations with Congress provide substantial political constraints on the Agency's ability and willingness to rewrite legislation independently. Much of what the Agency normally does—interpreting legislation, adopting regulations, and enforcing those regulations—requires it to give functional meaning to substantive statutory provisions. In the process, EPA works closely with congressional committees to clarify and give shape to congressional policies. As EPA learns of Congress' priorities and its commitment to the statutory language, Congress comes to understand the Agency's concerns. The interchange keeps the Agency in check, and the Agency, through delay and reformulation, provides a check on legislative posturing. Second, because EPA is not politically isolated, the risk of subgovernmental arrangements between the Agency and congressional committees is small. Environmental regulation is so visible and the interest groups are so active that the Agency develops a good sense of the breadth and intensity of support for and opposition to its policies. The Agency's contacts with the legislature and the White House also provide EPA with a sense of public preferences.

Part III concludes by considering the role of judicial review, the principal obstacle to agency reformulation of symbolic legislation. As the regulatory history of section 112 makes clear, the threat of judicial review caused EPA to delay implementation of a hazardous air pollutant program for as long as politically feasible. Judicial intervention denied the Agency the opportunity to create a functional regulatory program and advanced few, if any, of Congress' substantive goals. To minimize the risk of this result in the future, a reviewing court should, in many cases, defer to an agency's interpretation of a symbolic statute rather than interpret the statute literally or impose the court's own instrumental interpretation. Deference is especially appropriate if the agency has been candid with Congress about the statute's shortcomings and the agency's attempted reformulation, and if Congress has signalled its acquiescence in the changes.

I

SECTION 112 AS SYMBOLIC LEGISLATION

A. The Hazardous Air Pollutant Program in Section 112

The statutory language creating the federal hazardous air pollutant program is uncomplicated, but its very simplicity conceals a range of
policy issues. The key provision requires EPA to set emission limits for “hazardous air pollutants”9 “at the level which in [the Administrator’s] judgment provides an ample margin of safety to protect the public health.”10 Section 112 does not explicitly mention technological feasibility or economic costs to industry as factors to be considered in setting standards. This omission contrasts sharply with other provisions in the Act, such as section 111, that explicitly require EPA to consider costs and technological feasibility in setting emission standards for new sources of nonhazardous pollution.11 As Congress emphasized in the Clean Air Act Amendments of 1977,12 the statutory language manifested “the predominant value of protection of public health”13 and the “precautionary or preventive purpose of the act.”14

The most striking features of section 112 are its extremely short deadlines and its substantive criteria for emission standards. Section 112 required the EPA Administrator to publish a list of hazardous air pollutants within ninety days of the effective date of the statute,15 to issue

9. A “hazardous air pollutant” is defined as “an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.” 42 U.S.C. § 7412(a)(1) (1982). Although this definition is quite broad, Congress apparently envisioned that section 112 would be used to regulate only chemicals that endangered health in trace quantities. See S. REP. No. 1196, 91st Cong., 2d Sess. 20 (1970) (expressly referring to chemicals causing injury in “trace concentrations”); H.R. REP. No. 1146, 91st Cong., 2d Sess. 3 (1970) (referring to “extremely hazardous” pollutants).


11. Id. § 7411(a).


proposed emission standards 180 days later,\textsuperscript{16} and to issue final emission standards 180 days after that.\textsuperscript{17} Significantly, the statute provides no timetable for listing additional chemicals for regulation under section 112. That is, even though EPA is under strict deadlines to adopt emission standards for listed hazardous air pollutants, the Agency has broad discretion to decide whether to designate a chemical as a hazardous air pollutant in the first place.\textsuperscript{18}

The short statutory deadlines implicitly, and incorrectly, assumed the existence of adequate and reliable scientific data on the amount and geographic distribution of hazardous emissions, the extent of human exposure to hazardous air pollutants, and the size and distribution of health risks from such exposures. But because there often is no clear scientific information correlating current exposures with health risks,\textsuperscript{19} EPA must spend time evaluating studies, weighing scientific evidence, and developing policies to set standards. EPA has estimated that before beginning the standard-setting process, it must spend at least three years to prepare a technical health assessment document for a single chemical. The entire process can last as long as seven years.\textsuperscript{20} Although EPA probably is

\begin{itemize}
\item \textsuperscript{16} Id. § 7412(b)(1)(B).
\item \textsuperscript{17} Id. These deadlines are not unique to section 112. See, e.g., id. § 7411(b) (1982) (setting deadlines in the regulation of new stationary sources).
\item \textsuperscript{18} In 1986, the Natural Resources Defense Council sued EPA to compel it to list several known or suspected airborne carcinogens as hazardous air pollutants under section 112. The district court dismissed the suit for lack of subject matter jurisdiction, holding that the Administrator did not have a mandatory duty to list carcinogens as hazardous air pollutants. In reaching its conclusion, the court emphasized that the decision to list a chemical goes "to the very heart of the Administrator's discretionary powers" under section 112. Natural Resources Defense Council v. Thomas, 689 F. Supp. 246, 255 (S.D.N.Y. 1988).
\item \textsuperscript{19} There are few studies establishing either typical human exposures or the relationship between emissions and exposures. Moreover, there are no epidemiological data establishing health risks for most hazardous air pollutants in the general environment. NATIONAL RESEARCH COUNCIL, RISK ASSESSMENT IN THE FEDERAL GOVERNMENT: MANAGING THE PROCESS 22 (1983).
\item Scientists have developed some estimates of the human health risks from potential carcinogens based on extrapolations from animal studies, but there is an ongoing debate about the reliability and usefulness of such studies. The results of risk analysis depend on a variety of unverifiable assumptions about the exposures that individuals actually face in the environment and about the relationship between high dosage experiments with rodents and typical low dosage human exposures. See Lave, \textit{Methods of Risk Assessment}, in QUANTITATIVE RISK ASSESSMENT IN REGULATION 31, 37-43 (L. Lave ed. 1982); Schneiderman, \textit{The Uncertain Risks We Run: Hazardous Materials}, in SOCIETAL RISK ASSESSMENT: HOW SAFE IS SAFE ENOUGH? 20, 31-35 (R. Schwing & W. Albers eds. 1980). As a result, it is not unusual for risk estimates for typical human exposures to chemicals to vary widely, depending on the assumptions made. See, e.g., Cothern, Conigli & Marcus, \textit{Estimating Risk to Human Health}, 20 ENVTL. SCI. & TECH. 111 (1986); Whittemore, \textit{Mathematical Models of Cancer and Their Use in Risk Assessment}, 3 J. ENVTL. PATH. & TOXICOL. 353 (1980). One prominent scientist discussing risk assessment has stated, "[I]t's not all science. It's mathematics, with worst case assumptions." Science Advisory Panel, California Drinking Water and Toxics Enforcement Act of 1986 (statement of Dr. Bruce Ames) (Dec. 11, 1987).
\item \textsuperscript{20} See EPA, DRAFT TOXIC AIR POLLUTANT STRATEGY (Oct. 7, 1982), reprinted in 13 Env't Rep. (BNA) 1183, 1184-85 (1982). In Sierra Club v. Gorsuch, 551 F. Supp. 785 (N.D.
exaggerating the time needed to issue final emission standards, it is indisputable that the one-year deadline is grossly insufficient.

The strict deadlines in section 112 were matched by tough-sounding substantive criteria for setting emission standards. Not only does section 112 require EPA to set standards at levels that "protect the public health" with "an ample margin of safety," it precludes EPA from considering technological and economic factors in adopting emission standards. That is, EPA must set standards that protect public health, regardless of their cost or feasibility.

This conclusion is based on inferences from the language and structure of the Clean Air Act and the legislative history of section 112, because section 112 contains no explicit language barring EPA from weighing costs and feasibility in setting standards. Most significantly, while Congress did not mention costs and feasibility in section 112, it explicitly instructed EPA to weigh these factors in setting emission standards for new sources of nonhazardous pollution under section 111 of the Clean Air Act.\(^2\) Since section 111 deals with all new sources of pollution (except pollutants covered by section 112), and section 112 deals solely with "hazardous" pollutants, it seems likely that Congress deliberately excluded costs and feasibility as factors in setting standards under section 112. When used in connection with chemicals, the word "hazardous" evokes dread of serious disease, such as cancer. Since hazardous chemicals cause (or at least are viewed as causing) greater injury to public health than nonhazardous pollutants, costs and feasibility are correspondingly less salient factors.

The limited exemption provision in section 112 also supports this conclusion. Under this provision, if the President concludes that operation of the polluting source is necessary for national security reasons, and the required control technology is not available, EPA may grant the source a renewable two-year exemption from the emission standards.\(^2\) By explicitly authorizing EPA to consider technological feasibility in exempting certain sources from emission standards, Congress seems to have barred EPA from using that factor in promulgating emission standards in other cases.\(^2\)

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22. Id. § 7412(c)(2).
23. The provision requiring the EPA Administrator to use his "judgment" in setting standards that provide an ample margin of safety, id. § 7412(b)(1)(B), does not change this conclusion. Although this wording affords the Administrator some flexibility in setting standards by deciding how large a safety factor is required, it is not evidence that Congress authorized EPA to weigh costs and technological feasibility in setting standards.
The legislative history of the 1970 Act provides less guidance than the statute itself, but on balance it supports the same conclusion. During the floor debates, several legislators argued briefly that section 112 required a complete ban on emissions when low-level emissions endangered public health. Senator Muskie, the principal Senate sponsor of the Clean Air Act, provided a summary of the conference agreement which stated that section 112 could require "no measurable emissions," even though "a plant would be required to close because of the absence of control techniques."24 Another supporter of the legislation, Representative Hechler, said that he hoped "the Administrator [would] vigorously enforce the act to the point of setting zero emission levels for these highly hazardous substances."25 The legislators' remarks suggest that, to the extent they considered the matter at all, they wanted hazardous air pollutant emissions reduced or eliminated if necessary to protect health regardless of costs or the availability of control technology. Endangerment of health, not a balance of control costs and health benefits, was the key consideration.

The only evidence that section 112 does not preclude EPA from weighing costs and feasibility is Congress' failure to discuss the potentially ruinous consequences of health-based standards. EPA maintains that zero-emission standards for many suspected nonthreshold hazardous air pollutants would require the closure of coal and nuclear power plants, steel manufacturing plants, mines, smelters, metal refineries, would preclude the manufacture of organic chemicals, and would halt the refining or use of petroleum products.26

The legislators who addressed section 112 during the 1970 congressional debates were content to speak in favor of a zero emissions standard whenever low-level emissions "endangered" the public health, without defining "endangered" or considering the regulatory consequences.27 Senator Muskie was the only legislator to acknowledge directly that the


There is some indication in a Senate report that the legislators wanted EPA to eliminate only "significant dangers," rather than all risks. For example, the Senate Report on an earlier version of section 112 did not state that the regulations should eliminate all risks to health, but that they should apply where there is "significant danger to public health or welfare." S. REP. NO. 1196, 91st Cong., 2d Sess. 20 (1970).

26. National Emission Standards; Policy and Procedures, supra note 7, at 58,660. A non-threshold pollutant is one that poses a risk of injury to human health at all concentrations. Threshold pollutants, by contrast, pose a risk only above a threshold concentration. Id. at 58,659-60.
27. See supra note 25 and accompanying text.
"ample margin of safety" standard could close factories. Otherwise, Congress never debated the desirability of making the tradeoffs required to attain a high degree of protection for health and environment. As there is little evidence in the legislative history or the statute to indicate that Congress considered (much less endorsed) the social and economic consequences of such a policy, arguably Congress did not intend section 112 to require these consequences. The debate over whether Congress intended a health-based standard or a standard that incorporates cost and feasibility is not an academic issue. Achieving "health-based" standards can be enormously expensive because the marginal costs of compliance rise sharply as more stringent regulations require industry to eliminate residual health risks. A report by the Office of Management and Budget (OMB) reviewing EPA's arsenic standards illustrates this point. Using EPA's health risk and exposure data, OMB found that the Agency's standards would prevent an expected 4.05 fatal cancer cases annually at a cost of $27.1 million to industry, but that more relaxed standards would prevent 3.92 cases annually at a cost of only $7.4 million to industry. Thus, the marginal annual cost of preventing an additional 0.13 fatal cases of cancer (that is, ...
roughly one case every eight years) by adopting the stricter standards was $19.7 million, or roughly $150 million to save an additional life.\footnote{1}

Despite Congress' failure to discuss the potentially enormous costs of health-based standards, the language, structure, and legislative history of the Clean Air Act strongly indicate that Congress specifically adopted language designed to preclude EPA from weighing cost and feasibility in adopting emission standards for hazardous air pollutants. Moreover, as discussed below, there is substantial reason to believe that the legislators would have enacted language requiring health-based standards for hazardous air pollutants even if they had been specifically aware of the potential economic and social consequences of the legislation.

B. Legislators' Intentions and Symbolic Legislation

1. Senator Muskie and the Enactment of the 1970 Clean Air Act

By 1970, many legislators recognized that the existing federal air pollution statute, the Air Quality Act of 1967,\footnote{32} needed to be strengthened. In December 1969 and again in March 1970, Senator Muskie, the leading congressional advocate of a cleaner environment and the author of the 1967 Act, introduced legislation proposing modest reforms. Muskie's bills, however, contained no provisions for hazardous air pollutants.\footnote{33}

Several events combined to scuttle Muskie's incremental amendments and to force him to substitute a more stringent, but symbolic, air pollution control bill. Perhaps the most significant pressure was from the Nixon administration, which had taken a much greater interest in the environment due in part to its accurate perception that Muskie was a political rival who might become a strong Democratic presidential candidate. President Nixon, in his January 1970 State of the Union address, advocated strong environmental controls, and during the following month, the administration introduced legislation requiring more stringent standards than required by Muskie's bills.\footnote{34}

In addition, public sentiment rapidly coalesced around demands for more substantial environmental controls. The nationwide demonstra-
tions on Earth Day, April 22, 1970, called for an equally dramatic congressional response. One month later, a Nader task force on air pollution released a report excoriating Muskie on his environmental record and labeling him "the chief architect of the disastrous Air Quality Act of 1967. That fact alone would warrant his being stripped of his title as 'Mr. Pollution Control.'" The report accused Muskie of being preoccupied with the 1972 presidential election and suggested that he resign his post as chair of the Subcommittee on Air and Water Pollution. Many observers maintain that the Nader report was the principal reason Muskie abandoned his incremental approach.

Muskie also found himself competing with members of the House who were seeking to demonstrate their commitment to a clean environment. Three months before the Senate acted on Muskie's bill, the House voted overwhelmingly to enact a bill that was even stronger than the original Nixon bill in many substantive areas. Notably, the House bill contained a provision regulating emissions of "extremely hazardous" pollutants from new sources.

There were no countervailing political forces. For a variety of reasons, industry responded slowly to signals that Congress was about to enact stringent environmental legislation. Republican legislators, who might have been expected to resist such legislation, were unwilling to do so, in part because President Nixon had become a strong advocate of air pollution controls, and in part because they also sensed popular support for stringent controls.

36. Id. at 292.
37. See J. Davies & B. Davies, The Politics of Pollution 54-55 (2d ed. 1975); H. Jacoby & J. Steinbruner, Clearing the Air: Federal Policy on Automotive Emissions Control 11 (1973); A. Marcus, Promise and Performance: Choosing and Implementing an Environmental Policy 53-82 (1980). Marcus maintains that Muskie was vulnerable to the Nader criticism in part because the 1967 Air Quality Act had not achieved its goals or even been fully implemented. Id. at 64-65.
38. The House's aggressive interest in air pollution stemmed in part from the leadership of a House Democrat, Paul Rogers, who wanted to establish his environmental credentials. C. Jones, supra note 33, at 176-79, 183-91. Rogers later became the principal legislator behind the 1977 amendments to the Clean Air Act.
40. David Vogel argues that industry representatives did not play a significant role in shaping the 1970 act because they did not want to be viewed as "heavies" for opposing popular legislation, because some of them favored federal regulation over fragmented and inconsistent state regulation, and because many viewed administrative standard setting as far more important, and thus deserving of attention, than the statutory criteria. Vogel, A Case Study of Clean Air Legislation 1967-1981, in The Impact of the Modern Corporation 309, 329 (B. Bock, H. Goldschmid, I. Millstein & F. Scherer eds. 1984).
In an effort to reassert his role as a leading environmentalist, Muskie completely reworked his bill so that the version reported in August 1970 was more stringent than the House bill. One of his bill’s numerous provisions banned all emissions of air pollutants that posed a hazard to health. During the Senate debate in September, Muskie reestablished his credentials as Congress’ foremost environmental advocate by emphasizing that many of his bill’s provisions precluded consideration of costs or technological feasibility to assure that public health would not be “compromised.” He made substantially the same point when reporting to the Senate on the Conference Committee’s compromise on section 112.

Muskie’s tone also became more strident. Whereas less than a year earlier Muskie had emphasized the need to strengthen existing pollution control programs, he now spoke in terms of an “environmental crisis,” where “[t]he costs of air pollution can be counted in death, disease, and disability.” Consequently, the “limited objectives” of the 1967 Act would have to be abandoned in favor of a “stern response” from Congress.

The stringent provisions in the 1970 Clean Air Act, at least in part, were the product of this competitive “policy escalation.” By the end of the legislative process, the “symbolic benefits [of the Clean Air Act had become] overwhelmingly important, whereas costs of all sorts were far less significant.” The particular form that section 112 finally took was a product of that process.

2. Other Motivations to Support Symbolic Legislation

Other legislators were not subject to the identical pressures that Muskie faced. Nevertheless, both houses voted overwhelmingly in favor of the 1970 Act. Like Muskie, other legislators sensed a widespread
and deeply felt public concern about the health risks from air pollution, and they realized the political risks of opposing strong environmental controls as well as the potential benefits of championing those controls. Although Love Canal and Bhopal were not yet symbols of the dangers created by modern chemical technologies and irresponsible corporate and government officials, even in 1970 proponents of the Clean Air Act portrayed human health and the environment as endangered by corporate greed and irresponsibility.51

Charges about the insensitivity of "big business" and corporate greed have long been part of the American political fabric, but such rhetoric is especially prevalent in debates about proposed environmental legislation. As James Q. Wilson points out, legislation conferring diffuse benefits and concentrated costs, which describes most environmental legislation, can be enacted only if large constituencies are mobilized. So, in order to ensure vital publicity and develop political momentum in the competition for attention in and around Congress, the bills will focus attention on an "evil," personified if possible in a corporation, industry, or victim. [In addition], the proposal will be "strong"—that is, there will be little incentive in the developmental process to accommodate conflicting interests and thus little incentive to find a politically acceptable formula which all affected parties can live with. (To compromise the proposal would be to sacrifice the capacity of the bill to mobilize support by its moralistic appeal).52

The political risks and benefits associated with taking a position on environmental issues are magnified when hazardous chemicals are involved because the regulation of hazardous chemicals raises "deeply disturbing questions about national attitudes toward life and death, [and] about the appropriate claims which proponents of environmentally secure surroundings can make against other socially advantageous goals and norms."53 With so much potentially at stake in the regulation of hazardous pollutants, there is a tendency for interest groups to be strongly polarized on basic policy issues. Public consensus is not easily achieved.

In such a volatile policy area, even legislators who understand that complete safety is unattainable avoid positions that can be characterized as trading lives for dollars. It is safer politically to vote "for" safety—or better yet, an "ample margin of safety"—and to let the agency or the courts deal with the unresolved legal, ethical, and political questions. Requiring health-based standards allows legislators to assert that society can have a virtually risk-free environment without significant social or

51. See generally J. ESPOSITO, supra note 35.
53. Schroeder, Foreword: A Decade of Change in Regulating the Chemical Industry, L. & CONTEMP. PROBS., Summer 1983, at 1, 8.
economic costs, while avoiding difficult choices and the accompanying political costs.

Legislating in this fashion may not be responsible, but neither is it unusual or surprising. Legislators want to enact sound public policies, but they also have personal goals, which may include acquiring wealth, gaining prestige or power within the legislature, being reelected, or being elected to another office.54 Viewing congressional behavior as fundamentally strategic reveals a deeper pathology of lawmaking in a representative democracy. Rational behavior by individual legislators may produce irrational public policy. Thus, in anticipating the next election, some legislators will propose or support symbolic legislation, such as section 112, because it minimizes political costs and maximizes political credit.55

Supporting symbolic legislation is not necessarily the most efficient election strategy. Truly self-interested legislators concentrate their resources on relatively risk-free constituent services and pork-barrel legislation and try to avoid controversial positions on legislation.56 When legislators must take a position on a substantive statute, they often prefer to support statutes that explicitly or implicitly (through ambiguous statutory language) delegate policymaking authority to regulatory agencies.57 However, legislators are less likely to prefer delegation when they view regulatory agencies as slothful, captured, or jointly responsible with polluting industries for environmental problems. In these cases, legislators

54. See generally D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); R. FENNO, CONGRESSMEN IN COMMITTEES (1973). An early work that tried to explain government decisionmaking on the premise that an elected official's primary motivation is to be reelected is A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

55. Mayhew views the rational electoral strategy as involving "credit claiming," "position taking," and "advertising." Credit claiming arises when the legislator claims responsibility for moving the government to some desirable end. Position taking involves publicly making a judgmental statement on any topic likely to be of interest to constituents. Advertising is Mayhew's rubric for generating high name recognition among constituents through contacts that involve little substantive content. D. MAYHEW, supra note 54, at 49-77.

Mayhew emphasizes the importance of "particularized benefits" in credit claiming, id. at 53-61, and characterizes regulatory statutes, with their vague substantive provisions, as position taking. Id. at 134-35. It is evident, however, that legislators view the diffuse benefits from environmental legislation as an important source of credit claiming. See, e.g., Elliott, Ackerman & Millian, supra note 48, at 326-29, 333-38 (describing Senator Muskie's efforts to claim credit for enactment of environmental laws in order to advance his presidential ambitions). Thus, the line between position taking and credit claiming is not a precise one, especially if both involve substantially symbolic rather than substantive congressional action.

56. M. FIORINA, CONGRESS—KEYSTONE OF THE WASHINGTON ESTABLISHMENT 39-49 (1977). Taking a position on substantive issues risks offending important constituent groups. In addition, it is more difficult to claim credit for broad national statutes (which obviously are the work of many legislators) than to claim credit for a pork-barrel project.

57. Because regulatory statutes generate (or redistribute) costs and benefits in society, a statute that explicitly resolved all important policy issues would be more likely to create political costs from those who believe that the legislature did not do enough and from those who think it did too much. Obviously, Congress also delegates in recognition of its institutional limitations in formulating regulatory policy.
prefer statutory language that ostensibly limits agency discretion in setting standards and forces agency action by imposing short deadlines. Where, in addition, the threatened risks are unfamiliar and the injuries are especially dreaded—and latent cancer risks from hazardous chemicals are particularly feared in American society—legislators are more likely to favor a symbolic statute that expresses their firm commitment to eliminate such threats, even if the legislation does not promote their own vision of sound public policy.

The political benefits of supporting symbolic legislation may be significant. More importantly, the risks of taking a position that can be viewed as favoring profits over people often are too great for a legislator to oppose symbolic legislation. In these circumstances, creating a functional and effective administrative program may be less important to many legislators than sending a signal to interest groups that they have a right to be free from hazardous air pollutants.

To characterize some statutory provisions, such as section 112, as being symbolic, however, is not to deny their instrumental value. Section 112 probably reflects the concern that absent an unequivocal (if somewhat idealistic) national policy to eliminate risks from air-borne hazardous pollutants, the compromises characteristic of rulemaking and enforcement would undermine the goal of protecting public health. Supporters may have believed that whenever regulators explicitly consider tradeoffs, such as implementation costs and technical feasibility, the resulting emission standards do not protect public health as well as when the Agency has public health protection as its only mission. As Senator Muskie argued, "[W]e have learned that tests of economic and techn-
logical feasibility . . . compromise the health of our people and lead to inadequate standards.\textsuperscript{60}

The argument is not just that cost-sensitive standards are inherently weaker than health-based standards, but that explicit consideration of costs overemphasizes costs and underemphasizes health concerns. Implementation costs seem quantifiable and their impact is felt immediately, while public health risks are difficult to quantify, statistical, and remote. Because of these differences, political pressure may be greater from, and the agency may be more sensitive to, constituencies that feel immediate regulatory costs. In addition, industry generally has the best information about the costs and feasibility of pollution controls, and thus it is able to present data supporting predictions of dire economic consequences if strict standards are adopted.\textsuperscript{61}

Congress also may view excessively stringent standard-setting criteria as a "technology-forcing" device. By allowing EPA to consider only health-related factors, and by providing limited waivers from emission standards, Congress may have hoped to force industry to develop and bear the costs of developing effective and efficient control technologies. So understood, section 112 would be consistent with other sections in the Clean Air Act that were expressly identified in the congressional reports as technology-forcing provisions.\textsuperscript{62}

Other legislators may have been less concerned with the dynamics of rulemaking and more committed to the symbol itself—that protection of human health has no price.\textsuperscript{63} Even though they would have acknowledged privately that the symbolic goal is unattainable, these legislators wanted the government to pronounce an idealistic social policy in order to preserve the underlying values, even at the cost of a certain amount of

\textsuperscript{60} 116 CONG. REC. 32,901 (1970).

\textsuperscript{61} Allowing the agency to consider implementation costs and feasibility, however would not weaken emission standards in every case. Environmental groups, no less than industry, tend to exaggerate the consequences of particular emission standards, with environmentalists emphasizing mortality rather than implementation costs. And if there has been a recent crisis (for example, an accidental release of chemicals in a populated area), regulators are much less likely to give economic and feasibility factors much weight.


There is, however, no direct indication in the legislative history that Congress specifically viewed section 112 as an exercise in technology-forcing. Instead, members of Congress emphasized that section 112 was designed to ensure the protection of public health by eliminating hazardous emissions that endanger public health and by closing factories if necessary. \textit{See supra} text accompanying notes 24-25. Technology-forcing is often consistent with this goal—strict emission standards may force the development of new technologies to protect health—but it is not a prerequisite for achieving that goal.

\textsuperscript{63} Muskie, for example, referring to auto emissions standards in the Clean Air Act, stated that "[p]redictions of technological impossibility or infeasibility were not considered sufficient reasons . . . to compromise the public health." 116 CONG. REC. 42,382 (1970).
Symbolic legislation serves this purpose precisely because it symbolizes the government's commitment to certain public values. Notwithstanding the existence of self-styled public interest groups, only the government can plausibly claim to act in the public interest. Its symbolic actions can redirect society by reallocating resources and by legitimating certain values. A law that is unenforceable or not administrable when read literally may be important symbolically because it establishes the proper ideals. As one author has noted:

The creation, reaffirmation, and institutionalization of symbols is a vitally important and easily neglected causal factor in politics. Adopting policies that provide largely symbolic gratifications for demands may achieve little of substance in the immediate case but constitute nonetheless a positive reinforcement for the demands themselves and the legitimation of a governmental role in dealing with these demands.65

Thus, some legislators may support health-based environmental controls because they establish government priorities and public values promoting protection of public health.

Finally, it is tempting to explain section 112 as the product of congressional naiveté. This argument rests on the nearly complete silence in the congressional debates and reports about the consequences of excluding costs and feasibility. The legislators' glibness suggests that many legislators did not grasp the implications of adopting health-based emission standards, or that they had only a weak understanding of the relationship between stricter regulations, rising marginal costs, and decreasing marginal benefits. Legislators confidently spoke about the need to ban emissions that endangered health, but they never addressed the meaning of "endanger" in section 112, perhaps assuming that EPA easily could decide which emissions "endangered" human health and set emission standards without weighing the social and economic tradeoffs.

The available evidence, however, indicates that legislators simply avoided these questions. During the congressional debates, Senator Muskie acknowledged that in many cases there were no feasible control technologies, but declared that the absence of control technologies did not excuse stringent health-based controls.66 In addition, circumstances surrounding the enactment of the 1970 Act indicate that legislators delib-

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64. Cf. G. Calabresi & P. Bobbitt, TRAGIC CHOICES 26 (1978) ("evasion, disguise, temporizing [and] deception" are normal and necessary means of dealing with "tragic choices" if "society must confront suffering without being willing to discard its values every time it cannot uphold them").

65. Wilson, supra note 52, at 166. Joseph Gusfield made a similar point in his study of the Temperance Movement. Although his account focused on the status politics underlying the battles over temperance, his observations about the importance of symbolic laws apply to the environmental movement as well. See J. Gusfield, SYMBOLIC CRUSADE (1963).

erately drafted and supported provisions they knew had little chance of being implemented.\textsuperscript{67}

Even if naiveté helped explain the initial passage of section 112, it cannot explain Congress' continued reliance on health-based standards. Since the mid-1970's, it has been evident that EPA has had difficulty deciding what emission levels endanger public health and what factors should play a role in that decision.\textsuperscript{68} For years, it has been clear that setting emission standards for hazardous air pollutants is an enormously complicated political and scientific task that cannot be accomplished simply by commanding an agency to adopt emission standards that provide an ample margin of safety. Section 112 became entrenched with time. Even if many legislators initially viewed section 112 as a practical hazardous air pollutant program, the continued existence of the program, despite its failure, suggests that the statute's promise of a risk-free environment became too powerful a political symbol to discard casually.

Section 112 is symbolic legislation because few legislators contemplated (either at the time of enactment or since then) that its commands would be taken literally. Although it is not physically impossible to implement health-based standards, it is inconceivable that an agency would set standards without regard for other social consequences. Unlike most regulatory statutes, section 112 is addressed not to the regulatory agency, but to interest groups and the public at large. Moreover, the message was not intended to be taken literally. The absurdly short deadlines and excessively strict emission criteria communicate a more general message that the legislature recognizes hazardous air pollutants as a frightening and potentially serious public health problem and that EPA should make special efforts to control these hazards.

II

AGENCY RESISTANCE TO SYMBOLIC LEGISLATION

Symbolic legislation does not suppress the conflicts that arise in designing and implementing a regulatory scheme; instead, it transfers those conflicts to agencies, and at times to courts, for resolution. Not only must the agency resolve the policy and technical disputes that the legislature so deftly avoided, it also must frame its resolution in terms of statutory interpretation. Confronted with this challenge, an agency has three options. It can implement and enforce the legislation literally. Alternatively, it can use the rulemaking process to "rewrite" the legislation to a form more compatible with the agency's policy goals or its notions of practicability. This rewrite may be done openly with the agency announcing its intentions and consulting with Congress, or it may be done

\textsuperscript{67} See supra notes 32-65 and accompanying text.

\textsuperscript{68} See infra text accompanying notes 71-117.
silently if the political costs or the risk of judicial reversal are too high. Finally, the agency can use the time-honored bureaucratic tactic of delay in the hope that either Congress or the courts will rescue it.

Agencies view literal implementation of symbolic legislation as politically and professionally unsound. They do not want to bear the political consequences that inevitably flow from adopting excessively stringent standards, and they do not believe that regulatory consequences should be ignored. Moreover, the professional values of regulators generally demand that regulatory decisions be made in light of costs.

Rewriting the statute and delaying implementation are not exclusive of each other. In practice, agencies resist by degrees—rewriting a little here, delaying a little there—to achieve their goals. An agency's response to the legislative mandate will reflect its evaluation of two factors: the intensity and durability of political support for the statute, and the risks of judicial reversal or legislative revision. Delay, for example, could be a politically costly strategy if Congress becomes sufficiently irritated with the agency. But delay may be a more practical approach than revision if the agency believes the courts would reject its construction of the statute.

EPA has adopted both strategies in implementing section 112. Although EPA initially denied that it based the section 112 standards partly on economic factors, it later candidly informed Congress and the public that its standard-setting criteria included implementation costs and technological feasibility. Stating openly that section 112 demands impossibly strict standards, EPA has refused steadfastly to implement the provision literally. At the same time, EPA moved slowly in adopting emission standards, apparently fearing judicial reversal. When reversal finally came, EPA proposed a standard-setting procedure that masks its reliance on the factors that Congress excluded in section 112.

A. Regulation and Litigation under Section 112

As the potential impact of section 112 became clear, EPA gradually developed a two-fold strategy to deal with the "ample margin of safety" criterion. First, the Agency effectively rewrote section 112 by construing it to permit consideration of economic and technological factors in issuing emission standards. Second, EPA developed a cumbersome deci-

sionmaking process for listing pollutants and adopting emission standards, thereby forcing substantial delays. This second tactic reflects EPA’s tendency to “study” a problem interminably when faced with a difficult regulatory choice or an ambiguous or unpalatable statutory mandate.


From the enactment of section 112 in 1970 until the 1977 amendments, EPA adopted emission standards for only four chemicals. Almost immediately after passage of the 1970 Act, the Agency listed three chemicals (asbestos, mercury, and beryllium) as hazardous air pollutants, the first step in the regulatory process. Eight months later, EPA issued proposed emission standards, but did not adopt final standards until nearly sixteen months after that, and then only in response to a court order. In 1975, EPA listed a fourth chemical, vinyl chloride, with proposed emission standards. The final rule was promulgated in late 1976. From the beginning, then, EPA missed the statutory deadlines for setting proposed and final standards.

At first, EPA half-heartedly denied that it took economic considerations into account. There is, however, ample evidence that the opposite was true. For example, the final standards for beryllium and mercury are virtually identical to the proposed standards that EPA concededly based on economic considerations. Moreover, after disclaiming the relevance of economic impacts, EPA argued that the economic impact of each

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70. See GENERAL ACCOUNTING OFFICE, DELAYS IN EPA’S REGULATION OF HAZARDOUS AIR POLLUTANTS 21-23, 37 (RCED-83-199) (1983) [hereinafter GAO REPORT].
77. See, e.g., Standards for Asbestos, Beryllium & Mercury, supra note 73, at 8820, 8822, 8824, 8825.
78. See Proposed Standards for Asbestos, Beryllium & Mercury, supra note 72, at 23,239.
standard was "reasonable" and that the asbestos standard in particular was appropriate because "asbestos is too important in our technology and economy for its essential use to be stopped." During subsequent rulemakings, EPA finally admitted that economic considerations played a role in setting the asbestos standards.

EPA was more forthright about its use of economic factors in the proposed and final emission standards for vinyl chloride. In the proposed regulations, EPA labelled vinyl chloride a "non-threshold" pollutant, one that poses some health risk at any finite concentration. Because no substitutes for vinyl chloride existed and control technologies that would prevent all emissions had not been developed, the Agency argued that a zero-emission standard "could require closure of an entire industry" and have "extensive economic costs." Deeming this result "neither desirable nor necessary," EPA proposed to set the standard at the "lowest level achievable by the use of the best available control technology" whenever a zero-emission standard would result in widespread industry closure and the cost of closure would be "grossly disproportionate to the benefits" of removing the residual health risk. The final vinyl chloride regulations reflected this newly articulated policy.

79. Standards for Asbestos, Beryllium & Mercury, supra note 73, at 8822, 8824, 8825.
80. Id. at 8820 (quoting a report from the National Academy of Sciences).
82. Proposed Standard for Vinyl Chloride, supra note 75, at 59,532; Standard for Vinyl Chloride, supra note 76, at 46,560-61.
83. Proposed Standard for Vinyl Chloride, supra note 75, at 59,533-34.
84. Id. at 59,534.
85. Id.
86. Id.
87. In its notice of final emission standards, EPA emphasized the social costs of the alternative zero-emission standard. According to EPA, there were "beneficial uses" of vinyl chloride products and no adequate substitutes; the substitutes had potentially adverse health and environmental impacts; a zero-emission standard would force workers in fabrication plants out of work; and there existed a control technology capable of substantially reducing vinyl chloride emissions. Standard for Vinyl Chloride, supra note 76, at 46,561.

The Environmental Defense Fund challenged the vinyl chloride standard as insufficiently stringent. EDF v. Train, No. 76-2045 (D.C. Cir. settled and dismissed June 24, 1977). EDF and EPA settled the suit in 1977, with EPA promising both to propose stricter emission standards for vinyl chloride and to reformulate its policy for regulating airborne carcinogens under section 112. See National Emission Standards for Hazardous Air Pollutants; Vinyl Chloride, 42 Fed. Reg. 28,154 (1977). Although the proposed standards were stricter than the existing standards, they still incorporated costs and technological feasibility. Id.

2. **Rewriting Section 112: The Development of Best Available Technology Standards**

By the time EPA adopted the final vinyl chloride regulations in 1976, it had issued the first of a series of guidelines for regulating suspected carcinogens, a category that includes many hazardous air pollutants. An explicit premise of these guidelines was that, for many hazardous air pollutants, it would not be possible to eliminate risk "without unacceptable social and economic consequences." These guidelines formed the basis of EPA's evolving regulatory policy under section 112. The "ample margin of safety" criterion would be read to permit consideration of costs and technological feasibility in setting emission standards. EPA forthrightly announced that section 112 required unreasonably strict standards and openly began to rewrite the provision to create a workable regulatory program.

EPA adopted this construction of section 112 because it believed that strictly following the language of the statute was wholly inappropriate for regulating the health risks posed by airborne carcinogens. The Agency assumed that in the absence of contrary evidence carcinogens do not have a threshold level; every level of exposure presents some non-zero risk that exposed humans will develop cancer. Thus, construing

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89. Interim Procedures and Guidelines, supra note 88, at 21,402-03.

90. EPA, DRAFT TOXIC AIR POLLUTANT STRATEGY (Oct. 7, 1982), reprinted in 13 Env't Rep. (BNA) 1183, 1184 (1982) ("We also have been reluctant to implement actions under the relatively restrictive section 112 without a clear indication that the cost of controls is not grossly disproportionate to health benefits.").

91. Alfred Marcus points out that White House officials, particularly those at the Office of Management and Budget, pressured EPA to take economic considerations into account in all of the Agency's environmental decisions. A. MARCUS, supra note 37, at 94-97. Although he acknowledges that top EPA officials also felt that the Clean Air Act's standard-setting criteria were too strict, id. at 93, Marcus argues that some of the delay in implementing the Clean Air Act was due to the conflicting signals that EPA received from Congress and the White House. Id. at 97-99, 172-75.

Marcus is correct that the White House, which often is held politically responsible for the national economy, urged EPA to moderate the Clean Air Act's health-based goals. But, he mistakenly assumes that Congress sent EPA unambiguous signals about the role of costs, and he ignores pressure within the Agency to moderate the statutory goals. That internal pressure arose from agency officials' assessment of the most effective policy and their assessment of the political costs that the Agency would incur from implementing the statute literally.

92. National Emission Standards; Policy and Procedures, supra note 7, at 58,644-45,
section 112 strictly would require a zero-emission standard to provide an "ample margin of safety." This standard, EPA felt, would produce massive social dislocations, given the pervasiveness of at least minimal levels of carcinogenic emissions in key American industries. Since few such industries could soon operate in compliance with zero-emission standards, closure would be the only legal alternative. Among the important activities affected would be the generation of electricity from either coal-burning or nuclear energy; the manufacturing of steel; the mining, smelting, or refining of virtually any mineral (e.g., copper, iron, lead, zinc, and limestone); the manufacture of synthetic organic chemicals; and the refining, storage, or dispensing of any petroleum product.

EPA's position was that the legislative history did not indicate that Congress intended such drastic results and that the "ample margin of safety" language in section 112 permitted "some residual risk." Although EPA insisted that it would rely primarily on evidence of health risks in setting emission standards, the Agency acknowledged that it would also weigh "social and economic factors," such as

the benefits of the activity or substance producing risk, the distribution of the benefits versus the distribution of the risks; the availability and possible environmental risks of substitutes for that substance or activity; and the cost of reducing the risks further.

Based on this view of the statutory policy, EPA proposed that existing sources of hazardous air pollutants be required to use the "best

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93. This is a vulnerable point in EPA's logic. Certain risks from hazardous air pollutants may be so inconsequential (because either toxicity, the number of persons exposed, or individual exposure is relatively low) that they do not warrant regulation. EPA tacitly admitted this point when it declined to regulate numerous sources of carcinogens (including listed hazardous air pollutants) because the magnitude of the risks posed, regardless of costs and technological feasibility, was so small. See, e.g., National Emission Standards for Hazardous Air Pollutants; Benzene Emissions from Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, and Benzene Storage Vessels, 49 Fed. Reg. 23,558 (1984) (proposed rule and notice of public hearing) (withdrawing proposed regulations after concluding that the actual risks presented, apart from the costs of regulations, were too insignificant to warrant regulation); Air Pollution Control; Decision Not to Regulate Vinylidene Chloride and Solicitation of Information, 50 Fed. Reg. 32,632 (1985); Assessment of Nickel Subsulfide and Nickel Carbonyl as Potentially Toxic Air Pollutants, 51 Fed. Reg. 34,135 (1986).


95. National Emission Standards; Policy and Procedures, supra note 7, at 58,656, 58,660.

96. Id. at 58,661.
available technology' to control emissions from source categories presenting significant risks to public health." 97 Under this approach, EPA would identify an air pollutant as hazardous and identify categories of sources which emitted that pollutant and presented significant health risks. Then, EPA would choose the "best available technology" (BAT) by surveying existing control options, including the use of substitute chemicals and a complete ban on emissions, and by weighing the social and economic consequences of each option. 98 EPA admitted that it would consider technological and economic feasibility in setting emission standards, stating that BAT standards "would not exceed the most advanced level of technology that at least most members of an industry could afford without plant closures." 99

BAT standards represented the minimum controls for existing sources of hazardous air pollutants. EPA promised to impose additional controls if "unreasonable residual risks remained." 100 In determining whether residual risks were unreasonable, EPA stated it would consider many of the same factors—a combination of health and economic considerations—that it had used in setting the BAT standards. 101


98. Specifically, EPA stated that it would consider

- the number of plant closures predicted and the direct impact on employment and end product prices; the impact on growth and expansion of the industry; the resulting changes in profitability; capital availability for control equipment; the impacts from the availability of substitute products and foreign imports; the potential increases in national energy consumption; and the impacts on other environmental media including increased water pollution and solid waste disposal.

99. Id. Although the BAT standards depended in part on costs and technological feasibility, they generally did not take into account local conditions (such as population density and meteorology) that could substantially affect the estimates of the health risks involved. Thus, in some areas, an emission standard would reduce health risks significantly, and in other areas the same standard would produce virtually no health benefits. See Office of Management and Budget, supra note 31, at 1594 (observing that the health gains varied among different plants by a factor of 2000). In addition, EPA did not consider the differential economic impact among sources in relation to the reduction in risks through regulation. Id. at 1594-96.

EPA was aware of the uneven distribution of health benefits across pollution sources and proposed in the arsenic regulations to consider further subdividing the arsenic sources into low and high population density sources. See National Emission Standards for Hazardous Air Pollutants; Proposed Standards for Inorganic Arsenic, 48 Fed. Reg. 33,112, 33,145-46 (1983).

100. National Emission Standards; Policy and Procedures, supra note 7, at 58,651.

101. EPA stated that it would consider:

1. the range of total expected cancer incidence and other health effects in the existing and future exposed populations through the anticipated operating life of existing sources; 2. the range of health risks to the most exposed individuals; 3. readily identifiable benefits of the substance or activity; 4. the economic impacts of requiring additional control measures; 5. the distribution of the benefits of the activ-
Although EPA never formally adopted this BAT policy, it relied on the proposed policy in setting emission standards for several sources of hazardous air pollutants.\textsuperscript{102} Even when EPA subsequently announced that it had abandoned the BAT standard-setting process, it retained its essential elements.\textsuperscript{103} Whatever the precise label or formulation, EPA set emission standards at a level that would eliminate only "unreasonable risks," determined in part by the social and economic costs of regulation.\textsuperscript{104} EPA thus moved consistently, albeit cautiously, in revising section 112.

\textit{Id.} EPA proposed a different approach for regulating new sources of hazardous air pollutants under section 112 because it believed that new sources could limit risks more efficiently through preconstruction design changes. \textit{Id.} In particular, the Agency proposed to set "a presumptive national emission standard" for each category designed to prevent "significant risks under projected worst case assumptions of plant size and emissions, surrounding population density and distribution, and meteorology." \textit{Id.} at 58,652. EPA would grant a waiver from the presumptive standards to the BAT standards upon a showing that actual conditions were significantly better than the worst case assumptions. \textit{Id.} EPA also proposed an intermediate "alternative standard" for sources failing to obtain a waiver. The standards would be based on the criteria used for determining unreasonable residual risk for existing sources. \textit{Id.}


This approach incorporates an amalgam of elements of the BAT residual risk approach combined with elements of the two risk-based alternatives set forth in the proposal. Under each control option, the residual risks were considered along with other important factors such as risk assessment uncertainties, economic and environmental impacts, and affordability.

National Emission Standards for Hazardous Air Pollutants; Standards for Inorganic Arsenic, \textit{supra} at 27,968.

\textsuperscript{104} See, e.g., National Emission Standards for Hazardous Air Pollutants; Standards for Inorganic Arsenic, 51 Fed. Reg. 27,956, 27,968 (1986) (final rule). In a 1987 proposal to adopt an intermediate emission standard for coke ovens, EPA wrote:

Beyond the issue of what health risk coke oven emissions pose is the issue of whether that health risk is unreasonable. To eliminate all risks posed by carcinogenic emissions, for example, would entail eliminating all such emissions, a requirement that few industries could survive. Instead, EPA believes that the appropriate inquiry is to what extent the risk posed by a pollutant should be minimized so that the residual risk is reasonable for society to accept. In this context, the economic and social costs of reducing risk to different degrees becomes relevant.

3. **Paralysis by Analysis: The Development of Elaborate Internal Review Procedures**

Rewriting section 112 was not EPA's only implementation strategy. During the late 1970's and early 1980's, EPA also developed an extensive internal review process that delayed, and indeed almost eliminated, the adoption of emission standards. Although EPA had listed and issued proposed emission standards for asbestos, mercury, and beryllium within a year of the enactment of the Clean Air Act in 1970, by the early 1980's, EPA took as long as four years to decide whether to list a chemical and several additional years to issue proposed regulations.

The evolution of the Agency's internal review process is more difficult to document than the development of the BAT standards. EPA often publishes its proposed standard-setting policies and always explains the basis for emission standards, but the Agency rarely if ever announces that it has expanded its internal review process. A 1983 report from the General Accounting Office (GAO), however, illustrates the extensive procedures EPA adopted to decide whether to list a chemical as "hazardous."

In late 1979, EPA began to consider whether to list vinylidene chloride as a hazardous air pollutant. EPA's Environmental Criteria and Assessment Office (ECAO) submitted a draft health assessment document (the basic technical document supporting a listing decision) to the Office of Health and Environmental Assessment (OHEA) and to a "peer review workshop" for comments in mid-1980. The following spring, ECAO sent a second draft to OHEA and to the Office of Research and Development. A third draft went to OHEA for additional comments in late 1981. After receiving comments from all reviewers by October 1982, ECAO incorporated the comments, asked an outside contractor to update the scientific information, and returned the document to OHEA and the Office of Research and Development for yet another review. Finally, in October 1983, four years after beginning its analysis, EPA was ready to submit the health assessment document to public review and for comments from an outside Science Advisory Board (SAB). The SAB eventually held a public meeting in April 1984 and concurred with the technical conclusions of the draft report. In August 1985, almost six

105. *See supra* text accompanying notes 71-74.
106. *GAO Report, supra* note 70.
107. In some cases OHEA also submits the health assessment document to the Assistant Administrator for Pesticides and Toxic Substances. *Id.* at 22-23.
108. *Id.* at 22.
years after initiating the regulatory process, EPA decided not to list vinylidene chloride as a hazardous air pollutant.110

Submitting the health assessment document to the SAB rarely ends the review process. If the SAB disagrees with portions of the document, EPA will revise and resubmit the document until it has obtained SAB approval.111 Following SAB approval, the Office of Air Quality Planning and Standards prepares an “action” memorandum for review by a Steering Committee, the Office of Legal and Enforcement Counsel, the Associate Administrator for Policy and Resource Management, any assistant administrator who requests the opportunity to review the documents, and finally the Administrator.112 Assuming that each of these offices and individuals approves the memorandum, EPA will publish a notice in the Federal Register announcing its decision to list or not list a chemical as a hazardous air pollutant.113

And this is only the first stage of rulemaking. After listing a chemical as hazardous, EPA begins the lengthy process of identifying categories of sources, collecting and analyzing information on implementation costs, assessing residual risks from various emission levels, and adopting emission standards for different source categories. For each chemical listed since 1977, EPA has taken more than five years to issue final emission standards.114

Several critics correctly view EPA’s extensive analysis and review process under section 112 as a means to avoid or delay issuing standards under a provison that the Agency finds irrational.115 This view com-

110. Id.
111. GAO REPORT, supra note 70, at 28. Although the Clean Air Act only requires EPA to seek advice from the Science Advisory Board, see 42 U.S.C. § 7417(c) (1982) (“the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees”), in practice EPA will not proceed with regulation until the SAB has approved the document. For a discussion of the problems that may arise in relying on panels of experts, see S. BREYER, REGULATION AND ITS REFORM 141-47 (1982).
112. GAO REPORT, supra note 70, at 36-37.
113. In order to avoid citizen suits challenging EPA’s failure to adopt emission standards within the statutory deadlines, EPA now publishes a notice of “intent to list” chemicals as hazardous air pollutants, which does not trigger any regulatory deadlines, rather than list the chemicals as hazardous. Through this mechanism, EPA can delay the official listing until the Agency has prepared the proposed emission standards. See EPA’S New Approach to Regulating Toxics May Delay Decision Process, Dingell Says, 14 Env’t Rep. (BNA) 2185-86 (1984); GAO REPORT, supra note 70, at 43.
114. See infra note 154.
115. See, e.g., Graham, supra note 69, at 131-32; Clean Air Act Oversight—Part 3: Hearings Before the Senate Comm. on Environment and Public Works, 97th Cong., 1st Sess. 515, 521 (1981) [hereinafter 1981 Senate Oversight Hearings] (“The Agency has seemed simply unwilling to reach decisions about whether these pollutants are hazardous, and has taken refuge instead in interminable evaluation.”) (statement of David D. Doniger, Senior Project Attorney, NRDC).

EPA’s reluctance to list a pollutant as hazardous may be reinforced by a provision making it virtually impossible to “delist” a chemical. See 42 U.S.C. § 7412(b)(1)(B) (1982) (requiring the Administrator to find that the pollutant “clearly is not a hazardous air pollutant”). There
ports closely with EPA's own explanation for the delay. During a 1983 congressional oversight hearing, EPA Administrator Ruckelshaus stated, "Where the [statutory] mandates are unclear or appear to suggest unfeasible programs, they tend to slow down, to 'study the problem,' as the saying goes. Something like this may have happened in the case of section 112." Other EPA officials have been even more candid, stating that because of the possibility that section 112 requires zero emissions, regardless of costs and benefits, "the Agency has been reluctant to list chemicals."

Under the most favorable circumstances, setting standards for hazardous air pollutants would be a time-consuming and technically complex undertaking. EPA officials, however, slowed the standard-setting process even further. By "studying the problem," EPA delayed listing most chemicals as hazardous, and when a listing was unavoidable or already had been made, EPA delayed adopting standards.

EPA's attempt to delay regulation was necessarily a short-term strategy. Congressional impatience with the pace of regulation, fueled by complaints from environmental groups, threatened to produce legislation restricting agency discretion in listing decisions. In addition, the availability of judicial review to ensure agency compliance with statutory deadlines made it impossible to withhold indefinitely final standards for listed chemicals. EPA's strategy of delay thus bought the Agency some additional time to seek legislative amendments. Congressional relief, however, was not quickly forthcoming.

is also some evidence that during the 1980's EPA undertook extended analysis to delay regulation as part of the Reagan administration's general campaign against new environmental regulations. See Latin, Good Science, Bad Regulation, and Toxic Risk Assessment, 5 YALE J. REG. 89, 129-30 (1988). This motivation may also have contributed to EPA's extensive review of proposed hazardous air pollution standards.


117. Clean Air Act (Part 2): Hearings before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 737 (1981) [hereinafter 1981 House Hearings—Part 2] (EPA, industry, and the environmental community "have perceived that there is a potential [under section 112] for open-ended control requirements and the possibility of ultimately requiring near zero emissions regardless of costs. Given this potential and the apparent lack of flexibility regarding removal of substances from the list or exclusion of source categories from control requirements, the Agency has been reluctant to list chemicals without some reasonable assurance that adverse effects could actually occur and can be prevented by control strategies.") (statement of Walter C. Barber, Jr., Director, Office of Air Quality Planning and Standards, EPA); see also 1981 House Hearings—Part 5, supra note 69, at 142 (EPA has not "been able to come up with a mechanism for making regulatory decisions on these hazardous pollutants. Accordingly, the process has found itself halted.") (statement of Walter C. Barber, Jr., Acting Administrator, EPA).

Given the lengthy internal review process, it is not surprising that EPA made few regulatory decisions for hazardous air pollutants during the late 1970's and early 1980's. Although the 1977 Clean Air Act Amendments required EPA to decide within one year whether to list four chemicals, EPA took no action on three of the chemicals until well beyond the 1978 deadline. The Agency eventually promulgated final emission standards for two of these chemicals under court order, including a contempt citation against the EPA Administrator. EPA still has not decided whether to list the remaining chemical, cadmium, as hazardous. EPA took regulatory action on only three other chemicals from 1977 to 1984, in one case in response to another court order. By

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118. 42 U.S.C. § 7422(a) (1982). The chemicals were radionuclides, arsenic, cadmium, and polycyclic organic chemicals. See supra note 14.


The state of New York and NRDC promptly challenged EPA's decision not to regulate polycyclic organic matter. The suit was settled when EPA agreed to consider setting emission standards for wood stoves under section 111 and municipal waste combustors under section 112. In addition, EPA agreed to produce information on the control of emissions from municipal waste incinerators. New York v. Ruckelshaus, No. 84-1472 (D.C. Cir., January 22, 1987).

Public interest groups also challenged the radionuclide standards. Following the D.C. Circuit's decision in the Vinyl Chloride case, see infra notes 155-70 and accompanying text, EPA settled the radionuclide case by agreeing to reconsider the emission standards under a court-imposed schedule. EDF v. Thomas, No. 84-1524 (D.C. Cir., Dec. 8, 1987); EDF v. Thomas, No. 84-1524 (D.C. Cir., Mar. 17, 1988).


the end of 1984, nearly fourteen years after enactment of section 112, EPA had adopted emission standards for only seven hazardous air pollutants.

During this time, Congress pressured EPA to regulate more chemicals under section 112. The first indication that Congress was dissatisfied with EPA's progress came during the 1975 House hearings on amendments to the Clean Air Act. Although most of the hearings focused on automotive pollutants, Representative Waxman (who later emerged as a strong supporter of tighter controls on hazardous air pollutants) asked EPA officials about certain suspected carcinogens that EPA had not listed as hazardous air pollutants.\(^{124}\) Caught off-guard by Waxman's inquiries, the Agency agreed that new legislation might be "helpful" to ensure that EPA did not bear a heavy burden of proof in regulating suspected toxics.\(^{125}\)

The bill under consideration during these hearings did not deal with the problem Waxman cited.\(^{126}\) However, a bill later reported out of committee included a provision requiring EPA to regulate four suspected carcinogens—vinyl chloride, arsenic, cadmium, and polycyclic organic matter—unless the Administrator found that the pollutants did not "cause or contribute to air pollution, which may reasonably be antici-

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\(^{124}\) Waxman apparently based his questions on a report of the National Air Quality Advisory Council, which recommended some controls for specified pollutants. See *Clean Air Act Amendments—1975 (Part 1): Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 129-30 (1975). Environmentalists testifying before the subcommittee did not refer to the problem of unregulated chemicals. See, e.g., id. at 709 (statement of Richard E. Ayres, Staff Attorney, NRDC, on behalf of the National Clean Air Coalition).

\(^{125}\) Id. at 131.

\(^{126}\) See id. at 4.
pated to endanger public health." The House Committee Report accompanying the bill stated:

[T]here are numerous . . . air pollutants which to date have not been subject to regulations under the Clean Air Act. Despite mounting evidence that these pollutants are associated with serious health hazards and despite recommendations from prestigious medical and scientific bodies, the Agency has failed to promulgate regulations to institute adequate control measures for these unregulated pollutants.

Although the committee report stated that EPA needed "some impetus" to act on the specified pollutants, and a Conference Committee substantially adopted the House proposal on unregulated toxics, the bill died on the Senate floor.

In 1976, Congress signalled that it was taking a greater interest in hazardous chemicals. A House oversight subcommittee held hearings on cancer-causing chemicals in the environment and Congress enacted the Toxic Substances Control Act (TSCA) and the Resource Conservation and Recovery Act (RCRA). These actions reflected an increasing sense of urgency that something had to be done about "hazardous" or "toxic" chemicals. Ironically, Congress' mounting concern with haz-

128. Id. at 22.
129. Id. at 26. During the House debate, Rep. Preyer said that the provision was needed "to give [EPA] a signal. We need to say, 'Do something about this.'" 122 CONG. REC. 29,231 (1976).
130. H.R. REP. NO. 1742, 94th Cong., 2d Sess. 25, 95 (1976). The Senate bill had no comparable provision. The Conference Committee weakened the House proposal somewhat. Instead of requiring EPA to list the four chemicals automatically for regulation unless the Agency found within one year that regulation was unnecessary, the committee substitute required EPA to decide within one year whether the chemicals posed a human health threat, and, if so, to adopt appropriate standards. Id. at 95.
131. The principal cause for the bill's demise was that this enormously complicated and controversial legislation reached the floor of the Senate and the House too late in the session. Although the Senate passed the Senate bill in early August (on a vote of 78-13), the House did not pass its version until mid-September (on a vote of 324-68). See Clean Air Amendments Die at Session's Close, 32 CONG. Q. ALMANAC 128 (1976). Because Congress was set to adjourn on October 1, the Conference Committee had less than two weeks to produce a compromise bill.

The Conference Committee filed its report on September 30, and the Senate voted to consider the report on October 1. Id. at 141, 143. When the Senate narrowly defeated Muskie's attempt to postpone adjournment, the bill was easily defeated by a filibuster. Id. at 143. The bill never reached the House floor.

ardous chemicals contrasted with its general desire in 1976 to balance environmental protection with economic costs. While events like the 1973 oil embargo had dampened the fervor to enact many strict environmental controls, Congress seemed less willing to compromise when hazardous chemicals were involved.

In 1977, Congress reconsidered amendments to the Clean Air Act. Again, the Senate committee bill did not address "unregulated" carcinogens, whereas the House bill did. The Conference Committee substantially adopted the House proposal, and both houses adopted the conference bill by voice vote. The bill slightly changed the definition of hazardous air pollutant to emphasize "the predominant value of protection of public health" and the "precautionary or preventive purpose of the act." Despite EPA's request to modify section 112 to allow technology-based standards, the 1977 amendments retained health-based standards.

Congress reexamined the hazardous air pollutant program again in 1981 as part of the reauthorization of the Clean Air Act. Environmental groups sought both a program to control acid rain and substantial revisions of the section 112 hazardous air pollutant program. Many industries were eager to amend the Act to postpone statutory deadlines for achieving federal air quality standards for the nonhazardous criteria air pollutants. Environmental groups and industry agreed that Congress should pay special attention to areas that had not attained air quality

135. In the opening debate on the House bill on the Clean Air Act Amendments, Rep. Rogers, the leading House supporter of the bill, spoke of the need to "balance[e] environmental goals with other social needs of the Nation":

Under the committee bill public health protections are not abandoned. The committee bill recognizes that we must continue to move forward to clean up existing air pollution and to minimize significant, new air pollution problems.

But the committee recognizes that our Nation's economic, industrial, and energy resources are limited. Therefore, meeting our necessary clean air goals will take longer than we had originally planned and required under the 1970 act.


136. The 1977 House bill differed from the 1976 version only in that vinyl chloride was replaced with radionuclides. The House subcommittee made this change largely because EPA had issued proposed emission standards for vinyl chloride under section 112. H.R. REP. NO. 294, 95th Cong., 1st Sess. 3 (1977).

137. H.R. CONF. REP. NO. 564, 95th Cong., 1st Sess. 39, 141-43 (1977). As in 1976, the Conference Committee weakened the House proposal by requiring EPA to make an affirmative finding that the chemicals posed a danger to human health before adopting standards. Id. at 141-42. The Conference Committee endorsed the House's substitution of radionuclides for vinyl chloride, noting that this change removed doubts as to whether radionuclides could be regulated as air pollutants. Id. at 142.


standards within statutory deadlines, but they differed over the shape and
details of a new program.

However, the political landscape in 1981 had changed dramatically.
Many observers felt that the Reagan administration would try to relax
environmental standards. The President's hand was strengthened by the
troubled economy, which many Republicans attributed in part to exces-
sive governmental regulation of private industry. The new administra-
tion also received substantial support from two Democrats in Congress—
Representative John Dingell of Michigan, Chair of the Energy and Com-
merce Committee (which has jurisdiction over the Clean Air Act), and
Senate Minority Leader Robert Byrd of West Virginia. Both Dingell and
Byrd represented regions with major industries (auto manufacturing and
coal mining) that would be hurt by stringent acid rain controls. 141

Environmentalists also had important congressional allies. Although the authors of the 1970 and 1977 legislation, Senator Muskie
and Representative Rogers, were no longer in Congress, their replace-
ments—Senator Stafford (Chair, Environment and Public Works Com-
mittee) and Representative Waxman (Chair, Health and Environment
Subcommittee)—were strong environmentalists. 142 Moreover, public
opinion polls showed that popular support for environmental controls
remained strong. 143

Many of the reauthorization bills introduced would have required
EPA to decide, within a statutory deadline, whether to list specified
chemicals as hazardous. Failure to decide in time would have resulted in
automatic listing of these chemicals as hazardous and triggered deadlines
for adopting emission standards. 144 EPA strongly resisted these pro-
posed amendments, describing the automatic listing provision as an effort
to "wish away the substantial scientific uncertainty that we must face and
resolve in order to make responsible decisions here." 145

141. Rank and file Democrats from Midwestern states also opposed acid rain legislation. In these heavy industrial regions, utilities burn high-sulfur Appalachian coal that contributes to acid rain. Because most proposed acid rain legislation followed the philosophy that the "polluter pays," legislators from these regions feared that their constituents would bear substantial utility rate increases.

142. Although Stafford was a Republican, his state, Vermont, had a "strongly pro-envi-

143. Senate Committee Begins Clean Air Revision, 39 CONG. Q. WEEKLY 2191 (1981).


Congress, however, failed to enact Clean Air Act amendments in 1981 and remained deadlocked until 1990. The principal reason was strong regional opposition to provisions to control acid rain, not opposition to the provisions for hazardous air pollutants. Legislators from coal producing and automobile manufacturing states joined with the Reagan administration to defeat the legislation. This opposition may have

Administrator for Air and Radiation, EPA).


In the 98th Congress (1983-84), Waxman's subcommittee rejected his proposal for strict acid rain controls by a single vote, and Waxman let the bill, H.R. 5314, die before marking up the provisions for hazardous air pollutants. See Acid Rain Provisions Cut from Clean Air Bill, 42 CONG. Q. WEEKLY 1009 (1984); Clean Air Bill Stalled by Acid Rain Dispute, 40 CONG. Q. ALMANAC 339, 342 (1985).


Senator Stafford's Environment and Public Work Committee reported several bills that included provisions for acid rain controls as well as amendments to the hazardous air pollutant program. Senator Byrd's opposition to acid rain controls, however, prevented the legislation from reaching the Senate floor. In the 97th Congress, Stafford's committee reported S. 3041, which imposed modest controls on acid rain and revamped the hazardous air pollutant program. S. REP. NO. 666, 97th Cong., 2d Sess. 13-19, 1334 (1982). Because there was little chance that the House committee would report a bill, and because he was unwilling to jeopardize the acid rain provisions by subjecting the bill to full Senate debate, Stafford never pressed to put the bill on the crowded Senate agenda for full consideration. See Congress Fails to Act on Clean Air Rewrite, 38 CONG. Q. ALMANAC 425 (1983).

Stafford reintroduced the committee's bill (now designated S. 768) in the 98th Congress, and his committee strengthened the provisions for acid rain. Clean Air Reauthorization With New Acid Rain Controls Approved by Senate Panel, 42 CONG. Q. WEEKLY 621, 622 (1984); see also S. REP. NO. 426, 98th Cong., 2d Sess. (1984). However, the bill faced strong opposition from both Byrd and the Reagan administration and consequently was never brought to the Senate floor. See 98th Congress Leaves Thorny Legacy for 99th, 42 CONG. Q. WEEKLY 2699, 2711 (1984). Stafford introduced a new acid rain bill, S. 2203, in the 99th Congress, but never put it through markup, reportedly because it stood little chance on the Senate floor due to Byrd's opposition. Acid Rain Measure Faces Very Cloudy Future, 44 CONG. Q. WEEKLY 2041 (1986). This bill contained no provisions to amend the hazardous air pollutant program.

In the 100th Congress, the committee reported a bill, S. 1894, with provisions to control
been difficult to overcome in part because acid rain, which is viewed primarily as an environmental threat, lacks the emotional punch of pollutants that pose a more immediate danger to human health.

Two observations can be made based on this decade of indecision. First, even if a broad consensus for reform exists, unrelated political conflicts may prevent Congress from reforming existing regulatory statutes. Proposed legislation typically involves several independent issues, such as acid rain and hazardous air pollutants. Political pressures and conflicts generated by one issue may stall legislative action on others. By contrast, agency rulemaking typically involves only a single issue. As a result, the agency can more quickly respond to the need to revise a policy.

Second, during the hearings and in the text of the proposed bills, legislators voiced their impatience with EPA's hazardous air pollutant program and revealed the extent to which some of them were willing to go to compel more regulation. These hearings gave EPA officials and key congressional committee members an opportunity to reach an informal understanding about a practical approach to implement the hazardous air pollutant program more expeditiously. EPA Administrator Ruckelshaus, for example, promised to make listing decisions on twenty-seven to twenty-nine new chemicals by the end of fiscal year 1986. In 1985, EPA gave notice of intent to list eight chemicals under section 112 and made tentative or final decisions not to list eight others.
Since 1985, however, EPA has not promulgated either proposed or final standards for any of the newly listed hazardous substances. Instead, EPA announced that it intended to shift primary standard-setting authority for air toxics to the states and to focus its efforts on regulating new sources using the explicitly cost-conscious standards in section 111 of the Act.\textsuperscript{151} After strong criticism from Congress and state officials, EPA reportedly shelved the new strategy,\textsuperscript{152} but it did not revive the section 112 program.

EPA's continued inaction under section 112 stemmed in part from it's growing doubts that strict controls of many hazardous air pollutants would reduce health risks significantly. By the mid-1980's, EPA found itself in the unenviable position of implementing a statute that it believed served a limited public health purpose at potentially great social and economic costs. As Administrator Ruckelshaus testified, benefits from section 112 controls were "relatively low," and "standards that eliminate more than one cancer case per year are more the exception than the

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After EPA gave notice that it considered several of these chemicals to be carcinogens and that it intended to list them under section 112, NRDC filed suit to compel EPA to list those chemicals immediately. The district court, however, dismissed the suit for lack of subject matter jurisdiction, holding that since carcinogens were not necessarily hazardous air pollutants under section 112, the Administrator did not have a mandatory duty to list the chemicals. Natural Resources Defense Council v. Thomas, 689 F. Supp. 246, 261 (S.D.N.Y. 1988), aff'd, 885 F.2d 1067 (2d Cir. 1989).


The result was that while EPA began to make substantial progress in evaluating potential hazardous air pollutants, its record for actually regulating such pollutants under section 112 failed to improve. EPA's inaction also resulted from a judicial challenge to EPA's BAT policy. In 1985, the Natural Resources Defense Council (NRDC), an environmental group, challenged three sets of emission standards issued under section 112 on the ground that EPA illegally had considered costs and feasibility. Unwilling to adopt additional standards that might be struck down, EPA waited two years for the results of that litigation. The court's holding did nothing to encourage EPA to set additional standards.

5. NRDC v. EPA: The Demise of BAT Standards

Until 1985, environmental groups used judicial review mainly to force EPA to issue standards for listed hazardous pollutants. Only one suit challenged the adequacy of EPA's standards, and that case, which settled, did not involve the BAT policy. This lack of legal action probably stemmed from the fact that EPA had not formally adopted the BAT policy, and between 1973 and mid-1984 had not promulgated any emission standards. By mid-1985, however, EPA's final standards for ben-

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154. The following table shows the lengthy delays that have occurred between listing chemicals as hazardous, issuing proposed standards, and issuing final standards.

<table>
<thead>
<tr>
<th>Chemicals</th>
<th>Listing</th>
<th>Proposed standard</th>
<th>Final standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>beryllium</td>
<td>3/31/71</td>
<td>12/7/71</td>
<td>4/6/73</td>
</tr>
<tr>
<td>asbestos</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>mercury</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>vinyl chloride</td>
<td>12/24/75</td>
<td>6/2/77</td>
<td>9/30/86</td>
</tr>
<tr>
<td>(revisions)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>benzene</td>
<td>6/8/77</td>
<td>4/18/80-1/5/81</td>
<td>6/6/84</td>
</tr>
<tr>
<td>radionuclides</td>
<td>12/27/79</td>
<td>4/6/83</td>
<td>2/6/85</td>
</tr>
<tr>
<td>arsenic</td>
<td>6/5/80</td>
<td>7/20/83</td>
<td>8/4/86</td>
</tr>
<tr>
<td>coke emissions</td>
<td>9/18/84</td>
<td>4/23/87</td>
<td>—</td>
</tr>
</tbody>
</table>

155. In one other case, a criminal defendant successfully challenged the "work practices" standards for asbestos as not being authorized under section 112. See Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978). That case also did not involve the legitimacy of the BAT policy.
zene, radionuclides, and vinyl chloride\textsuperscript{156} provided environmental groups with an opportunity to challenge the BAT policy. The resulting litigation ended EPA’s experiment with the BAT standards, required EPA to reconsider many of its standards, and probably forced its policymaking underground.

In 1985, NRDC sued EPA, arguing that the Agency impermissibly had relied on nonhealth factors in setting emission standards for vinyl chloride.\textsuperscript{157} The group’s position that the “ample margin of safety” language required EPA to set zero-emission standards for nonthreshold pollutants\textsuperscript{158} not only struck at the heart of the BAT policy, but advocated the most extreme view possible of section 112.\textsuperscript{159}

The Agency maintained that section 112 did not require a zero-emissions standard because Congress could not have intended to require standards that would impose staggering economic and social costs. EPA reasoned that since the statute did not require risk-free standards, it had authority to adopt emission standards under the BAT policy.\textsuperscript{160} Attempting to reach a middle ground, the court of appeals construed section 112 as requiring EPA to regulate only “significant” or “unacceptable” risks.\textsuperscript{161} The court rejected NRDC’s position that EPA could never consider costs and technological feasibility in setting emission standards,\textsuperscript{162} but, in a significant reversal of EPA policy, it strictly limited EPA’s use of these factors in setting emission standards.\textsuperscript{163}

The court acknowledged that EPA’s interpretation of a statute deserves great deference when the Agency’s technical expertise guides its interpretation, particularly where the substantive area involves unresolved scientific issues.\textsuperscript{164} The court concluded, however, that in ap-

\textsuperscript{156} See supra note 154. Although EPA did not issue final vinyl chloride standards until 1986, its withdrawal of proposed standards in 1985 effectively reinstated the 1976 BAT standards.


In the original panel opinion, Judge Bork wrote that because section 112 was silent on the role of costs and feasibility, and because the legislative history did not clearly address the issue, the court had to defer to EPA’s interpretation (i.e., BAT standards). 804 F.2d at 715-27. Judge Wright wrote a lengthy dissent, arguing that congressional intent to exclude costs and feasibility was clear. Id. at 727-39. Shortly thereafter, the D.C. Circuit voted to rehear the case en banc. Judge Bork wrote the unanimous en banc decision, implicitly repudiating his previous panel opinion.

\textsuperscript{158} 824 F.2d at 1152.

\textsuperscript{159} NRDC also filed separate suits challenging the emission standards for radionuclides and benzene. Following the en banc decision in the Vinyl Chloride case, those cases were settled, with EPA agreeing to issue new emission standards. See supra notes 119 and 123.

\textsuperscript{160} 824 F.2d at 1148-49.

\textsuperscript{161} Id. at 1164-65.

\textsuperscript{162} Id. at 1154-63.

\textsuperscript{163} Id. at 1163-66.

\textsuperscript{164} Id. at 1163 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467
plying the BAT formulation to set the vinyl chloride emission standards, the EPA Administrator had failed to exercise discretion in determining an "acceptable risk to health," and had "simply substituted technological feasibility for health as the primary consideration."\textsuperscript{165}

Because section 112 makes protection of health the primary consideration, the court held that EPA must first "make an initial determination of what is 'safe,' . . . based exclusively upon the Administrator's determination of the risk to health at a particular emission level."\textsuperscript{166} Emphasizing that it did not equate "safe" with "risk-free"\textsuperscript{167} or even free from uncertainty, the court stated that EPA must set an emission standard that results in "acceptable" risk to health without considering costs or technological feasibility.\textsuperscript{168} "Once safety is assured,"\textsuperscript{169} EPA may reduce the emission standard further to provide an ample margin of safety. In this second step, EPA may take into account the limitations of scientific knowledge in measuring risks, as well as costs and technological feasibility.\textsuperscript{170}

The decision was an important victory for environmental groups. By requiring EPA to determine a "safe" level of exposure without considering costs and feasibility, the court vindicated the symbolic value of legislation that places the protection of health above all other considerations. It also effectively forced EPA's policymaking underground.

6. Regulation in a Vacuum: Setting Health-Based Emission Standards

The Vinyl Chloride decision rendered infeasible EPA's strategies for resisting section 112. By barring EPA from considering costs and feasibility in determining an "acceptable" level of risk, the court severely circumscribed the Agency's ability to construe the statute to avoid the consequences of symbolic legislation. Combined with several prior successful court challenges to EPA's failure to adopt emission standards for listed hazardous chemicals, including one case that resulted in a contempt citation against the Administrator,\textsuperscript{171} the decision further dampened EPA's enthusiasm for delaying the issuance of standards.

EPA also faced pressure from Congress to list hazardous chemicals. Several proposed amendments would have automatically listed specified

\textsuperscript{165} Id.
\textsuperscript{166} Id. at 1164.
\textsuperscript{167} Id. (citing Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 642 (1980)).
\textsuperscript{168} Id. at 1165.
\textsuperscript{169} Id.
\textsuperscript{170} Id. at 1165-66.
chemicals as hazardous if EPA failed to make a listing decision within the statutory deadline.\textsuperscript{172} Although EPA could continue somewhat to delay listing chemicals, the Agency needed to devise a new regulatory approach.\textsuperscript{173}

EPA had two options. Pursuant to the \textit{Vinyl Chloride} decision, it could adopt standards to ensure a "safe" level of exposure that did not consider costs or feasibility. This approach risked closure of major industries but might have forced Congress to reconsider the substantive criteria in section 112. Alternatively, EPA could devise a strategy, consistent with the letter but not the spirit of the court's construction of section 112, allowing it to weigh nonhealth-related factors in setting standards. EPA apparently chose the second option and has attempted to rewrite section 112 silently in an effort to avoid judicial review.

Although the \textit{Vinyl Chloride} decision prohibits EPA from considering nonhealth factors in setting "safe" and "acceptable" emission levels, the court's only hint as to what constitutes an "acceptable" risk was its statement that "the Administrator must . . . decide what risks are acceptable in the world in which we live."\textsuperscript{174} Taking this hint at face value, EPA could look for analogous "acceptable" risks presently or historically tolerated in American society, such as the risk of death from smoking or car accidents, and deem similar levels of risk "acceptable" under section 112. Using risk assessment models, EPA could then translate

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{172} See \textit{supra} text accompanying notes 144-45.
\item \textsuperscript{173} EPA's position was also complicated by the increasing probability that Congress would amend the Clean Air Act, including the hazardous air pollutant program, within the next few years. On the one hand, EPA was working with a lame-duck statute and was not eager to initiate a fruitless rulemaking process that would consume agency resources. On the other hand, EPA was under court deadlines to issue new regulations for three listed hazardous air pollutants (vinyl chloride, benzene, and radionuclides). In addition, EPA did not want to appear to Congress to be slothful and recalcitrant while the legislature was reforming the hazardous air pollutant program.
\item \textsuperscript{174} 824 F.2d at 1166 ("it is not the court's intention to bind the Administrator to any specific method of determining what is 'safe' or what constitutes an 'ample margin [of safety]' "). In making this statement, the court of appeals cited the plurality opinion in Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 642 (1980) (the "Benzene Case"), and Alabama Power Co. v. Costle, 636 F.2d 323, 360-61 (D.C. Cir. 1979). The \textit{Benzene Case}, in part, involved section 3(8) of the Occupational Safety and Health Act, which permitted the Secretary of Labor to promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment." The plurality construed this section as requiring the agency first to find that workers were threatened with a "significant risk of harm." In explaining this expression, the plurality wrote: "But 'safe' is not the equivalent of 'risk-free.' There are many activities that we engage in every day—such as driving a car or even breathing city air—that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities "unsafe."" 448 U.S. at 642.

The circuit court's citation of \textit{Alabama Power} apparently refers to a passage in which the court wrote that agencies generally had an implied power to decline to regulate "de minimis" risks. See 636 F.2d at 360 ("Courts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures of effort.").
\end{enumerate}
\end{footnotesize}
those risks into emission levels and reduce them further to reflect an ample margin of safety.

Disregarding the methodological problems with this approach\textsuperscript{175} and the objections to the underlying normative assumption that these existing risks are acceptable, the “analogous risk” method still would be at odds with the Vinyl Chloride holding. Existing or historically tolerated risks inherently reflect some assessment of both the social and economic costs of reducing risks further and the benefits derived from the risky activity at the permitted risk level. Relying on historically tolerated risks to set an acceptable risk level for hazardous air pollutants would implicitly incorporate those tradeoffs and thus violate Vinyl Chloride.

As an alternative, EPA might try to identify a \textit{de minimis}, but nonzero, risk level. The residual risk from a hazardous air pollutant might be considered \textit{de minimis} when it is overwhelmed by other existing health risks, or when the residual risk standing alone poses no meaningful risk of harm because the exposed population is small. Relabeling the risk level as \textit{de minimis}, however, does not avoid the conceptual problem of establishing a suitable risk level without considering implementation costs and technological feasibility. Deciding when a residual risk is “meaningless” or “overwhelmed” by other risks implicitly involves weighing costs and benefits, that is, deciding that the regulation of such risks does not warrant expenditure of the necessary administrative or capital resources.

Moreover, EPA probably would not accept a \textit{de minimis} risk approach because, like NRDC’s “zero-risk” approach, it achieves relatively small health benefits at potentially large economic and social costs. In addition, establishing a \textit{de minimis} risk—or any fixed risk—as acceptable for any particular chemical would make it difficult for EPA to resist using a “fixed target” approach, that is, the same risk level for all hazardous air pollutants. A uniform level of acceptable risk, especially at a \textit{de minimis} level, would severely constrain EPA’s ability to set standards in light of the implementation costs and feasibility of regulating each chemical.

EPA publicly voiced its displeasure with the Vinyl Chloride case when it issued four alternative proposals for radionuclide and benzene

\textsuperscript{175} The analogous risk approach assumes that new risks can be uncontroversially and unambiguously correlated with existing risks. The assumption is questionable. The acceptability of existing risks is determined not only by their magnitude and distribution, but by the type of risk and the type, quantity, and distribution of benefits derived from the risky activity. In addition, some risks are more acceptable than other risks, all other things (including magnitude) being equal, simply because the corresponding risky activities are culturally or psychologically more acceptable. As a result, it may be difficult to find satisfactory analogues for new risks.
standards in late 1988 and early 1989.\textsuperscript{176} EPA argued that the decision forced it “to consider whether a risk is acceptable \textit{without} at the same time considering benefits of the activity causing risk, feasibility of control, or other factors that EPA (or anyone) would normally consider in deciding whether a risk was ‘acceptable.’”\textsuperscript{177} In a stronger, not-so-veiled rebuke to the D.C. Circuit, EPA also emphasized that acceptability of risk is a relative concept and involves consideration of different factors. Considerations in these judgments may include: The certainty and severity of the risk; the reversibility of the health effect; the knowledge or familiarity of the risk; whether the risk is voluntarily accepted or involuntarily imposed; whether individuals are compensated for their exposure to the risk; the advantages of the activity; and the risks and advantages for any alternatives. Thus, different judgments on acceptability can be made for similar numerical risks.\textsuperscript{178}

EPA first proposed an approach under which it would define a “preferred range for the maximum individual lifetime risk”\textsuperscript{179} and then set standards reflecting a specific level of acceptable risk (on an industry-by-industry basis) after considering “health information, risk measures, and potential biases, underlying assumptions, and quality (i.e., uncertainties) of the information.”\textsuperscript{180} In deciding whether an emission standard would create an acceptable risk, EPA proposed to consider not only the maximum individual risk and distribution of risk in the population, but also the quality of the health data.\textsuperscript{181} This approach would maximize the Agency’s discretion in setting emission standards, particularly with regard to cost and technical feasibility. As opponents argued, however, because this approach provides no clear criteria for setting an acceptable risk level, EPA could set relatively lax risk levels.\textsuperscript{182} The real standard


\textsuperscript{177.} 1988 National Benzene Emission Standards, supra note 176, at 28,512 (emphasis in original).

\textsuperscript{178.} Id. at 28,513.

\textsuperscript{179.} Id. at 28,497. EPA stated that the range it chose (a lifetime risk of one in 10,000) “falls roughly into the middle of the risk range developed in the survey of risks.” Id. at 28,529.

\textsuperscript{180.} Id. at 28,497.

\textsuperscript{181.} Id. at 28,523.

\textsuperscript{182.} An EPA memorandum, signed by Administrator Lee M. Thomas, revealed the Agency’s willingness to manipulate the “acceptable risk” concept to preserve its policymaking discretion:

[B]ecause I am free to issue rules that drive even lower those risks that I find “acceptable,” it may sometimes be appropriate for an “acceptable” risk to be somewhat higher than the target risk ranges EPA has used when implementing statutes that do not provide for the second, more protective, step called for by the \textit{Vinyl Chloride} opinion.

EPA Memorandum, Proposed Benzene NESHAP Decisions and Limitation of Issue to Sec-
setting would occur in the second step, when EPA adds an ample margin of safety. Because the \textit{Vinyl Chloride} decision allows EPA to consider costs and feasibility during this second step, EPA could give those factors substantial weight in adopting final emission standards.

By contrast, EPA's three other proposals would severely constrain its discretion by defining a single numerical criterion as the measure of acceptable risk. Under the second proposal, EPA would set an acceptable risk level based solely on the "total incidence" of risk from a particular chemical from each "source category." Using this approach, EPA proposed to limit benzene emissions from each source category to a level that would produce only one case of cancer per year nationwide.\footnote{183} Under the third and fourth proposals, the only relevant factor for defining acceptable risk would be the "maximum individual lifetime risk" of cancer.\footnote{184} Thus, while the second proposal emphasizes the total public health impact, the third and fourth limit the risk to which any individual may be exposed. Although under all these options costs and feasibility would still be relevant in setting the final emission standard with an ample margin of safety, these factors would play a smaller role than they would under EPA's preferred approach. Under the disfavored proposals, EPA's "baseline" acceptable risk would be much smaller and would give the Agency less opportunity to relax the final standards by using costs and feasibility in determining an "ample margin of safety."

\begin{itemize}
\item Environmental groups and some members of Congress strongly objected to EPA's proposed definition of acceptable risk. Yuhnke, Issues Presented by the Environmental Defense Fund, Inc. for Reconsideration in the Proceeding to Reconsider the NESHAP for Radionuclides 3, 6 (Apr. 18, 1988) (characterizing the risk levels in the existing emission standards as "astounding and totally unacceptable" and amounting to a "human sacrifice policy"); \textit{Benzene Rule Undergoes Final Review; Plan Faulted by Senate Committee Members}, 19 Env't Rep. (BNA) 91 (1988). Predictably, environmental groups argued that the \textit{Vinyl Chloride} decision required EPA to "virtually eliminate ... environmentally-induced cancer." Yuhnke, \textit{supra}, at 21. Having won in court, they were not about to lose their legislative bargaining position through administrative reformulations. The intensity of the reaction was also a response to the relatively large individual risks that EPA is willing to label "acceptable" in certain circumstances.
\end{itemize}

\footnote{183} EPA proposed a limit of one case per year for each source category "because it is small in relation to the millions of persons exposed to benzene, and in relation to the incidence associated with risks from numerous everyday activities." 1988 National Benzene Emission Standards, \textit{supra} note 176, at 28,527.

\footnote{184} \textit{Id.} at 28,497. EPA stated that in evaluating this alternative it would consider both a lifetime risk of one in 10,000 and a risk of one in a million.
In late 1989, EPA adopted final emission standards for several benzene and radionuclide sources. As expected, EPA did not base these standards on a single criterion for acceptable risk. Rather, the Agency set a presumptively acceptable level for the "maximum individual lifetime risk" (MIR), but gauged acceptability only after also considering other factors, including the overall incidence of disease caused by the exposure, the number of persons exposed within different risk ranges, the science policy assumptions used in calculating risk, and the weight of the evidence. EPA justified the MIR standard by stating:

[T]he Agency compiled and presented a "Survey of Societal Risk." . . . [T]he survey developed information to place risk estimates in perspective, and to provide background and context for the Administrator's judgment. . . . Individual risk levels in the survey ranged from [one in ten to one in ten million]. . . . The EPA concluded from the survey that no specific factor in isolation could be identified as defining acceptability under all circumstances, and that the acceptability of a risk depends on consideration of a variety of factors and conditions. However, the presumptive level established for MIR of approximately 1 in 10 thousand is within the range for individual risk in the survey, and provides health protection at a level lower than many other risks common "in the world in which we live." On this basis, EPA could easily have chosen an MIR from one in one thousand to one in one million. The arbitrary nature of EPA's choice assures the Agency the flexibility to weigh costs and technological feasibility when it adds an ample margin of safety to the acceptable risk level. Not surprisingly, the final requirements for benzene and radionuclide source categories are similar to the pre-Vinyl Chloride requirements.

186. 1989 National Benzene Emission Standards, supra note 185, at 38,045.
187. Id. at 38,046.
188. It is not a simple matter to compare the BAT standards with the standards adopted under the approach mandated by the Vinyl Chloride decision. Emission standards are highly technical and thus require a close comparison of control technologies. In addition, some control techniques and EPA's estimates of hazardous air pollutant emissions have changed since the BAT standards were proposed in 1984. Where comparisons can be made, it is apparent that the Vinyl Chloride decision has had little practical impact in most cases. For example, the requirements for some benzene source categories remained completely unchanged. Compare National Emission Standards for Hazardous Air Pollutants; Benzene Equipment Leaks (Fugitive Emission Sources), 49 Fed. Reg. 23,498 (1984), with 1989 National Benzene Emission Standards, supra note 185, at 38,048 (benzene equipment leaks). Even the greatest change resulted in relatively insignificant additional expenditures and little improvement in public health. Compare National Emission Standards for Hazardous Air Pollutants; Proposed Standards for Benzene Emission from Coke By-
B. The Costs of Symbolic Legislation

Despite congressional rhetoric to the contrary, it is not possible in an industrialized society to implement and enforce health-based standards for hazardous pollutants. Because the economic and social costs of such standards would be staggering, EPA will not adopt, much less enforce, such standards.

To maintain this position in the face of explicit statutory language to the contrary, however, the Agency must distort the regulatory process. As the regulatory history of section 112 suggests, one significant distortion is the delay in standard setting.\textsuperscript{189} Lengthy delays create not only greater health risks than are permissible under the statutory health-based standards, but higher risks than would be allowed under the more lenient cost-sensitive standards that EPA prefers.

A statute requiring EPA to do the impossible also undermines the integrity of the rulemaking process and forces the Agency to misrepresent its decisionmaking process to the public and to the courts. When decisionmaking is driven underground, rationality and genuine public participation are sacrificed and public confidence in government is eroded.

I. Regulatory Delay

It would be a great overstatement to attribute EPA's glacial standard-setting pace entirely to a conscious strategy of delay. As a new agency in the early 1970's, EPA attempted to create a variety of air pollution control programs from a new and enormously complex statute. Immediate results were hardly to be expected. Moreover, until the mid-1970's, there was little public pressure to regulate hazardous air pollutants, and EPA understandably put its limited resources into other air pollution programs, such as auto emissions, where Congress, the courts, and the public demanded regulation. In addition, the difficult and sometimes intractable scientific and policy issues involved in regulating hazardous air pollutants required extensive and careful study.\textsuperscript{190}


Although EPA adopted new exposure standards for several radionuclide source categories, in most cases these standards did not require any additional reductions in radionuclide emissions. \textit{See}, e.g., 1989 National Radionuclide Emission Standards, \textit{supra} note 185, at 51,666-68 (NRC-licensed facilities); \textit{id.} at 51,668-69 (uranium fuel cycle facilities). In other cases, the new regulations required only modest additional expenditures and produced insignificant improvements in public health. \textit{See}, e.g., \textit{id.} at 51,669-71 (elemental phosphorus plants).

\textsuperscript{190} In a similar vein, Richard Merrill noted that because of the stringency of the Delaney Clause (which completely bans all carcinogenic food and color additives), FDA often "comes under pressure to delay a decision. The temptation to seek additional tests or invite review by esteemed experts becomes very strong." Merrill, \textit{supra} note 8, at 76.

\textsuperscript{190} \textit{See}, e.g., \textit{GAO REPORT, supra} note 70, at 17-18 (concluding that some of the delay could be attributed to internal agency disagreements over the usefulness of quantitative risk
Finally, political pressures unrelated to section 112's stringent requirements slowed the regulatory pace. Finding itself to be an arbiter between politically powerful interest groups, EPA has been unwilling to take decisive regulatory action absent strong outside pressure.\textsuperscript{191} Moreover, in the early 1980's, the antiregulatory stance of the Reagan administration slowed EPA's standard setting even further.\textsuperscript{192}

Symbolic legislation, however, magnifies an agency's tendency to "study the problem." As a mission-oriented agency, which in no sense could be characterized as "captured" by regulated industries, EPA sees its primary goal as protection of health and the environment.\textsuperscript{193} At the same time, EPA officials believe that it would be both professionally and politically irresponsible to implement section 112 as written. The Agency fears that listing a chemical as a hazardous air pollutant will put EPA, "like a runaway locomotive, on an uncontrollable path towards imposing potentially draconian measures on industry."\textsuperscript{194} Given the enormous scientific uncertainties that exist in health and exposure data, EPA officials have stated bluntly that "the ability to balance the magnitude and uncertainty of health risk with the cost and impact of control strategies is a prerequisite to any accelerated decision making under the

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\item assessments and policy shifts regarding the need for assessments of noncarcinogenic health effects, such as respiratory problems). The delay resulting from technical questions has been exacerbated by EPA's decision to issue BAT standards, which require EPA to collect and analyze information on implementation costs and technological feasibility of various emission standards. \textit{Id.} at 39.
\item Jaffe, \textit{The Illusion of the Ideal Administration}, 86 \textit{Harv. L. Rev.} 1183, 1190 (1973) ("there is no reason to believe that the agency will be able to rise above power conflicts to achieve solutions that the legislature itself cannot or does not choose to provide"). \textit{Cf.} Hays, \textit{The Politics of Environmental Administration}, in \textit{The New American State: Bureaucracies and Policies Since World War II} 21, 32-33 (L. Galambos ed. 1987) (arguing that environmental agencies are "cautious and conservative, [and] tend toward inertia" and thus cannot act "without clear and recurring political crises that might again highlight the urgency of an environmental problem").
\item \textit{See infra} text accompanying notes 311-14 (EPA not captured); \textit{Federal Pesticide Control Act of 1971: Hearings before the House Comm. on Agriculture}, 92d Cong., 1st Sess. 736 (1971) (statement of William D. Ruckelshaus, Administrator, EPA) (EPA's mission is environmental protection, not promotion of industry).
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With no authority to weigh these factors, however, EPA feels compelled to "produce exhaustive scientific evidence to support [the] decision" simply to list a chemical as hazardous. This delays both the decision to list the chemical and the adoption of emission standards. Because the statutory criteria are so stringent, EPA is unwilling to initiate the standard-setting process unless it is confident there is a substantial threat to human health.

EPA officials have admitted to Congress that the Agency carefully collects and reviews scientific evidence not only to justify stringent regulations, but also deliberately to delay the issuance of the regulations that it believes are excessively strict. EPA even publishes notices of "intent to list" chemicals as hazardous air pollutants in order to appear to be taking action while in fact delaying the actual listing decision indefinitely.

EPA has delayed listing hazardous pollutants and issuing emission standards under section 112 to avoid judicial review. As John Mendeloff has shown in his recent study of OSHA's regulation of hazardous substances in the workplace, agency fear of judicial reversal can result in regulatory delay. Reversal can damage agency credibility with Congress, environmental groups, and the regulated community, undermine agency morale, and require the expenditure of additional agency resources by requiring new rulemaking. Thus, an agency facing close judicial scrutiny has strong incentives to delay making a regulatory decision in order to marshal as much evidence as possible in support of its position.

Because many EPA officials doubted that the BAT standards would satisfy the "ample margin of safety" standard, they had no desire to issue standards that would be challenged in court. In addition, EPA offi-

197. EPA's strong desire to study the hazardous air pollutant problem indefinitely was illustrated in Sierra Club v. Gorsuch, 551 F. Supp. 785 (N.D. Cal. 1982). In that case, the district court rejected EPA's request for a seven-year extension of time to conduct further studies before issuing proposed radionuclide emission standards. The court noted that "the agency has already compiled a substantial amount of information on radionuclide emissions. . . . [B]y calling for further elaborate study of the radionuclide emission problem . . . the EPA envisions a level of thoroughness and scientific certainty not within the contemplation of Congress." Id. at 788-89.
198. See supra notes 116-17 and accompanying text.
199. See supra note 113.
200. GAO REPORT, supra note 70, at 17.
cials were fairly certain that environmental groups would sue the Agency over its decisions not to regulate airborne carcinogens.\textsuperscript{203} To prepare to defend its decisions in court if necessary, the Agency spent considerable time and resources assessing potential health risks and updating its assessments as new studies were published.

The promise in section 112 of a risk-free environment further polarized interest groups that refused to acknowledge the symbolic nature of the statutory language. No middle ground could be reached because environmentalists viewed the congressional policy as fixed by the statute and had no desire to reopen the issue,\textsuperscript{204} and industry feared that any concession, even the listing of chemicals as hazardous, would subject it to impossibly strict emission standards. Caught between these irreconcilable positions, the Agency temporized in hopes that a compromise—perhaps even one outside the terms of the statute—could be reached.

Such a compromise had been forged on at least one other occasion. As originally enacted in 1972, section 307 of the Clean Water Act required EPA to set toxic effluent standards without regard to implementation costs or feasibility.\textsuperscript{205} EPA, however, declined to list many pollutants as toxics and incorporated considerations of costs and feasibility in adopting effluent standards for the few toxics it did list. Environmental groups sued EPA to force it to list more chemicals and to set health-based standards. In the resulting settlement agreement, EPA agreed to regulate nearly 130 toxic chemicals, but using a BAT provision that allowed consideration of costs and feasibility.\textsuperscript{206} One year later, Congress “affirmed” the settlement by amending the Clean Water Act to conform with the settlement.\textsuperscript{207}

It is unclear why EPA and various interest groups never reached a similar settlement under the Clean Air Act. Whatever the reason, it has been left to Congress to break the regulatory deadlock. Although frustrated with EPA’s refusal to list hazardous air pollutants, Congress understands that the health-based standards are the root of the problem. As a result, at the time of this writing, Congress is on the verge of enacting legislation that would list numerous chemicals as hazardous air pol-

\textsuperscript{203} See supra notes 119 and 123.

\textsuperscript{204} McCloskey, Debating the Problems that Underlie Pollution Control Problems, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,413 (1988) (“environmentalists tend to think that policies have already been set by statute and that there is nothing left to discuss”).


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In the meantime, EPA's strategy of delay has threatened public health by leaving most hazardous air pollutants unregulated. Because EPA chose to delay implementation rather than adopt unrealistically strict standards, the Agency did not impose relatively inexpensive intermediate controls. Although no controls may be better than excessively strict controls, framing regulatory options as polar extremes forces the Agency to disregard the middle ground that might provide a reasonable amount of additional health protection while new information about health effects or control costs, or even new control technologies, is developed. Demanding perfection now, without compromises, delays real progress.

2. Undermining the Integrity of the Regulatory Process

Section 112 has distorted the regulatory process in other ways. In the course of recasting a hazardous air pollutant program it viewed as unrealistic and potentially damaging to the Agency, EPA tested the limits of statutory interpretation and disregarded its responsibility to implement the laws literally. In effect, the Agency adopted its policy goals in place of the legislature's declared goals. EPA's experience with section 112 taught it that Congress often cannot be trusted to prescribe workable regulatory programs and that the Agency must be prepared to substitute its own program.

By avoiding the hard choices that must be made in regulating hazardous substances, Congress not only shifted the difficult decisions to EPA, it also forced EPA to resist both congressional and judicial directives. This resistance has generated new demands for more statutory deadlines and additional restrictions on agency discretion to list pollutants. By making promises that cannot be kept, and thus forcing EPA to reformulate public policy, Congress indirectly undermined public confidence in the Agency's competence and good faith. Both those who

208. See infra notes 258, 262 and accompanying text.

209. John Mendeloff makes a similar point about the regulation of occupational carcinogens. He argues that in setting excessively stringent statutory criteria for exposure limits in the workplace, Congress has created strong political resistance to regulation. That resistance, which comes from the regulated community, the White House, and the courts, effectively allows OSHA to issue exposure limits for only a few chemicals and thus leaves numerous other hazardous chemicals unregulated. See J. Mendeloff, supra note 201, at 73-102.

210. Although EPA also developed a BAT policy as a means to resist section 112, it issued so few emission standards that it is fair to characterize EPA's principal strategy as delay.

211. EPA, however, was aware of the need for intermediate, low-cost controls and unsuccessfully recommended that Congress amend section 112 to give EPA such authority. See 1981 House Hearings—Part 2, supra note 117, at 740-42; 1983 House Oversight Hearing, supra note 116, at 30-31.

212. Henderson and Pearson argue that similar costs would be incurred if EPA imple-
want stricter regulation and those who oppose regulatory controls will see the Agency as a paper tiger whose cajoling, promises, and threats—all essential tools in any regulatory program—are not to be taken seriously.

Symbolic legislation tends to force an agency to misrepresent its position to Congress, the courts, and the public. This is especially likely if the courts read symbolic legislation literally, but it will also occur if the agency feels too much political criticism for rewriting the substantive statute. Although EPA has been fairly candid with Congress in reworking section 112, its policy proposals following the Vinyl Chloride decision\textsuperscript{213} indicate that EPA is prepared to disguise the extent of its reliance on costs and feasibility in setting standards.

If EPA disguises the basis of its decisionmaking, interest groups and reviewing courts will have a far more difficult time debating and judging the rationality of Agency decisions. Because it does not have a monopoly on information or expertise, EPA relies heavily on contending interest groups to provide and challenge the validity of data and the inferences drawn from that data. Moreover, courts look to the rulemaking record in reviewing the rationality of agency decisions. If the underlying issue cannot be placed on the Agency's agenda, however, there will be neither informed, frank debate at the rulemaking stage, nor comprehensive review in court. As a result, there is a greater risk that the Agency will make poorly considered or even irrational decisions.

Suppressing debate also undermines democratic principles by effectively eliminating public participation in agency decisionmaking. The values inherent in participatory governmental decisionmaking are largely lost if an agency pretends that important issues do not exist or are beyond the agency's reach. Moreover, if there is no effective public debate during the regulatory process, there will be fewer and less consistent political checks on agency behavior.

III
THE VIRTUES OF AGENCY REVISION: FROM SYMBOLISM TO FUNCTIONING REGULATION

By taking an uncompromising stance toward hazardous airborne chemicals in section 112, Congress was able to claim credit for protecting health and the environment while avoiding difficult policy questions and

\textsuperscript{213} See supra notes 176-88 and accompanying text.
shifting the political problems to EPA. Part I of this Article argued that Congress' real purpose in passing section 112 was to symbolize its commitment to resolving this particular social problem. As Part II demonstrated, the Agency responded by delaying implementation and, to a lesser extent, by rewriting the statute into a more palatable form, one that would deliver significant health benefits at a cost it felt Congress would deem acceptable. With this background, this section of the Article argues that literal interpretation of symbolic legislation would be a mistake and that the Agency should be allowed to reformulate symbolic legislation because rational policymaking involving volatile social issues is more likely to be done by an agency than by the legislature, particularly where statutes are difficult to amend and enacting symbolic legislation is an accepted means of doing business.

The argument for agency revision is based on a number of considerations. First, Congress occasionally enacts regulatory laws that cannot be implemented because of economic or political constraints. Legislators often are aware of this, but feel it is important to pass the legislation to make a statement. At other times, the infeasibility of the statute becomes evident only with experience. Because symbolic statutes address real social conflicts in unrealistic ways, the underlying problems, such as widespread exposure to hazardous air pollutants, remain unsolved. Agency revision bridges the gap between congressional goals and economic, technological, and political reality.

Second, the regulatory agency is deeply and continuously involved in lawmaking. This involvement stems partly from the legislative delegation inherent in ambiguous statutory language and partly from the agency's enforcement responsibilities. But the agency is also deeply involved as a result of its relationship and interactions with Congress. Not only is the agency an important source of policy initiatives—in many cases it is intimately involved in drafting and amending statutes—it often shares with Congress the responsibility of determining statutory meaning. This is particularly true with environmental statutes, where there are active, powerful, and competing interest groups, and EPA has a running dialogue with congressional committees about the priorities and policies that will shape its interpretation of the legislation. From a variety of formal and informal contacts with agency officials, legislators develop an understanding of agency concerns and the concerns of interest groups, and the agency gets a measure of Congress' priorities and its commitment to the statute as written. By delaying implementation, consulting with congressional committees, and experimenting with various policy alternatives, an agency can avoid irrational policies, educate Congress about the problems it has encountered in implementing the statute, and seek congressional approval for or acquiescence in some alternative formulation of policy.
Third, regulatory agencies are responsive to majoritarian preferences. A regulatory agency—especially EPA—typically operates in a politically charged atmosphere, in which competing groups fight for the agency’s attention and seek to persuade or compel it to adopt or change certain policies. The openness of agency proceedings and policymaking and the broad opportunities for interest groups to seek congressional and judicial review have made agencies sensitive to shifting majoritarian preferences. Although regulatory agencies are not as representative as the legislature, various legal and political checks often give them a semimajoritarian cast.\(^ {214} \) In their study of the National Highway Traffic Safety Administration, Jerry Mashaw and David Harfst posited that a regulatory agency struggles
to provide the form of regulation that society wants. As it engages in this struggle, the agency receives feedback from many sources, including Congress, the courts, the Executive Office of the President, interest group activity, general public opinion as expressed in opinion polls and press commentary, and many others. Responding to this rich environmental feedback, the agency engages in action designed to explore the contours of its legitimate regulatory mandate.\(^ {215} \)

Thus, agency resistance to the literal implementation of symbolic legislation may provide political actors with an opportunity to shape a meaningful regulatory policy.

These considerations do not mean that agency lawmaking should be unchecked or that agencies should routinely revise statutes in defiance of the legislative mandate. Rather, agency discretion should be tolerated because the risk of judicial reversal, the professional values of agency personnel who recognize the precedence of congressional judgment, and the fear of congressional sanctions, constrain agency officials to stay within the bounds of the legislature’s instructions. An agency uses interpretation, delay, and, less commonly, revision more to round off the sharp corners of legislation than to change its shape altogether.

Symbolic legislation, however, tends to force the agency to choose between upholding the symbol and blatantly resisting the statutory mandate. Minor adjustments to such a statute, which a court might tolerate, often will not make the statute workable. In these circumstances, agency revision of the statute is appropriate while the legislature reconsiders its initial position.

Judicial review, however, threatens to undermine the process of agency revision. Disappointed interest groups have ready access to the courts to challenge agency action, including administrative decisions that may be the product of an informal accommodation between the agency

\(^ {214} \) See generally E. REDFORD, DEMOCRACY IN THE ADMINISTRATIVE STATE (1969).

and congressional committees. Because judicial review can frustrate valuable agency revision of symbolic legislation, one must also take account of judicial review of symbolic statutes. The analysis in this Part concludes that courts should defer to the agency's interpretation under an expanded or alternate doctrine of deference to "reasonable" agency interpretations of regulatory statutes.216

A. Fidelity to the Statute as Written

An agency policy to implement a statute literally is normatively attractive. We expect governmental officials to uphold the law, not subvert it. In a democratic society, unelected bureaucrats ordinarily should not substitute their judgment for the legislature's judgment about the wisdom of statutory policy. Faithful obedience to the law's commands helps to protect democratic institutions and to avoid the caprice characteristic of institutions not governed by rules. In addition, by implementing statutory provisions as written, the agency shifts responsibility for making considered policy choices back to Congress. If the agency (or a court, for that matter) bails out the legislature whenever it acts irresponsibly, the legislature is less likely to develop habits of deliberation.

There are also pragmatic reasons supporting faithful adherence to the statutory language. An agency may find it difficult to make a principled decision about whether a statutory provision is symbolic. Physical impossibility is rarely a suitable test because virtually every provision can be implemented. What makes an environmental statute symbolic are the wholly disproportionate economic and social costs that flow from its implementation and enforcement. Defining "wholly disproportionate" is problematic, however, because the symbolic statute provides no guiding principles. Absent identifiable standards, an agency might characterize as symbolic those provisions that are inconvenient or that contravene existing agency policies. This risk that an agency would disregard or reformulate disfavored provisions would be especially serious if there were no significant political checks on agency behavior.

In addition, once an agency is cut adrift from the text of the statute, it may be difficult for the agency to decide how to approach its reformulation of congressional policy. If the provision is symbolic, and thus not to be taken literally, the agency is left with little or no statutory guidance.

In the end, however, the reasons for demanding that the agency faithfully implement and enforce the statute under all circumstances are unpersuasive. First, the premise of symbolic legislation is that Congress

216. Recognizing that statutory interpretation normally is an exercise in policymaking, and that agencies have a more legitimate political basis than the courts for exercising that authority, the Court has insulated the agencies' interpretation from review unless it departs from clear congressional intent. See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 864-66 (1984).
did not mean or did not really understand all that it said. To label the agency as undemocratic when it avoids a literal interpretation of symbolic legislation is to miss the point of this type of statute: the statute means less “do it this way” than “we’re serious, do something now.” Far from being undemocratic, the agency actually is taking a more nuanced view of Congress’ purposes.

Second, while Congress should certainly be encouraged to draft more realistic and workable statutes in the first place, uncritical implementation of Congress’ symbolic commands is not likely to achieve this goal. As legislators and agency officials fully understand, literal interpretation and implementation of absurd provisions are more likely to damage the agency than Congress. Indeed, literal implementation of symbolic legislation allows legislators to play the role of the cavalry by intervening with the agency on behalf of constituents to restrain the “idealistic” or “overzealous” regulators. Rather than providing incentives to enact workable statutes in the first instance, literal interpretation and implementation of symbolic statutes may provide the opposite incentives. Moreover, given that symbolic legislation often is the product of crises or exogenous political forces (witness the development of the 1970 Clean Air Act), literal implementation is unlikely to discipline future legislative behavior when a new crisis or political battle develops and when some of the old political actors have been replaced.

Even though literal implementation will not prevent symbolic legislation, arguably it would force Congress to reconsider existing symbolic provisions. This approach, however, is a gamble with high social stakes. EPA was not being hyperbolic when it insisted that completely disregarding costs in setting emission standards under section 112 would involve a major realignment of economic and social priorities. If costs and feasibility are not considered in setting and enforcing emission standards, factories and perhaps entire industries will close. The resulting social and economic dislocation could be staggering, all for relatively small, and in many cases speculative, health benefits.

Of course, EPA need not gamble the nation’s whole economic stake. It could choose one chemical to regulate with symbolic standards. Given the normal delays inherent in rulemaking and judicial review, Congress arguably would have sufficient time to reconsider its symbolic statute before the economic disruption became too acute. Yet Congress’ response might be no more considered than was the original enactment. Given the pressures to maintain the symbol, Congress could try to duck

217. See Fiorina, Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?, 39 Pub. Choice 33, 53 (1982) (arguing that legislators prefer delegation because it creates a “demand for a legislative ombudsman”). The motivation for delegation, however, is probably least applicable to standard-setting agencies, such as EPA, and most applicable to agencies conferring direct benefits, such as the Social Security Administration.
the issue or enact an extremely limited exception. Careful, deliberate policymaking would not be the likely result. Congress' response to FDA's ban on saccharin under the Delaney Clause is illustrative. Although Congress quickly blocked FDA's decision in that case, it refused to amend the Clause. "[L]egislative revision of the law was improbable. Congress was prepared to create exceptions to the . . . Act's general requirements . . . but it seemed unwilling to entertain seriously any categorical revisions of this icon."218

It is also far from clear that literal implementation would shift policymaking responsibility back to Congress, even if a majority of Congress was inclined to consider reform. For a variety of reasons, Congress often is unable to correct its mistakes: legislative inertia tends to be the rule. Under the best of circumstances, Congress' agenda is full of issues competing for legislative attention. Absent an imminent crisis, Congress will not soon return to the same set of issues. In addition, it is often easy for a legislative minority, or even a vocal interest group, to use existing procedural hurdles to block legislative amendments. Opposition to unrelated provisions can also doom a legislative package. These obstacles are magnified when policy issues are cast in symbolic terms. Once Congress has taken the position that public health must be protected at any cost, it is difficult for the legislature to adopt a more moderate position. Position-taking by other legislators and charges of trading lives for dollars will deter many legislators from supporting such amendments.

Congress' repeated failure to revamp the hazardous air pollutant program during the 1980's illustrates how unresponsive the legislature can be to serious, well-publicized problems. Despite widespread agreement in the legislature that the program was wholly ineffective and that section 112 needed substantial revision, bitter disputes over unrelated issues involving acid rain blocked legislation for nearly a decade.219 Although Congress would be more responsive to administrative action that threatened to close major industries, it is unclear whether Congress could respond quickly enough to prevent unwarranted dislocation.

B. Reformulation in Light of the Agency-Committee Dialogue

A policy of literally interpreting symbolic legislation postulates a clean separation of legislative and administrative functions: legislators make laws and administrators implement them. Although statutory omissions and ambiguities may require some administrative lawmaking to fill in the gaps, an administrator's attempt to resist a relatively clear statutory mandate would impermissibly shift legislative power to the agency.

218. Merrill, supra note 8, at 31-32.
219. See supra note 146.
A policy tolerating a degree of agency resistance begins with very different assumptions about the ability of the legislature to police agency deviations from the legislative mandate and about the joint role that the agency and the legislature play in shaping regulatory policy. Christopher Foreman has written:

[N]o one any longer supposes that politicians can make decisions that administrators merely execute. Agencies . . . are not empty vessels into which political authorities or interest groups simply deposit their preferences. The power of regulatory bureaucracy is . . . the ability to shape the legislature's sense of what policies are appropriate and, perhaps, to play off contending forces against one another. Bureaucracies can powerfully shape their institutional environments, providing ideas and perceptions to which other actors respond.220

Foreman's view recognizes that regulatory agencies are intimately involved in lawmaking. They propose legislative programs, help draft new legislation, and resolve statutory ambiguities through rulemaking and enforcement. From enactment through implementation, enforcement, and revision, legislators and agency officials often have a continuing dialogue on matters surrounding statutory interpretation and regulatory priorities.

Much of this dialogue takes place in the legislative, oversight, and appropriations committees and subcommittees that are responsible for overseeing agency spending and implementation of regulatory statutes.221 These committees use both formal and informal means to obtain information, guide agency actions, and shape legislative policies. They may require the General Accounting Office to "review and evaluate" agency programs,222 and they periodically hold public hearings at which agency officials (and others) are invited to testify. Committee members and their staffs also rely heavily on informal contacts with agency personnel to assess existing programs, discuss the need for new legislation, and evalu-

220. C. FOREMAN, JR., supra note 58, at 184-85.
ate funding needs.\textsuperscript{223} Given the difficulty of amending statutes, informal contacts often give legislators substantial influence over the formulation and execution of agency policies.

More importantly, these contacts permit a "constant two-way flow of information and views on substance, procedure, individuals, and organizations."\textsuperscript{224} With the help of interest groups, congressional committees can rein in an agency that strays unacceptably far from the statute. At the same time, the agency can educate Congress about the difficulties in implementing a statute. Although the agency may press for an amendment to correct the problem, the agency is just as likely to seek the committee's approval for, or at least acquiescence in, the agency's revisionist interpretation.\textsuperscript{225}

There are, of course, important limitations to the efficacy of congressional oversight. Although there have been some moves to coordinate the oversight activities of congressional committees,\textsuperscript{226} oversight remains unsystematic and fragmented.\textsuperscript{227} Congress is too small, its resources too slim, and the federal bureaucracy too large and impenetrable for regular congressional oversight. As a result, many issues do not come to the legislature's attention, or are not able to compete successfully for room on the legislative agenda.

Frequently, there is little political incentive for thoroughgoing legislative review. Unlike constituent services and pork-barrel legislation, there are few political benefits from performing oversight responsibilities carefully.\textsuperscript{228} Absent a crisis, a scandal, or strong pressure from an important interest group, legislators see little advantage in spending limited time and resources on oversight activities. As a consequence, legislators tend to address "discrete narrowly focused issues" and "dramatic issues with high emotional quotients."\textsuperscript{229} Legislators also may view oversight processes as serving a symbolic or public relations function, and, as a result, legislative review may not produce needed reforms in the law.

\textsuperscript{224} Id. at 68. These informal contacts are facilitated by the now-common use of congressional liaison units in regulatory agencies. R. Ripley, Congress: Process and Policy 364-65 (3d ed. 1983).
\textsuperscript{225} See, e.g., infra notes 240-43, 251-62 and accompanying text.
\textsuperscript{227} M. Ogul, Congress Oversees the Bureaucracy 10 (1976) ("Oversight is neither comprehensive nor systematic. Oversight is performed intermittently."). To some extent fragmentation of oversight authority is a virtue of the current system. For example, if a legislative committee relaxed its critical stance toward an agency, other committees would be able to continue their oversight.
\textsuperscript{228} See Sher, Conditions for Legislative Control, 25 J. Pol. 526, 531-32 (1963); R. Ripley, supra note 224, at 382 ("[T]he dice are still loaded against sustained oversight. There is little political payoff either in Washington or at home for senators and representatives in being aggressive overseers.").
\textsuperscript{229} M. Ogul, supra note 227, at 34.
Moreover, in some circumstances, political incentives are structured to discourage close oversight. If the responsible committee has a cozy relationship with the agency, it is less likely to carry out its oversight responsibilities carefully. More generally, congressional committees do not necessarily represent the views of Congress as a whole. As a result, the signals that the agency receives from a committee, for example that the committee has acquiesced in agency policy, cannot be interpreted as necessarily having a congressional imprimatur.

In addition, informal techniques for controlling or shaping agency policies and programs are vitiated when the agency receives mixed signals from various House and Senate committees or when agency policy is directed by the White House. An agency may take a House legislative committee’s strongly worded criticisms less seriously if the corresponding Senate committee has commended or tacitly approved the agency’s course of action.

Because of these general limitations on congressional oversight, Congress is most responsive to “fire alarms”—specific controversies that are objectionable to interest groups. Lobbyists for regulated and public interest groups voice their concerns about agency action and inaction to congressional committees, which in turn raise the issues with the agency. The committees “not only enforce compliance with legislative goals; they help decide what those goals are.” It is through this process that legislators, agency officials, and interest group lobbyists give operative meaning to symbolic statutory language.

Congress has conducted extensive oversight of the hazardous air pollutant program since the 1977 amendments to the Clean Air Act.

230. See Sher, supra note 228, at 533-34.
231. See M. Ogul, supra note 227, at 41-44.
233. Id. at 79-82. For a discussion of White House control of the rulemaking process through the Office of Management and Budget, see Bruff, Presidential Management of Agency Rulemaking, 57 Geo. Wash. L. Rev. 533 (1989).
235. Id. at 427 (“Congress [has] establishe[d] a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative decisions (sometimes prospectively), to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts, and Congress itself.”).
236. Id. at 432.
237. Of course, legislative hearings cannot be taken at face value. They generally are scripted and often are designed to show congressional constituents that their lawmakers are working hard. The real legislative business takes place in more informal settings. Nevertheless, legislative hearings, even those in which the participants are posturing for other audiences, provide useful information about the nature and extent of the working relationship.
Over several years, as the Agency expressed its strong reservations about section 112, legislators, Agency officials, and interest group lobbyists began to give functional shape to the symbolic commands of section 112.

The House Committee on Energy and Commerce and the Senate Committee on Environment and Public Works have been the most important committees overseeing section 112. Like most legislative committees, congressional environmental committees are responsible for creating agency programs, for reviewing those programs for necessary statutory amendments, and, in the Senate, for reviewing nominations of top agency officials. Because the Clean Air Act, like many regulatory statutes, is authorized for only a few years, these committees (or their subcommittees) hold periodic reauthorization hearings to review the entire Act. In addition, the House Energy and Commerce Committee has an Oversight and Investigations Subcommittee to review the "application, administration, execution, and effectiveness [of regulatory laws]... in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of Congress." Thus, there are institutional mechanisms and substantial authority for congressional oversight of Clean Air Act programs.

The power of legislative committees rests in their authority to hold public hearings and in their ability to draft, shape, and report proposed legislation. Through public hearings, the committees can investigate an interest group's allegations of agency sloth or of overzealous regulation between the agency and its oversight committees.

238. Congressional oversight also comes from investigative and appropriations committees. Investigative committees have broad authority to investigate agency programs, see, e.g., RULES OF THE HOUSE OF REPRESENTATIVES, Rule X cl. 2(b)(2) (1988), and may substantially influence the course of agency policy. See R. RIPLEY, supra note 224, at 380 ("Opponents of bureaucratic policies can... simply keep the offending bureaucrats in the limelight and direct their criticism and those of hostile lobbies and (maybe) of the press toward them."). These committees, however, tend to focus on relatively dramatic incidents or systematic agency problems, such as corruption. They rarely examine disputes over proper regulatory policy, and in fact congressional investigative committees have paid no attention to EPA's hazardous air pollutant policy.

Appropriations committees also have substantial authority to review and influence the evolution of agency programs. See, e.g., RULES OF THE HOUSE OF REPRESENTATIVES, Rule X cl. 2(b)(3) (1988). The importance of the appropriations committees derives from their authority to specify the purposes of appropriations and to reduce agency funding. The committees also make suggestions in committee reports, in committee hearings, or even during floor debates. See generally M. KIRST, supra note 232. Richard Fenno has noted that agency officials are quite sensitive to the committee members' concerns. R. FENNO, THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS 292 (1966) (stating that the agency "elevates [committee suggestions] to a status barely distinguishable from statute"). But because these committees are responsible for fiscal oversight, they are unlikely to take a systematic interest in related issues involving statutory interpretation absent indications of waste or abuse or the need to evaluate closely the funding requirements of an agency program. Since 1977, the appropriations committees have touched only lightly on the hazardous air pollutant program.

and, under the right circumstances, focus unwelcome public and media attention on EPA officials. They can also use the hearings to "threaten" legislation that EPA might view as unduly restrictive.

The legislative committees' role, however, is not entirely or even primarily a coercive one. The committees often seek the Agency's cooperation in gathering information to evaluate the efficacy of existing environmental laws. Normally the committees are interested in amendments that EPA thinks would be useful in carrying out congressional programs.

The evolution of section 112 regulation demonstrates the interactive agency-committee process. The hearing record reveals that EPA was candid with the congressional committees in its assessment of section 112 and its regulatory plans. EPA officials took every opportunity to explain to the committee members both that the Agency considered section 112's health-based standards to be unworkable and that the statutory language was responsible for the slow pace of standard setting.240

In addition, agency officials were careful to explain that EPA had developed and had begun to implement a standard-setting policy that probably violated the section 112 criteria. For example, in 1981 Acting Administrator Walter Barber, Jr., testified:

One needs to look at the risk, the cost of control, [and] come to a reasoned judgment about reasonableness or unreasonableness of the residual emissions. . . . We have a draft policy that we have issued that would allow us to do that, but I have to admit that the logic is substantially strained, given the language of the statute. I am not really sure that it would pass muster if it ever got to court.241

Three years later an Assistant Administrator testified:

To be perfectly candid about this thing, we have worked with section 112. Some would argue that we have stretched it, that we have made a pretzel out of it. . . . [I]f we knew we were never going to get challenged in court, and we just thought we were doing what Congress wanted us to do, we would feel fine about the present statute. Unfortunately or fortunately, courts out there are going to construe our actions in light of what they think the statute means. It could be that then we would have more specific difficulties in implementing this particular section.242

240. See supra notes 116-17 and accompanying text; see also 1981 Senate Oversight Hearings, supra note 115, at 564 (responses to questions submitted to Joseph Padgett, Director, Strategies and Air Standards Division, Office of Air Quality Planning and Standards, EPA) (explaining that zero-emission standards were "not now physically possible").

241. 1981 House Hearings—Part 5, supra note 69, at 143 (statement of Walter C. Barber, Jr., Acting Administrator, EPA); see also 1981 Senate Oversight Hearings, supra note 115, at 517-18 (statement of Joseph Padgett, Director, Strategies and Air Standards Division, Office of Air Quality Planning and Standards, EPA); 1983 House Oversight Hearing, supra note 116, at 17 (statement of William D. Ruckelshaus, Administrator, EPA).

EPA officials repeatedly asked Congress to amend section 112 to confirm the agency's policy choices.

EPA's candor with the congressional committees is striking. It is also an essential ingredient in any proposal to tolerate, much less to encourage and legitimate, agency resistance to symbolic statutes. Absent an open legislative-administrative dialogue about section 112, agency officials would be less able to inform the legislators about perceived shortcomings of the statute and proposed agency amendments, and legislators would be less able to signal their acceptance or rejection of agency policy. If agency policy were hidden from view, it would be difficult for legislators to learn about and evaluate that policy.

Without this dialogue, the legitimacy of agency resistance would be erased. The joint lawmaking process would be replaced by secret agency action. Unable to disapprove of or acquiesce in the agency's reformulation of the statute, the legislature's role would be sharply reduced and agency officials would not have to pay close attention to congressional priorities or policies. Acting in secret, the agency would no longer need to be responsive to majoritarian preferences; it would be free of both legal and political checks.

EPA, of course, was not the only participant at the congressional hearings on section 112. Representatives of industry and national environmental groups (who also have informal access to legislators) testified at every hearing. This limited EPA's ability to mislead Congress or to gloss over its policy decisions. Although environmental groups were dismayed with the pace of standard setting under section 112, they also conceded that the statutory deadlines should be lengthened and that the statute should be amended to permit the agency to set more relaxed emission standards in the short run.

Environmental groups, however,


244. As Khristine Hall, who testified on behalf of the Environmental Defense Fund and the National Clean Air Coalition, conceded, the "ample margin of safety standard" was unrealistically strict:

Since it is not scientifically possible to demonstrate a no-effects level for carcinogens, this requirement has been construed in some instances to require a zero emissions level standard. Obviously this has significant economic implications and has led EPA and industry to propose that standards under section 112 be allowed to be set on a technology base.

wanted something in exchange for these concessions: if deadlines and standards were to be relaxed, Congress should also enact a provision that would automatically list chemicals as hazardous if EPA failed to act within specified deadlines. Thus, even though their posture in litigation suggested otherwise, environmental groups acknowledged that symbolic provisions in section 112 hindered real progress in achieving health and environmental protection.

The legislators on these committees were responsive to the agency’s and the environmentalists’ concerns. Clearly unhappy with the slow pace of standard setting, they also understood that the substantive criterion in section 112 was the root of the problem. While there is no evidence that the committees explicitly told EPA: “Go ahead, use BAT standards, regardless of the literal requirements in section 112,” in a variety of ways they signaled the Agency that it could adopt cost-sensitive emission standards.

Legislative committees are extremely unlikely in a public hearing to give agency officials express permission to disregard a statute. The committees are mindful that their will is not necessarily the will of Congress and that they have neither the authority to speak for Congress, nor the confidence that Congress will follow their lead. In addition, publicly condoning agency deviation from health-based standards could be politically risky. A committee’s acquiescence in an agency’s reformulation of congressional policy, then, is evidenced by the committee’s silence or by the amendments it drafts and reports to the House or Senate.

The clarity of congressional signals varies from case to case. Legislative committees do not speak with a single voice, and with committee members as different as Dingell and Waxman there will be a range of responses to EPA’s actions. Moreover, committees do not send consistent signals over time. Rather, the committees’ attitudes toward agency policy evolve as EPA and interest groups lobby Congress and as unpredictable external factors, such as sudden environmental crises, occur.

The House and Senate committees unambiguously responded to EPA’s delay in issuing standards and its use of BAT criteria in place of the health-based criteria. In several legislative hearings and reports, the legislators were sharply critical of EPA’s slow pace, and rebuked EPA officials for the agency’s “disgraceful inaction.”

245. Ms. Hall also noted:
We believe that section 112 should be clarified and that there is some merit to allowing standards under section 112 to be initially set on a technology basis, provided, however, that there are more pollutants listed and ultimately regulated, and provided that the technology that is used is genuinely the best technology. 1981 House Hearings—Part 2, supra note 117, at 710 (statement of Khristine Hall, Senior Attorney, Environmental Defense Fund).

lators acknowledged that the substantive statutory criteria were the root of the inaction, they still found the delays intolerable.

The legislature signaled its discontent with EPA's regulatory pace in other ways as well. Representative Dingell, for example, extracted a promise from EPA Administrator Ruckelshaus that he would make listing decisions on two dozen chemicals within two years and then monitored the Agency's progress with quarterly reports. In addition, the Senate and House committees drafted and reported legislation designed to accelerate the pace of Agency decisionmaking. One bill would have required EPA to consider a list of chemicals for listing as hazardous air pollutants. If the Agency failed to decide whether to list the chemicals within a statutory deadline, the chemicals would be listed automatically, which would trigger further deadlines for adopting standards. Later bills simply listed certain chemicals as hazardous air pollutants.

By contrast, the committees' response to EPA's BAT standards was more muted. No legislators objected to the BAT standards, which suggests that the legislators found the standards unobjectionable, or at least much less objectionable than the delays. For example, during a 1981 Senate oversight hearing, legislators carefully questioned Agency off-
cials, as well as industry and environmental representatives, about the slow pace of standard setting.\textsuperscript{251} Although the committee asked EPA to provide a legal justification for its policy of weighing costs in setting emission standards, it never asked the Agency to renounce its approach and adopt health-based standards.\textsuperscript{252} When EPA officials testified that the Agency’s BAT policy probably contravened section 112, and probably would not survive judicial review,\textsuperscript{253} not a single legislator suggested that EPA return to health-based standards.

Indeed, the legislative committees, which probably favored more stringent standards than most members of the House or Senate, drafted and reported legislation relaxing the standard-setting criteria in section 112. In 1982, the House Committee on Energy and Commerce approved Rep. Waxman’s amendments to section 112, which would have repealed the “ample margin of safety” criterion, and narrowly rejected Rep. Dingell’s amendment, which would have authorized BAT standards.\textsuperscript{254} In 1984, Waxman introduced and held hearings on H.R. 5314, which would have required EPA to set health-based standards with an ample margin of safety, but would also have permitted the Agency to set “interim” emission standards for six years based in part on considerations of technological feasibility.\textsuperscript{255}

The Union Carbide accident at Bhopal, India which killed 2000 people rekindled Waxman’s enthusiasm for revamping the hazardous air pollutant program.\textsuperscript{256} Although Waxman’s bill would have increased from thirty-five to eighty-five the number of pollutants to be regulated, and would have required EPA to list the chemicals as hazardous, it would have retained the same substantive criteria for emission standards, including the interim BAT standards, that he had proposed in the previ-

\begin{itemize}
  \item \textsuperscript{251} 1981 Senate Oversight Hearings, supra note 115, at 537-49. See also Nomination of Lee M. Thomas: Hearing Before the Comm. on Environment and Public Works, 99th Cong., 1st Sess. 70-71 (1985).
  \item \textsuperscript{252} 1981 Senate Oversight Hearings, supra note 115, at 563-64.
  \item \textsuperscript{253} See Hearings on Clean Air Act Amendments of 1983—Part 2, supra note 145, at 10 (statement of Joseph A. Cannon, Assistant Administrator for Air and Radiation, EPA); 1981 House Hearings—Part 5, supra note 69, at 143 (statement of Walter C. Barber, Jr., Acting Administrator, EPA); 1981 Senate Oversight Hearings, supra note 115, at 517-19 (statement of Joseph Padgett, Director, Strategies and Air Standards Division, Office of Air Quality Planning and Standards, EPA).
  \item \textsuperscript{254} Environmentalists Prevail in New Clean Air Showdown, 40 CONG. Q. WEEKLY 1981 (1982); Dingell Loses Key Vote on Toxics As House Panel Resumes Air Act Markups, 13 Envt’l Rep. (BNA) 491 (1982).
  \item \textsuperscript{255} See 1984 House Reauthorization Hearings—Part 1, supra note 249, at 43-45. The hazardous air pollutant provisions in H.R. 5314 were taken from H.R. 5084, which was co-sponsored by a majority of Waxman’s subcommittee. Comprehensive Clean Air Bill Introduced, 14 Envt’l Rep. (BNA) 2204 (1984).
  \item \textsuperscript{256} Bhopal Tragedy Prompts Scrutiny by Congress, 42 CONG. Q. WEEKLY 3147 (1984); see also Repeal of Section 112 of Clean Air Act, Other Controls Being Considered by Waxman, 15 Envt’l Rep. (BNA) 2230 (1985) (Waxman’s criticism of hazardous air pollutant program increased “especially in the wake of the accident in Bhopal”).
\end{itemize}
ous Congress.\textsuperscript{257} In 1990, the House Energy and Commerce Committee overwhelmingly approved H.R. 3030, which required the "maximum available control technology," a version of BAT standards.\textsuperscript{258}

The Senate Environment and Public Works Committee went even further. In 1982 and 1984, it reported two bills that authorized EPA to adopt BAT emission standards. Paradoxically, the bills also required EPA to adopt emission standards that would "protect the public health . . . with an adequate margin safety" if BAT standards did not provide such protection.\textsuperscript{259} Although the committee explicitly recognized the need for BAT standards,\textsuperscript{260} it did not fully relinquish the 1970 Act's health-based goals. In 1987, however, the committee reported a bill that would have replaced health-based emission standards with BAT standards for toxic air pollutants and authorized EPA to impose health-based standards as the Agency saw fit.\textsuperscript{261} In 1989, it reported a bill with similar criteria for emission standards.\textsuperscript{262}

Although irreconcilable divisions over unrelated provisions for acid rain blocked passage of these bills,\textsuperscript{263} the bills, together with legislators' comments and silences, delivered two messages: EPA must act promptly to regulate more hazardous air pollutants, and health-based emission standards were unnecessarily strict. It would be going too far to interpret these events as congressional approval of BAT standards, however, because Congress as a whole had not yet expressed its views. Moreover, some of the bills stopped short of endorsing BAT standards. But, these actions did signal EPA that some consideration of costs and feasibility was appropriate in setting emission standards for hazardous air pollutants and that Congress was ready to consider amendments to the existing health-based criteria.

This account illustrates the important role EPA has played in developing environmental policy, not merely by filling the gaps in statutory language but by actively reshaping congressional policy. In the dialogue


\textsuperscript{258} See Clean Air Act: War About Over in Both House and Senate, 48 CONG. Q. 1057 (1990).


\textsuperscript{260} The committee stated that it was adopting BAT criteria so that EPA would not delay listing chemicals as hazardous to avoid extreme emission standards. S. REP. No. 666, 97th Cong., 2d Sess. 15 (1982); S. REP. No. 426, 98th Cong., 2d Sess. 15 (1984).

\textsuperscript{261} S. REP. No. 231, 100th Cong., 1st Sess. 218-19, 238-39 (1987).


\textsuperscript{263} See supra note 146 and accompanying text.
between EPA and the congressional committees, EPA explained how it had reformulated the hazardous air pollutant program, and the committees communicated their displeasure with the Agency’s delays and acquiesced in its relaxation of substantive standards. Thus, the Agency reshaped the statute subject to important political checks.

The lesson from EPA’s experience with section 112 is not that this dialogue always takes place, but that it can and does occur. Agencies and congressional committees can work together to transform symbolic provisions into functional regulatory policies. Congressional oversight thus runs two ways. While committees monitor agency adherence to statutory mandates, agencies check legislative posturing by delaying implementation, reformulating policy, and working with legislators to shape a politically and technically acceptable policy.

C. Agency Reformulation and Legislative Intent

This Article’s proposal to allow agency reformulation of symbolic statutory provisions can be examined in the context of the current debate about statutory interpretation.264 Much of the recent scholarship promotes either a textualist or an intentionalist approach.265 Textualists interpret statutes by looking exclusively to the words and structure of the statute.266 Intentionalists, by contrast, look beyond the “four corners” of the statute and rely on other materials, such as the relevant committee reports, floor statements by the legislation’s authors, and other indices of legislative history.267

Both textualist and intentionalist theories of statutory interpretation are positivistic: each assumes that the legislature has primary responsibility for lawmaking and that statutory interpretation is an act of revealing legislative will. In addition, textualists and intentionalists agree that characteristics of the legislative process make it exceptionally difficult (or impossible) to ascribe a specific legislative intent to particular statutory language.268 From this point, textualists and intentionalists part ways. Textualists argue that it is meaningless and misleading to seek extrastatutory evidence of legislative intent and that resort to such

evidence risks unwarranted judicial lawmaking.\textsuperscript{269} Intentionalists, however, maintain that legislative histories reveal legislative purposes that are valuable in deciding interpretive questions, and they rely on certain conventions for using extrastatutory materials to resolve ambiguous statutory provisions.\textsuperscript{270} In practice, courts adopt both textualist and intentionalist approaches.\textsuperscript{271}

Daniel Rodriguez has described a third school, the "new legal process" movement.\textsuperscript{272} Proponents of this approach emphasize rather than constrain the role of the interpreter in creating law and thus deemphasize, if not wholly eliminate, legislative supremacy as an ideal. Although adherents vary in the weight they would give to text and legislative histories, they share a deep distrust of the legislative process and celebrate creative judicial lawmaking through the use of "public values"—essentially a resort to natural law.\textsuperscript{273}

None of these approaches to statutory interpretation, however, was designed to deal with symbolic legislation, and most of them focus on (but perhaps are not limited to) judicial rather than agency interpretation. Nevertheless, they provide a conceptual context within which to discuss agency interpretation of symbolic statutes.

The "new legal process" approach is not an attractive method of statutory interpretation for a number of reasons. First, it is premised on the ideas that courts have special expertise to derive public values and that courts contribute to the legitimacy of government by infusing statutory interpretation with public values.\textsuperscript{274} Its proponents have never suggested that these premises, or that the new legal process approach itself, apply to agency interpretation of statutes.\textsuperscript{275} It is noteworthy that advocates of the theory rely on civil rights statutes to illustrate their point and

\textsuperscript{269} See Easterbrook, supra note 266, at 547-48 (arguing that legislatures have "outcomes," not intentions and that it is possible only to make "wild guesses" about what the legislature would have done with an issue it did not address in the statute).


\textsuperscript{271} Aleinikoff, supra note 265, at 24-25.


\textsuperscript{275} Indeed, regardless of what one thinks of courts' authority to invoke public values, there seems to be no room to believe that agencies would be authorized under this approach to engage in freewheeling interpretation.
generally ignore regulatory statutes in which agencies necessarily do most of the interpreting. 276

Second, even if this approach applied to agencies, it would unrealistically assume that agencies will rely on or invoke certain public values in assigning meaning to an ambiguous statute. While judges, arguably, decide interpretive questions that way, agencies do not. Agency officials work in an intensely political atmosphere in which they must heed legislators’ demands and arbitrate disputes between different interest groups. If an agency invoked “principle” to decide a question of statutory interpretation—which from the agency’s view is primarily a question of policymaking—it would, in reality, only be disguising the political and pragmatic policy bases for its decision.

Third, there often is no agreement regarding the appropriate public values at a level of specificity necessary to answer interpretive questions. The problem is magnified with symbolic legislation, the very enactment of which signals unresolved conflicts over basic public values.

Textualism is also the wrong approach for symbolic legislation. Textualists assume that the only reliable information about legislative will is found in the statute itself. 277 Yet, with symbolic legislation the one thing we can be certain of is that the legislature did not intend the statute to be implemented as written. Symbolic legislation is not a set of specific instructions for the agency to follow, but a statement of legislative aspirations and assurances delivered to various constituencies as well as the agency. Thus, if we are committed to legislative supremacy, we must look to other sources of legislative intent.

A modified intentionalism provides a better basis for interpreting symbolic legislation. Intentionalists look not only at the statutory language, but also at legislative histories and imputed statutory purposes in an effort to guess what the legislature would have done had it dealt with the specific issue. Daniel Farber and Philip Frickey view this approach as “an exercise in practical reason.” 278 Cass Sunstein emphasizes that interpretation must be made while keeping in mind “how statutory interpretation will improve or impair the performance of governmental institutions,” as well as “the intended functions of regulatory statutes and the

276. See, e.g., Eskridge, supra note 274, at 1531-33.

277. This assumption is troubling because it disregards the rich variety of legislative materials that together communicate the legislative purposes of the statute. As Farber and Frickey have noted about courts, when substantial evidence of congressional intent is ignored, “it weakens the legitimacy of the statute by detaching the implementation from the actual purposes of the electorate’s representatives.” Farber & Frickey, supra note 267, at 460.

278. Id. at 456. Specifically, they state that “such interpretation is a mixture of inductive and deductive reasoning based on a combination of arguments that seem most persuasive in context, not the inexorable outcome of some pre-established formula.” See also Eskridge & Frickey, Statutory Interpretation as Practical Reasoning, 42 STAN. L. REV. 321 (1990) (giving a theoretical basis for this approach); Posner, supra note 270, at 190 (interpreters should ask what the legislator would have wanted).
ways in which such statutes fail in practice." In particular, he argues, courts should be sensitive to the unintended and counterintuitive consequences—generally overregulation or underregulation—of different interpretations. "Aggressive [statutory] construction is entirely legitimate," he contends, if the consequences of literal interpretation are palpably irrational and there is "no affirmative evidence that the legislature intended the result." In addition, Sunstein would have courts interpret regulatory statutes to ensure some degree of proportionality between the costs and benefits of regulations.

The traditional view of statutory interpretation, even among intentionalists, generally opposes the use of postenactment legislative statements and actions because, as Judge Posner has noted:

Postenactment statements [of legislators] are likely to reflect the current preferences of legislators and of the interest groups that determine or at least influence those preferences, but the current preferences bear no necessary relationship to those of the enacting legislators, who may have been reacting to a different constellation of interest-group pressures. To give effect to the current legislators' preferences is to risk spoiling the deal cut by the earlier legislators. . . .

Although this statement reflects the general judicial attitude, courts do not always adhere to it. For example, courts often find that "legislative acquiescence," the legislature's failure to overturn a prior judicial or agency interpretation, is relevant evidence of legislative intent. Assuming that legislative silence is good evidence of legislative acquiescence, this approach reflects the willingness of courts to credit the intentions of the current legislature.

Postenactment statements and actions can be especially helpful when an agency interprets symbolic legislation. By enacting symbolic legislation, the legislature has delayed deciding certain policy ques-

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279. Sunstein, supra note 264, at 466.
280. Id. at 480.
281. Id. at 482. Since the statutory language is "affirmative evidence" of legislative intent, presumably Sunstein means no affirmative evidence in the legislative history.
282. Id. at 487-93. Sunstein cites the Vinyl Chloride case, Natural Resources Defense Council v. EPA, 824 F.2d 1146 (D.C. Cir. 1987) (en banc), see supra notes 155-70 and accompanying text, as an attempt to achieve proportionality. Sunstein, supra note 264, at 487 n. 342. Sunstein recognizes the difficulty in measuring "proportionality," id. at 488, and also suggests that statutes with "symbolic or aspirational benefits . . . should be treated hospitably." Id.
284. Aleinikoff, supra note 265, at 40-41.
tions—for example, what role should costs and feasibility play in setting emission standards. There is no definitive legislative “deal.” This refusal to make a definitive deal may reflect an unwillingness to bear the political costs of a clear decision or uncertainty about the consequences of various policy choices. It may also reflect a deadlock resulting from disagreement on unrelated issues. Thus, interpretation based on the policy and political judgments of the agency, but informed by evolving legislative preferences, has a role to play in shaping legislative policy. In order to provide useful regulatory instructions, symbolic statutes must evolve, not only through episodic legislative amendments, but also through agency interpretation influenced in part by current legislative judgment.

D. The Role of Judicial Review

Courts obviously can play a critical role in shaping legislative and administrative responses to symbolic legislation. By monitoring sublegislative arrangements, for example, courts protect the integrity of the legislative process. However, it is unclear how or when a court should deal with symbolic legislation. Outright reversal could damage both agency morale and EPA’s credibility with interest groups. Potentially the most important political cost to the Agency would be its loss of bargaining power in the legislature. By striking down the Agency’s reformulation of a symbolic provision (which EPA officials viewed as likely with the BAT standard), courts would give environmental groups great leverage in negotiating subsequent legislation.

At the extremes, the court can either interpret literally or nullify symbolic legislation in an effort to force Congress to deal concretely with the underlying policy issues. Alternatively, a court can engage in or tolerate a certain amount of instrumental interpretation either by interpreting the statute itself to remove the symbolic conditions or limitations, or by deferring to the agency’s reformulation. None of these approaches is ideal. But, given the relative capacities of courts and agencies to compel congressional reform or to produce a functional regulatory program, deference is the best approach.

1. Literal Interpretation

A court’s most obvious option is to interpret the symbolic statute literally and to require the agency to adopt regulations implementing the symbolic provisions as written. Although this approach conceivably could force the legislature to reconsider the legislation and to deal with the difficult tradeoffs, it also could limit the agency’s ability to work informally with the legislature to reformulate the statute’s meaning. Literal interpretation means that all policy changes would have to be made

286. See J. Mendeloff, supra note 201, at 121-22.
through formal amendments. Presumably, agency officials and industry lobbyists would intensify their efforts to have the provision amended as the political and social costs increased. In the end, the court decision would serve the political ideals of popular control and sound policymaking.287

Literal judicial interpretation, however, suffers even more shortcomings than literal agency interpretation. The court’s action could manufacture a crisis, but given the legislature’s crowded agenda and the ability of a minority to block legislation, the legislature could be slow to respond to the crisis. Moreover, a court decision legitimating symbolic promises as legal “rights” could make the legislature even more reluctant to reconsider the statute, especially if reconsideration entailed curtailing established rights. Indeed, the legislature might amend the statute with even more symbolic promises to mask the effect of its amendments.

A court decision striking down an agency’s reformulation may also drive agency resistance underground. Shep Melnick has shown that when EPA revised national ambient air quality standards for ozone under section 109 of the Clean Air Act (which also prohibits consideration of costs in setting standards), EPA officials took into account estimates of control costs.288 Likewise, when EPA set standards for lead under section 109, it formally disavowed reliance on control costs, but took costs into account both in deciding that an “adequate margin of safety” permitted a standard that exposed 200,000 children to potentially excessive levels of lead and by delaying implementation of the standard.289 Similarly, following the Vinyl Chloride decision on section 112, EPA adopted a standard-setting approach designed to camouflage its use of costs and technological feasibility in setting emission standards.290

287. See Farber, Statutory Interpretation and Legislative Supremacy, 78 GEO. L.J. 281, 298 (1989). An example of a court enforcing a statute literally is the snail darter case, TVA v. Hill, 437 U.S. 153 (1978). In that case, the Court held that the Tennessee Valley Authority was properly enjoined from completing construction of the Tellico Dam, which threatened a variety of perch protected under the Endangered Species Act. Congress subsequently amended the act to create an exemption procedure for proposed projects whose value outweighed the value of protecting the endangered species. See 16 U.S.C. § 1536(e)-(p) (1988). When TVA was denied the exemption, Congress added a provision to an appropriations bill that specifically directed that the Tellico Dam be completed. See Plater, In the Wake of the Snail Darter: An Environmental Law Paradigm and its Consequences, 19 U.MICH. J.L. REF. 805, 813-14 (1986).


289. Id. at 275-80. Taking a different approach, the Food and Drug Administration has “chipped away” at the Delaney Clause by inventing numerous “exceptions” to limit its scope. Merrill, supra note 8, at 21-41. The D.C. Circuit recently eliminated one of those exceptions when it interpreted the Clause literally and thus rejected the FDA’s attempt to read a “de minimis” exception into the Clause’s absolute prohibition. Public Citizen v. Young, 831 F.2d 1108 (D.C. Cir. 1987). However, as Richard Merrill notes, the FDA “will find ways to avoid banning carcinogenic food constituents that pose very small risks.” Merrill, supra note 8, at 88.

290. See supra text accompanying notes 176-88.
These examples are instructive. Literal judicial interpretation probably will not prevent the Agency from looking for and finding a way to take costs and feasibility into account. In defying the court’s holding, the Agency is likely to disguise its decisionmaking and suppress informed public policy debate (and judicial review) of agency standards. The result is that Congress may never be asked to amend the legislation.

2. Nullification

A more extreme alternative would be for courts to invalidate symbolic regulatory legislation. In recent years, several scholars and judges have argued that courts should take a more active role in invalidating legislation. Because their principal goal is to force the legislature to make the important policy decisions and shift policymaking authority away from the agencies, their arguments may apply by analogy to judicial review of symbolic legislation.

The principal nullification theory proposes a reinvigorated nondelegation doctrine: Courts should invalidate ambiguous regulatory legislation as an unconstitutional delegation of legislative authority. In his concurring opinion in the Benzene case, Justice Rehnquist wrote that Congress, and not “politically unresponsive administrators,” should “make the critical policy decisions.” Although some authors maintain that broad delegations of policymaking authority reduce public welfare, the principal argument for a nondelegation doctrine is that broad delegations lack legitimacy. Unbounded discretion in the hands of unelected officials is the antithesis of majoritarianism, and properly exercised, judicial nullification would not conflict with the norm of legislative supremacy in nonconstitutional matters.

Symbolic legislation, although not necessarily ambiguous, often serves the same purpose as ambiguous statutory language: it helps legislators avoid making “critical policy decisions” and shifts those decisions


292. 448 U.S. at 686-87. The Benzene case involved an industry challenge to toxic exposure standards set by the federal Occupational Safety and Health Administration.

293. See Aranson, Gellhorn & Robinson, supra note 291, at 36-37.


to "politically unresponsive administrators." For this reason, James Freedman has suggested that courts should use the nondelegation doctrine to invalidate not only ambiguous statutes, but also statutes in which Congress failed to "appreciate or to grapple seriously" with underlying issues.\textsuperscript{296}

Guido Calabresi has advanced a different nullification theory to deal with obsolete statutes.\textsuperscript{297} He maintains that due to changed circumstances many statutes no longer serve their original purpose, but legislative inertia blocks their repeal or amendment. By exercising the authority to nullify obsolete statutes, courts may compel the legislature to reconsider such statutes. Like nondelegation advocates, Calabresi believes that nullification forces the legislature to accept more responsibility for its decisions.

Calabresi's proposal is not directly applicable to symbolic legislation because it is based on the assumption that outdated legislation no longer commands a legislative majority. Because symbolic legislation is neither obsolete nor lacking majoritarian support, nullification is more difficult to justify as a legitimate exercise of judicial authority.

Still, judicial nullification is attractive because it forces the legislature to make difficult policy choices and to bear responsibility for those choices. It also allows the legislature to correct the court by reenacting the identical provision. As a result, it may foster more open and honest public debate about regulatory issues and support democratic norms by ensuring that the political branches make considered decisions.

Despite their superficial appeal, nullification theories are an unsatisfactory approach to symbolic legislation. They postulate an idealized view of the legislative process and judicial review and an unnecessarily rigid demarcation between the lawmaking roles of agencies and the legislature. Although symbolic statutes are often counterproductive and should be discouraged, they may also be a necessary type of legislation. A symbolic provision such as section 112 may be a critical compromise that allows legislation to be enacted. For precisely the reason that it is unsatisfactory—it makes promises that cannot be kept—symbolic legislation allows legislators to avoid particularly divisive issues and enact an entire legislative package.

Nullification theories also unrealistically assume that judges are capable of exercising this authority judiciously. Faced with sharply conflicting claims, courts would have a limited ability to decide whether a statutorily mandated regulatory program is workable. Courts also could

\textsuperscript{296} J. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 84 (1978). Freedman wrote specifically about constitutional issues inherent in statutes, but his proposal for a reinvigorated nondelegation doctrine would seem to apply to any statute as a means of "preventing congressional abdication of responsibility." \textit{Id}.

\textsuperscript{297} G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).
be tempted to nullify provisions on the specious ground that the legislature can readily reconsider and reenact the nullified provision. The seriousness of the court's decision would be magnified because most cases challenging agency interpretations of statutes begin and end in the courts of appeals. There would be virtually no appellate review of nullification decisions involving regulatory statutes.

A doctrine that tries to force all important policy decisions on the legislature also ignores the legitimate need to have agencies make policy decisions. Agencies have the technical expertise and knowledge, which courts and legislatures often lack, to evaluate the "workability" of statutes. They also have the ability to change policies in light of their experience or as new information is acquired. Flexibility, much more than doctrinal rigidity about the proper roles of Congress, courts and agencies, is a critical element in developing a rational regulatory program.

Nullification is too blunt an instrument for its avowed purposes. Rather than helping to shape policy, nullification would simply instruct the legislature to try again. What is needed in most cases, however, is not a thorough reconsideration of the provision, but a modest reformulation in light of regulatory realities and experience.

3. Instrumental Interpretation

Alternatively, a court could interpret the statute instrumentally to create a functional regulatory program. For example, by explicitly recognizing the symbolic provision as the product of legislative posturing and concluding that Congress never intended to close down the economy to save a few lives, the court could interpret or reformulate the statute to require standards that would protect public health without creating a major economic disruption.

There are several advantages to having courts cure symbolic legislation through instrumental interpretation. This approach carries none of the constitutional baggage of nullification. Moreover, it would still allow the agency to develop a regulatory program and might ensure that the agency pursued the symbolized values vigorously. It would also give the legislature the opportunity to decide whether to "overrule" the court without presenting the legislature with a manufactured crisis. Additionally, instrumental interpretation would reduce the risk that the informal accommodation between the agency and the legislative committees could become a "subgovernment"—a politically insulated, and presumably nonmajoritarian, cabal involving the subcommittee, the agency, and a few, favored interest groups. Judicial interpretation could ensure that the public's interest or perspective is properly represented.299

298. See, e.g., Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 COLUM. L. REV. 452, 499-510 (1989) (arguing that courts should exercise in-
The Supreme Court's decisions in the Benzene\textsuperscript{299} and Cotton Dust\textsuperscript{300} cases exemplify this approach. Both cases involved section 6(b)(5) of the Occupational Safety and Health (OSH) Act, which provides that in setting standards for occupational exposure to toxic chemicals, the Secretary of Labor must

set the standard which \textit{most adequately assures, to the extent feasible}, on the basis of the best available evidence, that \textit{no employee will suffer material impairment of health} or functional capacity even if such employee has regular exposure to the hazard . . . for the period of his working life. . . . In addition to the attainment of the highest degree of health and safety protection for the employee, \textit{other considerations shall be . . . the feasibility of the standards}.\textsuperscript{301}

The government argued in the Benzene case that this provision allowed it to set exposure limits at the "lowest technologically feasible level that will not impair the viability of the industries regulated,"\textsuperscript{302} regardless of the health benefits. Concerned that a "feasibility only" criterion could impose unwarranted standards, a plurality of the Supreme Court wrote that section 6(b)(5) was modified by section 3(8), which states generally that "occupational safety and health" standards must be "reasonably necessary or appropriate to provide safe or healthful employment."\textsuperscript{303} The plurality stated, "As presently formulated, the benzene standard is an expensive way of providing some additional protection for a relatively small number of employees."\textsuperscript{304} Chief Justice Burger was more blunt: "When the administrative record reveals only scant or minimal risk of material health impairment, responsible administration calls for avoidance of extravagant, comprehensive regulation. Perfect safety is a chimera; regulation must not strangle human activity in the search for the impossible."\textsuperscript{305}

Despite its concern that the government was seeking excessively stringent standards, the Court did not eviscerate the underlying statutory

dependent judgment when interpreting regulatory statutes because agencies are not responsible to direction from Congress or the President, but only to a few interest groups and a few powerful legislators); Macey, supra note 273, at 263-64 (agencies are subject to "substantial interest group influence" that will tend to suppress the public interest). Macey argues that interpretive conventions produce public-regarding interpretations because judges try to harmonize the statutory language with the "publicly articulated purpose of the statute. That publicly articulated purpose will almost invariably be a public-regarding purpose." \textit{Id.} at 250.

\textsuperscript{299} Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607 (1980).
\textsuperscript{302} 448 U.S. at 613.
\textsuperscript{304} 448 U.S. at 628. \textit{See also id.} at 645 ("the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit" (footnote omitted)). For a critique of the plurality's decision, see Latin, \textit{The "Significance" of Toxic Health Risks: An Essay on Legal Decisionmaking Under Uncertainty}, 10 ECOLOGY L.Q. 339 (1982).
\textsuperscript{305} 448 U.S. at 664 (Burger, C.J., concurring).
value that the protection of health was the predominant concern. In the *Cotton Dust* case, decided the next year, the Court held that the OSH Act does not require the Occupational Safety and Health Administration (OSHA) to set exposure standards according to a cost-benefit analysis.\(^{306}\) Whether the plurality correctly interpreted the OSH Act is less important, for our purposes, than the Court’s concern that the statute would impose unwarranted economic burdens, its attempt to blunt this impact, and its recognition that regulatory costs were a less important statutory consideration than reducing risks to human health. In short, the Court vindicated much of Congress’ symbolized value, while interpreting the statute to avoid extreme economic consequences.

Recognizing that courts, no less than agencies, can give functional meaning to symbolic statutes does not mean that this is the preferred approach. For a variety of reasons, courts should reformulate congressional policies only when the political process of reformulation has failed.

First, a court is not well suited either to identify symbolic statutes or to choose the “best” reformulation. Where a statute involves technical and scientific issues, as most environmental or health and safety statutes do, a court will find it difficult to evaluate competing claims and arguments. Because many of these controversial issues are value-laden, they more appropriately are decided by the political branches. The courts are extremely limited in their ability to “converse” with the legislature or with interest groups, and there is little opportunity for the legislature to respond to proposed judicial interpretations or for courts to adjust accordingly. Judicial interpretation of symbolic legislation thus leaves no room to refine congressional policies incrementally. As a result, the policymaking process may not be advanced rationally or predictably.

The *Vinyl Chloride* case\(^{307}\) illustrates the difficulty courts have in selecting the best reformulation. There the court tried to transform section 112 into a functional regulatory program by preserving some vestige of agency discretion while fostering Congress’ intent to give highest priority to the protection of public health. The court did so by holding that EPA must determine an emission standard that provides an “acceptable” or “safe” level of risk without regard to costs or feasibility. Only after protection of public health was assured could EPA consider costs and feasibility in adding an “ample margin of safety.”

The court’s interpretation, however, produced more confusion than regulation. In conflating “safe” and “acceptable,” the court mistakenly assumed that an “acceptable” level of risk could be determined without regard to regulatory costs or consequences and, paradoxically, equated

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an acceptable cost-free risk level with "risks [that] are acceptable in the
world in which we live." In response to the decision, the Agency pro-
posed regulations that perverted the meaning of "safe" in order to incor-
porate the costs and feasibility considerations that the court thought it
had excluded from the first step in the standard-setting process. The
Vinyl Chloride decision may not change the emission standards that the
Agency adopts, but it probably will change the way the Agency deals
with Congress and the public. Whereas EPA once openly experimented
with different formulations and candidly informed Congress of the crite-
rria it was using, the Agency now has proposed an approach that is funda-
mentally dishonest. Congressional, judicial, and public review of
agency action will be undermined.

The second reason to prefer agency reformulation to court reformu-
lation is that the risk of capture, one justification for close judicial review
of agency interpretations, is relatively remote in environmental regula-
tion. The theory of the "captured" agency, as espoused over thirty years
ago by Marver Bernstein in his "life cycle" theory of agencies, is based
on the assumption that as the public's attention shifts to other matters
and political support for stringent regulation weakens, agencies lose their
crusading spirit and identify more with the regulated community than
with the public. The regulators and the regulated develop "a more subtle
relationship in which the mores, attitudes, and thinking of those regu-
lated come to prevail in the approach and thinking of many [administra-
tors]." This shift in the agency's orientation is facilitated by broad
statutory mandates that give the agency the flexibility to redefine the
"public interest" as synonymous with industry's interests.

The New Deal agencies that Bernstein described were vulnerable to
capture because each agency regulated a single industry. Agencies such
as the Civil Aeronautics Board were more likely to hear from a regulated
industry that spoke with a single voice on price and entry controls than
from the unorganized public or potential entrants into the regulated
market.

Bernstein's model does not accurately describe EPA. Because of
"competing economic and ideological passions," the policy issues in
social regulation are almost always controversial and involve numerous
interest groups representing all points of view. As Christopher Foreman
notes:

308. 824 F.2d at 1165.
309. Benzene Rules to Heed Vinyl Chloride Decision, Though Controls May Be Same, EPA
310. See supra text accompanying notes 176-88.
312. C. FOREMAN, JR. supra note 58, at 20.
It is impossible to speak of policy triangles or neat networks when discussing social regulation—there are simply too many competing participants. Symbolism, ideology, and media attention run high, for these are vital to the very creation of programs destined to impose severe costs upon narrow but well-organized interests. Regulatory policy and decisions are often fiercely contested; relationships among players are hardly cozy. . . . Environmental and consumer protection issues also attract press attention, in large measure because the players regularly pose the issues in dramatic terms of conflict and victimization that make good copy.\textsuperscript{313}

Moreover, because regulatory statutes cover numerous industries, EPA has less opportunity to develop the "subtle relationship" with industry that Bernstein noted.\textsuperscript{314} Indeed, EPA has to deal with conflicting demands from competing industries (including the growing pollution control equipment industry) on any given regulatory issue. As a result, there often is no clear industry position for EPA to adopt as serving the public interest.

A third reason that courts should determine a statute's meaning only as a last resort is that even the "best" interpretation necessarily leaves the agency little room to maneuver. A court decision hinders an agency's ability to adjust public policy in light of new facts, the lessons of experience, or shifts in public preferences, without obtaining statutory amendments. Although the legislature is always free to correct the court, the legislative process can easily be halted as the disputes over acid rain legislation show. Judicial interpretation would more likely freeze public policy because Congress would be unable to act or because it simply would follow the court's policy lead.\textsuperscript{315}

Finally, the use of instrumental interpretation to achieve a policy goal risks compromising the reviewing court. The bases of a court's legitimacy in a democratic society—candor, adherence to principle, and deference to the political branches on matters of policy—are undermined by deliberate misinterpretation of troublesome statutes. As Gerald Gunther noted in a slightly different context:

A vital Court task, after all, is the interpretation of legislation in contexts free from ulterior purposes of avoidance, free from lurking constitutional problems. Will the faithful execution of that task not be impaired if addi-

\textsuperscript{313} Id. at 21. See also Posner, \textit{Theories of Economic Regulation}, 5 \textit{Bell J. Econ. & Mgmt. Sci.} 335, 342 (1974).

\textsuperscript{314} Posner, \textit{supra} note 313, at 341-43 (discussing more generally modern regulatory agencies).

\textsuperscript{315} In his study of the Clean Air Act, Shep Melnick describes two instances (involving "prevention of significant deterioration" and "dispersion enhancement") in which Congress "ratified" court decisions interpreting provisions in the Clean Air Act, even though the statutory basis for these decisions "was slim at best." R. MELNICK, \textit{supra} note 288, at 71-72.
tional demands are made on the Court to invoke an often spurious legis-
lative intent to promote the Court-Congress colloquy?\textsuperscript{316}

Misinterpretation, even in service of the highest policy ideals, inevitably
leads to manipulation, lack of candor, abandonment of principle, and
second-guessing of political institutions.\textsuperscript{317}

4. Deference to Agency Reformulation

Neither literal interpretation, nullification, nor instrumental inter-
pretation provides a satisfactory means for courts to address the conse-
quences, or underlying causes, of symbolic legislation. The basic reason
is that symbolic legislation is often a product of a political and legislative
process in which discussion of a controversial issue is incomplete and
unresolved. Judicial processes cannot substitute for and often are not
effective at jump-starting a stalled political process.

Agencies are better suited to reformulate the statute into workable
regulations and standards. As Colin Diver persuasively argues, agencies
are better equipped than courts to unearth the legislature’s purposes, un-
derstand the expectations of various audiences of the statute, and recog-
nize and make adjustments for the behavioral consequences of different
interpretations.\textsuperscript{318} Agencies are more competent at lawmaking because
they tend “to invoke ‘policies’ to justify their interpretive choices, while
courts prefer to invoke ‘principles’”\textsuperscript{319} and because they “rely more
heavily on utilitarian-instrumentalist justifications for these decisions.
By contrast, relatively isolated judges must rely more on deontological
reasoning.”\textsuperscript{320} Consequently, agencies are in a relatively good position to
judge the administrability, enforceability, and likely consequences of new
policies. This is especially true in cases involving symbolic legislation
where courts are farther removed from the underlying politics. If not
bound by a literal reading of the symbolic statute, the agency is better
able to remodel the statutory policy into a workable regulatory scheme.

Regulatory agencies also can change direction as political values and
priorities shift. Regulators have ongoing contact with legislators and
their staffs, are controlled by politically appointed executives who change
with each new presidential administration, and are accessible to interest

\textsuperscript{316} Gunther, The Subtle Vices of the “Passive Virtues”—A Comment on Principle and
Expediency in Judicial Review, 64 COLUM. L. REV. 1, 21 (1964). Gunther’s article was a

\textsuperscript{317} Gunther, supra note 316, at 25.

\textsuperscript{318} Diver, Statutory Interpretation in the Administrative State, 133 U. PA. L. REV. 549,
574-78 (1985).

\textsuperscript{319} Id. at 583.

\textsuperscript{320} Id. at 584. See also Starr, Judicial Review in the Post-Chevron Era, 3 YALE J. REG.
283, 309-12 (1986) (supporting a deferential approach to judicial review for a variety of practi-
cial reasons, including that this approach will make it easier for a new presidential administra-
tion to “recast the regulatory system in its own image”).
groups. Thus, agencies are sensitive to shifts in majoritarian preferences. Diver has observed that deference to agency interpretation "insures that the [legislative] 'deal' will remain flexible and adaptive to changing political fashions." One can overstate administrative responsiveness and expertise and underestimate the strength of agency inertia and the readiness of agencies "to allow personal bias or self-interest to distort their reading of the enactor's intent." Because judges are more insulated than administrators from the political process, and have less at stake in interpretive disputes, they are bound more by established conventions of statutory interpretation. While the court's relative insensitivity to current political preferences can be a disadvantage in gauging the legislatures' evolving purposes for symbolic legislation, it also allows the court to check an agency's tendency to go off on its own.

The concerns about agency inertia and bias can also be overstated. When opposing interest groups are actively involved in legislative oversight and agency decisionmaking, they force the agency to remain responsive and faithful to legislative preferences and policy shifts over extended periods. These political checks on agency interpretation permit the proper balance between the need for interpretive flexibility and constraints and reduce the need for legal checks.

Deferential review of agency interpretations also is consistent with the courts' constitutional obligation to review agency decisions. Because regulatory statutes routinely delegate congressional lawmaking authority to agencies, interpretation actually is one form of delegated lawmaking. Unless courts are prepared to invoke a reinvigorated nullification doctrine—a practical impossibility in a regulated industrial society—judicial deference to agency interpretation is best viewed as recognizing the legitimacy of delegation. As Henry Monaghan puts it, "[T]he only judicial task is to determine what statutory authority has been conferred upon

321. See Mashaw, supra note 294, at 95-99.
322. Diver, supra note 318, at 580.
324. Arguably, courts should also be more faithful than agencies to the enacting legislature's intent. This would be true, however, only if conventions of statutory interpretation accurately reveal legislative intent. The conventions assume that legislative purposes (which are then used to guide judicial interpretations) can reasonably be inferred from the statutory text and the formal legislative history. The validity of this assumption seems doubtful. First, agencies are better able than courts to understand legislative histories. Because agencies help to draft regulatory statutes, and because agencies have a continuing relationship with congressional committees, they are better equipped to distinguish and make sense of the variety of congressional signals. Second, because courts are limited to the statutory text and formal legislative history, they ignore a variety of actual legislative motivations and purposes that may be more apparent to agency officials.
the administrative agency, . . . [and] to fix the boundaries of delegated authority." 326

Recognizing that statutory interpretation often is an act of policymaking rather than a neutral, dispassionate reading of statutory language, the Supreme Court has left statutory interpretation primarily to agency officials. 327 The Court’s clearest statement of deference to agency interpretation is *Chevron U.S.A. Inc. v. Natural Resources Defense Council.* 328 In admonishing the parties that “policy arguments are more properly addressed to legislators or administrators, not to judges,” 329 the *Chevron* court stated:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities. 330

From the Court’s point of view, an agency’s policymaking expertise and its political accountability make it the preferred institution for interpreting an ambiguous statutory provision. Thus, under *Chevron*, courts may strike down only interpretations that clearly contravene congressional intent. Following Monaghan’s prescription, *Chevron* reflects a shift from an “independent judgment” mode of review to a deferential one in which the court’s “interpretational task is . . . to determine the boundaries of delegated authority.” 331 The deference approach “convert[s] the court’s task from determining whether the contested interpretation is correct to determining whether it is ‘reasonable.’ ” 332 Importantly, it reflects the Court’s willingness to let statutory meaning

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327. Martin Shapiro has described this development as part of a larger shift from a “democratic” to a “technocratic” mode of public administration. Whereas the former is characterized by an accessible policymaking process and judicially enforced procedures, the latter emphasizes expertise and discretion. Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1495-1500, 1519-22 (1983).
329. *Id.* at 864.
330. *Id.* at 865-66.
evolve to some extent with changing political demands and public policy values.

*Chevron*’s emphasis on the agency’s expertise and on the legitimacy of its exercising policymaking prerogatives is consistent with the proposal to allow the agency leeway to reformulate symbolic legislation. Of course, the *Chevron* decision is not directly applicable to symbolic legislation because the Court held that deference to an agency’s reasonable interpretation was required only when the governing statute is silent or ambiguous on a critical issue.\(^3\) Conversely, symbolic legislation, such as section 112, often clearly states the criteria that an agency must or cannot use in implementing the statute.

Yet Congress does not always mean precisely what it seems to be saying in a statute. Congress often has several audiences in mind. The same statute enunciates substantive policy, communicates priorities and a sense of urgency to the agency, and informs the public that Congress is doing something to address a serious social problem. One audience may be slighted at the expense of another. In demonstrating its commitment to rid the environment of toxic chemicals, Congress may make legislative statements that it never intended to have implemented. Or, once having made such statements, Congress may find itself politically unwilling to relax its stance despite new information casting doubt on the wisdom of its statements. At the same time, Congress may be perfectly content for the agency to adopt a more moderate position.

Concededly, symbolic legislation is not always easy to identify. What appears to be impossible or irresponsible to implement to one person or agency may appear to be a sound policymaking judgment to another. This polarity is magnified when each side in a controversy has substantial incentive to exaggerate the reasonableness or unreasonableness of the statutory requirements. Unfortunately, Congress is unlikely to help resolve the issue.

Regardless of these difficulties, a court should be sensitive to the possibility that a statute may have been written in symbolic terms. It should consider the congressional-agency dialogue to learn whether agency officials have been candid with Congress about their objections to and their reformulation of the statute, and whether Congress in turn has signalled its acquiescence in those changes. The more the agency and Congress have worked together in reformulating policy, the more appropriate it is for the court to defer to the agency’s interpretation of the statute, even though that interpretation departs significantly from the range of interpretations normally deemed acceptable by resort to traditional sources of statutory meaning—statutory language, statutory structure, and legislative history.

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333. *See* 467 U.S. at 842-45.
Deference, however, is not always appropriate. When the agency has not been candid with the congressional committees, when the committees have rejected the agency's reformulation, or when there is some evidence of agency capture, courts have an important role to play by closely reviewing agency interpretations of symbolic legislation. When the political processes that constitute democratic policymaking fail to function properly, legal checks on agency decisionmaking become important.

Although the court of appeals in the Vinyl Chloride case recognized that it should defer to an agency's interpretation of a regulatory statute, the court declined to follow EPA's interpretation of section 112. Believing itself to be bound by conventional rules of statutory interpretation, and apparently unwilling to concede that Congress might not have intended precisely what it said in the statute, the court found EPA's interpretation unreasonable. Recognition that Congress occasionally enacts symbolic legislation, and that congressional committees often work with the agency to formulate regulatory policy after a statute has been enacted, would have helped the court to understand that deference was appropriate in that case.

CONCLUSION

Lawyers naturally focus on principles of statutory interpretation and judicial review as the proper prescription for legislative and regulatory malfunctions. Likewise, they naturally assign different legal actors clearly defined roles: legislatures make laws, agencies carry out legislative purposes (interpolating when necessary), and courts keep agencies in check. Judicial review helps to ensure that legislative mandates are implemented and enforced. It also protects the political and substantive integrity of the administrative process by guaranteeing broad public access to administrative decisionmaking and by requiring that administrative decisions pass minimal tests for rationality.

But much of the regulatory process—from legislative enactment to implementation and administrative enforcement—is distinctly political. It involves negotiation and compromise as well as evolving strategies to achieve certain ends. The press, popular support, and potential political consequences are important factors at most stages of regulatory decisions.Figuring out the proper mix of law and politics, or of rights and discretion, is a difficult task under most circumstances. Frequently there are no clear or satisfactory answers about the proper limits of agency discretion, the proper standards of judicial review, or even the proper approach to statutory interpretation.

The proper balance between law and politics in statutory interpretation is especially unclear when the statute is symbolic rather than func-
Although the legislature sidesteps difficult policy issues in enacting symbolic legislation, it creates regulatory programs that give individuals and interest groups enforceable rights. The dilemma that agencies and the courts face is deciding whether to take the legislature's words literally or to reformulate legislative policy. If the choice is for reformulation, should it be by the agency or the courts, and what should be its limits?

Symbolic legislation is a political gesture. Although it serves both instrumental and symbolic purposes, the instrumental ends are beneath the surface. The superficial ends—protection of public health regardless of costs—are not to be, and cannot be, taken literally. At the same time, the legislature does not want its policy ignored entirely. Reformulation of the statute is a means to carry out much of the legislative intent, without going to absurd lengths.

Reformulation, no less than the original legislative enactment is a political process that is better performed by the agency, not the courts. Creating a regulatory policy requires consideration of tradeoffs and a rough determination and balancing of public values. These in turn involve some assessment of the breadth and intensity of support for policy preferences. Because reformulation requires value-laden choices, not the application of legal principles, it should take place in a context where those tradeoffs are considered openly and explicitly.

This case study of section 112 illustrates that agencies and congressional committees can converse about fundamental policy choices that are only symbolically addressed in the statute. EPA told the committees of its strong reservations about health-based standards and its experiments in reformulating statutory policy. The committees, in turn, told EPA that the regulatory delays were unacceptable and that some reformulation would be acceptable. In this context, the available political checks minimized the need for and desirability of legal constraints.