

“Courts and Regulatory Capture”

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Regulatory agencies have many supervisors. Congress gives them life, appropriates their money, and conducts oversight of their activities. The President appoints and can remove their senior officers, occasionally instructs them, and conducts review of many of their important actions before they take effect. Federal courts, too, supervise agencies. Statutes authorize federal courts to entertain complaints about agency action and, in the course of hearing those complaints, federal courts evaluate the legal validity of agency action. If a regulatory agency goes astray, each of these institutions has some ability to nudge it back to the proper path.

These supervisors have distinct tools at their disposal to supervise agencies. Congress, at least in theory, has nearly limitless authority over agencies, constrained only by the Constitution. Assuming the approval of the President, or a veto-proof majority, Congressional power to legislate and appropriate can be deployed to control an agency in any number of ways—specifically, generally, preventing future action, or overturning past action (or all four at once). The President, by contrast, has much more limited authority to initiate agency action or to alter the agenda of an agency, but there are many crucial “implementation” decisions that agencies make that are not clearly dictated by statute, and in that space, the President can seek to work his will through his appointments and his supervision. Compared to the institutions set forth in Articles I and II of the Constitution, the federal courts identified in Article III seem to have the most limited authority to supervise agency action. They are purely reactive, permitted to

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intervene only when a challenger to agency action seeks to invoke the authority of the federal courts. Federal judges review a tiny slice of agency actions and the blueprint for their review is not of their own making. It is dictated by statute.

This chapter focuses on this third principal, the federal courts, and asks whether federal courts prevent or facilitate regulatory capture and, if they do not presently act to prevent regulatory capture, asks whether judicial controls on administrative action can be redesigned to allow them to do so. These are not questions that should be answered in a vacuum, without attention to the available alternatives. Hence, as this chapter takes up these questions, it compares judicial supervision of agencies as a means to prevent regulatory capture to the supervisory capacities of the legislature and the executive.

A. THE BASICS OF JUDICIAL REVIEW

We should start first with a basic outline of judicial review of administrative action. Courts are in a position to police regulatory capture when they evaluate agency decisions in court. This judicial review is triggered only when a party who objects to agency action files suit claiming that some particular agency action is unlawful. Federal courts review the work of agencies pursuant to statutes, and there are many potentially relevant statutes in any given legal challenge to agency action. It is thus hard to generalize across all cases, but the Administrative Procedure Act (APA) does provide the basic framework for federal court review of agency action.¹

Under that legal framework, there are two major questions about judicial review of administrative action. The first question is whether judicial review of the agency action is even available. To those outside of law, this may come as a surprise, but it is important to understand that, not only can judicial review occur only when a challenger appears and brings suit, but even when the challenger appears, not all agency actions are reviewable in court. That is to say, in some cases a court will not even consider the parties' objections to the actions that the agency

¹ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

took, even if the objection that the agency ignored the law seems well-founded based on the known facts.

Broadly speaking, the modern trend has been to expand the set of cases where judicial review is available, but it is still true that sometimes it is not available. It is not available in a variety of circumstances—a challenger may lack standing, she may come to court at the wrong time (she might be too early, she might be too late), or the agency-specific statute may make the particular decision not subject to review in court. There are also a set of agency decisions that are not reviewable in court because they are especially discretionary. This category is both important and hard to pin down, but, speaking generally, it means that parties are likely to have a difficult time challenging an agency's failure to act or an agency's general management of a regulatory program.

If judicial review *is* available, the second question is whether that review provides much of a constraint on agency action. There are different standards of review that apply in any given circumstance, and which standard of review will apply depends on two factors—what procedure the agency used to make its decision, and the type of decision the agency made. The first factor is what *procedure* the agency used when it made its decision. An agency might have completed an elaborate process as agencies are generally required to do when they adopt general rules that are intended to constrain the actions of private parties. In such cases, an agency must request comment on proposed agency action and consider and respond to those comments as it announces its final decision.² This may not sound particularly onerous, but it can be: A significant rulemaking can take an agency several years to complete.³ In other cases, as when it announces how it will exercise its prosecutorial discretion, an agency is not required to provide notice, invite comment, and respond to those comments.⁴ There is a similar range of agency

² 5 U.S.C. § 553. This is commonly referred to as “notice and comment rulemaking” or informal rulemaking.

³ Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 964 (2008) (finding that “the average duration of completed rulemakings for nine of the ten agencies [analyzed in the article] was under two years.”); Sidney A. Shapiro and Randy Rabinowitz, *Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA*, 52 ADMIN. L. REV. 97, 98 (2000) (analyzing the Occupational Safety and Health Administration, which “has completed only a few rules in less than three years, and has taken between four and seven years to complete most rules.”).

⁴ 5 U.S.C. § 553(b) (stating exceptions to the “notice and comment” rulemaking, including policy statements and interpretive rules).

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process when it comes to adjudications, that is, agency decisions that determine the rights and duties of a single individual or entity. An adjudication may resemble a trial, with a judge, the presentation of evidence and witnesses, and the requirement that the decision be based on the record compiled at the proceeding. An adjudication may, at the other end of the spectrum, be highly informal, involving no record or submissions by the parties about facts and law.⁵

The second factor that determines the intensity of a court's review of agency action is the *character* of the decision that the agency made. An agency decision may pivot on a finding of fact, such as the level of concentration in a particular industry. It may turn on an interpretation of law, such as the meaning of a key term in the relevant statute. Or it may rest heavily on a policy choice—a mix of fact, judgment and law.

A court needs the answer to both of these questions in order to choose the proper standard to apply. There are different verbal formulations of the standard depending on whether an agency is making, for instance, a factual determination or a policy judgment. In the first case, the question would be whether the agency's finding is supported by substantial evidence,⁶ while in the second it would be whether the agency's decision is arbitrary and capricious.⁷ Likewise, there are different standards that apply depending on the procedure used. If an agency interprets the statute it administers in the course of promulgating a rule with the force and effect of law, then the court will be fairly deferential to the agency's interpretation,⁸ but if the agency does exactly the same thing in the course of issuing a policy statement, the court will be less deferential to its interpretation.⁹

It is difficult to generalize about the consequences of judicial supervision of agencies. Its on-the-ground intensity can vary with context and, more than that, it is hard to know whether the distinctions that the legal doctrine makes, which could be characterized as very fine ones, have a significant effect on agency behavior. One generalization, however, is fair: Judicial review of

⁵ 5 U.S.C. §§ 554, 556-58 (formal adjudication); 5 U.S.C. § 555 (informal adjudication).

⁶ 5 U.S.C. § 706(2)(E); *Universal Camera Corp v. National Labor Relations Board*, 340 U.S. 474, 477 (1951).

⁷ 5 U.S.C. § 706(2)(A).

⁸ *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

⁹ *United States v. Mead Corp.*, 533 U.S. 218, 231-34 (2001).

agency action will be quite a bit more skeptical of the government than the review a court conducts of routine legislative action of the same variety.¹⁰

B. REGULATORY CAPTURE

Determining the role that judicial review does or could play in preventing or facilitating regulatory capture depends on when, and under what conditions, regulatory capture is likely to occur. The general idea of capture is easy to state: Capture occurs when some set of interests (usually an industry group) persuade government actors to exercise the coercive power of the state to deliver “private” benefits to them—that is, benefits that are, by some definition, not in the “public interest.” The interests of the industry group diverge from the public interest and the government chooses the former over the latter.

A classic example of capture, provided in George Stigler’s account, is when an industry group convinces government actors to adopt policies that erect barriers to entry in their industry.¹¹ For example, the present producers of coal have much to gain if they can persuade the government to adopt policies that inhibit competitors. They would favor government policies that make entry into the industry difficult—such as regulatory requirements for new entrants into their market from which existing players are shielded. In most careful versions of the account, it is important that the industry group is seeking a *private good* in the technical, economic sense—one that is both excludable and rivalrous. This is important because it explains why the group can effectively organize to seek these goods in the first place. Members of such a group have much to gain that they will not have to share with anyone else, and for this reason they are able to overcome the typically powerful barriers to collective action.

How do we know when capture has occurred? That is a difficult question to answer. As Professors Carpenter and Moss point out, the studies showing that legislative or regulatory outcomes coincide with the interests of industry fall (far) short of persuasively demonstrating

¹⁰ *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44 n.9 (1983) (stating that the Court does not “view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.”).

¹¹ George J. Stigler, *The Theory of Economic Regulation*, 2 THE BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE 3 (1971).

“capture.” Among other things, these studies do not identify the alternative policy that was not adopted that would have served the public interest. But that is a serious failing: to know whether capture has occurred, we have to know what the public interest outcome would have been and compare that to the outcome adopted.

There are a variety of definitions of what counts as “public interest” regulation and, hence, identify what metric we should use to determine whether government policies are the product of capture or constitute actions that further the public interest.¹² Two measures are prominent. One measure posits that a government policy does not further the public interest when it is not, on net, welfare enhancing. Another posits that policy does not further the public interest where it departs from the preferences of the median voter.

The first definition of capture focuses on whether government action produces more benefits than costs. The many disputes over cost-benefit analysis demonstrate that it is hard to measure the costs and benefits of government intervention, but the example I have used might be considered easy. The coal-industry preference for anti-competitive regulation will not be welfare enhancing because it will cost consumers more than the benefits it confers. In many cases, though, it will be much more difficult to determine—or, more precisely, it will be highly contested—whether a regulatory intervention is welfare enhancing.

The second measure focuses on whether government policies are consistent with a particular vision of democratic decision making. It assumes that government policies are in the public interest only to the extent that they accord with the views of the median voter. Some might argue that we should assume that the median voter will always prefer government action that is welfare enhancing and thus these two measures are unlikely to produce different results. But there are several reasons why the median voter’s preferences might not always favor what is, strictly speaking, welfare enhancing. The median voter may care more about distribution of

¹² See STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 10-11, 254, 256 (2008) (stating that some measures of “socially beneficial regulation” include cost benefit analysis, distributive consequences, expert opinion, and public support); Michael E. Levine and Jennifer L. Florence, *Regulatory Capture, Public Interest and the Public Agenda: Toward a Synthesis*, 6 J.L. Econ. & Org. 167 (1990) (discussing possible meanings and measures of “public” versus “private” interest and “special” versus “general” interest).

benefits than overall welfare and she may favor government intervention to respond to highly salient risks, such as the risk of cancer, even if the interventions cannot be justified as welfare enhancing.

The key difficulty with the median voter preference as a test of government policies is not one of measurement. It is, at least when compared to calculating the overall welfare effects of a policy, easy to discern the views of the median voter. The more difficult problem with this measure is a theoretical one. It rests on a particular (and controversial) version of democratic decision making, one that ignores intensity of preference.¹³ If we take a poll to determine the views of the median voter, and measure government action against those results, we ignore the obvious fact that those who have intense preferences have, and perhaps should have, more influence in shaping government policies. Mediating institutions stand between the voters' views about what government should do and what government does. Those institutions quite naturally, and in some cases are designed to, respond to those who are more engaged and interested in particular government policy outcomes.

Taking account of intensity of preference is no easy task, however. That is because citizens exhibit intense preferences for different reasons, some of which we might reject. Some citizens' intense engagement is the result of especially deep ideological, religious, or substantive commitments that they want to see expressed in government policy. That is the sort of intensity of preference that most are talking about when they argue that intensity of preference is a valid consideration in evaluating whether government policy fairly "represents" the people's views. But some intense engagement is part of the logic of collective action that gives rise to the capture concern. Certain groups can overcome collective action problems *precisely because* they can obtain private goods—excludable, rivalrous—from the government, while the rest of us pay for that good. Those groups do display greater "intensity of preference" in favor of a certain policy, but for reasons that we (might) discredit. The broader point is that if intensity of preference

¹³ For commentary about the role of intensity of preference in the legitimacy of government, see Wojciech Sadurski, *Legitimacy, Political Equality, and Majority Rule*, 21 *RATIO JURIS* 39 (2008); Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 *HARV. L. REV.* 434 (1998).

should be considered when determining whether a government policy constitutes capture, it will be difficult to develop an external measure against which government policies should be judged.

I have focused for now on the difficulty of defining the “public interest” against which we are to measure government policies to test for capture, but there are other important difficulties. It is not clear, for instance, exactly what mechanism produces capture. That is, how does it happen that some groups have undue influence and others do not? One can construct an account of the mechanism for legislators. They seek reelection and thus need the resources for reelection. The focus of this chapter is regulatory capture, however, and the mechanism in that case is more difficult to identify. Some have suggested implicit bribes—the revolving door—as the mechanism by which regulators might be captured. Others suggest fear of retaliation by powerful interests. But it remains a bit murky how exactly regulators can be captured.¹⁴

I have identified several problems with defining capture. To proceed, however, I need a working definition. I assume that capture occurs when some interest group succeeds in obtaining a regulatory outcome that is not in the “public interest.” As relevant, I will discuss the different measures of public interest as well as the different mechanisms that might produce that capture. The focus here is regulatory capture. Thus, the case of interest is one where the statute itself does not reflect capture, but the regulatory agency implements the statute in a way that produces policies that will benefit a particular group at the expense of the public.

C. JUDICIAL REVIEW AND REGULATORY CAPTURE

Does judicial review inhibit or facilitate capture? This part takes up that question. I first identify a basic characteristic of judicial review of agency action, the consequences of which will vary depending on the pattern of regulatory capture. I then identify those features of judicial supervision of agencies that might work to prevent capture and those that might facilitate capture. Along the way, I compare the institution of judicial review as a means to inhibit capture to the other available supervisors of agency action—the legislature and the executive.

¹⁴ See STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 14-18 (2008); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Texas L. Rev. 15, 21-24 (2010).

Judicial Review as a Cost on Change

There is a straightforward feature of judicial review of administrative action that too often gets lost: Judicial review of administrative action is conservative in the sense that it is status quo protecting. There are two reasons for this. First, judicial review is generally triggered by agency actions that depart from the status quo. It is systematically more difficult, although not impossible, to challenge agency inaction. Second, judicial review takes all comers. A poorly-funded, disorganized group can challenge regulatory action. Precisely the same is true, however, for the well-funded and focused group. Thus, judicial review can be seen, and should be seen, as cost on change imposed by those who prefer prior arrangements.

An influential modern view celebrates judicial review of administrative action, but judicial review's inherently conservative nature is one reason why architects of regulatory agencies created during the New Deal were antagonistic to judicial supervision of agencies. They viewed judges and courts to be stumbling blocks to progressive regulation. The supporters of the new social regulation in the 1960s and early 1970s were enthusiastic about judicial supervision of agency action. In their view, courts were a necessary check on a government that might be inclined to go astray if not properly supervised by "the public" who could access the courts to object to agency action.¹⁵

It is a straightforward insight that judicial review adds costs to change, but the hard question is whether these costs will generally inhibit capture or promote it. The answer to that question depends on the character of agency efforts to change the status quo. If challenged agency policy reflects capture, then imposing judicial review as a cost on that change is a good thing, but if the policy reflects the public interest, then inhibiting that change does not police capture and could very well do the opposite by protecting pre-existing regulatory arrangements that reflect capture. There will not be a single answer to the question whether, as a general matter, agency policies that are challenged in court are the product of capture. The character of agency actions will no doubt vary across regulatory arenas, and across time. It is, however, important to keep in mind

¹⁵ Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039 (1997); Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 Admin. L. Rev. 1139, 1151-55 (2001).

the general tendency of judicial review of administrative action to favor the status quo ante by allowing those who resist change to make it more costly.

Judicial Review as a Brake on Capture

How does judicial supervision of agencies prevent capture? Imagine a world of political controls, where judicial review is rarely available and, in those rare cases where it is available, it is minimalist. Compare that to a second state of the world, judicial controls, where judicial review is often available, and is probing when it is available. The latter is the world we live in and, as compared to political controls, there are several reasons think that judicial controls make it more difficult for agencies to get by adopting policies that favor the private over the public interest.

There is the obvious point that judicial controls are—regardless of their content—an *additional* control. Judicial review is another potential veto point that is on top of and in addition to whatever political controls exist.¹⁶ Capture is more likely to be detected when there are more controls and thus the addition of any control means that detection is more likely. Judicial controls, however, do more than provide a generic stop on the roadway between policy formulation and its ultimate implementation. They have a particular content that suggest that they may in some ways be superior to political controls in policing capture.

The *character* of political and judicial controls differs in ways that give judicial controls an edge in policing agency capture. If an agency has gone astray, there are multiple political controls available and their exercise requires political actors to take the initiative to exercise them. The President has the ability to fire senior officers (an authority that is sometimes constrained by statute),¹⁷ the authority to “supervise” the implementation of policy (and the cajoling and pressure that that supervision might involve), and perhaps the authority to actually direct the reversal of the agency’s position—although that is subject to dispute at least in cases where the

¹⁶ I am admittedly assuming that if judges detect regulatory capture, they will try to do something about it, an assumption I cannot defend here.

¹⁷ Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Texas L. Rev. 15, 27-30 (2010).

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statute delegates the choice to the agency.¹⁸ The legislature can likewise cajole, pressure, shame, and otherwise jump and shout about the agency decision and the legislature has the authority to reverse agency policy by approving a statute that reverses the agency's decision. The exercise of any of these controls does not happen automatically. The President or Congress must *choose* to exercise that authority.

Whether and how political actors exercise their controls will depend on the costs and benefits of their exercise. Removing an agency head or passing new legislation will in the typical case be politically costly and thus the benefits must be substantial to justify the exercise. Other political controls, such as conducting aggressive oversight, will be less costly. The exact cost and benefit of the exercise of a political control will vary from one case to the next, depending on the political environment associated with the particular policy question. One feature that will remain constant, however, is that the forces that favor the agency policy, and the agency, will work to increase the political costs attendant to the exercise of political controls.

In contrast, judicial controls are simple. As just noted, there are a variety of political controls, they must be initiated by the political actors, their exercise will vary across cases depending on costs and benefits of their exercise, and supporters of agency policy are in a position to increase the (political) costs of reversal. Courts, on the other hand, do not have a variety of controls available. A court does not pressure or cajole; it does not direct or remove. Courts have a single control—the formal authority to affirm the agency's choice as lawful, or to find that the choice was unlawful.¹⁹ Nor is the exercise of that judicial control voluntary in the sense that it is for political controls. The judicial authority to review the legality of the agency's action is part and parcel of judicial review of administrative action. It is not something the courts choose—or

¹⁸ The President's "directive" authority is a controversial topic. Some argue that unless Congress made explicit the President's authority, then he does not have it. See, e.g., Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 277 (2006) (stating that "...delegations to executive officials alone – 'simple delegations' – should not be read to grant directive authority to the President."). On the other hand, some argue that it is reasonable to interpret a delegation of authority from Congress to an agency as including the President as one who may use that authority. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2326-31 (2001). See generally Peter L. Strauss, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 Geo. Wash. L. Rev. 696 (2007).

¹⁹ Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003) (discussing the remedial options a court has in a successful challenge to administrative action).

not—to exercise in a particular case. Finally, the costs and benefits of exercising judicial controls will not be understood in terms of political costs and benefits, they will not vary much across cases, and the agency and the supporters of the agency policy do not have the capacity to increase the costs associated with the exercise of judicial controls.

Judicial controls may be simple, but they are powerful. In fact, these features make judicial controls in some ways superior to political controls as a mechanism for policing capture. Assume that an agency policy represents capture. If a proper party brings suit to set aside the agency action, judicial controls *will* be exercised one way or the other, their exercise will not be inhibited by increasing political costs, and those who support the agency policy have few tools at their disposal to pressure the court. This is all true in any individual case, but if we consider the whole range of cases, judicial control has another feature that makes it superior to political controls. Judicial controls operate with similar effectiveness across a range of cases. The political environment surrounding some cases of capture will make it impossible for political actors to exercise political controls and thus some cases of capture will escape reversal. Judicial controls do not suffer that fate.

Judicial review can also be seen to inhibit capture because, as Professor Steve Croley has argued, it levels the playing field between concentrated, well-funded interests and less well-funded interests.²⁰ To the extent that regulatory capture is most likely to occur in such circumstances, judicial controls will be superior to political controls in policing capture. It is true that it takes resources to file a lawsuit, especially one that has a plausible shot at reversing or significantly delaying an agency decision. But compare what it takes to do that to the resources it would take to influence outcomes in the legislature, the executive, or even at the agency as it formulates policy in the first instance. Influencing the legislature is a large-scale endeavor, requiring resources and savvy. Influencing the executive branch, such as getting the Office of Management and Budget interested in more closely supervising an agency decision, may require

²⁰ STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 140-42 (2008) (stating that “[d]ifferences in economic or political-electoral resources therefore do not translate into different interest groups’ relative ability to subject agency action to judicial review. Therefore, such disparities in interest group resources or political clout do not translate into equal disparities in regulatory influence in the way they may in the legislative arena.”).

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a similar level of resources. Influencing an agency's implementation of a statute in the first instance—before the matter gets to court—may be less resource-intensive than these two but it is no small matter to get the agency's attention.

Relatively speaking, it does not take enormous resources to file a lawsuit. But it is not simply the relatively limited cost that makes the judicial arena a distinctive and effective place to police agency behavior. The most striking consequence of filing a lawsuit is that the challenger receives what it is very hard to do—and very hard to do predictably—in other forums where regulatory decision making might be subject to review and revision: The legal challenger obtains the time and attention of a decision maker who has the authority to, and will, exercise his authority to decide the case that the challenger brought before the court. A government relations consultant who could guarantee something like that in the legislative arena—the legislature will listen to your objection, and it will decide whether your objection is valid within a certain time frame—would be considered a magician.

The reasons so far focus on the existence and availability of a judicial forum and the remedies available there. But the content of that review also facilitates judicial controls on regulatory capture. If the court reviews the agency's decision – and sometimes it will not, as discussed shortly – the agency must defend its choice as supported by the record (in the case of a factual finding); as a permissible choice under the statute; and/or as well-reasoned in light of the alternatives and the objections raised to the proposed course of action. That strips away a fair amount of complexity, but even so it fairly illustrates an important feature of judicial controls that makes them distinctive. When courts review agency decisions, they apply a merits-based test. They ask: Is the decision reasoned, is it well-supported, is it defensible under the statute? Under this form of review, any reason that sounds in “capture” will be quickly rejected by the court. An agency, that is, could not defend its decision by explaining that a “powerfully-connected interest group sought this result.” Given the nature of judicial controls, which agencies well understand, no agency would choose to defend its decision in that way, of course,

but if discovery produced evidence that suggested to the court that the agency was captured by the regulated industry, the agency's decision would be reversed.²¹

The last reason why judicial controls may be effective in policing regulatory capture, and more effective in doing so than political controls, is related to this feature of judicial controls—namely, the nature of what judges look for when they review agency decisions and (more generally) the nature of the federal judiciary. Imagine that it is true that regulatory capture is most likely to occur when an industry group persuades regulators to adopt policies that are not in the public interest. It is, as noted above, not exactly clear what the mechanism is that produces this undue influence. Perhaps regulators hope to walk through the revolving door and obtain a job in the industry; perhaps regulators fear retaliation by political actors that the interest group has the capacity to generate.

However it is that regulators are subject to capture, judges will not be vulnerable to it in the same way. Those who exercise political controls, by contrast, could be vulnerable. Federal judges are not generally planning to resign their post and seek another job and they are not (at least as a relative matter) that concerned about retaliation by politicians. That is to say, owing to the features of their positions, the mindset of federal judges is dissimilar to that of regulators. But those who exercise political controls might very well be subject to a similar pathology to that of the (captured) regulator. Elected officials may leave their posts and be interested in lucrative, post-official employment. Even if they are not likely to be interested in such an implicit bribe, political actors need to be re-elected and they need the resources that the interest group can provide in order to succeed in that task. In short, the pathology that produces capture in the regulator could cause those exercising political controls to look the other way. The federal judge is unlikely to do the same.

Missing Capture

But not all the news is good. Judicial review of agency action could also fail to detect and prevent capture.

²¹ *Am. Horse Protection Ass'n., Inc. v. Lyng*, 812 F.2d 1, 5-7 (D.C. Cir. 1987).

There are several large-scale structural features of judicial controls that weaken their capacity to police capture. One feature of judicial controls that is both obvious and worth emphasizing is that these controls are purely *reactive*. Judicial review is not available when no party challenges government action, even if it might otherwise be subject to challenge in court. A select group of agency decisions come before the courts and there is reason to fear that the cases that are not selected—that is, where there is no judicial review because no challenger steps forward—may coincide with a category of cases where there are particular risks of regulatory capture. Most agency actions are not challenged in court at all.²² That does not mean that agencies ignore what a court might say about action that is not challenged because the agency operates in the shadow of judicial review even if it does not materialize in a particular case. Even so, there are many, many cases where no party brings suit.

An optimistic view is that the absence of a challenger means that the agency's action is entirely unobjectionable. But the absence of a challenger might also mean something more disturbing: It may mean that those who captured the regulators chose wisely because no one will appear to object. A standard story in the literature of capture is that an intensely interested and organized interest group is able to persuade the regulator to provide private goods while the dispersed and disorganized (and therefore disempowered) pay for those goods. If the dispersed and disorganized are unable to be a counter-weight in the regulatory arena, they might not be able to bring suit (even though it is relatively cheap to do so) either. Cary Coglianese's study of litigation challenges to EPA's regulatory action could confirm this fear. He found that parties that have the most sustained and extensive involvement with EPA regulation are the ones that are the most likely to bring a legal challenge.²³ In other words, bit players or outsiders do not tend to sue to challenge agency action. If it is the case that those who most actively participate in the development of regulatory policy are generally the primary ones who bring suit to challenge that

²² Cary Coglianese points out that the Environmental Protection Agency (EPA), for example, issued 1,568 rules between 1987 and 1991, and yet the EPA was named in a lawsuit only 411 times – a 26% litigation rate. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1296-1301 (1997). Agencies take thousands of other actions that are not rulemakings, few of which are challenged.

²³ Cary Coglianese, *Litigating within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 LAW & SOC'Y REV. 735, 744 (1996) (“Organizations most active in rulemaking tend to be most active in litigation.”).

policy, that means that the participants can seek private benefits, not worrying about an outside objector coming along to upset the apple cart.

Other structural features of judicial control limit its capacity to police capture. Judicial review is only available *ex post*, not *ex ante*, and only to evaluate discrete decisions. Administrative law doctrine rules out challenges that allege systematic or programmatic illegality. Instead, a challenger has to focus on a discrete (and final) agency action.²⁴ But capture can be exhibited systematically across a range of decisions within a program. That capture may be the product of malign personnel or may be facilitated by a highly discretionary regulatory program or statutory mandate. Those problems are best solved by systematic, *ex ante* action and thus the tools available to the executive and Congress are—if they are exercised—superior to judicial controls. The President can supervise and replace personnel, the Congress and the executive can conduct across-the-board investigations of agency decision making, and both entities are in a position to work to prevent the capture before it happens by constraining the range of available agency choices before the fact.²⁵ Courts cannot do anything similar.

These are large-scale structural features of judicial controls as compared to political controls, but consider now a closer-to-the-ground perspective on judicial review of agency action. There is reason to fear that, even from within the framework of judicial controls, judicial review is a thin shield against capture. Recall that, analytically, there are two large questions that organize the law of judicial review of administrative action. First, is review available? Second, if it is available, what is the content of that review and how skeptical is it of government action?

Judicial review is sometimes not available, and it is systematically less available in cases where there may be a risk of regulatory capture. Even when a challenger appears to challenge an agency's action, the suit might complain about matters that are not "reviewable" in the language of administrative lawyers or the challenger may not be the right party to bring suit. If either of

²⁴ Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004).

²⁵ Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 918-20 (2008); M. Elizabeth Magill, *The First Word*, 16 WM. & MARY BILL OF RTS. J. 27, 30-35 (2007).

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these barriers is present in a particular case, a court will not evaluate the challenger's objection to the agency's decision.

A challenger must complain about agency action that is actually subject to review in court. While modern courts have expressed a "presumption" in favor of review,²⁶ categories of unreviewable agency action remain. Statutes sometimes identify whole swaths of agency decisions that cannot be challenged by anyone in court—these statutes are said to "preclude" judicial review.²⁷ Preclusion of judicial review, however, is not a large problem for objectors to regulatory capture because Congress has generally not chosen to preclude review in the regulatory arena. Statutes preclude review most often in cases involving national security, immigration, foreign affairs, and veteran's affairs.²⁸

The larger issue is that, even where a statute does not explicitly preclude judicial review, courts will not review an action that is, in the language of the relevant statute, "committed to agency discretion by law."²⁹ In this category, there are several types of agency activity that will be difficult to challenge in court. The most controversial among commentators is agency *inaction*.³⁰ Although *Massachusetts v. EPA*³¹ evidences some movement by the courts in this area, in the typical case it will remain difficult to attack an agency's failure to regulate and it has always been, and remains, very difficult to attack an agency's failure to bring an enforcement action.³²

²⁶ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (stating the rebuttable presumption of judicial review of agency action); *Abbot Labs. v. Gardner*, 387 U.S. 136 (1967), which established this presumption.

²⁷ 5 U.S.C. § 701(a)(1).

²⁸ See Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 739-40 (1990) (discussing an apparent hierarchy the Court uses regarding preclusion).

²⁹ 5 U.S.C. § 701(a)(2).

³⁰ *Heckler v. Chaney*, 470 U.S. 821, 832-38 (1985) (stating that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)" of the APA and that "[t]he general exception to reviewability provided by § 702(a)(2) for action 'committed to agency discretion' remains a narrow one [...] but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise."); Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461 (2008).

³¹ 549 U.S. 497 (2007).

³² For a discussion of the *Massachusetts v. EPA*, see Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth about Precedent*, 93 VA. L. REV. In Brief 75, 80-81 (2007). For an attempt to clarify the status of judicial review of action/inaction, see Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461 (2008). See also Daniel T. Deacon, *Deregulation through Nonenforcement*, 85 N.Y.U. L. REV. 795, 802-04 (2010) (discussing *Chaney*'s holding that "an agency's decision not to prosecute or

Critics of this feature of judicial review doctrine complain that it allows an agency to favor industry through inaction, while the courts sit idly by. Although perhaps problematic for other reasons, this feature of doctrine does not mean that regulatory capture specifically will escape judicial review. Regulatory capture requires the government to *act*. In the classic formulation, the agency exhibits capture when it regulates to establish barriers to entry in a market or otherwise disadvantages competitors to the industry group that sought the private good.³³ Such agency behavior will constitute *action*, and should in the normal case be subject to judicial review.

Other agency behavior that is insulated from judicial review as “committed to agency discretion” poses more of a threat of capture. It is exceedingly difficult to attack an agency’s general administration of a program, including its pattern of enforcement decisions.³⁴ But by devising a particular pattern of enforcement, an agency might very well exhibit regulatory capture. Consider agencies that are authorized to engage in various forms of economic regulation—antitrust, consumer fraud, securities regulation. These agencies might have general rules that are even-handed, but they might choose to pursue enforcement action selectively—in one segment of a market but not in another, against newcomers but not incumbents. An agency could thereby advantage a class of competitors within a market. That pattern of agency decisions would be extremely difficult, if not impossible, to challenge in court. Courts would treat it as “committed to agency discretion.”

Courts are thus sometimes not available to evaluate particular agency decisions, but even if the action is reviewable, there is another barrier: The courts must determine *which* parties can challenge agency action. Not just any party can come into federal court to complain about agency action. Courts must be satisfied that some source of law, most often a statute, authorizes the party to bring the challenge *and* that the party’s standing is consistent with the Constitution’s

enforce...is a decision generally committed to an agency’s absolute discretion” has not been widely adopted in the context of agency refusal to promulgate rules, as exhibited by the *Massachusetts v. EPA* decision.).

³³ George J. Stigler, *The Theory of Economic Regulation*, 2 THE BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE 3, 4-5 (1971).

³⁴ Heckler v. Chaney, 470 U.S. 821, 832-33 (1985) (stating that “an agency’s decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)” of the APA); Daniel T. Deacon, *Deregulation through Nonenforcement*, 85 N.Y.U. L. REV. 795, 804 (2010).

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requirement that the courts entertain only cases or controversies. The law of standing is devilishly complicated, but as described below, in some ways it operates to fence out those who might challenge regulatory capture in the courts.

Statutes that govern agency decision making often provide that agency actions can be challenged in court by so-called “aggrieved” parties.³⁵ This is a term of art and its meaning has changed over time to include two groups of challengers. It includes so-called regulatory competitors.³⁶ A regulatory competitor is not directly subject to the agency’s regulatory action, but its competitive position is affected by the agency action. Thus, if a rate-making agency makes a decision that sets a favorable rate for a regulated party, but hurts that party’s competitor, the regulatory competitor counts as an aggrieved party. “Aggrieved” parties also, in principle, include those individuals who are supposed to benefit from regulation, such as consumers, workers, drivers, and those who care about the environment.³⁷ Since the early 1970s, there has been another model of statutory standing, the so-called “citizen suit” provision.³⁸ Instead of identifying a limited class of people, such as those who are aggrieved by agency action, who can challenge government action, these statutes authorize “any person” to challenge agency action. These provisions were intended to, and do, extend standing as far as is possible under Article III of the Constitution. It is here that some who would challenge regulatory capture might run into trouble.

Constitutional standing doctrine requires that challengers demonstrate an alleged injury from the government action, and, more than that, that the injury is traceable to the government’s action,

³⁵ 5 U.S.C. § 702. For example, 47 U.S.C. § 402(b)(6), the Federal Communications Commission, allows “any other person who is aggrieved or whose interests are adversely affected by any order of the Commission” to seek an appeal. Similarly, the Occupational Safety and Health Act of 1970 allows for “person[s] adversely affected or aggrieved” to obtain judicial review (29 U.S.C. § 660).

³⁶ *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 492 (1998); *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970).

³⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-3 (1992) (stating that “the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purpose of standing.”); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 437 (D.C. Cir. 1998) (en banc) (there is a “myriad [of] cases recognizing individual plaintiffs’ injury in fact based on affronts to their aesthetic interests in observing animals living in humane habitats, or in using pristine environmental areas that have not been despoiled.”).

³⁸ The first citizen suit provision was contained in the Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.).

and that it can be redressed by judicial intervention.³⁹ The idea is that only those with this sort of an injury can make out a case or controversy that federal courts under the Constitution are authorized to hear. The way courts have defined “injury” has evolved over time. Today, it is clear that competitive injury counts to establish standing. It is also the case that injury to aesthetic and ideological interests *can* count to establish standing.

Despite this evolution in the law, however, at least as compared to the regulated parties, certain parties will have difficulty establishing standing. Examples of the types of parties that cannot establish standing illustrate the difficulties. It is clear that a citizen or voter who is disturbed by the direction of government policy cannot, on that basis, establish standing. Nor can a taxpayer (outside of limited area not relevant here) establish standing. These two categories cover many parties who might otherwise wish to challenge government regulation. Others like consumers and those who represent aesthetic interests may under certain circumstances be able to establish standing, but they will face difficulties. The injury they complain of may not be specific enough to them, or may be speculative, and, more than that, they may have difficulty showing so-called causation and redressability because there are likely to be many different causes of their injury and there may be very limited ways judicial intervention can cure that injury.

The consequences of these limits on standing depend on the pattern of capture. If capture occurs where (in the simple case) there are two present economic actors and one is advantaged over the other, the disadvantaged economic actor can challenge the action as a competitor. But if capture occurs in other types of cases, establishing standing will be more difficult. For instance, in the case where an agency erects a barrier to entry for new entrants in a market, one injured party is a future competitor who will not now exist. The present-day proxy for that future competitor will be a present consumer, but that consumer, qua consumer, will have a difficult time establishing standing. A court would be likely to consider the injury, loss of competition that would otherwise exist in a future market, speculative. Another case where capture can occur is where the agency fails to regulate with the rigor that it should because it has been captured by the

³⁹ Lujan v. Defenders of Wildlife, 504 U.S. 555, 568-71 (1992) (discussing the requirement of redressability, specifically that even if a decision were made in the environmental group’s favor, the injury complained of would not be redressed).

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industry. Here the present regulatory beneficiaries are the obvious challengers, but they will systematically have a difficult time establishing standing.⁴⁰ Together, these limits on standing may mean that a court will not even have the opportunity to catch regulatory capture in its net.

Even if judicial review is available and the right sort of party has brought suit, that does not mean that the court will be able to invalidate agency action that is the product of capture. The fundamental problem is that judicial evaluations of the legality of agency action are simply not designed to screen for the possibility of regulatory capture. It is true, as noted already, that a court will inquire into the merits of the agency's decision, and that an agency cannot defend its action on the grounds that concentrated interests lobbied hard for it. But no (competent) agency will provide such an explanation.

Regulatory capture occurs when an industry group succeeds in persuading the agency to deliver regulation that is not in the "public interest" and, as defined here, that means regulation that is not welfare enhancing or regulation that is not in accord with the preferences of the median voter. Assuming the agency does not confess that it was captured, how will judges be able to detect whether that has occurred?

Judicial examination of agency action does not elicit information that would allow a judge to comprehensively evaluate the net welfare effects of the policy or its correspondence to the median voter's views. Under the doctrine, courts ask whether a factual determination is well-supported, whether an exercise of discretion is reasoned, or whether an interpretation of the statute is reasonable. The agency's response to these questions does not supply the information that the judge would need to make the determination about the welfare effects of the policy and it certainly does not supply information about the median voter's views.

Nor is it easy to see how the agency's answers to the questions that the doctrine asks bear a reliable connection to the existence or non-existence of regulatory capture. An agency could

⁴⁰ Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-62 (1992); Block v. Cmty. Nutrition Inst., 467 U.S. 340, 346-47 (1984); Karl S. Coplan, *Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause*, 61 ME. L. REV. 377, 404-08 (2009); Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369, 370-71 (2009) ("Simply put, regulated entities have access to legal relief when they challenge unduly aggressive agency action, whereas regulatory beneficiaries do not have access to legal relief when they allege that an agency has failed to implement its statutory mandate.").

answer all of these questions to the satisfaction of a court and still be delivering private benefits; conversely, an agency could flunk this test and not be captured, but rather be incompetent.

Even if court obtained the needed information in the course of evaluating the agency action, judges are not trained to make such determination, nor are they inclined as a matter of judicial culture to do so. Judicial review of agency action is admittedly merits-based and that means that a bald assertion by the agency that it delivered rents would doom the agency action. That may rule out a very small number of cases where capture has occurred, but those may also be cases where the agency is just incompetent. For the vast majority of cases, judicial review does not screen for regulatory capture.

D. REVISING JUDICIAL REVIEW

The analysis of the last section does not produce an easy answer to the question whether judicial review works to prevent capture. In some ways it does, in some ways it does not, and much depends on the causes and pattern of regulatory capture in the real world. A final question, however, is whether judicial review can be revised to bolster its capacity to detect and invalidate regulatory capture.

The last section identified five ways in which judicial controls on administration may not, or do not, successfully police regulatory capture. Judicial review is status quo protecting; judicial review is reactive; judicial review is only available *ex post* and with respect to discrete decisions; judicial review is systematically less available in cases where capture may be a real risk; and judicial review does not screen for the subtle cases of regulatory capture, whether capture is defined as non-welfare enhancing regulation or regulation that departs from median voter preferences.

Some of these aspects of judicial review could be revised, and others are close to hard-wired and cannot be remedied without a dramatic restructuring of judicial controls. One could tinker with the several judicial doctrines that inhibit judicial review. It is quite possible, for instance, to imagine that more parties, including taxpayers or ideological plaintiffs, could have standing to challenge government action. It is also imaginable that a broader range of agency actions and

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behaviors—including failures to take action, patterns of enforcement, or systematic management of programs—could be subject to judicial review as opposed to being unreviewable. These changes would no doubt be vigorously resisted by many judges and scholars of administrative law, but they are certainly conceivable revisions to existing doctrines.

Several of the features identified earlier, however, are not so amenable to revision. Without a fundamental rethinking of federal courts, it is not possible to imagine them as anything as other than *reactive*. It would take a substantial conceptual shift in our constitutional design to imagine federal courts that could proceed without a challenger appearing before them and raising objections to government behavior. This means that courts will inevitably see only a small slice of agency decisions, and therefore it is possible that the selected cases will not include the worst forms of regulatory capture. Second, it is hard to understand how judicial doctrines could be revised to catch subtle cases of regulatory capture. Courts will be fine at catching those cases where there is some smoking gun evidence of capture, but in the absence of that, it seems quite inconsistent with basic conceptions of judicial role to imagine federal judges sitting in judgment of whether regulation enhances social welfare or comports the views of the median voter. Finally, even if judicial review can be expanded to encompass challenges to systematic program mismanagement and failures to act, the tools available to judges will remain narrow. Their job is to resolve the particular case brought before them, not to conduct an overall investigation of the agency, to replace its personnel, or to revise its statutory mandate. Those are tools available only to the executive and the legislature and there will be cases where those are the best, if not the only, tools to inhibit regulatory capture.

* * *

Courts can undoubtedly play some role in inhibiting capture. They have some advantages over the controls political actors have available to them. In particular, courts have a narrow but unique power to declare agency action legal or illegal. It is a power that courts, if a proper case is brought to them, will exercise and it is a power that supporters of the agency action have little power to resist. In certain cases, then, courts will be best situated to and most likely to police agency capture. But courts are far from the perfect policemen when it comes to agency capture.

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The narrowness of judicial authority and the unique role of judges in our constitutional system is in some cases an advantage, but is a disadvantage in others. In some ways, the more extreme the capture, the less useful the judicial controls. If what is needed is systematic, across-the-board investigation and revision of an agency's agenda, the executive or the Congress are far better suited to respond.