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A RETREAT FROM JUDICIAL ACTIVISM: THE SEVENTH CIRCUIT AND THE ENVIRONMENT

ROBERT L. GLICKSMAN*

The spate of federal environmental legislation enacted in the late 1960's and early 1970's provided a fertile breeding ground for litigation. The federal courts reacted to the resulting proliferation of lawsuits by aggressively promoting the new, pro-environmental legislative objectives. They lowered the barriers to private litigants' access to the federal courts, subjected administrative agencies to procedural requirements not always apparent on the face of applicable legislation, interpreted environmental laws expansively and used common law to fill statutory gaps, and engaged in rigorous review of the substantive merit of agency decisions which seemed to give insufficient weight to legislatively sanctioned environmental values.

By the 1980's, the courts, led by the Supreme Court, were presenting a much lower profile in environmental cases, even though Congress remained firmly committed to the environmental protection initiatives commenced earlier. Judicial expansions of the role of private parties in implementing environmental legislation, broad statutory interpretations, and reversals of agency action for failure to adequately protect the environment were less common. This retreat from judicial promotion of pro-environmental objectives is illustrated by four decisions of the Court of Appeals for the Seventh Circuit between 1980 and 1986. All four decisions involved the protracted (and thus far unsuccessful) attempts by the State of Illinois and the federal Environmental Protection Agency to clean up pollution in Waukegan Harbor and Lake Michigan allegedly caused by a manufacturer of outboard motors and industrial and turf care vehicles.[1]

This article investigates the reasons for the recent retreat from ag-

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1. United States v. Outboard Marine Corp., 789 F.2d 497 (7th Cir.), *cert. denied*, 107 S. Ct. 457 (1986); Outboard Marine Corp. v. Thomas, 773 F.2d 883 (7th Cir. 1985), *vacated and remanded*, 107 S. Ct. (1986); Illinois v. Outboard Marine Corp., 680 F.2d 473 (7th Cir. 1982); Illinois v. Outboard Marine Corp., 619 F.2d 623 (7th Cir. 1980), *vacated and remanded*, 453 U.S. 917 (1981).

gressive judicial implementation of environmental legislation, both generally and in the Seventh Circuit. The courts' increased reluctance to actively promote environmental protection objectives may be partially attributable to individual judges' beliefs that environmental regulation of business has become excessive, or that the costs of such regulation have become disproportionate to the benefits it produces. To the extent the recent reduced judicial promotion of environmental objectives is attributable to these beliefs, the courts are engaging in a kind of activism which may improperly elevate the judges' own policy preferences over legislative policy decisions.

The retreat from aggressive regulatory implementation by the federal courts, however, is not peculiar to environmental litigation and may have nothing to do with the judges' personal views on the merits of environmental legislation. Rather, it appears to be part of a broader movement toward institutional judicial restraint. This movement has been fueled by growing concerns about the limits of the courts' authority and competence to review the implementation of regulatory legislation. Whereas the federal courts in the 1960's and early 1970's stressed their obligation to prevent executive branch subversion of the legislative will, more recent decisions reflect the belief that an unrestrained judiciary actively seeking to implement its own notions of public policy infringes improperly upon executive and legislative authority. Although doubts about judicial competence to review the decisions of expert regulatory agencies are not new, the burgeoning caseload of the federal courts seems to have reinforced these doubts.

Ironically, the institutional judicial restraint prompted by these concerns, if taken to extremes, has the potential to raise separation of powers problems similar to those that courts purporting to exercise institutional restraint are seeking to avoid. A judiciary unwilling to review in any meaningful way the faithfulness of agency decisions to statutory goals invites executive branch subversion of the legislature's will. A judiciary that refuses to carry out the responsibilities delegated to it in regulatory legislation itself infringes upon congressional authority. The recent retreat from active judicial participation in the regulatory process thus has the potential to invade the domain of the other two branches, whether that retreat is grounded in individual judges' personal policy preferences or in concerns about relative institutional competence.

Both the institutional activism characteristic of the 1960's and 1970's and the more recent institutional restraint are based upon legitimate separation of powers concerns. Both have the potential, however, to exacerbate those concerns if taken to extremes, at which point both

institutional postures begin to look suspiciously like a judicial activism derived from the judges' own policy preferences. The task of the Seventh Circuit, as well as of the other federal courts, should be to assist the Supreme Court in striking the appropriate balance between the two extremes. If the courts succeed in defining that balance, they will have charted a course which facilitates judicial reversal of agency decisions inconsistent with statutory objectives without sanctioning judicial usurpation of the authority of the other two branches.

I. ACTIVISM, RESTRAINT, AND ENVIRONMENTAL LITIGATION

A. Two Kinds of Judicial Activism and Restraint

This article explores the reasons for and effects of judicial activism and restraint in the context of federal court review of the implementation of regulatory legislation.[2] It distinguishes between two different types of activism and restraint. The first type deals with the extent to which a judge is willing to substitute his or her own notions of optimal public policy for those of the legislature that enacted or the agencies charged with implementing a regulatory statute. A court that elevates its own policy objectives above those of the other two branches of government is engaged in what may be called "policy activism."[3]

The second type of activism and restraint, which is the primary focus of this article, is not concerned with a judge's view of the substantive merits of a particular regulatory program. Rather, it involves his or her view of the scope of the institutional competence and constitutional authority of the federal courts, in relation to similar attributes of the executive and legislature, to implement regulatory legislation. This article measures the degree of a court's "institutional activism or restraint"[4] by the number of techniques that a court is willing to employ to protect the intended beneficiaries of the statute in question and to prevent subversion of the legislative scheme by the implementing agency.

A court inclined toward institutional activism in the implementation of regulatory legislation displays three characteristics. First, it protects

2. The definitions of activism and restraint used in this article are limited to the context being addressed here and do not necessarily describe, for example, a court's approach to constitutional interpretation.

3. There are probably as many definitions of judicial "activism" and "restraint" as there are authors who have addressed the subject. *See, e.g.*, R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 207 (1985) ("The term 'judicial self-restraint' could be used in at least five different senses."). I owe my use of the dichotomy between "policy" and "institutional" activism and restraint to my colleague at the University of Kansas School of Law, Richard Levy.

4. Judge Posner divides what is referred to in this article as "institutional restraint" into two categories, prudential and structural self-restraint. *Id.* at 207-08.

statutory beneficiaries by increasing their procedural opportunities to participate in regulatory implementation. Such a court may force the agency to permit persons affected by its decisions to participate extensively in decisionmaking processes at the agency level. It may also expand private litigants' access to the federal courts for review of agency decisions. Second, an activist court maximizes the substantive protection afforded to statutory beneficiaries. It may interpret regulatory statutes expansively or fill statutory gaps with federal common law designed to promote the objectives reflected in the legislation. Third, a court engaged in institutional activism is relatively reluctant to defer to agency expertise when reviewing statutory implementation, especially when the agency reads its own statutory mandate narrowly. This reluctance may be manifested in rigorous scrutiny of agency reasoning processes, such as review under the "hard look" doctrine.[5] An activist court also tends to characterize issues as legal rather than factual in nature in order to subject agency resolution of those issues to de novo judicial review.

A court with a more restrained institutional approach to review of agency decisions will tend to exhibit the opposite three characteristics. First, it will not favor the judicial expansion of procedural opportunities for those affected by agency implementation of regulatory statutes. Such a court will be unwilling to expand procedures at the agency level beyond the requirements of due process, the Administrative Procedure Act,[6] or applicable enabling legislation. It will restrict access to the federal courts by those seeking review of agency decisions. Second, a restrained court typically will be unwilling to supplement or extend the scope of statutory provisions beyond their facial applicability. It will tend to interpret regulatory legislation narrowly and refuse to create common law to fill in gaps left by the legislature. Third, a court exercising institutional restraint will be deferential in its review of the merits of agency decisions. When it can, it will characterize an issue as one of fact rather than law, since the former is typically subject to less rigorous judicial scrutiny than the latter.[7] It will hesitate to second-guess the means chosen by the agency to achieve statutory objectives. It might, for example, apply the "minimum" rationality test, which requires only that the agency's decision has some conceivable, rational relationship to the applicable statu-

5. *See infra* notes 68-80 and accompanying text.

6. 5 U.S.C. §§ 551-559 (1982).

7. *See* Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986) (Factual issues are subject to the substantial evidence standard of review, while legal issues are usually subject to "plenary" review, which "invariably is much less deferential than is the review of findings of fact."). *See also* R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 7.4, at 370 (1985) [hereinafter "ADMINISTRATIVE LAW"].

tory purposes.[8] A restrained court may even afford substantial deference to agency interpretations of the meaning of statutory provisions.

Whether a court adopts a posture of institutional activism or restraint depends in large part upon its view of the role of the judiciary in insuring adherence to the separation of powers doctrine. An activist court tends to focus on the federal courts' responsibility to prevent subversion of the legislative will by the executive branch. A court practicing institutional self-restraint is typically more aware of the potential for judicial infringement upon either executive or congressional authority.[9]

It is only where the applicable regulatory legislation is not clear that a court's willingness to use what this article calls "activist" techniques will be an accurate measure of its inclination toward institutional activism or restraint. If Congress clearly precludes the use of one of the activist techniques, even a court amenable to institutional activism presumably will defer to that legislative judgment. If it fails to do so, it seeks to elevate its own policy preferences over those reflected in the statute. Conversely, if Congress unequivocally orders the courts to employ a technique associated with institutional activism, the separation of powers doctrine should compel even a court inclined toward institutional restraint to adopt that technique. If it does not, it is probably engaging in policy judicial activism.

B. The Emergence of Judicial Activism in Environmental Litigation

1. The Reasons for Environmental Activism

Environmental commentators remarked in the early 1970's that "[p]resently the courts are in the 'age of judicial activism' "[10] and that "[t]he federal court system has played an extraordinarily active role in shaping federal environmental law and in revising the methods by which

8. *See, e.g.*, Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185 (1935) ("[I]f any state of facts reasonably can be conceived that would sustain [an agency order], there is a presumption of the existence of that state of facts. . . ."). *See generally* Shapiro & Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers Concerns and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. — (forthcoming).

9. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (courts should not interfere with agency shifts in policy or priority brought about by a change in administration, since that "is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations"); R. POSNER, *supra* note 3, at 207 (A "self-restrained" judge "believes that the power of his court system relative to other branches of government should be reduced."). *See also* Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 14-15 (1981).

10. Comment, *Preservation of the Environment Through the Doctrines Governing Judicial Review of Administrative Agencies*, 15 ST. LOUIS U.L.J. 429, 447 (1971).

federal agencies deal with environmental issues."[11] This section explores the reasons for and manifestations of the emergence of this activism by the federal courts in environmental litigation.

The roots of judicial activism in environmental litigation lay in social attitudes toward environmental problems prevailing among the American public in the late 1960's. As early as 1966, four years before Earth Day[12] and the effective date of the National Environmental Policy Act ("NEPA"),[13] Justice Douglas noted that "there is greater concern than ever over pollution—one of the main threats to our free-flowing rivers and to our lakes as well."[14] Events such as the Santa Barbara oil spill and reports linking pesticides and toxic substances with potential health hazards focused public attention on the need to protect the nation's environment.[15] In 1970, a prominent environmental attorney wrote that "[t]he explosion of concern for the environment, at every private and governmental level, is the great political phenomenon of the last twelve months."[16]

This mounting public concern over the environment prompted the enactment of a series of new federal laws designed to prevent deterioration of environmental quality and degradation of natural resources.[17]

11. Thompson, *The Role of the Courts*, in FEDERAL ENVIRONMENTAL LAW 193 (E. Dolgin & T. Guilbert eds. 1974). *See also* Rosenbaum & Roberts, *The Year of Spoiled Pork: Comments on the Court's Emergence as an Environmental Defender*, 7 LAW & SOC'Y REV. 33, 38 (1972) (describing an "almost unprecedented" confidence in judicial action to achieve environmentalist goals, and "a climate far more congenial" to such action than in the past).

12. Earth Day, April 22, 1970, symbolized a new commitment to prevent environmental degradation in the United States. *See* Comment, *supra* note 10, at 429 ("Earth Day . . . marked the beginning of a new era in American attitudes. Pollution control became the watchword for many people who came to the realization that something must be done now in order to preserve the world in which they live.").

13. 42 U.S.C. §§ 4321-4370a (1982).

14. United States v. Standard Oil Co., 384 U.S. 224, 225 (1966).

15. Atkeson, *Introduction*, in FEDERAL ENVIRONMENTAL LAW 3, 13 (E. Dolgin & T. Guilbert eds. 1974). Influential books, such as C. REICH, THE GREENING OF AMERICA (1970), and B. COMMONER, THE CLOSING CIRCLE (1971), provided additional focal points for the nation's emerging environmental consciousness.

16. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 612 (1970). Sive added that the "long struggle of the bird lovers and wilderness wanderers . . . has become the movement of everyone everywhere for a 'liveable environment.'" *Id. See also* Cornwell, *From Whence Cometh Our Help? Conservationists' Search for a Judicial Forum for Environmental Relief*, 23 U. FLA. L. REV. 451, 451 (1971) ("A strong groundswell of public opinion . . . is slowly moving the United States toward a saner ecological policy."); Comment, *The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality*, 17 UCLA L. REV. 1070, 1070 (1970) ("The fundamental national problems of environmental quality are increasingly attracting fervent national awareness and concern.").

17. *See* statutes cited at Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 404 n.1 (1971); Pub. L. No. 91-604, 84 Stat. 1677 (1970) (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)) (Clean Air Act); Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)) (Clean Water Act).

Laws such as the Clean Air and Water Acts delegated significant new responsibilities for protecting environmental quality to the federal Environmental Protection Agency ("EPA"), while NEPA sought to inject environmental considerations into the decisionmaking processes of all agencies of the federal government.[18]

The mere fact that Congress assigned these new environmental responsibilities to federal administrative agencies, however, did not necessarily ensure that they would be diligently carried out. During the late 1960's and early 1970's, contemporary concern about the "capture" of administrative agencies by the industries they regulated was widespread.[19] Critics charged, for example, that development-oriented agencies such as the Corps of Engineers and the Bureau of Reclamation had been captured by the "engineering mentality" and political sensibilities of the groups they were charged with regulating.[20] These agencies accordingly were not inclined to place much importance on environmental considerations, even if ordered to do so by Congress.[21]

Agency capture can result in a failure to implement the legislative will. If the legislative process is viewed as an arena in which pluralistic interest groups struggle to protect and promote their own objectives, a particular piece of legislation is the product of a series of compromises reached in the political bargaining among these groups.[22] The legislative

18. *See, e.g.*, 42 U.S.C. § 4332(2)(C) (1982) (requiring all federal agencies to prepare an environmental impact statement concerning proposals for major federal action significantly affecting the quality of the human environment).

19. *E.g.*, Sierra Club v. Morton, 405 U.S. 727, 745-48 (1972) (Douglas, J., dissenting); Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 408-09 (1981) (describing a "chorus of disaffection" in the late 1960's to the "rank favoritism or obsequiousness" that dominated many agency decisions); Shapiro, *The Supreme Court and Government Planning: Judicial Review and Policy Formulation*, 35 GEO. WASH. L. REV. 329, 343 (1966) ("Bureaucratic specialization leads to parochialism, excessive preoccupation of the agency with its own goals and its own vision of the public interest, and a disproportionate sacrifice of other social and economic interests to those it feels itself commissioned to protect and foster."). *See also* Anderson, *The National Environmental Policy Act*, in FEDERAL ENVIRONMENTAL LAW 279 (E. Dolgin & T. Guilbert eds. 1974); Comment, *supra* note 10, at 429-30.

20. *See, e.g.*, Rosenbaum & Roberts, *supra* note 11, at 34-36; Jaffe, *The Administrative Agency and Environmental Control*, 20 BUFFALO L. REV. 231, 235 (1970).

21. *See* E. HANKS, A. TARLOCK & J. HANKS, ENVIRONMENTAL LAW AND POLICY 194-95 (1974). The indifference of agencies whose mandate was not primarily to protect the environment to the potential environmental consequences of their actions prompted the enactment of NEPA, a statute which was meant to force the agencies to broaden their perspective. *See* Sive, *supra* note 16, at 650 (NEPA provides a means of "curbing the power of narrowly oriented administrative agencies.").

22. This pluralist model is described extensively and criticized in Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). *See also* R. POSNER, *supra* note 3, at 262-65; Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986). An institutionally restrained judge is likely to be attracted to the pluralist model of legislation since this model implies that a judge's role in implementing regulatory legislation should be limited to enforcing the bargain reached in the legislature. Some of the more prominent proponents of institutional judicial restraint rely heavily on the pluralist model

bargain is breached if the implementation of the statute is dominated by one group or an alliance of groups involved in the bargaining process. That kind of domination is possible where the agency in charge of statutory implementation gives disproportionate weight to the views of a particular interest group or groups.[23] If legislation is viewed as a process for determining the public interest,[24] then the capture of an agency by one faction may divert the agency from an attempt to serve the public interest to an effort to promote that faction's narrower self-interest.

Two ways to protect the sanctity of the legislative bargain and to minimize the opportunity for subverting the public interest are to expand the opportunities of intended statutory beneficiaries to participate in, and seek judicial review of, agency decisions.[25] Congress endorsed both techniques in environmental and other legislation of the late 1960's and early 1970's. Public access to information at the agency level was increased through enactment of the Freedom of Information Act,[26] and agencies were required to hold hearings before finalizing their decisions.[27] Most of the new statutes for controlling pollution contained provisions authorizing private citizens to seek judicial review of agency decisions.[28] Congress appeared to believe that the courts were more isolated than the agencies from political pressures of special interest groups and therefore could remedy any executive branch subversion of congressional intent attributable to agency capture.[29]

in their commentary on the legislative process. *See, e.g.*, R. POSNER, *supra* note 3, at 271, 274, 278-79, 282, 289, 291, 295, 337.

23. Sunstein, *supra* note 22, at 32-33.

24. The "public interest" model of legislation is described in R. POSNER, *supra* note 3, at 262-63. Proponents of institutional activism may focus on the public interest model of legislation since it appears to envision a broader role for the courts than the pluralist model does. Under the public interest model, the judge may be obligated to take affirmative steps to assist in promoting the public interest reflected in the legislation.

25. *See* Sunstein, *supra* note 22, at 65.

26. 5 U.S.C. § 552 (1982).

27. *See* Atkeson, *supra* note 15, at 13-14. *See also* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 594-95 (D.C. Cir. 1971) (discussing public hearing requirements under the Federal Insecticide, Fungicide, and Rodenticide Act).

28. *E.g.*, 33 U.S.C. §§ 1365, 1369 (1982); 42 U.S.C. §§ 7604, 7607 (1982). This kind of access to the courts would permit an individual or group to "inform[ ] the court that some voters believe that a particular point of view is being ignored or underestimated by the decisionmaking body." Comment, *supra* note 16, at 1099.

29. *See* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 633 (D.C. Cir. 1973). *Cf.* Rosenbaum & Roberts, *supra* note 11, at 39 (summarizing Professor Sax's view that since judges are " 'outsiders' to the political pressures that often sway administrators," access to the courts is "a way to shift the 'center of gravity' away from a concern with private economic interests and political calculations among administrators and toward a concern with the public's stake in environmental protection."). At least one Seventh Circuit opinion explicitly subscribed to this view. *See* Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107, 1121 (7th Cir. 1976) ("Courts are insulated from the lobbying that gives strong advantages to industrial polluters when they face administrative or legislative review of their operations.").

The federal courts, like Congress, were alert to the possibility of executive infringement upon legislative branch authority and were willing to take aggressive steps to ensure that agency decisions were consistent with statutory purposes.[30] The courts' willingness to intervene actively in the regulatory process was thus in large part attributable to institutional concerns. As Judge Skelly Wright remarked in his noted opinion in the *Calvert Cliffs'* case,[31] the essence of the courts' constitutional responsibilities was to ensure that "the promise of the new environmental legislation will become a reality. . . . Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."[32]

The federal courts' institutional commitment to thwarting agency efforts to derail legislative programs was perhaps heightened by what some contemporary commentators viewed as a special judicial sensibility to an agency's failure to adequately assess environmental consequences.[33] The District of Columbia Circuit, which perhaps best exemplified this sensibility, explained that "[a]gency decisions in the environmental area touch on fundamental personal interests in life and health, and these interests have always had a special claim to judicial protection."[34] Because some courts felt that an agency's failure to protect these important inter-

30. *See* Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1119 n.21 (D.C. Cir. 1971). *See also* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) (discussing judicial and agency partnership to effectuate the legislative mandate); Kennecott Copper Corp. v. EPA, 462 F.2d 846, 848-49 (D.C. Cir. 1972) (referring to judicial and agency partnership in furtherance of the public interest); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972). *See generally* ADMINISTRATIVE LAW, *supra* note 7, § 5.1.1, at 121 ("Courts aid Congress by insuring that agencies stay within the substantive boundaries established by Congress."); *id.* § 5.1.4, at 124 ("Judicial review of agency action is supportive of the efforts of the legislative branch to establish and implement policy through legislative delegation of power.").

31. *Calvert Cliffs'*, 449 F.2d 1109.

32. *Id.* at 1111. *See also* Porter County Chapter of the Izaak Walton League v. AEC, 515 F.2d 513, 522 n.11 (7th Cir. 1975), *rev'd sub nom.* Northern Ind. Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League, Inc., 423 U.S. 12 (1975) (stating that AEC had tended to become lax in assuring that its decisions did not adversely affect safety and noting the phenomenon of agency capture).

33. *See, e.g.*, Thompson, *supra* note 11, at 211 (arguing that the Court in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), "was aware of the special place which environmental and aesthetic concerns should play in the agency decision making."); Note, Citizens to Preserve Overton Park, Inc. v. Volpe: *Environmental Law and the Scope of Judicial Review*, 24 STAN. L. REV. 1117, 1118 (1972) (Court's test for scope of judicial review embodies "a preference for environmental values vis-a-vis competing values"). *Cf.* Leventhal, *Environmental Decision Making and the Role of the Courts*, 122 U. PA. L. REV. 509, 514 (1974) (The Court did not employ a more stringent standard of review in *Overton Park* because it was an environmental case. But "[t]he 'paramount importance' attributed to environmental values serves to grab the court initially and causes the court to be especially attentive in its review and, where necessary, to delve into the decisional process to see whether the Government has acted to give due protection to the environment.").

34. Scientists' Inst. for Pub. Information, Inc. v. AEC, 481 F.2d 1079, 1094 (D.C. Cir. 1973). *See also* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

ests could have far more serious consequences than agency abuses under traditional economic regulatory legislation, they were particularly prone to intervene actively in environmental litigation.[35] To the extent this special judicial sensibility was motivated by the judges' personal sympathies with the objectives of the new environmental laws,[36] the judicial activism of the 1960's and 1970's may have had a policy as well as an institutional component.

2. The Techniques of Environmental Activism

The federal appellate courts in the late 1960's and early 1970's displayed all of the characteristics of institutional judicial activism in environmental litigation.[37] They expanded procedural opportunities for private participation in agency decisionmaking, interpreted broadly the substantive scope of environmental legislation, and subjected agency decisions to stringent judicial review.

a. Procedural techniques

To reduce the potential for subversion by captured administrative agencies of environmental legislative efforts, the federal courts sought "to ensure that the administrative process itself will confine and control the exercise of [agency] discretion."[38] They did so by imposing new and more elaborate procedural requirements on EPA and on agencies responding to NEPA.[39] Although the sources of these requirements were not always clear, the courts were at times quite blunt in admitting that the procedures imposed could not be traced either to the APA or to the agencies' organic statutes.[40] One court stated that "in a particular case

35. *See* F. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 21 (1973). *See also* Sive, *supra* note 16, at 643 ("there is a special aspect of environmental rights which renders them more basic and fundamental than most other more traditional civil rights").

36. Associate Justice Tom Clark, sitting on a Seventh Circuit panel, noted that "environmental consciousness may be the saving prescript for our age." Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107, 1120 (7th Cir. 1976).

37. These characteristics are described at *supra* notes 4-5 and accompanying text.

38. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

39. *See* Diver, *supra* note 19, at 410-11.

40. In a case involving implementation of the Clean Air Act, for example, the Court of Appeals for the District of Columbia Circuit remanded a rule to EPA so that the Administrator could supply a more complete explanation of the basis for the rule, even though the court admitted that the regulation's statement of basis and purpose satisfied the minimal requirements of the APA. Kennecott Copper Corp. v. EPA, 462 F.2d 846, 850 (D.C. Cir. 1972). For other cases remanded for the development of a fuller administrative record, see American Meat Inst. v. EPA, 526 F.2d 442, 465-66 (7th Cir. 1975); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 624-25 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

fairness may require more than the APA minimum."[41] In other cases, the procedural requirements were derived from creative statutory interpretations.[42] To ensure that agencies complied with their affirmative duty to protect the public interest,[43] the courts required the agencies to inquire into and consider all relevant facts,[44] to expand opportunities for intervention and public comment,[45] and to respond to significant objections raised by commentators.[46]

Increased procedural requirements at the agency level alone, however, could not guarantee agency adherence to the legislative mandate. Intended statutory beneficiaries whose interests were improperly ignored had to be able to challenge agency decisions in court. The courts expanded express statutory opportunities for judicial review by liberalizing standing rules, recognizing implied private rights of action, and interpreting statutes that were silent on the matter to authorize judicial review.

The relaxation of standing requirements for judicial review of agency actions involving environmental issues began when the courts held that a plaintiff need not prove injury to a personal economic interest to satisfy the "case" or "controversy" requirement of article III of the Constitution. Injury to "a special interest" in aesthetic, conservational, or recreational matters would suffice.[47] The Supreme Court's decision in *United States v. SCRAP*[48] illustrated that even a plaintiff whose alleged environmental injury had only the most tenuous connections with the challenged agency action would receive a judicial hearing on the merits.[49] The courts apparently viewed the relaxation of standing requirements as one more technique for protecting statutory goals from the

41. *Kennecott Copper*, 462 F.2d at 850 n.18.

42. The requirement for the preparation of a "negative" impact statement under NEPA, for example, is not traceable to any express statutory language. *See* Thompson, *supra* note 11, at 195-98. *See generally* Hanly v. Mitchell, 460 F.2d 640, 648-49 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972); Scherr v. Volpe, 466 F.2d 1027, 1032 (7th Cir. 1972). *Cf.* Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972) (requiring discussion of environmental consequences of alternative courses of action).

43. *Scenic Hudson Preservation Conference*, 354 F.2d at 620.

44. *Id.*

45. *See, e.g.*, International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631 (D.C. Cir. 1973); Greene County Planning Bd. v. FPC, 455 F.2d 412, 422 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

46. *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

47. *See* Sierra Club v. Morton, 405 U.S. 727, 734 (1972); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 615-16 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

48. 412 U.S. 669 (1973).

49. There were, of course, occasional cases in which the courts refused to recognize environmental plaintiffs' standing. *See, e.g.*, Sierra Club v. Froehlke, 486 F.2d 946, 953-55 (7th Cir. 1973). However, by 1977, Professor Rodgers noted that the question of standing in environmental litigation

decisions of agencies not inclined to place a high value on environmental concerns.[50]

Private access to the courts in environmental litigation was also expanded through judicial implication of private rights of action and of a right to review of agency decisions. The Supreme Court, for example, inferred a right to reimbursement or equitable relief for persons injured by violations of the River and Harbors Appropriation Act of 1899.[51] The most significant example of the courts' recognition of an implied right to judicial review of agency decisions arose under NEPA, where the courts engaged in rigorous review of agency compliance despite the fact that the statute "gives no hint whatsoever that citizens may even litigate the question of preparation of an impact statement."[52]

According to one Seventh Circuit decision, these judicial efforts to expand the rights of environmentally-aggrieved parties to obtain redress in the courts "serve[d] as a necessary and valuable supplement to legislative efforts to restore the natural ecology of our cities and countryside."[53] If these efforts were based upon the courts' conclusion that Congress intended the judiciary to supplement the express statutory mechanisms for protecting the environment, they simply reflected institutional activism. If, however, the federal courts turned to the activist procedural techniques because they believed the measures chosen by Congress were inadequate, the courts were engaged in policy activism.

had shifted "from a significant doctrinal barrier to a nettlesome technicality." W. RODGERS, ENVIRONMENTAL LAW § 1.6, at 23 (1977).

50. *See, e.g.*, E. HANKS, A. TARLOCK & J. HANKS, *supra* note 21, at 214 (citing Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1445, 1475 (1971)) (viewing the removal of standing hurdles as "the divorce of judicial review from the core of common law jurisprudence and the recognition of a rather broad public interest in the functioning of government"); Rosenbaum & Roberts, *supra* note 11, at 41 (more expansive view of standing has permitted public interest litigation against government agencies); Comment, *supra* note 16, at 1088 (the "expanded concept of standing is crucial to a judicial function of review which assures that administrative decisions affecting environmental quality are as fully as possible responsive to competing values"). *Cf. Scenic Hudson Preservation Conference*, 354 F.2d at 616 (expansive view of "aggrieved parties" with standing to challenge FPC licensing activities is necessary to ensure that the FPC adequately protects the public interest in the aesthetic, conservational, and recreational aspects of power development).

51. *See* Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); United States v. Republic Steel Corp., 362 U.S. 482 (1960). Professor Rodgers reported in 1977 that the courts "freely" and "readily" implied private remedies under federal water pollution control legislation. W. RODGERS, *supra* note 49, § 4.5, at 395, § 4.6, at 403.

52. Thompson, *supra* note 11, at 216. The conclusion that private litigants could seek review of agency implementation of NEPA was not inevitable. *See, e.g.*, Bucklein v. Volpe, 1 Envtl. L. Rep. (Envtl. L. Inst.) 20,043, 20,044 (N.D. Cal. 1970) (concluding that NEPA "would not seem to create any rights or impose any duties of which a court can take cognizance").

53. Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107, 1120 (7th Cir. 1976).

b. Substantive techniques

The courts in the 1960's and 1970's also sought to protect the interests and promote the goals reflected in environmental statutes by interpreting those statutes broadly and by filling statutory gaps with federal common law.[54] The Supreme Court's foray into expansive statutory interpretation arose primarily under the 1899 River and Harbors Act. The Court held that the Act's prohibition on creating an "obstruction" to navigation[55] applies to the deposit of industrial organic wastes[56] and that its prohibition on the deposit of "refuse matter" into navigable waters[57] covers commercially valuable gasoline, even absent proof of an adverse effect on navigation.[58] Although Justice Harlan charged Justice Douglas, the author of the opinions in these cases, with engaging in policy activism,[59] the latter denied that he was "stretching statutory language . . . to meet strange conditions."[60]

The lower courts produced similarly broad interpretations of the Clean Air Act and NEPA. The Clean Air Act's program for preventing significant deterioration, although incorporated into the statute in 1977,[61] was implied from the general purposes of the statute by an earlier federal district court decision over EPA's objection.[62] Although not all

54. According to Judge Posner, "many issues of statutory interpretation cannot be answered deductively." R. POSNER, *supra* note 3, at 202. As a result, "some statutes do little more than provide an initial impetus to the creation of bodies of frankly judge-made law." *Id.* He cites the antitrust laws as an example. NEPA is surely another.

55. 33 U.S.C. § 403 (1982).

56. United States v. Republic Steel Corp., 362 U.S. 482, 485, 489 (1960).

57. 33 U.S.C. § 407 (1982).

58. United States v. Standard Oil Co., 384 U.S. 224, 229-30 (1966). *See also* United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 670-71 (1973).

59. According to Justice Harlan, the majority had "read[ ] into the statute things that actually are not there" in order to reach what it considered a "just result." *Republic Steel Corp.*, 362 U.S. at 510 (Harlan, J., dissenting). Justice Harlan's objections reflected his adherence to institutional restraint:

> However appealing the attempt to make this old piece of legislation fit modern-day conditions may be, such a course is not a permissible one for a court of law, whose function it is to take a statute as it finds it. The filling of deficiencies in the statute . . . is a matter for Congress, not for this Court.

Id. See also Standard Oil, 384 U.S. at 230 (Harlan, J., dissenting) (The court's decision would have been different if it had "been content to confine itself to applying relevant rules of law and to leave policies affecting the proper conservation of the Nation's rivers to be dealt with by the Congress.").

60. *Standard Oil*, 384 U.S. at 225.

61. 42 U.S.C. §§ 7470-7479 (1982).

62. *See* Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C.), *aff'd*, 2 Envtl. L. Rep. (Envtl. L. Inst.) 20,656 (D.C. Cir. 1972), *aff'd by an equally divided Court sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973). The District of Columbia Circuit ruled that EPA's authority to issue hazardous air pollutant standards based on "adequately demonstrated" technology includes the power to force emissions reductions to a level projected to be achievable through systems not currently in use. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 391-92 (D.C. Cir. 1973). Professor Rodgers has called this "a bold interpretation" of the statute. W. RODGERS, *supra* note 49, § 3.10, at 270.

courts agreed, many, including the Seventh Circuit, concluded that NEPA was not purely a procedural statute. Under this interpretation, the Act not only required preparation of an impact statement that adequately discussed a proposal's environmental effects; it also included a judicially enforceable requirement that the preparing agency adhere to the choices dictated by the impact statement's analysis.[63]

In addition to interpreting environmental statutes expansively, the courts sometimes filled statutory gaps with federal common law. The most prominent example was *Illinois v. City of Milwaukee*,[64] where the Supreme Court, relying in part on Congress' increasing concern with protecting the quality of the environment,[65] recognized the propriety of applying a federal common law of nuisance to resolve interstate disputes involving water pollution.[66] Thereafter, the lower federal courts frequently resorted to this body of federal common law to resolve environmental disputes.[67]

c. Scope of judicial review

The third technique the courts used to prevent agencies from defeating legislative purposes was a rigorous scrutiny of agency reasoning. The Supreme Court's decision in the *Overton Park* case[68] provided the clearest signal that, by more closely scrutinizing the substantive merit of agency decisions under environmental statutes, the courts would act as "aggressive overseers" of agency implementation of these laws.[69] The courts expressed the new, heightened scope of judicial review in environ-

63. *E.g.*, Sierra Club v. Froehlke, 486 F.2d 946, 953 (7th Cir. 1973). *Cf.* Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (courts probably cannot reverse a substantive decision under NEPA unless the balance of costs and benefits struck by the agency was "arbitrary or clearly gave insufficient weight to environmental values"). *See generally* materials cited in W. RODGERS, *supra* note 49, § 7.5, at 738 n.1. The Supreme Court severely restricted, if not eliminated, the courts' substantive review authority in Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980) (per curiam).

64. 406 U.S. 91 (1972).

65. *Id.* at 101-02.

66. *Id.* at 103-04.

67. In several cases, the doctrine was extended to cover suits by private litigants, *e.g.*, National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1233 (3d Cir. 1980), *vacated and remanded sub nom.* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Byram River v. Village of Port Chester, 394 F. Supp. 618 (S.D.N.Y. 1975), and suits involving intrastate pollution of navigable waters. *E.g.*, Illinois v. Outboard Marine Corp., 619 F.2d 623, 628 (7th Cir. 1980), *vacated and remanded*, 453 U.S. 917 (1981). This case is discussed *infra* notes 81-94 and accompanying text. For a summary of the post-Illinois v. City of Milwaukee development of the federal common law of nuisance, see Glicksman, *Federal Preemption and Private Remedies for Pollution*, 134 U. PA. L. REV. 121, 158 n.198 (1985).

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

69. W. RODGERS, *supra* note 49, § 1.5, at 18. *See also* Note, *Administrative Law and Procedure—Judicial Review—Discretionary Action by Secretary of Transportation Is Subject to Judicial Review When His Decision Creates Substantial Environmental Impact*, 60 GEO. L.J. 1101, 1112

mental cases in a variety of ways.[70] Collectively, these formulations of a more searching scope of review became known as the "hard look doctrine,"[71] which generally demanded that the agency accompany its decision with a clear explanation of the factors considered, the weights assigned to them, and the reasons they dictated the decision ultimately adopted.[72]

At the same time as they were demanding more detailed explanations by the agencies, the courts felt less compelled than previously to prostrate themselves before the "mysteries of administrative expertise."[73] Despite their frequent protestations of deference to the agency's resolution of complex technical and scientific issues,[74] the courts did not hesitate to form their own judgments on whether agency resolution of these issues would promote congressional objectives.[75] A court addressing such an issue but concerned about an agency's departure from its statutory mandate might classify the issue before it as one of law rather than of fact. Because the courts typically engaged in a more searching inquiry of agency legal questions than factual ones,[76] such a classification would subject the agency's determination of the issue to relatively strict judicial scrutiny.[77]

(1972) ("The *Overton Park* case heralds the advent of closer scrutiny of agency actions, particularly if statutory environmental safeguards are involved.").

70. The Supreme Court announced in *Overton Park* that the APA requires a court reviewing agency rulemaking proceedings to engage in "a thorough, probing, in-depth review." *Overton Park*, 401 U.S. at 415. The judicial task, said some courts, was to ensure that the agency had engaged in "reasoned decisionmaking." *E.g.*, American Meat Inst. v. EPA, 526 F.2d 442, 453 (7th Cir. 1975) (citing Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427, 434 (D.C. Cir. 1973), *cert. denied sub nom.* Appalachian Power Co. v. EPA, 416 U.S. 969 (1974)); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 402 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). Others referred to the courts' obligation to inspect agency decisions pursuant to "a more searching standard" or "a more penetrating inquiry." Save Our Ten Acres v. Kreger, 472 F.2d 463, 466 (5th Cir. 1973).

71. The "hard look" label originated in a non-environmental case, where Judge Leventhal described hard look review as judicial review of agency reasoning "with vigilance." Greater Boston Television Co. v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). But by 1977, one author deemed the doctrine "a catechism of environmental law." W. RODGERS, *supra* note 49, § 1.5, at 19. Professor Rodgers stated that, in suits initiated under NEPA, the courts "elevated the hard look to a penetrating autopsy of agency actions affecting the environment." *Id.* at 23.

72. *Cf.* Sunstein, *supra* note 22, at 61 (the "hard-look doctrine" currently contains four principal features: "Agencies must give detailed explanations for their decisions; justify departures from past practices; allow participation in the regulatory process by a wide range of affected groups; and consider reasonable alternatives, explaining why they were rejected.").

73. *See* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971). *See also* W. RODGERS, *supra* note 49, § 1.5, at 17-18.

74. *See, e.g.*, International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 633, 647-48 (D.C. Cir. 1973).

75. *See, e.g., id.*; Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 374, 402 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

76. *See* Diver, *supra* note 19, at 402 and cases cited *id.* at n.n. 45-46.

77. Evidence that courts engaged in manipulation of the fact-law distinction for this reason is

The courts resorted to these techniques for increasing the stringency of judicial review for the same reason they maximized the procedural opportunities of statutory beneficiaries and read statutory provisions expansively: they sought to prevent agencies from basing their decisions on factors inconsistent with or extraneous to the applicable statutory delegation.[78] Hard-look review, then, was another means of preventing agency capture from subverting the legislative will.[79] If such review increased future agency adherence to statutory objectives, it would eventually reduce the need to resort to the techniques of institutional activism as a check on agencies straying from their statutory mandate.[80]

II. THE WAUKEGAN HARBOR LITIGATION

The federal courts' conviction that agencies could not be trusted to take proper account of environmental values in implementing their statutory responsibilities caused them to resort frequently to the techniques of institutional activism in the late 1960's and early 1970's. Judges in the Court of Appeals for the District of Columbia Circuit, which heard the bulk of the environmental cases, were the leading practitioners of this activism, but other courts, including the Seventh Circuit, also employed the activist techniques. By the early 1980's, institutional activism in environmental litigation had declined, but not necessarily because agencies were conforming more closely to statutory directives than they did in the 1960's and 1970's.

difficult to produce. But at least one writer in 1970 believed that the courts had begun to classify mixed questions of fact and law in environmental cases as questions of law. *See* Sive, *supra* note 16, at 619-31 (citing Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); Citizens Comm. for the Hudson Valley v. Volpe, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970)). *See also* Thompson, *supra* note 11, at 194.

78. *See, e.g.*, Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597-98 (D.C. Cir. 1971).

79. *See* Sunstein, *supra* note 22, at 61 (hard-look review permitted the courts to "flush out" agency decisions which were solely the product of political pressures); Thompson, *supra* note 11, at 236-37.

80. *See, e.g.*, Note, *supra* note 69, at 1113.

Some judges convinced of the need for and legitimacy of institutional activism in environmental cases believed that some of the activist techniques were more likely to promote agency adherence to legislative purposes than others. Judge Bazelon, for example, believed that "technically illiterate" judges were incapable of engaging in meaningful substantive review of agency decisions involving complex scientific evidence. He contended that the courts would do more to improve administrative decision-making "by concentrating our efforts on strengthening administrative procedures." Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir.) (Bazelon, J., concurring), *cert. denied*, 426 U.S. 941 (1976). *See also* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973). Other activists, like Judge Leventhal, countered that judges were capable of engaging in meaningful substantive review and had a responsibility to Congress to do so to assure that agencies exercised broad delegations of power within statutory limits. *See Ethyl Corp.*, 541 F.2d at 68-69 (Leventhal, J., concurring). *See also* Leventhal, *supra* note 33.

This part of the article describes a recent line of Seventh Circuit environmental law cases involving the pollution of Waukegan Harbor. The next part concludes that, although the Waukegan Harbor litigation does not point uniformly in one direction, it reflects an institutional approach which contrasts with the activism characteristic of earlier environmental litigation in the federal courts. Part IV contends that the retreat from activism displayed in the Waukegan Harbor cases and the Seventh Circuit's other recent environmental decisions is part of a broader movement among the federal courts toward institutional restraint based on concerns about the limits of the courts' authority and competence.

A. Illinois v. Outboard Marine Corporation ("OMC I")

In August 1978, Illinois sued the Outboard Marine Corporation ("OMC") in federal district court, alleging that at least since 1959, the company had discharged toxic polychlorinated biphenyls ("PCBs")[81] from its Waukegan, Illinois manufacturing facility into Waukegan Harbor and Lake Michigan. According to the state, the PCBs had accumulated in the bottom sediments of the receiving waters, causing contamination at levels damaging to aquatic life and water quality, threatening the health of Illinois residents, and impairing the usefulness of the lake for recreation. Illinois sought an injunction restraining OMC from further discharges of PCBs and directing it to remove and dispose of the PCB-contaminated sediments and soil, relying, among other things, on the federal common law of nuisance.[82]

The district court dismissed the state's complaint. It held that although the federal district courts have jurisdiction over a claim based on the federal common law of nuisance, that body of law does not extend to controversies between a state and its own residents. Absent any allegation of injury to or from another state, the court lacked jurisdiction to hear the dispute.[83]

Before the district court dismissed Illinois' complaint, the United States brought its own action against OMC, alleging that OMC's property constituted a threat to the environment and seeking civil penalties

81. PCBs are highly toxic chemical mixtures that are heat and flame resistant. Illinois v. Outboard Marine Corp., 619 F.2d 623, 624 n.1 (7th Cir. 1980), *vacated and remanded*, 453 U.S. 917 (1981). Congress has authorized the EPA to regulate the manufacture, use, and disposal of PCBs under the Toxic Substances Control Act. 15 U.S.C. § 2605(e) (1982). *See also* 40 C.F.R. Part 761 (1986).

82. 619 F.2d at 624.

83. *Id.*

and injunctive relief similar to that requested by Illinois.[84] The federal government's suit was based on both the federal common law of nuisance and the Federal Water Pollution Control Act ("FWPCA").[85] When Illinois' suit was dismissed, it moved to intervene in the United States' suit, alleging that it had a statutory right to do so under the FWPCA.[86] The district court denied Illinois' motion.[87]

On appeal, the Seventh Circuit reversed both the dismissal of Illinois' federal common law action and its motion to intervene in the federal government's suit. On the first point, the court held that a state has a federal common law nuisance action against an in-state source polluting interstate or navigable waters.[88] The court, relying upon the Supreme Court's 1972 decision in *Illinois v. City of Milwaukee* ("*Milwaukee I*"),[89] and the policies reflected in the FWPCA, concluded that the "overriding federal interest in preserving, free of pollution, our interstate and navigable waters"[90] justified the application of a uniform federal common law of nuisance, even to the intrastate pollution of such waters, to fill in the gaps of the FWPCA.[91] The court also held that the FWPCA gave Illinois a statutory right to intervene in the federal government's suit.[92] This result was supported by Congress' desire to preserve to the state "a vital role" in eliminating water pollution.[93] The court permitted Illinois to decide whether to remain in the United States' suit upon revival of the state's federal common law nuisance action.[94]

B. Illinois v. Outboard Marine Corporation ("OMC II")

Following the Seventh Circuit's decision in *OMC I*, OMC filed a petition for certiorari, which the Supreme Court granted. Subsequently,

84. *See* 33 U.S.C. § 1364(a) (1982) (authorizing EPA to sue in federal district court to immediately restrain any person causing or contributing to pollution presenting an imminent and substantial danger to public health or welfare to stop the discharge causing the pollution or "to take such other action as may be necessary"); *id.* § 1319(b), (d) (authorizing district court to assess civil penalties for statutory violations).

85. This Act is now commonly referred to as the Clean Water Act and is codified at 33 U.S.C. §§ 1251-1376 (1982), *amended by* Pub. L. No. 100-4, 101 Stat. 7 (1987).

86. *See id.* § 1365(b)(1)(B); FED. R. CIV. P. 24(a)(2).

87. 619 F.2d at 625.

88. *Id.* at 623-24. Two other federal circuit courts previously had held to the contrary. *See* Committee for the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976); Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975). *See also* Ancarrow v. City of Richmond, 600 F.2d 443 (4th Cir.), *cert. denied*, 444 U.S. 992 (1979).

89. 406 U.S. 91 (1972).

90. 619 F.2d at 630.

91. *Id.* at 626-30.

92. *Id.* at 632.

93. *Id.* at 631-32 (citing 33 U.S.C. § 1251(b)).

94. 619 F.2d at 632.

the Court held in *City of Milwaukee v. Illinois* ("*Milwaukee II*")[95] that the 1972 amendments to the FWPCA pre-empted the federal common law of nuisance in the area of water pollution.[96] The Court then vacated the *OMC I* decision and remanded the case to the Seventh Circuit for reconsideration in light of *Milwaukee II*.[97]

On remand, Illinois and the United States, as amicus curiae, conceded that *Milwaukee II* barred the state's claim for injunctive relief against the effects of pollution occurring since the enactment of the 1972 amendments to the FWPCA. They contended, however, that Illinois retained its rights under federal common law to abate a nuisance resulting from the discharge of pollutants prior to 1972.[98]

In *OMC II*, the Seventh Circuit characterized the governments' arguments as "not . . . unreasonable."[99] It noted that the issue raised in this case was distinguishable from that in *Milwaukee II* in at least three ways. First, unlike the discharge in *Milwaukee II*, OMC's discharges were not governed by EPA effluent limitations enforceable in civil or criminal proceedings against the polluter, since those limitations applied only prospectively to discharges occurring after 1972. Second, Illinois had no forum under the FWPCA's 1972 amendments to protect itself against OMC's pre-1972 discharges. The Supreme Court's decision in *Milwaukee II* had noted the availability of such a forum to the state in that case.[100] Third, the 1972 amendments did not include explicit rules for deciding suits against polluters for pre-1972 pollution. The court felt that the presence of similar rules governing post-1972 pollution was significant to the decision in *Milwaukee II*.[101]

Despite these differences, the court held that Illinois' federal common law nuisance claims stemming from pre-1972 discharges were barred by the *Milwaukee II* decision. The key question, the court said, was whether the 1972 amendments addressed the question of pre-1972 water pollution. The court concluded that they did.[102] Since Congress

95. 451 U.S. 304 (1981). For a discussion of the scope and implications of the *Milwaukee II* decision, see Glicksman, *supra* note 67, at 159-71; Murchison, *Interstate Pollution: The Need for Federal Common Law*, 6 VA. J. NAT. RESOURCES 1 (1986).

96. 451 U.S. at 317. *See also* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 22 (1981).

97. Outboard Marine Corp. v. Illinois, 453 U.S. 917 (1981).

98. Illinois v. Outboard Marine Corp., 680 F.2d 473, 474 (7th Cir. 1982).

99. *Id.* at 477.

100. 451 U.S. at 324.

101. 680 F.2d at 477 (citing *Milwaukee II*, 451 U.S. at 324).

102. The court relied on several provisions of the 1972 amendments, which authorized EPA to arrange for the removal of in-place toxic pollutants in harbors and navigable waterways (33 U.S.C. § 1265); authorized EPA to enter into agreements with states and municipalities to demonstrate the feasibility of removing pollutants from the Great Lakes (*id.* § 1258(a)); directed EPA to develop

had comprehensively addressed the issue of pollution, including pre-1972 pollution, of navigable waterways, Illinois' federal common law nuisance claim was pre-empted.[103]

C. Outboard Marine Corporation v. Thomas ("OMC III")

While the Seventh Circuit was considering the issue in *OMC II*, the federal government's suit against OMC proceeded through discovery. In January 1982, the government amended its complaint to add a claim based on section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"),[104] which authorizes the government to seek abatement of an imminent and substantial endangerment to public health or the environment because of the release of a hazardous substance.[105] After the issuance of the decision in *OMC II*, the district court dismissed the United States' federal common law nuisance claims,[106] but refused to dismiss the government's statutory claims under the FWPCA[107] or the CERCLA.[108]

In December 1982, EPA issued its first National Priorities List of leaking hazardous waste sites under the CERCLA.[109] This List contains sites which, because of the risk they pose to public health or the environment, merit the highest priority in the allocation of Superfund cleanup resources.[110] The contaminated portion of Waukegan Harbor adjacent

practical methods for eliminating the effects of pollutants from in-place or accumulated sources (*id.* § 1255(a)); and authorized federal funds for state cleanup projects under EPA guidelines (*id.* § 1324). *See* 680 F.2d at 476-78.

103. 680 F.2d at 480. OMC also urged the court to reverse its holding in *OMC I* that Illinois had a statutory right to intervene in the United States' FWPCA action against OMC under § 505(b)(1)(B) of that Act, 33 U.S.C. § 1365(b)(1)(B). The court refused to do so. It concluded that, to the extent the *Milwaukee II* decision was relevant, it supported the court's earlier holding on the intervention issue. The Supreme Court's emphasis on the comprehensiveness of the statute, to the exclusion of other remedies, suggested that courts should read the FWPCA's remedial provisions expansively. OMC argued that the FWPCA only authorized intervention in a suit "to require compliance" with the statute. Since the federal government's suit sought to ameliorate the effects of past discharges, the intervention provision therefore was inapplicable. The court disagreed, characterizing the United States' suit as an effort "to seek prospective relief from the effects of past discharges." 680 F.2d at 480-81.

104. 42 U.S.C. §§ 9601-9657 (1982), *amended by* Pub. L. No. 99-499, 100 Stat. 1613 (1986).

105. *Id.* § 9606(a) (1982).

106. United States v. Outboard Marine Corp., 549 F. Supp. 1032 (N.D. Ill. 1982).

107. United States v. Outboard Marine Corp., 549 F. Supp. 1036 (N.D. Ill. 1982).

108. United States v. Outboard Marine Corp., 556 F. Supp. 54 (N.D. Ill. 1982).

109. *See* United States v. Outboard Marine Corp., 789 F.2d 497, 500 (7th Cir.), *cert. denied*, 107 S. Ct. 457 (1986).

110. The CERCLA requires EPA to include in its national contingency plan for cleaning up releases from hazardous waste disposal sites criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action. 42 U.S.C. § 9605(a)(8)(A) (1982), *amended by* Pub. L. No. 99-499, § 105(a)(1)-(2), 100 Stat. 1613, 1625 (1986). Based on those criteria, EPA must identify facilities that are the "top priority among known

to OMC's facilities was ranked eighty-second among the 540 listed sites. Illinois then designated this site as its top priority among all Illinois Superfund sites.[111] At that point, in February 1983, EPA moved to dismiss its CERCLA section 106 claim without prejudice. The agency felt that, because of the time necessary to complete discovery, conduct a trial, and appeal the result, the implementation of remedial work at the Waukegan site would be delayed for another three to four years.[112] EPA proposed instead to clean up the PCBs itself, using its authority under section 104 of the CERCLA,[113] and later sue OMC under section 107 of the Act[114] for reimbursement of any cleanup costs incurred. The government also requested that the district court stay the remainder of the action for injunctive relief pending the completion of EPA proceedings under the CERCLA. The court stayed consideration of EPA's requests to give EPA time to issue its plan for cleaning up Waukegan Harbor.[115]

After more than a year of study, EPA concluded in May 1984 that it would engage in a $21 million cleanup project, to include dredging the harbor and storage of the PCB-contaminated sediments both on and off the OMC facilities.[116] Early the next year, EPA sought access to the OMC complex for the purpose of surveying, soil testing for weight-bearing, and design specification work in preparation for actual construction.[117] When OMC refused access to the agency, EPA applied *ex parte* for a warrant for entry and investigation. The magistrate issued the warrant, but OMC continued to refuse to admit EPA onto its property, and the company filed suit in federal district court to enjoin EPA from exe-

response targets." *Id.* § 9605(a)(8)(B), *amended by* Pub. L. No. 99-499, § 105(a)(3), 100 Stat. 1613, 1625 (1986).

111. 789 F.2d at 500. To the extent practicable, EPA's National Priorities List must include among the 100 highest priority facilities the site designated by each state as the one presenting the greatest danger to public health or welfare or the environment in that state. 42 U.S.C. § 9605(a)(8)(B) (1982), *amended by* Pub. L. No. 99-499, § 105(a)(3), 100 Stat. 1613, 1625 (1986).

112. 789 F.2d at 500.

113. This section generally authorizes EPA to take actions in response to the release or threatened release of hazardous substances which are necessary to protect the public health or welfare or the environment. 42 U.S.C. § 9604(a)(1) (1982), *amended by* Pub. L. No. 99-499, § 104(a), 100 Stat. 1613, 1617-18 (1986).

114. That section describes four categories of persons, including owners of facilities from which a release of hazardous substances occurs, who may be liable in an action in federal district court to reimburse cleanup costs incurred by the federal government, a state government, or a private party. 42 U.S.C. § 9607(a) (1982), *amended by* Pub. L. No. 99-499, § 107(a)-(b), 100 Stat. 1613, 1628-29 (1986).

115. 789 F.2d at 500.

116. *Id.* at 500-01.

117. Outboard Marine Corp. v. Thomas, 773 F.2d 883, 885-86 (7th Cir. 1985), *vacated and remanded*, 107 S. Ct. 638 (1986). The actual remedial operations would entail years of treatment of the contaminated sediments in lagoons and facilities to be constructed by EPA on OMC's property, as well as the erection of a permanent 15-foot high containment cell, which would occupy 6 acres of the OMC parking lot. *Id.* at 885.

cuting the warrant. The company appealed the district court's denial of a preliminary injunction to the Seventh Circuit.[118]

On appeal, the government contended that sections 104(a), (b), and (e) of the CERCLA[119] authorized it to enter OMC's property to engage in the preliminary investigation and other work necessary to prepare for the actual remedial action. Although it did not concede that its preliminary work constituted a taking of OMC's property, EPA argued that even if it did, the taking was authorized by statute, and therefore the company's sole remedy was a suit under the Tucker Act[120] for compensation.[121] Furthermore, EPA claimed compensation need not precede the taking.[122] Thus, according to the agency, OMC failed to show any likelihood of success on the merits and its request for a preliminary injunction was properly refused.[123]

In *OMC III*,[124] a panel of the Seventh Circuit reversed the trial court and remanded for issuance of a preliminary injunction against EPA's execution of the warrant. The court rejected EPA's Tucker Act argument because that contention assumed statutory authorization for the entry onto OMC's property. According to the court, however, "the EPA lacks the authority to enter as the warrant adds nothing when the statute provides nothing."[125]

Of the three provisions relied upon by EPA, the court construed section 104(a) as "merely a general grant of power for remedial action" which contains no express right of entry for the agency.[126] Section 104(b), although it grants to EPA the power to "undertake such investigations, monitoring, surveys, testing, and other information gathering as [it] may deem necessary or appropriate,"[127] was inapplicable since it grants these authorities for the purposes of identifying the existence, source, and nature of the hazard. These purposes had already been accomplished at the OMC site.[128] Section 104(b) also vests in EPA the

118. *Id.* at 886-87.
119. 42 U.S.C. § 9604(a), (b), (e) (1982).
120. 28 U.S.C. § 1491 (1982). The Tucker Act gives the United States Claims Court jurisdiction to render monetary judgments against the United States in non-tort causes of action based on federal law.
121. 773 F.2d at 887.
122. *See* Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862, 2880 (1984) (citing Hurley v. Kincaid, 285 U.S. 95, 104 (1932)).
123. 773 F.2d at 887.
124. Outboard Marine Corp. v. Thomas, 773 F.2d 883 (7th Cir. 1985), *vacated and remanded*, 107 S. Ct. 638 (1986).
125. *Id.* at 888.
126. *Id.* at 888-89.
127. 42 U.S.C. § 9604(b) (1982).
128. 773 F.2d at 889.

power to "undertake such planning, . . . engineering, architectural, and other studies or investigations as [EPA] deem[s] necessary or appropriate to plan and direct response actions . . . and to enforce the provisions of [the CERCLA]."[129] The court noted, however, that the section does not expressly include a right of entry to carry out these planning and other responsibilities, and it rejected the district court's conclusion that such a right must necessarily be implied to permit EPA to execute its statutory mandate.[130] The court construed the portion of section 104(e)(1) granting EPA access to private property to include only the power to copy records. Any authority to take samples does not encompass the right to take subsurface samples to determine what construction the land can support.[131] Doubting that EPA even had the power to enter the property to engage in final remedial action, the court refused to "rewrite the statute" to give EPA a right of entry in a nonemergency situation to assist it in preliminary design specification work.[132]

D. United States v. Outboard Marine Corporation ("OMC IV")

Shortly after EPA formulated its $21 million cleanup proposal in May 1984, the agency renewed its motion to the district court to dismiss without prejudice the government's civil action against OMC for injunctive relief and civil penalties. OMC opposed the motion, contending that it would be improper to dismiss without prejudice after so much time and expense had been expended for trial. OMC requested that the district court either set the case for trial or dismiss it with prejudice.[133]

129. 42 U.S.C. § 9604(b) (1982).

130. 773 F.2d at 889.

131. *Id.* at 889-90.

132. *Id.* at 890-91. The government had conceded in response to OMC's request for admission of facts that it had no scientific proof that the PCBs in the harbor had caused harm to any persons. *See* 789 F.2d at 499. The court in *OMC III* concluded, based on this admission, that "[t]here is no imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance. If there is an emergency, it is almost ten years old." 773 F.2d at 886. *But cf.* 789 F.2d at 499 (noting that the government did not admit that the PCBs would not present a potential threat to health or the environment in the future).

The Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986), includes new provisions broadening EPA's investigatory authority. The Amendments expressly authorize EPA to enter private property "for the purposes of determining the need for response, or choosing or taking any response action under [the CERCLA], or otherwise enforcing the provisions of [the CERCLA]." *Id.* § 104(m), 100 Stat. at 1622 (to be codified at 42 U.S.C. § 9604(e)(1)) (1986). EPA may enter any facility or property (a) where any hazardous substance has been generated, stored, treated, disposed of, or transported from; (b) where a hazardous substance has been or may have been released; and (c) where entry is needed to determine the need for response or to effectuate a response action under the CERCLA. *Id.* Furthermore, entry onto property adjacent to such a facility or property is authorized. *Id.* This authority appears sufficient to encompass the entry authorized by the warrant in *OMC III.*

133. 789 F.2d at 501.

The district court initially dismissed with prejudice the counts in the government's complaint requesting injunctive relief, but indicated that the dismissal would not bar a future cost recovery action against OMC under section 107 of the CERCLA.[134] OMC then filed a motion to reconsider on the ground that the dismissal of the injunctive counts barred a cost recovery suit due to the *res judicata* effect of the dismissal. In response, the government suggested that, to avoid the *res judicata* issue, the district court dismiss the request for injunctive relief without prejudice, on the condition that both the federal government and Illinois execute a covenant not to sue OMC except for a possible cost recovery action arising from the removal of PCBs in Waukegan Harbor.[135] The district court agreed.

On appeal, OMC contended that the district court abused its discretion in dismissing without prejudice. According to OMC, the United States failed to provide sufficient justification for dropping its suit for injunctive relief, pursuing its own cleanup of the harbor, and planning on a section 107 cost recovery action against OMC at the completion of the cleanup. OMC asserted that the true reason for the government's change of course was the recognition that it would lose the pending section 106 action for injunctive relief on the merits.[136] The company requested that the district court be ordered to dismiss the injunctive claim with prejudice, and argued that the *res judicata* effect of such a dismissal would also bar a subsequent section 107 cost recovery action.[137]

In *United States v. Outboard Marine Corp.* (*"OMC IV"*),[138] a panel of the Seventh Circuit held that the district court did not abuse its discretion in dismissing without prejudice, conditioned on the government's execution of a covenant not to sue.[139] The court concluded that the years of anticipated litigation over the injunctive claims, balanced against the "overwhelming interest of the government in protecting the environment from further irreparable damage" from the PCBs in Waukegan Harbor, justified the government's decision to clean up the harbor itself and then possibly seek cost reimbursement from OMC. The court believed that

134. United States v. Outboard Marine Corp., 104 F.R.D. 405 (N.D. Ill. 1984).

135. *See* United States v. Outboard Marine Corp., 789 F.2d 497, 501-02 (7th Cir.), *cert. denied*, 107 S. Ct. 457 (1986).

136. *Id.* at 502-03. OMC also argued that since 1982, the government had the authority to clean up the harbor itself and seek reimbursement for its removal costs under the Clean Water Act, 33 U.S.C. §§ 1259, 1265, 1321 (1982). Having consciously decided to bypass this remedy, the government should not be permitted to change its mind after years of expensive litigation. 789 F.2d at 502-03.

137. 789 F.2d at 507-08.

138. 789 F.2d 497 (7th Cir.), *cert. denied*, 107 S. Ct. 457 (1986).

139. *Id.* at 507.

the district court properly deferred to Congress' grant of discretion to EPA to determine the most economical and feasible means of using the government's limited resources to remedy the pollution problems at hazardous waste sites.[140] The court rejected OMC's contention that it had been unfairly prejudiced by the time and expense incurred in litigating the injunctive claims, noting that the company had "actively participated" in causing this "litigation nightmare."[141] The court did not agree that OMC clearly would have prevailed in a trial of the injunctive claims,[142] and noted that in any event OMC would be able to raise the same defenses in a section 107 cost recovery action as in a section 106 suit for injunctive relief.[143]

III. THE WAUKEGAN HARBOR DECISIONS AND INSTITUTIONAL RESTRAINT

The Waukegan Harbor litigation indicates that the Seventh Circuit is more reluctant than previously to use each of the techniques of institutional activism to promote the objectives of federal environmental statutes. Whereas courts committed to institutional activism seek to expand the opportunities of environmental statutory beneficiaries to seek judicial review, thus increasing litigation, the Seventh Circuit's opinions seem designed to reduce the volume of litigation currently burdening the court. The *OMC* decisions also reflect an unwillingness to expand the substantive scope of environmental legislation; the Seventh Circuit's reluctance to interpret statutory provisions expansively or to fill legislative gaps with federal common law is evident. Finally, although the *OMC* cases present somewhat conflicting evidence, the Seventh Circuit may be more inclined than earlier federal courts were in environmental litigation to defer to the expertise of the implementing agency, at least where the agency interprets its statutory authority narrowly. The Seventh Circuit's reduced reliance on the techniques of institutional activism appears to stem from its emphasis on the need for judicial economy and its fear of usurping the authority of the legislative and executive branches.

140. *Id.* at 503-04.

141. *Id.* at 504.

142. *Id.* at 505.

143. *Id.* at 506. These defenses would include an inquiry into the cost effectiveness of the cleanup proposed or undertaken by the government. *See id.* Having concluded that the district court did not abuse its discretion in refusing to dismiss with prejudice, the court did not reach the issue of the *res judicata* effect of such a dismissal. *Id.* at 508.

A. Institutional Restraint and Economy of Judicial Resources

The Waukegan Harbor cases reflect the Seventh Circuit's desire to economize on judicial resources and, ultimately, to reduce the volume of litigation before the court.[144] The decision in *OMC I* appears at first glance to be inconsistent with this desire; the court there recognized Illinois' right to sue OMC under the federal common law of nuisance. The court held as it did, however, in part because permitting Illinois to sue on this theory would allow consolidation of suits brought by the United States and Illinois (and perhaps of OMC's third party complaint against the company that manufactured the PCBs), "thus conserving scarce judicial resources."[145]

The holdings in the *OMC* cases also reflect the Seventh Circuit's tendency to read Supreme Court precedents expansively, a practice which, although institutionally neutral, is generally likely to reduce litigation in the long run. In both *OMC I* and *OMC II*, the court declined to distinguish Supreme Court decisions concerning the availability of federal common law nuisance actions. In neither case had the Supreme Court directly addressed the issue before the Seventh Circuit. In both, the arguments for distinguishing the earlier Supreme Court precedents were at least plausible.[146] Yet, in both cases, the court expressed its reluctance to narrowly interpret those precedents.[147] In *OMC I*, the court stated that the Supreme Court's 1972 decision in *Milwaukee I*[148] com-

144. In a recent decision not involving environmental issues, Judge Posner indicated that mounting federal caseloads make it imperative that the courts impose sanctions on those bringing groundless litigation. Dreis & Krump Mfg. Co. v. International Ass'n of Machinists & Aerospace Workers, 802 F.2d 247, 255 (7th Cir. 1986).

145. *OMC I*, 619 F.2d at 630. *See also id.* (court's holding might "promote economy of judicial administration" as well as uniformity in result). In *OMC IV*, the court referred disparagingly to the eight-year history of the *OMC* case as a "litigation nightmare." 789 F.2d at 504. The Seventh Circuit's decisions in other recent environmental cases reflect the same concern with judicial economy. *See, e.g.*, Bethlehem Steel Corp. v. EPA, 782 F.2d 645, 652 (7th Cir. 1986) (refusing to permit piecemeal review of a single EPA order in more than one suit); Indiana & Mich. Elec. Co. v. EPA, 21 Env't Rep. Cas. (BNA) 1487, 1489 (7th Cir. 1984) ("Judicial economy would be disserved by having different aspects of the same order reviewed in different courts at once. . . ."). *Cf.* New York v. EPA, 716 F.2d 440, 445 (7th Cir. 1983) (after noting that New York had filed eight suits in challenging EPA's approval of air pollutant emissions increases from mid-western sources, the court noted that an administrative proceeding under the Clean Air Act, which provided a "consolidated forum" for New York's allegations, was the proper forum to challenge the emissions increases).

146. *See, e.g.*, *OMC II*, 680 F.2d at 477 (Illinois' attempt to distinguish *Milwaukee II* was "not an unreasonable one."); *supra* notes 99-101 and accompanying text.

147. *See, e.g.*, *OMC I*, 619 F.2d at 626 (the court is "not so bold" as to assume that language in *Milwaukee I* was merely dictum); *id.* at 629 (refusing to "put[ ] a gloss on the Supreme Court holding in [*Milwaukee I*] that would restrict its application"); *OMC II*, 680 F.2d at 478 ("we cannot hold, after [*Milwaukee II*] that the federal common law of nuisance continues to afford a remedy for [pre-1972] discharges"); *id.* at 478 n.8 (distinguishing the decision in *Milwaukee II* would render the analysis in that case "meaningless").

148. Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

pelled the conclusion that Illinois had a federal common law nuisance cause of action against an in-state pollution source, even though *Milwaukee I* involved a suit by one state against a municipal polluter located in another state.[149] In the short run, the holding in *OMC I* would appear to promote litigation in the federal courts, since it made a federal common law nuisance action available in a wider range of disputes. Proponents of institutional judicial restraint contend, however, that more generally, the laws will be more certain and predictable if the courts routinely interpret Supreme Court holdings broadly and apply them to factual situations distinct from the one addressed by the Court than if they interpret Supreme Court precedents narrowly and independently assess on a case-by-case basis whether to adhere to or distinguish those precedents.[150] Uncertainty concerning the status of the law tends to promote litigation while certainty discourages it.[151] Subsequent to the *OMC I* decision, the Supreme Court held in *Milwaukee II* that the 1972 amendments to the Clean Water Act pre-empted the federal common law of nuisance in the area of water pollution.[152] The Seventh Circuit then held in *OMC II* that the statute pre-empted federal common law remedies even for nuisances resulting from discharges that occurred before 1972.[153] The Seventh Circuit's tendency toward broad interpretation of Supreme Court opinions has continued in more recent environmental cases.[154]

B. Institutional Restraint and the Reluctance to Usurp Legislative and Executive Authority

Two other characteristics of institutional judicial restraint surface in the Waukegan Harbor cases. Both stem from the court's wariness of invading the law and policy-making province of the legislative and executive branches. First, the *OMC* cases appear to indicate that the Seventh Circuit is not as inclined as an institutionally activist court might be to interpret environmental statutes broadly or to supplement such statutes through the creation of common law rights or remedies. Second, the

149. 619 F.2d at 625-30. The court took a similarly expansive view of the *Milwaukee I* case in City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008 (7th Cir. 1979), *cert. denied sub nom.* Louisville & Jefferson County Metro Sewer Dist. v. City of Evansville, 444 U.S. 1025 (1980). There the Court made the federal common law of nuisance available to municipal as well as state plaintiffs. *Id.* at 1018-19.

150. *See* R. POSNER, *supra* note 3, at 252; Wallace, *supra* note 9, at 14.

151. *See* R. POSNER, *supra* note 3, at 255.

152. City of Milwaukee v. Illinois, 451 U.S. 304 (1981).

153. 680 F.2d at 480.

154. *See, e.g.*, Illinois v. City of Milwaukee, 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) (Illinois' state common law claims against Milwaukee were pre-empted by 1972 amendments to the Clean Water Act).

court is more inclined than an institutionally activist court would be to defer to agency expertise when reviewing questions of statutory implementation.[155] The court may refuse to defer, however, when the agency interprets its authority broadly, since deference in that situation would conflict with the court's tendency to retreat from broad statutory construction as a means of promoting environmental legislative objectives.

Two of the *OMC* opinions demonstrate the Seventh Circuit's reluctance to interpret environmental statutes broadly or to supplement such statutes with rights or remedies not expressly sanctioned by Congress. In *OMC III*, the court refused to interpret EPA's investigatory authority under the CERCLA to include the right to enter a privately-owned disposal site to plan a hazardous waste cleanup operation.[156] Finding the applicable CERCLA provisions[157] unambiguous, the court declined to act as "a committee to consider statutory amendments."[158] Similarly, in *OMC II*, following the Supreme Court's decision in *Milwaukee II*, the court refused to supplement the Clean Water Act's mechanisms for dealing with pre-1972 pollutant discharges by affording federal common law remedies to Illinois. The lesson of *Milwaukee II*, the court said, "is that once Congress has addressed a national concern, our fundamental com-

155. The *OMC III* decision illustrates a third technique of institutional self-restraint attributable to the court's desire to steer clear of confrontations with the legislature—statutory interpretation to avoid raising serious constitutional questions. The court interpreted EPA's investigatory authority narrowly under the CERCLA in part to avoid having to address whether EPA's entry onto and use of OMC's property constituted a compensable taking of property. *See OMC III*, 773 F.2d at 890. *See generally* R. POSNER, *supra* note 3, at 285 ("Construing legislation to avoid constitutional questions, as well as to avoid actual nullification, is thus one of those buffering devices by which the frictions created by the institution of judicial review are minimized.").

156. The court rejected EPA's "selective and expanded" reading of the statute to the contrary. 773 F.2d at 889.

157. 42 U.S.C. § 9604(a), (b), (e) (1982).

158. *OMC III*, 773 F.2d at 890. The court stated that it would not, "out of a zeal to rid our environment of its hazards, rewrite the statute for the EPA. Congress is very capable of doing that." *Id.* Congress in fact demonstrated that capability when it expanded EPA's investigatory authority to include a right of entry on private property in the 1986 amendments to the CERCLA. *See* Pub. L. No. 99-499, § 104(m), 100 Stat. 1613, 1622 (1986); *supra* note 132.

Other recent environmental decisions by the Seventh Circuit reflect the same fear that investing EPA with authority not apparent on the face of the statute through expansive statutory interpretation would involve the court in a legislative function. *See, e.g.*, Bethlehem Steel Corp. v. EPA, 723 F.2d 1303, 1309 (7th Cir. 1983); Sierra Club v. Indiana-Kentucky Elec. Corp., 716 F.2d 1145, 1154 (7th Cir. 1983). *But see* Scott v. City of Hammond, 741 F.2d 992, 998 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) (the Clean Water Act "should be liberally construed to achieve its objectives"). This fear is not confined to environmental litigation. *See, e.g.*, Community & Economic Dev. Ass'n v. Suburban Cook County Area Agency on Aging, 770 F.2d 662, 667 (7th Cir. 1985) (citing Simmons v. ICC, 766 F.2d 1177, 1181 (7th Cir. 1985)) (If Comprehensive Older Americans Act Amendments of 1978 are to be supplemented for the benefit of existing providers of health care services for the elderly, "it must be done by Congress, not the courts."); United States v. Torres, 751 F.2d 875, 885-86 (7th Cir. 1984) (citing Hand, *How Far Is a Judge Free in Rendering a Decision*, in THE SPIRIT OF LIBERTY 103, 108 (Dilliard 3d ed. 1960)) ("But judges are not authorized to amend statutes even to bring them up to date"; to do so constitutes "judicial usurpation" of legislative power.).

mitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution."[159]

The decision in *OMC IV* reflects the court's inclination to defer to agency expertise in reviewing issues of statutory implementation. The Seventh Circuit, like the other federal courts, typically defers to the agency on its resolution of factual issues involving technical matters[160] and in its right to make policy choices delegated to it or left unaddressed by Congress.[161] The court in *OMC IV* accordingly deferred to EPA's determination that the PCB deposits in Waukegan Harbor presented a threat of irreparable harm to the public health and the environment and to its choice of the appropriate mechanism for minimizing this threat most effectively—through EPA cleanup followed by a section 107 cost recovery action against OMC, rather than through continuation of EPA's section 106 action for injunctive relief.[162]

The *OMC* decisions indicate that the degree of deference the Seventh Circuit deems appropriate in judicial review of an agency's conclusions of law is only slightly narrower. Judicial attempts to explain the standard of review applied to questions of statutory interpretation have done little to dispel the confusion surrounding this issue.[163] The Seventh Circuit's statements in recent environmental cases appear no less than schizophrenic. In some instances, the court regards issues of statutory interpretation as subject to de novo judicial review, since the agency has no more expertise in interpreting statutory language than a court does.[164] In the bulk of the court's recent environmental decisions addressing the issue, however, the Seventh Circuit does afford considerable deference to

159. *OMC II*, 680 F.2d at 478. As the court interpreted *Milwaukee II*, federal common law "is thus appropriate only when a court is compelled to consider a federal question to which Congress has not provided an answer." *Id.* at 475.

160. *See, e.g.*, New York v. EPA, 716 F.2d 440, 444 (7th Cir. 1983) (concerning EPA's choice of a short-range model for assessing the impact of emissions on air quality).

161. *See, e.g.*, Cerro Copper Prods. Co. v. Ruckelshaus, 766 F.2d 1060, 1067 (7th Cir. 1985); Wisconsin Elec. Power Co. v. Costle, 715 F.2d 323, 329 (7th Cir. 1983).

162. *OMC IV*, 789 F.2d at 503-04 (emphasizing EPA's discretion in determining the most efficient uses of Superfund resources and in assessing the kind of action demanded by placement of a hazardous waste site on the NPL).

163. Professor Rodgers suggests that the following "rule" can be derived from environmental cases: courts "sometimes defer, sometimes not, depending upon indeterminate judicial inclinations of the moment." W. RODGERS, ENVIRONMENTAL LAW: AIR AND WATER § 4.3, at 34 (1986). *See generally* Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

164. *See, e.g.*, Central Ill. Pub. Serv. Co. v. EPA, 594 F.2d 636, 637 (7th Cir. 1979); Porter County Chapter of the Izaak Walton League v. AEC, 515 F.2d 513, 519 (7th Cir. 1975), *rev'd sub nom.* Northern Ind. Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League, Inc., 423 U.S. 12 (1975). *Cf.* Bethlehem Steel Corp. v. EPA, 723 F.2d 1303, 1309 (7th Cir. 1983) (since issue of statutory interpretation is not a technical one, automatic deference to the agency's view is inappropriate). *See generally* Edwards, *Judicial Review of Deregulation*, 11 N. KY. L. REV. 229, 256 (1984) (concerning judicial review of agency decisions based on statutory language and purpose).

EPA's interpretation of its authorizing legislation.[165]

It has been suggested that the confusion surrounding the formulation of a standard for the scope of judicial review of agency conclusions of law stems from the failure to recognize that "conclusions of law" often encompass a mixture of factual determination, statutory interpretation, and policy formulation.[166] Some judges and administrative law scholars contend that judicial deference to an agency's legal conclusions is often appropriate for two reasons, one relating to the court's competence and the other to the scope of its authority. First, the agency may have greater expertise than a court. To the extent that "conclusions of law" actually encompass the determination of complex factual matters, the court should defer to the agency's comparatively greater expertise on technical matters.[167] Even when an agency decision involves a more purely legal component, judicial deference is appropriate because the agency develops over time an expertise concerning the ways in which statutory provisions interrelate and the effects of a particular statutory interpretation on the agency's ability to achieve statutory objectives.[168] Second, deference to agency legal conclusions may be dictated by the need to avoid judicial usurpation of legislative and executive branch authority. Many statutory provisions are not amenable to straight-forward, clear-cut interpretation. Congressional use of vague or ambiguous language in effect constitutes a legislative delegation of policy-making authority to the implementing agency. Judicial second-guessing of agency interpretations in these situations may amount to little more than substitution of the court's own policies for those Congress empowered the agency to make.[169] In other words, a refusal to defer would stray beyond the bounds of legitimate institutional activism into unauthorized policy activism. The Seventh Circuit's recent environmental decisions indicate that it is inclined to defer to agency conclusions of law for both of these reasons.[170]

165. *See, e.g.*, Mobil Oil Corp. v. EPA, 716 F.2d 1187, 1189 (7th Cir. 1983), *cert. denied sub nom.* Mobil Oil Corp. v. United States, 466 U.S. 980 (1984); Public Serv. Co. v. EPA, 682 F.2d 626, 632 (7th Cir. 1982), *cert. denied*, 459 U.S. 1129 (1983); United States Steel Corp. v. EPA, 605 F.2d 283, 293 (7th Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).

166. *See* ADMINISTRATIVE LAW, *supra* note 7, § 7.1, at 351; *id.* § 7.4.3, at 375; W. RODGERS, *supra* note 163, § 4.3A, at 32-34. *See generally* NLRB v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961) (concerning controversy over whether application of legal standards to facts is question of law or fact); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546-50 (1965).

167. *See* ADMINISTRATIVE LAW, *supra* note 7, § 7.4.3, at 377; Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening*, 45 N.Y.U. L. REV. 201, 203 (1970).

168. *See* ADMINISTRATIVE LAW, *supra* note 7, § 7.4.3, at 377 (citing Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 329 (1979)); Breyer, *supra* note 163, at 368-69.

169. *See* ADMINISTRATIVE LAW, *supra* note 7, § 7.1, at 351-52; *id.* § 7.4.3, at 375-76; Breyer, *supra* note 163, at 369-70.

170. *See, e.g.*, Bethlehem Steel Corp. v. EPA, 782 F.2d 645, 653 (7th Cir. 1986) (deferring to

The Seventh Circuit's predisposition to defer to agency legal conclusions should not be equated, however, with unlimited judicial deference.[171] As a matter of due process and to ensure the availability of meaningful judicial review, the court continues to insist that the agency provide a statement clearly explaining the reasons for its conclusions.[172] If the agency's explanation reveals that its action is irreconcilable with its governing statutory authority, the court will take the agency to task.[173] Thus, in *OMC III*, where EPA's right to enter private waste sites presented an issue of law easily segregable from any of the agency's factual or policy determinations, the court afforded no deference at all to the agency's legal conclusion.[174] Because "[t]he statute is not as ambiguous as it is lacking,"[175] the court refused to provide EPA with the help it needed to accomplish its "noble purposes."[176]

The court in *OMC III* may have overcome its hesitation to second-guess the agency's statutory interpretation because deference to the agency's view of its authority under the CERCLA would have prevented the court from following its inclination to construe regulatory statutes narrowly. The court's refusal to redraft what it viewed as a narrowly drawn statute prevailed over the tendency, reflected in other environmen-

EPA's technical expertise in disapproving state's proposed methodology for meeting particulate emission limitations applicable to steel producers' coke ovens); River Rd. Alliance, Inc. v. Corps of Eng'rs, 764 F.2d 445, 449 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1283 (1986) (deferring to agency's decision not to prepare an environmental impact statement ("EIS") concerning proposed construction of temporary barge fleeting facility, in part because the agency's decision involved interpretation of NEPA's requirement that an EIS be prepared for actions with potential for a "significant" environmental impact, a concept with "no determinate meaning." The statute's interpretation involved predictive judgments that should be set aside only upon proof of abuse of discretion.).

171. *See, e.g.*, NLRB v. Indianapolis Mack Sales & Serv., Inc., 802 F.2d 280, 283 (7th Cir. 1986) (Although the substantial evidence tests accords the agency "considerable discretion, it does not mean that we will simply rubber-stamp its decisions, thereby substituting judicial abdication for judicial review.").

172. *See* Bethlehem Steel Corp. v. EPA, 638 F.2d 994, 1004 (7th Cir. 1980).

173. *See, e.g.*, Van Abbema v. Fornell, 807 F.2d 633 (7th Cir. 1986), where the court ordered the Army Corps of Engineers to reconsider its decision to issue a permit to build a facility for transloading coal from trucks to barges on the Mississippi River. According to the court, the Corps' conclusions were "entirely indifferent to the facts," *id.* at 642, and were based on "a record of miscalculations followed by recalculations apparently intended only to bolster a decision already made." *Id.* at 643.

174. Instead, the court's rather sarcastic if not strident opinion derides what the court regarded as EPA's attempt to circumvent the limits on its statutory authority. *See, e.g.*, *OMC III*, 773 F.2d at 888 (EPA's "ingenious" separation of its remedial operation into two phases was an attempt to begin cleanup "without its lack of authority being so obvious.").

175. *Id.* at 890.

176. *Id.* at 890-91. In two cases where the court considered the limits on the scope of EPA's investigatory authority to be less clear, the court deferred to EPA's statutory interpretations. *See* CED's Inc. v. EPA, 745 F.2d 1092, 1099-1100 (7th Cir.), *cert. denied*, 471 U.S. 1015 (1984) (Clean Air Act gives EPA the authority to inspect and copy records of manufacturer of device that can be used improperly to replace catalytic converter in automotive exhaust systems); *Mobil Oil Corp.*, 716 F.2d 1187 (Clean Water Act permits EPA to sample untreated wastestreams at petroleum refinery).

tal cases, to defer to EPA.[177] The court's fear of interfering with executive branch discretion was overcome by its conviction that acceptance of EPA's view would constitute usurpation of Congress' authority to define the scope of EPA's investigatory authority. Despite the Seventh Circuit's refusal to defer to EPA's legal conclusions, then, the *OMC III* decision may ultimately reflect the exercise of institutional restraint.[178]

IV. The Retreat From Institutional Activism: A Broader View

The late 1960's and early 1970's witnessed a flurry of institutional judicial activism in environmental litigation. The federal courts employed a variety of techniques to minimize the opportunities of administrative agencies to interfere with new congressional mechanisms to protect the environment. The Seventh Circuit's decisions in the Waukegan Harbor litigation between 1980 and 1986, along with its opinions in other recent environmental cases, depict a court which apparently believes its role in the process of statutory implementation should be much more circumscribed than previously. This retreat, however, is not unique to environmental litigation. Rather, it is part of a broader movement, led by the Supreme Court and exemplified by Seventh Circuit decisions in non-environmental cases, which has been motivated by judicial concerns that the earlier institutional activism overstepped the bounds of both judicial authority and competence.

A. The Retreat from Institutional Activism in Environmental Litigation

While the institutional judicial activism of the late 1960's and early 1970's was not confined to environmental litigation, judicial awareness of Congress' strong commitment to environmental protection measures undoubtedly spurred the use of activist techniques to help achieve the objectives of the new environmental laws.[179] Judicial perception of a

177. Similarly, in *OMC I*, the desire for certainty, and a reduction in litigation, through expansive interpretation of Supreme Court precedents resulted in the creation of federal common law rights and expanded access to the federal courts. The court was ultimately able to have its cake and eat it, too, however, when the Supreme Court's decision in City of Milwaukee v. Illinois, 451 U.S. 304 (1981) and the *OMC II* decision slammed shut the door on federal common law nuisance actions.

178. A less charitable characterization of *OMC III* would be that it reflects judicial hostility to what the court perceives as an undue and burdensome intrusion on the rights of a regulated business and a private property owner, and thus represents an example of tortured statutory construction based on policy activism.

179. *See supra* notes 30-36 and accompanying text.

shift in this legislative commitment might account for the recent retreat from institutional activism in the Seventh Circuit's environmental cases.

But legislative interest in and commitment to pollution control have not declined; Congress reauthorized and strengthened the Resource Conservation and Recovery Act in 1984,[180] the Safe Drinking Water Act[181] and the CERCLA[182] in 1986, and the Clean Water Act in 1987.[183] Furthermore, Congress has not reduced the judiciary's role in implementing environmental legislation. The legislature initially authorized judicial review of agency decisions with environmental consequences in part because it distrusted the willingness of administrative agencies to take account conscientiously of the potential environmental consequences of their decisions.[184] The implementation of the CERCLA by former EPA Administrator Anne Gorsuch-Burford raised congressional distrust of that agency to an all-time high.[185] In the few instances in which statutory reauthorizations have altered the role of the courts, Congress has increased, not decreased, private access to the courts concerning environmental matters.[186]

It is somewhat more difficult to assess whether prevailing judicial attitudes toward environmental protection legislation have changed.[187] The election of President Reagan in 1980 brought into power an administration that was more hostile than previous administrations were to government regulation of business.[188] Regulation in areas such as environmental protection was deemed appropriate only to the extent that those proposing to regulate could demonstrate that the benefits it pro-

180. Pub. L. No. 98-616, 98 Stat. 3221 (1984).

181. Pub. L. No. 99-339, 100 Stat. 642 (1986).

182. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

183. Pub. L. No. 100-4, 101 Stat. 7 (1987).

184. *See supra* notes 19-29 and accompanying text.

185. *See generally* SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 98TH CONG., 2D SESS., INVESTIGATION OF THE ENVIRONMENTAL PROTECTION AGENCY: REPORT ON THE PRESIDENT'S CLAIM OF EXECUTIVE PRIVILEGE OVER EPA DOCUMENTS, ABUSES IN THE SUPERFUND PROGRAM, AND OTHER MATTERS (Comm. Print 1984). This distrust has been reflected in the increased rise of legislative deadlines to force EPA to act. *See, e.g.*, Pub. L. No. 99-499, § 116, 100 Stat. 1613, 1653-54 (1986).

186. *See, e.g.*, Pub. L. No. 99-499, § 206, 100 Stat. 1613, 1703-05 (1986) (adding a citizen suit provision to the CERCLA for the first time).

187. It is clear that broader public attitudes have not. Opinion polls indicate that public support for government regulation to protect the quality of the nation's natural resources is very strong and growing stronger. *See, e.g.*, Oakes, *Back to Environmentalism*, N.Y. Times, Nov. 10, 1986, at 21, col. 2.

188. *See generally* Edwards, *supra* note 164; Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505 (1985) (judicial review of administrative agency's discretionary actions); *Administrative Law During Deregulation—Recent Developments*, 38 ADMIN. L. REV. 105-231 (1986) (concerning the changes in the roles and decisions of administrative agencies).

duced would outweigh its costs.[189] To the extent that the President's judicial appointees agree with these views, their retreat from the techniques of institutional activism could reflect a new policy activism[190] which is unreceptive to environmental regulation or at least cost-inefficient regulation.[191] The accuracy of this hypothesis might be tested if a judge committed to institutional restraint were asked to review an agency decision that reflected a more favorable attitude toward environmental regulation than his or her own. If institutional judicial activism, such as a refusal to defer to the agency's resolution of legal or policy questions, were to reemerge at that point, then one might suspect that the judge's adherence to "institutional restraint" is in part attributable to policy judicial activism.[192]

B. The Retreat from Institutional Activism in a Broader Regulatory Context

Realistically, it will be very difficult if not impossible to determine whether judicial attitudes about the desirability of regulation have changed, and whether those attitudes have contributed to the retreat from institutional activism in environmental litigation. It is already clear, however, that broader judicial philosophies about the proper role of the courts in our system of government have evolved since the 1960's and early 1970's. This evolution appears to be the principal cause of a retreat from institutional activism throughout the federal judiciary in cases involving all kinds of regulatory programs.

Of the three characteristics of institutional activism described above, the tendency to expand the opportunities of statutory beneficiaries to participate in agency proceedings and to secure access to the courts has been

189. *See* Exec. Order No. 12,498, 50 Fed. Reg. 1,036 (1985); Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601, at 431-34 (1982). *See generally* Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986).

190. Some judges concede that a change in judges' personal attitudes toward regulation in a particular area could account for a change in their willingness to intervene in agency decisionmaking. *See, e.g.*, Breyer, Vermont Yankee *and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833, 1833 (1978) ("I believe that, in practice, the reviewing standards courts apply often reflect unarticulated assumptions about, or attitudes toward, the substantive aspects of the subject matter being reviewed."); Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 224 ("I am not bothered overmuch by the undoubted truth that a reviewing court is more likely to take a charitable view toward error in subsidiary findings when it sympathizes with the agency's end result, than when it does not."). *See also* Kaufman, *supra* note 167, at 209.

191. *See, e.g.*, Natural Resources Defense Council, Inc. v. EPA, 804 F.2d 710 (D.C. Cir. 1986) (deferring to EPA's view that it may consider cost and technological feasibility in deciding whether to issue standards to control the emission of hazardous air pollutants under the Clean Air Act, 42 U.S.C. § 7412 (1982)).

192. *See, e.g., supra* note 178.

most dramatically reversed. The Supreme Court has prohibited the courts from imposing on the agencies procedures beyond those required by due process or specified in the APA and applicable organic legislation.[193] In recent years, it has tightened rules governing the constitutional criteria for standing to sue,[194] made it much more difficult for the courts to imply a private right of action to enforce regulatory statutes,[195] and created a presumption that an agency's discretionary decision not to pursue statutory enforcement is unreviewable.[196] The Seventh Circuit, among others, has followed the Court's lead,[197] especially in its reluctance to imply private statutory rights of action. The Seventh Circuit recently noted that the federal courts once "generously conferred rights of action on private litigants."[198] Since the Supreme Court's 1975 decision in *Cort v. Ash*,[199] however, "implied private rights of action have been doled out parsimoniously."[200] According to the Seventh Circuit, "there is now a strong presumption against the creation of private rights

193. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). *Cf.* Beerly v. Department of Treasury, 768 F.2d 942, 948-49 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1184 (1986) (Due process did not require the use of "expensive and time-consuming procedures" for oral testimony and cross-examination in Comptroller of the Currency's appraisal of the interests of shareholders dissenting from national bank merger.); United Air Lines, Inc. v. CAB, 766 F.2d 1107, 1120-21 (7th Cir. 1985) (Agency resolving antitrust issue need not hold evidentiary hearing with right to cross-examination.).

194. *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984); City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975). *But see* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) (environmental group and individuals living near nuclear power plant had standing to challenge constitutionality of the Price Anderson Act, which imposes limits on the liability of power plant operators in the event of a "nuclear incident").

195. The Court's opinion in Cort v. Ash, 422 U.S. 66 (1975), which set forth a four-part test for the implication of a private right of action, signalled a retreat from the Court's earlier willingness, in cases such as J.I. Case Co. v. Borak, 377 U.S. 426 (1964), to imply such actions. The Court has since restricted the availability of implied rights of action still further. *See, e.g.*, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); California v. Sierra Club, 451 U.S. 287 (1981). *See also* R. POSNER, *supra* note 3, at 270-72.

196. *See* Heckler v. Chaney, 105 S. Ct. 1649 (1985). Recent decisions in various regulatory contexts appear to indicate that the Seventh Circuit is reluctant to extend *Heckler*'s "presumption of unreviewability" beyond agency decisions not to enforce regulatory provisions. *See, e.g.*, Cardoza v. Commodity Futures Trading Comm'n, 768 F.2d 1542, 1548-51 (7th Cir. 1985) (agency decision not to review commodities exchange disciplinary action). *See also* North Am. Telecommunications Ass'n v. FCC, 772 F.2d 1282 (7th Cir. 1985) (FCC order setting conditions for telephone operating companies to market telephone equipment); Beerly v. Department of Treasury, 768 F.2d 942, 944-45 (7th Cir. 1985) (Comptroller of the Currency's appraisal of interests of shareholders dissenting from bank merger).

197. *See, e.g.*, Northside Sanitary Landfill, Inc. v. Thomas, 804 F.2d 371 (7th Cir. 1986) (applicant for hazardous waste management permit has no standing to challenge EPA remarks made during permit denial proceedings).

198. Community & Economic Dev. Ass'n v. Suburban Cook County Area Agency on Aging, 770 F.2d 662, 664 (7th Cir. 1985).

199. 422 U.S. 66 (1975). *See supra* note 195.

200. *Community & Economic Dev. Ass'n*, 770 F.2d at 664.

of action by implication."[201] In recent cases involving administrative decisions denying a grant of federal funds for nutrition care services for the elderly and refusing to overturn a commodities exchange disciplinary determination, the Seventh Circuit applied that presumption in refusing to imply a private right of action.[202]

The Supreme Court has also led the way in the federal courts' reduced reliance on the remaining techniques of institutional activism, although the courts' avoidance of these techniques has not been as consistent as their refusal to expand procedural opportunities for participation before the agency and in court. The Supreme Court, for example, has engaged in narrow statutory interpretation[203] and has held, in the face of statutory language that appeared to indicate the contrary, that federal common law remedies were pre-empted by federal statute.[204] Finally, the high Court's inclination to defer to agency legal conclusions has been pronounced,[205] although the Court has overturned the actions of agencies whose explanations revealed the absence of any consideration of relevant statutory factors.[206] Similarly, although the Seventh Circuit occasionally refers to the "hard look" doctrine,[207] and provides relatively little deference to the agencies when they change course without adequate explanation,[208] it typically goes out of its way to defer to agency factual,[209] policy,[210] and legal[211] conclusions.

201. *Id.* Indeed, the court was almost willing to concede "that the federal judiciary has simply done away with implied rights of action *sub silentio*." *Id.*

202. *See id.*; Cardoza v. Commodity Futures Trading Comm'n, 768 F.2d 1542 (7th Cir. 1985).

203. *See, e.g.*, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980) (Occupational Safety and Health Administration may promulgate health and safety standards under § 6(b)(5) of the Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5) (1982), only upon a showing of a significant risk of harm). This case is analyzed in Schroeder & Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation, and Information*, 72 GEO. L.J. 1231, 1260 (1984). *But see* United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455 (1985) (Army Corps of Engineers can apply Clean Water Act's dredge and fill permit requirements, 33 U.S.C. § 1344 (1982), to wetlands adjacent to navigable waters).

204. *See* City of Milwaukee v. Illinois, 451 U.S. 304 (1981). For a criticism of the Court's analysis in that case and a suggestion that the result is more consistent with policy judicial activism than with an attempt to carry out legislative intent, see Glicksman, *supra* note 67, at 159-67.

205. *See, e.g.*, Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116 (1985); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983).

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

207. *See* Van Abbema v. Fornell, 807 F.2d 633, 636 (7th Cir. 1986).

208. *See* Rosenthal & Co. v. Commodity Futures Trading Comm'n, 802 F.2d 963, 969-74 (7th Cir. 1986).

209. For a particularly broad statement of the scope of such deference, see Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1385 (7th Cir. 1986) ("Our only function is to determine whether the [FTC's] analysis of the probable effects of these acquisitions on hospital competition in Chattanooga is so implausible, so feebly supported by the record, that it flunks even the deferential test of substantial evidence.").

210. *See* Communication Workers of Am. v. NLRB, 784 F.2d 847, 852 (7th Cir. 1986) (discre-

C. *The Retreat from Institutional Activism and Separation of Powers Concerns*

The federal courts' recent withdrawal from the techniques of institutional activism appears to be attributable to both constitutional and practical concerns. Like the concerns that prompted the emergence of institutional activism in the late 1960's and early 1970's, the concerns responsible for the recent trend toward institutional restraint stem from the separation of powers doctrine. Institutional activism in the earlier environmental litigation was based on the belief that the courts played a vital role in preventing the executive branch from overstepping the bounds of its authority by checking the agencies' inclination to ignore congressional commands.[212] More recently, the courts seem more concerned about judicial than executive branch infringement upon the authority of the other branches of government.[213] Judge Wallace of the Court of Appeals for the Ninth Circuit has described the philosophy of judicial restraint as rooted in the notion that the judge should "bear in mind the value of deference to democratically elected officials and lawmakers" and not substitute his "own moral and political values and sociological theories for those of our elected representatives."[214]

Proponents of institutional judicial restraint agree with the institutional activists' contention that the legislative process is subverted when a captured agency hands a particular group "a victory that was denied it in the legislative arena through the efforts of another faction."[215] As Judge Posner of the Seventh Circuit recently explained in an environmental case, a court's responsibility is to "enforce the [legislative] compromise, not the maximum position of one of the interest groups among which the compromise was struck."[216] Thus, even judges exercising in-

tion afforded NLRB to execute the National Labor Relations Act "is scarcely reviewable at all, because the agency's decision *is* the implementation for which the law calls" (emphasis in original)).

211. *See* Rosenthal & Co. v. Commodity Futures Trading Comm'n, 802 F.2d 963, 969 (7th Cir. 1986) (court deferred to agency's interpretation of § 2(a)(1) of the Commodity Exchange Act, 7 U.S.C. § 4(a)(1) (1982)); Wisconsin v. Bowen, 797 F.2d 391, 397 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 926 (1987) (court should defer to agency's "reasonable and statutorily permissible" interpretations). *But see* Illinois v. HHS, 772 F.2d 329, 332 (7th Cir. 1985) (stating, without explaining why, that it would not be appropriate to afford *any* deference to the agency's legal determinations).

212. *See, e.g.*, Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d 1109, 1111 (D.C. Cir. 1971). *See also supra* notes 25-32 and accompanying text.

213. *See, e.g.*, *OMC III*, 773 F.2d at 890 (refusing to bestow upon EPA powers that Congress withheld from the agency); *OMC II*, 680 F.2d at 478 (refusing to scrutinize the sufficiency of the scheme Congress created for the control of water pollution).

214. Wallace, *supra* note 9, at 16. *See also* R. POSNER, *supra* note 3, at 207-08 (concept of "structural" judicial restraint involves limiting the courts' power over the executive and legislative branches of the federal government).

215. Bethlehem Steel Corp. v. EPA, 723 F.2d 1303, 1309 (7th Cir. 1983).

216. *Id.* Some scholars describe the legitimate role of the courts in interpreting statutes quite

stitutional restraint insist upon a statement of the reasons supporting an agency's decisions.[217] Such judges are willing to reverse a decision accompanied by an explanation which reveals that, by ignoring a clear legislative determination, the agency changed the outcome of a legislative battle.[218] For similar reasons, agency decisions based upon *ex parte* contacts by less than all of the affected interests are subject to reversal.[219]

The proponents of institutional restraint, however, perceive a threat to the legislative compromise not only in the captured agency, but also in the activist court. They view each of the techniques of institutional activism as a potential threat to the efficacy of the compromise reached in the legislative bargaining process (or to the legislative definition of the public interest). An unduly expansive application of constitutional standing criteria, for example, leads to judicial evaluation of issues which the legislature has either already decided or concluded the executive branch should resolve.[220] The implication of private rights of action not clearly authorized by statute permits members of interest groups whose enforcement priorities differ from those of the agency to exercise a prosecutorial clout not afforded them in the legislative process.[221] The expansion of statutory coverage through broad statutory interpretation[222] or the creation of

differently. *See, e.g.*, Macey, *supra* note 22, at 227 (judicial focus on interpretation of statutory language, rather than on an attempt to discern and enforce the legislative compromise among special interest groups, transforms statutes designed to benefit those groups into statutes that further "the public interest").

217. *E.g.*, Bethlehem Steel Corp. v. EPA, 638 F.2d 994, 1004 (7th Cir. 1980). For a comprehensive treatment of the derivations and functions of, and the justifications for, the reasons requirement, see generally Shapiro & Levy, *supra* note 8.

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

219. *See* cases cited in Sunstein, *supra* note 22, at 62 n.148.

220. *See* ADMINISTRATIVE LAW, *supra* note 7, § 5.4, at 141-42 (Injury in fact requirement responds well to the fear of the framers of the Constitution that "allowing the judiciary to decide legal issues in the abstract inevitably would enmesh the courts in debates concerning the best policies to pursue and the best methods to adopt those policies—matters the framers believed should be dealt with exclusively by the legislative and executive branches of government.").

221. *See* Community & Economic Dev. Ass'n v. Suburban Cook County Area Agency on Aging, 770 F.2d 662, 667 (7th Cir. 1985) ("[T]he judiciary may not extend the coverage of [regulatory legislation] simply because it might disagree with the legislature's allocation of rights and remedies."). *See also* Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1207 (1982) ("[P]rivate rights of action may usurp the agency's responsibility for regulatory implementation, decrease legislative control over the nature and amount of enforcement activity, and force courts to determine in the first instance the meaning of a regulatory statute."); *id.* at 1221 ("By enlisting new enforcement resources, courts that create private remedies substantially affect the content of regulatory policy—a task properly reserved for the political branches."); R. POSNER, *supra* note 3, at 271.

222. *See, e.g.*, Bethlehem Steel Corp. v. EPA, 723 F.2d 1303, 1309 (7th Cir. 1986), where Judge Posner stated that the court "would be upsetting the balance of power embodied in the legislation, rather than merely completing the legislative scheme, if we allowed the EPA to act without a clearer statutory authorization than we can find." *See also* Porter County Chapter of the Izaak Walton League v. AEC, 533 F.2d 1011, 1019 (7th Cir.), *cert. denied*, 429 U.S. 945 (1976) (judicial protection

federal common law remedies[223] provides the interest groups pressing the courts for such expansion with substantive rights they were unable to convince the legislature to create.

Finally, proponents of institutional restraint argue that a court's refusal to afford ample deference to an agency's statutory interpretation and implementation may constitute illegitimate policy activism if it improperly intrudes upon legislative and executive branch prerogatives. Challenges to agency decisions frequently involve unclear or ambiguous statutory provisions which reflect a legislative unwillingness or inability to agree on more specific language. In such a case, the legislature has decided to leave to the agency the tasks of policy formulation and statutory interpretation.[224] A court that questions the consistency of the agency's interpretation with the legislature's "intent" is therefore trying to enforce a bargain that was never consummated, or at least a bargain different from the one the legislature did strike (which was, in effect, an agreement not to agree). The court thereby interferes with the agency's attempt to accomplish its assigned task: the definition and enforcement of the bargain Congress never reached. This kind of judicial interference improperly nullifies the balance struck in the legislature in the same way that a captured agency ignoring clear legislative commands would. Separation of powers concerns therefore dictate deference to the agency's legal conclusions, so that the legislature's judgment that policy is best formulated by the agency is left intact.[225]

This constitutional justification for institutional restraint received its most important endorsement in the Supreme Court's 1984 decision in the *Chevron* case.[226] In deferring to EPA's application of the "bubble" concept[227] to nonattainment areas[228] under the Clean Air Act, the Court

of those opposed to the development of nuclear energy facilities would require assumption of "broader judicial power in the matter than the law permits").

223. *See* City of Milwaukee v. Illinois, 451 U.S. 304, 315 (1981) ("Our 'commitment to the separation of powers is too fundamental' to continue to rely on federal common law 'by judicially decreeing what accords with "common sense and the public weal" ' when Congress has addressed the problem.") (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)).

224. *See* Communication Workers of Am. v. NLRB, 784 F.2d 847, 852 (7th Cir. 1986), which discusses the delegation to the NLRB in § 10(c) of the National Labor Relations Act of the power to issue "cease and desist" orders. The Act "leaves in the Board's charge the selection of any 'affirmative action' that will 'effectuate the policies of' the statute. . . . This sort of discretion is scarcely reviewable at all . . . ." *See also* ADMINISTRATIVE LAW, *supra* note 7, § 7.1, at 352.

225. *See* ADMINISTRATIVE LAW, *supra* note 7, § 7.4.3, at 375-76. It is not clear whether, and if so when, Congress' commitment of policy judgments to an agency would itself violate the separation of powers doctrine as an impermissible delegation of legislative authority.

226. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

227. The "bubble" concept permits the owner of a stationary source of air pollution to exceed applicable emission limitations for that source, provided the excess is offset by reduced emissions from another stationary source within the same plant. *See id.* at 840.

stated:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."[229]

D. The Retreat from Institutional Activism and Competence Concerns

Proponents of institutional restraint question more than the constitutional authority of the courts to employ the techniques of institutional activism to prevent executive branch infringement upon legislative authority; they also doubt the courts' competence to ensure agency adherence to the legislative will. Judges refusing to interfere with agency implementation of regulatory statutes often concede that they are unable to match the agency's expertise concerning matters within its regulatory jurisdiction.[230] Even if the courts are capable of understanding the issues raised by agency decisions, proponents of institutional restraint question

228. A nonattainment area is one which has not met the statutory deadline for achieving the national ambient air quality standards for a so-called criteria air pollutant. *See* 42 U.S.C. § 7501(2) (1982).

229. *Chevron U.S.A., Inc.*, 467 U.S. at 865-66 (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)). It is interesting that none of the Supreme Court Justices who would have invalidated recent delegations of policy-making authority under the non-delegation doctrine objected on that ground to the Clean Air Act's delegation to EPA in the "bubble case." *See, e.g.*, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring).

230. *See, e.g.*, River Rd. Alliance, Inc. v. Corps of Eng'rs, 764 F.2d 445, 451 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1283 (1986); Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1019 (7th Cir. 1984). Judge Bazelon of the District of Columbia Circuit advanced this position well: "If, as Socrates said, it is a wise man who knows what he does not know, a discussion of 'coping with technology through the legal process' should allow me to display uncommon wisdom—because technology, and science, are things about which I frankly know very little." Bazelon, *Coping With Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 817 (1977). *See also* Kaufman, *supra* note 167, at 201. Academic commentators have urged judicial restraint for the same reason. *See*,

the efficacy of the activist techniques. A court convinced that the agency has subverted the legislature's will can only remand the matter to the agency; it cannot make the ultimate regulatory decision. There is no guarantee that the agency will rethink the issues or even try to come any closer to implementing its statutory mandate the second time around. It may only dress up the same substantive decision with an explanation more likely to satisfy the reviewing court.[231] Accordingly, some judges have begun to conclude that the costs of employing the techniques of institutional activism (primarily delay) do not justify the benefits those techniques produce (a slight, if any, improvement in the quality of agency decision-making).[232]

The ranks of the advocates of institutional restraint may be growing due to the mounting caseloads and backlogs in federal court dockets. Justice Scalia and Judge Posner, among others, contend that heavier caseloads may impair the federal courts' ability to function effectively.[233] The delay caused by docket overload, for example, may cause the deterioration of evidence, require courts to decide which cases to expedite and which to put on the back burner, and reduce the time available to study the record and explore the implications of agency decisions subject to review.[234] Perhaps for these reasons, "the premise of judicial restraint," according to Judge Wallace, is "that courts are hearing too wide a range of cases."[235] Advocates of institutional restraint agree that judicial concern over the effects of docket overload has curtailed courts' willingness to resort to all three of the major varieties of the techniques of institutional activism. This concern probably has contributed to the narrowing

e.g., ADMINISTRATIVE LAW, *supra* note 7, § 5.1.4, at 125, § 7.1, at 351; Verkuil, *Judicial Review of Informal Rulemaking: Waiting for* Vermont Yankee II, 55 TUL. L. REV. 418, 427 (1981).

231. *See* ADMINISTRATIVE LAW, *supra* note 7, § 7.1, at 351-52; Diver, *supra* note 19, at 428-29. As long ago as 1973, Professor Sax criticized NEPA on this basis: "I cannot imagine a more dubious example of wishful thinking. I know of no solid evidence to support the belief that requiring articulation, detailed findings or reasoned opinions enhances the integrity or propriety of the administrative decisions." Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239, 239 (1973). *Cf.* Van Abbema v. Fornell, 807 F.2d 633, 643 (7th Cir. 1986) (court's remand to comply with NEPA is not "merely to require a longer record and more paper").

232. *See, e.g., River Rd. Alliance*, 764 F.2d at 451 (7th Cir. 1985) (questioning the wisdom of requiring agencies to prepare routinely environmental impact statements under NEPA); ADMINISTRATIVE LAW, *supra* note 7, § 6.1.4, at 126. *Cf.* Wallace, *supra* note 9, at 7 (courts "become cost-ineffective when asked to re-engineer social structures and reorganize social priorities").

233. *See* N.Y. Times, Feb. 16, 1987, at 1, col. 1; R. POSNER, *supra* note 3, at 208.

234. *See* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 554-55 (1968). *See generally* R. POSNER, *supra* note 3.

235. Wallace, *supra* note 9, at 11. *See also* R. POSNER, *supra* note 3, at 207 (the decisions of a self-restrained judge "are influenced by a concern lest promiscuous judicial creation of rights result in so swamping the courts in litigation that they cannot function effectively").

of standing criteria,[236] the reluctance to create substantive rights through expansive statutory interpretation or the application of federal common law,[237] and the increased deference afforded to agency legal conclusions.[238]

E. Summary

The Seventh Circuit's retreat from institutional judicial activism to promote the implementation of environmental legislation appears to be part of a broader trend prompted by a shift in prevailing judicial philosophy in the Seventh Circuit as well as throughout the federal judiciary: to an increasing extent, the federal courts appear to be convinced that institutional activism requires judicial resolution of issues beyond the courts' competence and masks a policy activism which improperly invades the law and policy-making domain of the legislative and executive branches. The recent movement toward institutional restraint, then, has been motivated by separation of powers concerns and by the conviction that institutional activism has not worked in the past to confine agency discretion within statutory boundaries and is even less likely to do so in the future due to the increasing caseloads of the federal courts.

V. CONCLUSION

It would be premature to try to predict whether the retreat from institutional activism, either generally or in environmental cases, is a permanent phenomenon. But the techniques of institutional activism and restraint are manipulable doctrines. Since both judicial philosophies are premised upon legitimate separation of powers concerns, it would not be surprising to see the pendulum continue to swing back and forth between institutional activism and restraint in the context of judicial review of the implementation of regulatory statutes.

It is appropriate during a period when institutional restraint is apparently ascendant to note the potential for the exercise of such restraint to raise separation of powers concerns. Institutional activism represents an attempt to prevent executive branch interference with legislative pow-

236. *See* R. POSNER, *supra* note 3, at 208-09. *Cf.* Dreis & Krump Mfg. Co. v. International Ass'n of Machinists & Aerospace Workers, 802 F.2d 247, 255 (7th Cir. 1986) (mounting federal caseloads justify assessing a defendant's attorney's fees against plaintiffs filing groundless litigation). *See also* Floralife, Inc. v. Floraline Int'l, Inc., 807 F.2d 518, 520 (7th Cir. 1986).

237. *See* R. POSNER, *supra* note 3, at 207-08.

238. *See* Carrington, *supra* note 234, at 554. *Cf.* Donovan v. Robbins, 752 F.2d 1170, 1177 (7th Cir. 1985) (desire to lighten judicial caseload justifies creation of a presumption in favor of approving settlement between Department of Labor and trustee of employer benefit fund administered pursuant to the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1982)).

ers. Institutional restraint focuses on the potential for separation of powers violations if an overzealous judiciary engaged in policy activism usurps legislative or executive authority. Institutional restraint, however, may also facilitate an invasion of the legislature's domain by both the courts and the agencies.

Institutional restraint is motivated in large part by the courts' desire to avoid exercising authority that the Constitution vests in the other two branches of government. This fear of judicial overreaching has prompted, for example, frequent resort to the doctrine of deference to administrative expertise. Typically, when Congress feels the need for assistance in carrying out its law-making responsibilities it calls on the executive branch by delegating to the president or to administrative agencies the authority to implement a regulatory program. Recent opinions like the Supreme Court's decision in the "bubble case"[239] reflect the notion that failure to defer to the views of the recipient of the delegated powers would interfere improperly with this allocation of policy-making responsibility between the political branches.

When Congress turns to the agencies to flesh out a regulatory program, however, it does not thereby abdicate its policy-making function. The legislature has several means of confining agency discretion, including the delegation to the federal courts of the power to review agency decisions for consistency with legislative aims. If the courts do not take their delegated responsibilities seriously—if they stop insisting upon a statement of reasons for agency action and fail to reverse when those reasons cannot be reconciled with the discernible goals of the statute—then the prospects for executive branch indifference to or defiance of legislative commands will increase.[240] If judicial deference to agency reasoning becomes little more than judicial rubber-stamping of agency

239. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). This case is discussed at *supra* notes 226-29 and accompanying text.

240. Judge Skelly Wright, dissenting in a recent Clean Air Act case involving EPA's regulation of hazardous air pollutants, commented on this danger in protesting against what he perceived to be unwarranted deference to EPA's interpretation of the Act:

> The majority effectively suggests that judicial deference to administrative agencies is due whenever any ambiguity can be found in the legislative history of a provision, regardless of ambiguity or lack thereof in the actual language and structure of the statute. This approach comes perilously close to establishing an absolute rule of judicial deference to agency interpretations. . . . The majority would impose upon Congress a duty to be clear that goes far beyond what that body, or any human drafter, could possibly hope to achieve on a consistent basis in an age of complex statutory schemes. In our caution not to rob the Executive Branch of its proper role in the constitutional system, we must be extremely careful not to deprive Congress of effective legislative control over agency action.

Natural Resources Defense Council, Inc. v. EPA, 804 F.2d 710, 733 (D.C. Cir. 1986) (Wright, J., dissenting). For an argument that the separation of powers doctrine compels the agencies to provide an adequate statement of reasons for their actions, see Shapiro & Levy, *supra* note 8.

decisions, a significant check on agency discretion will have become ineffectual. Institutional restraint carried to such extremes would thus have significant implications for legislative behavior. Congress would either have to resign itself to relatively unconfined agency delegations or turn to other mechanisms to protect its policy-making turf from infringement by the agencies. At least in the environmental area, Congress has already recognized this need for self-protection and has begun taking steps, such as more specific delegations and the imposition of deadlines for agency actions, to restrict EPA's discretion.[241] It is too soon to tell how effective these new mechanisms for confining agency discretion will be compared to reliance on the techniques of institutional judicial activism.

The federal courts' failure to implement conscientiously the tasks assigned to them in regulatory legislation also threatens judicial usurpation of legislative authority. All of the modern environmental statutes recognize the need for judicial assistance to achieve legislative goals. These laws authorize private access to the courts to review agency decisions[242] and to enforce statutory violations.[243] Narrow interpretations of statutory or constitutional standing criteria may limit this access. The environmental statutes also expressly preserve the rights of private persons to resort to judicial enforcement of other legal constraints on polluting activities, such as common law tort remedies.[244] The courts, through some rather tortured statutory construction, in recent years have eliminated many of these supplemental rights and remedies.[245] The impetus for such reductions in the judicial role in achieving the goals of environmental statutes is surely in most instances a legitimate attempt to implement Congress' intent. It is possible, however, that these or similar examples of institutional restraint have been or could be motivated by the judges' doubts about their own competence to carry out congressionally assigned tasks or their desire to avoid burdening the courts with respon-

241. *See generally* the 1984 amendments to the Resource Conservation and Recovery Act, Pub. L. No. 98-616, 98 Stat. 5576 (1984); the 1986 amendments to the Safe Drinking Water Act, Pub. L. No. 99-339, 100 Stat. 642 (1986); and the 1986 amendments to CERCLA, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

242. *E.g.*, 33 U.S.C. § 1369(b) (1982); 42 U.S.C. § 7607(b) (1982).

243. *E.g.*, 33 U.S.C. § 1365 (1982); 42 U.S.C. § 6972 (1982 & Supp. III 1985); 42 U.S.C. § 7604 (1982).

244. *E.g.*, 33 U.S.C. § 1365(e) (1982); 42 U.S.C. § 6972(f) (1982 & Supp. III 1985); 42 U.S.C. § 7604(e) (1982).

245. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 328-29 (1981) (holding that, despite a savings clause preserving "any right which any person . . . may have under . . . common law," the 1972 amendments to the Clean Water Act pre-empted the federal common law of nuisance); Illinois v. City of Milwaukee, 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) (concluding that the 1972 amendments also preempted state common law remedies in interstate pollution disputes). *See generally* Glicksman, *supra* note 67 (criticizing these two decisions).

sibilities which they feel are better executed elsewhere. If so, the courts would be improperly second-guessing the legislature by upsetting its determination that the courts are better equipped than Congress or the agencies to perform the particular task in question. Thus, a decision purporting to rest on considerations of institutional restraint, like a decision premised on institutional activism, may in fact be a vehicle for policy judicial activism.

Although both institutional activism and restraint are meant to address separation of powers concerns, they may create such concerns if not exercised honestly and carefully. A balanced resort to the techniques of institutional activism and restraint is necessary. In its recent administrative law opinions, the Supreme Court appears to be seeking the best way to achieve that balance. The Court has announced a broad rule of judicial deference to agency interpretations of ambiguous statutes,[246] for example, but has reversed agency decisions which cannot be reconciled with governing statutory authority.[247] The federal appellate courts have the opportunity to assist the Court in defining the constitutionally appropriate mix of institutional activism and restraint. They should embark upon this task by carefully measuring the potential for the application of the techniques of both institutional activism and restraint to a particular regulatory program to facilitate or check improper infringement on legislative or executive authority. Above all, they should avoid disguising judicial policy activism as legitimate attempts to check potential violations of the separation of powers doctrine through the techniques of institutional activism or restraint.

246. *See supra* note 205 and accompanying text.
247. *See supra* note 206 and accompanying text.