SUBSTANTIVE REFORM, JUDICIAL REVIEW, 
AND AGENCY RESOURCES: 
OSHA AS A CASE STUDY

SIDNEY A. SHAPIRO*

Looking down the administrative road, Professor Richard Pierce analyzes the impact of diminished agency resources.1 Because he doubts that Congress will enact substantive reforms that can reduce administrative burdens, Pierce looks to judges to use their discretion to accommodate changes in administrative resources. He argues that the failure of courts to adjust discretionary doctrines, when such adjustments have no adverse systemic effects, arrogates to unelected judges inappropriate power over the fate of regulation.

With his usual intellectual gusto, Pierce has challenged us to think about the implications of diminished agency resources for regulation. To respond, I consider the implications of his analysis from the perspective of the Occupational Safety and Health Administration (OSHA). This analysis leads me to three conclusions. First, I am skeptical of Pierce's claim that deregulation or regulatory reform would produce significant budgetary relief for the government. These actions change the nature of rulemaking and enforcement, but they are not likely to lighten the government's administrative burdens. Second, I join Pierce in seeking greater judicial deference for agencies, but I anticipate two problems that he does not consider. The move to greater judicial deference is undesirable if it produces minimum rational basis review. Judicial review with some teeth is necessary to hold agencies legally accountable. More likely, judges will resist overtures that they be more deferential to agencies. Activist review is popular because administrative law involves important public issues about which judges have strong views. Finally, I propose that agencies engage in priority planning in response to budget cuts. This exercise can help rationalize an agency's reaction to budget constraints, and as importantly, it

*John M. Rounds Professor of Law, University of Kansas School of Law. J.D. 1973, B.S. 1970, University of Pennsylvania. I would like to thank my colleagues, Rob Glicksman and Rick Levy, for their helpful comments.

publicizes the impact of budget cuts on the agency’s capacity to carry out its mission.

**OSHA’s Diminished Resources**

Pierce warns that efforts to balance the budget will drain the coffers of administrative agencies, which will hinder their performance. OSHA’s performance has already been adversely affected by budget limitations, and future budget reductions can only make matters worse. For example, OSHA devotes about one-half of its budget to seeking regulatory compliance, yet only one out of every twenty-five job sites under OSHA’s jurisdiction has ever been visited by an OSHA inspector. Further, the agency has completed only a few rules in less than three years, and it has taken between four and seven years to complete most rules. Figure 1 below indicates how these problems are related to OSHA’s budget. The agency’s

![Graph showing OSHA Budget Authority from 1975 to 1996](image)

**Figure 1. OSHA Budget Authority from 1975 to 1996 (Source: Office of Management and Budget, Budget of the United States)**

budget authority (indicated by the upward sloping line) has gradually increased since 1971 and reached a total of $300 million in 1996, but its budget adjusted for inflation (indicated by the relatively straight line) has remained at about $200 million since 1982. Figure 2 below illustrates one impact of the $100 million that OSHA has lost to inflation. OSHA has ap-

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3. Id. at 185-86.
proximately 200 fewer employees than it employed in its first year and almost 800 fewer employees than it employed in 1980. Some agencies, like the Food and Drug Administration (FDA), have turned to user fees to offset budget reductions and improve performance.\textsuperscript{4} Industry has supported such fees because regulatory delay is costly for regulated entities. At OSHA, by comparison, regulated entities are benefited by ossification, which reduces the number of regulations the agency can issue and increases the time it takes the agency to issue such regulations.

OSHA's budget situation confirms Pierce's dire predictions about the impact of the budget agreement on regulatory agencies. As a preferred solution, Pierce would turn to deregulation and regulatory reform, which could "offset, or more than offset, the dramatic reduction in agency funding that will take place over the next seven years."\textsuperscript{5} Unfortunately, this optimism is misplaced.

DEREGULATION

Deregulation has brought substantial benefits to transportation consum-
ers, but deregulation of health and safety programs, such as those implemented by OSHA, is unlikely to produce similar benefits. OSHA’s critics have not been shy about proposing ways for the agency to improve, but most analysts concede that the agency has a worthwhile role to play.\textsuperscript{7} The 1994 elections, however, emboldened a few radical critics to propose that the agency be abolished.\textsuperscript{8}

Congress established OSHA after it became apparent that market incentives, such as additional compensation for dangerous jobs, and state regulatory systems, primarily workers’ compensation, were unable to prevent thousands of workplace fatalities and injuries. As I elaborated in a recent article, market incentives are still inadequate to protect workers.

Some workers receive additional wages for dangerous jobs, but they are not fully compensated for the risks that they assume.\textsuperscript{9} Likewise, workers’ compensation pays for only a portion of the cost of occupational accidents and for almost none of the costs of occupational illnesses.\textsuperscript{10} Like OSHA, most health and safety programs were established in the 1960s and early 1970s in recognition that market incentives and state regulation were not up to the task of protecting citizens and the environment. Although radical reformers are prepared to roll back federal protections to 1960s levels, if not 1880s levels, most reformers address the form and extent of social regulation, rather than seek its elimination.\textsuperscript{11}

Even when deregulation is appropriate, it may not lead to a decrease in regulatory activity. As Susan Rose-Ackerman has explained: “Deregula-

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\textsuperscript{7} See McGarity \& Shapiro, supra note 2, at 14 (arguing that OSHA is not doing enough to protect workers). See also John Mendeloff, The Dilemma of Toxic Substance Regulation: How Overregulation Causes Underregulation at OSHA 241-43 (1988) (arguing for more efficient promulgation of rules and more flexible enforcement); John Mendeloff, Regulating Safety: An Economic \& Political Analysis of Occupational Safety and Health 164 (1979).


\textsuperscript{9} Thomas O. McGarity \& Sidney A. Shapiro, OSHA’s Critics and Regulatory Reform, 31 WAKE FOREST L. REV. 587, 605-07 (1996) [hereinafter OSHA’s Critics].

\textsuperscript{10} Id. at 599-600.

\textsuperscript{11} See Thomas O. McGarity, The Expanded Debate over the Future of the Regulatory State, 63 U. CHI. L. REV. 1463, 1484-91 (1996) (distinguishing radical reformers who would eliminate almost all modern regulation from most reformers who would adjust extent and method of regulation); Sidney A. Shapiro, Keeping the Baby and Throwing Out the Bathwater: Justice Breyer’s Critique of Regulation, 8 ADMIN. L.J. 721, 726 (1995) (stating that “public policy consensus” exists that “unregulated markets will produce inappropriate levels of environmental pollution”).
tion of one area of the economy may itself produce the need for more regulation somewhere else. In moving toward a more competitive situation in one dimension, bottlenecks and market imperfections in other dimensions may become newly relevant.\(^{12}\) The more that deregulation has increased airline traffic and congestion, for example, the greater has become the burden on the government to monitor safety and oversee the allocation of space at airports.\(^{13}\)

**REGULATORY REFORM**

Pierce indicates that agencies would get more bang for the buck if Congress permitted them to use more effective and less costly regulatory methods. I have expressed doubts concerning the substantive merits of the regulatory methods that Pierce supports,\(^{14}\) but here I want to make a different point. OSHA's situation illustrates that these types of reforms are unlikely to save an agency anywhere near the amount of money that Pierce anticipates.

OSHA's critics would have the agency rely to a greater extent on performance standards, which permit employers to meet a regulatory goal by any method they choose, and less on command-and-control standards, which require employers to use a specific method of regulation to reach a regulatory goal.\(^{15}\) For example, OSHA could order grain elevators to use a specific method to reduce grain dust, which can be explosive, or it can specify a maximum level of dust and permit the elevators to use any method that meets this goal.\(^{16}\)

Performance standards have several advantages, including lower compliance costs, but they do not necessarily result in lower agency costs. Adoption of the standards is subject to the same Administrative Procedure Act (APA)\(^{17}\) and statutory rulemaking requirements. Moreover, performance standards can be more difficult to enforce and thus increase OSHA's regulatory burden. For example, if OSHA orders a specific method to reduce grain dust, an inspector need only verify that an employer has used that method. If OSHA orders an elevator to reduce the level of dust to a

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13. Id. at 153; see SHAPIRO & TOMAIN, supra note 6, at 232-35 (describing bottleneck problems and other competitive imperfections in airline markets).
certain level, an inspector must measure the amount of grain dust, which involves more time and expense for the agency.

The same problem exists concerning the economic incentives that Pierce favors. Emissions trading and pollution taxes require inspectors to monitor constantly the amount of pollution that a plant emits. Monitoring all of the potential discharge points for air and water pollution is likely to be far more expensive and difficult for the government than the current method of regulation, which requires a firm to use a required technology for abatement.\textsuperscript{18} Under a technology approach, inspectors are required only to determine whether a firm has installed the required technology and continues to operate it properly.\textsuperscript{19}

OSHA's critics have also recommended that it rely to a greater extent on industry self-policing as a method of increasing regulatory compliance.\textsuperscript{20} Similar recommendations have been made concerning other agencies.\textsuperscript{21} Cooperative enforcement policies work only as long as those regulated entities that voluntarily cooperate are assured that companies that operate in bad faith are likely to be punished.\textsuperscript{22} OSHA, however, is currently hard pressed to find violators. For example, it had not inspected during the previous five years seventy-five percent of the 6,411 sites where a fatal or serious accident occurred in 1994 through May 1995.\textsuperscript{23} If industry self-policing saves agency resources, OSHA needs to use them to do a better job of finding and punishing those employers who do not cooperate.

REGULATORY POLITICS

Whether new methods of regulation save agency resources is a moot point if there is no realistic chance that Congress will adopt them. Pierce explains Congress's reluctance to act on substantive reforms as a function of cynical politics.\textsuperscript{24} Legislators are reluctant to admit that they oppose the statutory "rights" embodied in most environmental and health and safety statutes because the public still subscribes to these goals. Thus, the expedient solution is to retain these ambitious goals, reduce agency funding,

\begin{itemize}
  \item \textsuperscript{18} 29 C.F.R. § 1910.119 (current through 1997).
  \item \textsuperscript{19} Technology-Based Regulation, supra note 14, at 748-49.
  \item \textsuperscript{20} See Sidney A. Shapiro & Randy S. Rabinowitz, OSHA Reform: Cooperation Versus Punishment, 49 ADMIN. L. REV. (forthcoming Sept. 1997).
  \item \textsuperscript{21} See, e.g., JOHN BRAITHWAITE, TO PUNISH OR PERSUADE?: ENFORCEMENT OF COAL MINE SAFETY (1985); EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (1982).
  \item \textsuperscript{22} Shapiro & Rabinowitz, supra note 20.
  \item \textsuperscript{23} Earle Eldridge, Study Links Jobs Deaths to OSHA Failure, USA TODAY, Sept. 5, 1995, at B1.
  \item \textsuperscript{24} Pierce, supra note 1, at 64.
\end{itemize}
and gain voter support by chastising agencies for failing to perform their assigned tasks.\textsuperscript{25}

OSHA's experience confirms the use of budget reductions as a legislative tool to reduce the agency's regulatory reach and hide the impact from the public. After the Republicans gained control of Congress in January 1995, hostile legislators attempted to secure a nearly \$20 million retroactive budget reduction.\textsuperscript{26} Had the cuts succeeded, OSHA would have been required to make the spending cuts in only six months because the agency was already half-way through the 1995 fiscal year. After President Clinton vetoed the bill containing the reduction, Congress and the President agreed to a retroactive cut of approximately \$850,000.\textsuperscript{27} The House Budget Committee then proposed to reduce OSHA's budget by twenty percent for the 1996 fiscal year, and not to be outdone, the Senate Budget Committee proposed a fifty-percent reduction.\textsuperscript{28} Congress abandoned these goals after two government shutdowns stimulated public opposition to draconian budget cuts. It then funded OSHA at \$305 million, a cut of only two percent from the 1995 appropriation.\textsuperscript{29}

At the same time legislators pursued deep budget cuts, they sought to envelop OSHA in a network of burdensome and detailed procedural requirements. The most significant change was to require OSHA to prove that the benefits of health and safety standards exceed their costs.\textsuperscript{30} I have previously explained my opposition to a cost-benefit test for OSHA.\textsuperscript{31} In short, this requirement is unnecessary to promote rational health and safety regulation, and more importantly for this topic, it would put a significant additional strain on OSHA's scarce resources. Reformers also proposed that the agency follow detailed procedures for risk assessment and for cost-benefit analysis.\textsuperscript{32} Risk and regulatory assessments contribute to better decisionmaking, but these tools must be used in a manner that recognizes the pitfalls and limitations in these methodologies, including the likelihood that the high cost of undertaking comprehensive studies will ex-

\textsuperscript{25} This observation is a variation on a general phenomenon identified by political scientists. Legislators make general delegations to agencies, rather than resolving regulatory issues, because they can obtain public credit for addressing a problem and still be able to intervene in agency proceedings on behalf of disgruntled constituents. \textit{Morris P. Fiorina, Congress: Keystone of the Washington Establishment} 48-49 (1977).

\textsuperscript{26} See \textit{OSHA's Critics}, supra note 9, at 633-42.

\textsuperscript{27} \textit{Id.} at 636.


\textsuperscript{29} \textit{OSHA's Critics}, supra note 9, at 641.

\textsuperscript{30} \textit{Id.} at 610.

\textsuperscript{31} See \textit{McGarity & Shapiro}, supra note 2, ch. 19; \textit{OSHA's Critics}, supra note 9, at 622-33; \textit{Technology-Based Regulation}, supra note 14, at 731-38.

\textsuperscript{32} \textit{OSHA's Critics}, supra note 9, at 609-10.
ceed the value of the insights to be gained from such detailed analysis.\textsuperscript{33}

Legislators claimed that the deep cuts they proposed in OSHA’s budget were necessary to balance the budget and free up money for tax cuts,\textsuperscript{34} but their simultaneous attempt to increase OSHA’s procedural burdens suggests that they had an ulterior motive. OSHA’s opponents believe that OSHA is overly protective of workers. Thus, they prefer that the agency spend its time studying risks and regulatory impacts rather than promulgating regulations. Of course, this strategy is more effective if OSHA has less money to accomplish these tasks.

\textbf{“HARD LOOK” REVIEW}

Pierce asks Congress to address the impact of the budget cuts through deregulation and regulatory reform, but he finds that regulatory politics is likely to stymie such efforts.\textsuperscript{35} My analysis indicates that even if Congress were to act, agencies would be unlikely to save enough money to offset the impact of the budget cuts. Either conclusion leads to Pierce’s second best solution. He calls on the judiciary to reconsider administrative law doctrines, such as “hard look” review, which impose significant costs on administrative agencies.\textsuperscript{36} If the courts are the institutional source of a doctrine, he urges judges to use their “discretion” to reshape the doctrine when doing so will not impose high systemic costs.\textsuperscript{37} For example, use of “soft look” review would be sufficient to ensure the quality of agency decision-making. I agree with Pierce’s analysis, but I see two problems that he does not acknowledge.

OSHA’s experience confirms that hard look review imposes on agencies time-consuming, expensive obligations to defend and explain regulations. Consider, for example, the agency’s lockout/tagout standard.\textsuperscript{38} The rule addressed the problem that, each year, 150 workers are killed and many more receive serious injuries when machines under repair are accidentally started. OSHA required employers to lock machines under repair and to provide the only key to the employee working on the machine. When installation of a lock would require that a machine be dismantled, rebuilt, or replaced, OSHA required a tagout, the posting of a sign warning that a machine is under repair and that it should not be turned on. When the rule was reviewed, Judge Stephen Williams, writing for a three-judge panel,

\begin{thebibliography}{99}
\bibitem{Shapiro} \textit{Id.} at 612-22; Sidney A. Shapiro, \textit{A Delegation Theory of the APA}, 10 \textit{ADMIN. L.J. AM. U.} 89, 105 (1996).
\bibitem{OSHA} \textit{OSHA’s Critics}, supra note 9, at 633-35.
\bibitem{Pierce} Pierce, supra note 1, at 66-90.
\bibitem{Id} \textit{Id.} at 89.
\bibitem{Id2} \textit{Id.} at 90.
\end{thebibliography}
determined that OSHA had done an inadequate job of determining compliance costs.\textsuperscript{39}

OSHA had estimated that the rule would likely save 122 lives, which meant that the standard cost $1.2 million per fatality avoided.\textsuperscript{40} When the economic benefit to employers of a reduction in injuries, such as fewer lost production days, was also taken into account, the cost of each fatality and injury avoided fell to $0.19 million.\textsuperscript{41} When OSHA included the benefits to workers from injuries that would be avoided, it found that the cost per injury was “extremely low.”\textsuperscript{42} Based on this data, the agency had no trouble concluding that the rule was highly cost-effective.

Judge Williams objected, however, that OSHA had not presented industry-by-industry comparisons of costs and benefits and had failed to explain its logic for failing to undertake this calculation.\textsuperscript{43} He speculated that there might be some industries where the costs of compliance were relatively high and the benefits relatively low.\textsuperscript{44} Without “disaggregated” data, Judge Williams believed that judges had no way of knowing whether the standard was justified.\textsuperscript{45} Presumably Judge Williams’s objection was that OSHA had failed to consider an important aspect of the problem: the possibility that costs might outweigh benefits in some individual industries.\textsuperscript{46} This objection, however, illustrates the problem with hard look review.

The record was sufficient to indicate the merits of OSHA’s rule without such a comparison. The cost per fatality and injury avoided was $190,000.\textsuperscript{47} Although the fact that the standard was so highly cost-effective strongly suggests that its benefits would exceed its costs in any industry, Judge Williams was concerned because injury rates varied widely among industries. This objection ignores OSHA’s finding that compliance costs were directly related to the injury rate. An industry has a low injury

\textsuperscript{39} International Union, UAW v. OSHA, 938 F.2d 1310, 1321 (D.C. Cir. 1991). Judge Williams remanded the rule to give OSHA the opportunity to clarify whether a cost-benefit standard applied to workplace safety. \textit{Id.} at 1325. Because he anticipated that OSHA would defend the standard under a cost-benefit test, he warned the agency that the existing record could not support the rule on that basis. \textit{Id.} at 1322. This second conclusion illustrates the application of “hard look” review.
\textsuperscript{40} 54 Fed. Reg. at 36,685.
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{International Union, 938 F.2d} at 1322.
\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.}
rate only if it has few machines that present a lockout/tagout problem. This means the costs of meeting OSHA’s standard would likewise be low. Indeed, OSHA found that the average cost of compliance in industries with low injury rates was approximately $169 per firm.  

Decisions like this one confirm Pierce’s analysis that hard look review has a significant impact on agency resources. OSHA can assemble a record that contains an industry-by-industry comparison of costs and benefits, but a court’s insistence that the agency prove the obvious diverts precious time and resources from rulemaking initiatives. In addition, the message that OSHA hears is that written rationales must be exceedingly thorough, or activist courts may send rulemaking initiatives back to the drawing board.

“PASS-FAIL” REVIEW

OSHA would benefit if the Supreme Court adopted Pierce’s recommendation that judicial review be more deferential. A good start would be to replace the “hard look” metaphor with a “pass-fail” test for adequacy. According to this metaphor, the judge is like the professor who is vaguely familiar with the subject matter of a paper and who must determine whether the paper meets minimum standards for passable work. Disagreement with the student’s conclusions is not a reason for the student to flunk. The student passes even if the professor disagrees with the student’s conclusions, discovers that the student could have found more sources, or finds that the student may have mischaracterized one of the cited sources. The student only fails when there is an inexcusable gap in the analysis, an obvious misquote, or evidence of intellectual dishonesty. When judges engage in substantive judicial review of OSHA rulemaking, they should, like the professor, see their role as screening out bad decisions rather than ensuring that agencies reach the “best” decisions.

The adoption of “pass-fail” review, however, faces two obstacles. One potential problem is that courts will be too deferential. The more likely problem is that the courts will resist abandoning hard look review.

TOO MUCH DEFERENCE

Courts need to maintain a minimum level of scrutiny because administrative agencies, unlike Congress, are not directly accountable to the electorate. The Supreme Court recognized this distinction in State Farm

48. Id. at 36,684.
49. Pierce, supra note 1, at 89-94.
50. McGrath & Shapiro, supra note 2, at 260.
when it rejected the Department of Transportation’s contention that the arbitrary and capricious standard was equivalent to the minimum rationality required of statutes under substantive due process review. The Court explained it did 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."  

Further, heightened scrutiny, i.e., more than minimum rational basis review, advances the doctrine of separation of powers by promoting agency fidelity to statutory mandates.  

OSHA’s actions in the 1980s illustrate the importance of avoiding extreme judicial deference. From 1981 to 1988, OSHA promulgated a total of four health standards, and for three standards, the agency acted only in response to judicial prodding. The courts acted after OSHA was unable to explain its lack of action in light of the rulemaking record it had compiled. As the Supreme Court made clear in State Farm, an agency is not free to ignore evidence that indicates regulation is necessary and appropriate without any explanation for its action. If courts ignore this minimal obligation, agencies are free to ignore their statutory mandate.

BETWEEN A ROCK AND A HARD PLACE

Once it is determined that heightened scrutiny is appropriate, administrative law is between a rock and a hard place. As just seen, review of rea-

(1983).

52. Id. at 43 n.9.


Similarly, the Third Circuit found that the rulemaking record did not justify OSHA’s decision to limit the hazard communication standard to workplaces engaged in manufacturing. United Steel Workers of Am. v. Auchter, 763 F.2d 728, 738-39 (3d Cir. 1985). After a two-year delay, during which OSHA failed to justify on remand its failure to extend the rule to non-manufacturing workplaces, the court ordered OSHA to promulgate such a rule in 60 days or explain why, on the basis of the existing administrative record, the rule would be inappropriate. United Steelworkers v. Pendergrass, 819 F.2d 1263 (3d Cir. 1987). The agency responded by extending the rule to non-manufacturing enterprises. 52 Fed. Reg. 31,852 (1987) (codified at 29 C.F.R. § 1910.1200 (1996)).

55. State Farm, 463 U.S. at 51.
sons cannot be dispensed with because it is necessary to hold agencies accountable to serve their statutory missions. Yet, the very existence of this type of review invites and enables judges to pay less deference to agency decisionmaking.

I have proposed elsewhere that the existence of indeterminate review doctrines, particularly the requirement of "adequate reasons," facilitates activist review in administrative law. See Sidney A. Shapiro & Richard E. Levy, Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions, 44 DUKE L.J. 1051, 1062-64 (1995).

When an indeterminate review doctrine is used, the judge is less susceptible to criticism that he or she has acted in a result-oriented manner. Put another way, indeterminate doctrines hinder an important method of judicial self-policing: the loss of respect that comes from making decisions that are inconsistent with legal doctrines. Moreover, judges have a greater incentive to pursue activist review in administrative law, as compared to most private litigation, because administrative law is more likely to involve important issues of public policy, about which the judge may have strong views.

If this assessment is accurate, it raises the issue of whether it is possible to have judicial vigilance without judicial activism. The necessity of policing fundamentally flawed agency decisions, while retaining an appropriate amount of judicial deference, creates a tension that administrative law has confronted since the dawn of hard look review. If Pierce intends to avoid this tension by adopting minimum rational basis review, I am opposed. If Pierce accepts heightened scrutiny, but of the soft look variety, he fails to indicate why judges will not escalate soft look review into hard look review whenever they have an incentive to do so.

To limit judicial review, it is necessary to find some word formulation that holds agencies accountable and prevents the hard look review that forces agencies to defend against every conceivable attack they might encounter. Mark Tushnet, for one, has argued that it is impossible to establish a norm that both permits judicial review and limits the ability of


judges to invalidate political decisions by the other branches. According to the previous theory, however, judicial deference can be increased by making review doctrines more determinate. Legislative action will be necessary, however, because judges are unlikely to adopt more determinate review doctrines on their own. If Congress is willing to amend section 706 of the APA for this purpose, it could follow Ron Levin’s useful restatement of judicial review, or it might consider the redrafting of this section that I have offered.

**PRIORITY SETTING**

Relying on the courts to mitigate the adverse effects of budget reductions is problematic in light of the potential for too little or too much deference. I therefore propose an additional way to address the adverse effects of budget reductions. Agencies should engage in the type of priority planning that OSHA has recently completed.

OSHA’s priority planning process was aimed at identifying the top workplace safety and health hazards most in need of either regulatory or nonregulatory action. A Priority Planning Committee, composed of persons with expertise in workplace health and safety issues from OSHA, other Labor Department agencies and offices, and other agencies, reviewed more than 125 workplace hazards nominated by agency staff and interested parties. The committee gave priority to eighteen hazards based on three criteria: the number of exposed workers or magnitude of the risk, the quality of available information, and the potential for risk reduction. The committee then designated five of the priorities for rulemaking and assigned the remainder for nonregulatory attention, such as making voluntary cooperative agreements with employers and providing additional information to employers and employees.

OSHA’s effort has two important advantages: It helps rationalize the manner in which the agency allocates scarce resources, and it indicates to the public the impact of scarce resources on the agency’s mission. Public knowledge of budgetary impacts is likely to make it more difficult for

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62. In evaluating this claim, the reader should know that the author served as a consultant to OSHA concerning the design of its priority-setting process.
Congress to ignore an agency's budgetary problems if the public favors the agency's mission. As Pierce notes, when the public is aware of such problems, legislators will be less successful in claiming that they support the mission if they are reducing the agency's budget.64

CONCLUSION

OSHA has a large mission and a shrinking budget. The agency's increasing inability to protect workers may please its opponents, but it is hardly good government to address perceived substantive shortcomings by starving OSHA of funds. Regulatory reform, even if it is a good idea, is unlikely to save OSHA significant resources. More deferential review would address OSHA's plight, but reducing the level of judicial scrutiny will be difficult to achieve. In the end, the best thing for OSHA and similarly situated agencies may be to engage in priority planning. This exercise helps agencies to sort out competing demands on their resources and to identify for the public the extent of the mismatch between regulatory obligations and available resources.

64. Pierce, supra note 1, at 69. See also Michael E. Levine & Jennifer L. Forrence, Regulatory Capture, Public Interest, and the Public Agenda: Toward Synthesis, J.L. ECON. & ORG., Special Issue 1990, at 167 (arguing that publicity increases cost to legislators of favoring special interest legislation).