STATUTORY DEADLINES FOR AGENCY REGULATION: A CARROT APPROACH

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Agency delay is a pervasive problem. It occurs in a broad range of policy areas, including environmental protection, healthcare, and financial regulation. The trope of slow and inefficient government agencies has become cliché.

Statutory deadlines are one solution to the problem of agency delay. Attaching a deadline to authorize legislation seems like an obvious way to make agencies act faster. Therefore, scholars and policymakers have urged the use of statutory deadlines to spur agencies to action. They have focused on ways to more vigorously enforce statutory deadlines through negative incentives, such as hammer provisions or mandamus remedies, as well as on the effectiveness and drawbacks of negative approaches.

The current debate neglects positive incentives as another way to encourage agencies to meet deadlines. This Note argues that statutory deadlines can be a superior way of avoiding agency delay when linked to positive incentives ("carrots") rather than negative incentives ("sticks"). The Note specifically focuses on conditional relaxation of judicial review as a promising mechanism to induce agencies to more appropriately avoid unnecessary delay. Conditional relaxation of judicial review is so promising because it accounts for the costs of litigation and judicial review in a manner that the typical negative incentives do not. This Note will review the relevant current doctrine and debate on enforcement of statutory deadlines, lay out the possible ways to attach positive incentives to statutory deadlines, and in comparing this carrot approach to deadlines to the stick approach, will show the advantages (and limitations) of positive incentives. Ultimately, the carrot approach will be most appropriate where there is a policy need for speed and when an agency faces resource constraints, though such an approach may never be appropriate when there is a strong principal-agent conflict between Congress and the relevant agency.

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Introduction

The image of the incompetent and slow federal agency looms large in the public imagination, and agency delay is an increasingly prominent subject in administrative law scholarship.[1] There is good justification for this attention: Delay by agencies, even when justified, can cause serious harm. Habitual agency delay can undermine public confidence in the regulatory process,[2] endanger people by leaving known hazards unaddressed,[3] and cause economic damage to regulated industries by increasing uncertainty and inhibiting planning.[4] Agency lethargy, of itself, can undermine the effectiveness of a statutory regime.

Statutory deadlines, which explicitly require an agency to commence or complete a particular action by a certain time, are one of the most direct ways to regulate the timing of agency action.[5] Congress

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1 *See, e.g.*, Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 65 (1995); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385 (1992); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 Geo. L.J. 1337 (2013); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. Rev. 1657 (2004).

2 *See* Admin. Conf. of the U.S., Recommendation 93-4, Improving the Environment for Agency Rulemaking 3 (1993), https://www.acus.gov/sites/default/files/documents/93-4.pdf [https://perma.cc/BJ5M-9FHR] (noting that "missed deadlines" can "undermine respect for the rulemaking process"); Martin v. O'Rourke, 891 F.3d 1338, 1349 (Fed. Cir. 2018) (Moore, J., concurring) (describing system for adjudicating veterans' disability benefits as "plagued by delays and inaction" and "fundamentally flawed").

3 *See, e.g.*, *In re* A Cmty. Voice, 878 F.3d 779, 784–88 (9th Cir. 2017) (holding that the EPA had unreasonably delayed in effectuating Congress's directive to "eliminate lead-based paint hazards in all housing as expeditiously as possible[,]" leaving in place "insufficient" standards that threatened the welfare of children (citing 42 U.S.C. § 4851a(1), (3)).

4 *See* Potomac Elec. Power Co. v. ICC, 702 F.2d 1026, 1034 (D.C. Cir. 1983) ("Quite simply, excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans."); MCI Telecomms. Corp. v. FCC, 627 F.2d 322, 341 (D.C. Cir. 1980) ("[D]elay in the resolution of administrative proceedings can also deprive regulated entities, their competitors or the public of rights and economic opportunities. . . .").

5 *See generally* Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 Harv. L. Rev. 543 (2007) (describing statutory deadlines as an obvious and explicit example of a timing rule).

is no stranger to statutory deadlines: Statutorily specified deadlines are commonly found throughout modern environmental and public health legislation,[6] and are also often imposed when legislation is passed in response to a high-profile issue.[7]

But enforcing statutory deadlines can be difficult. There are many dramatic examples of agencies exceeding statutory deadlines. The Environmental Protection Agency (EPA) is an especially salient case here; the U.S. Government Accountability Office and advocates report that the EPA regularly misses statutory deadlines by more than two years, in some cases missing deadlines for promulgating rules by over twenty years and counting.[8] Advocates recognize that agencies such as the U.S. Fish and Wildlife Service "[t]ime and time again . . . miss[] . . . deadlines for [protecting] species."[9] Agencies often exceed their deadlines, by years in some instances, and many agencies miss statutory deadlines much more often than not.[10]

On the other hand, Congress may set deadlines that are too short for political expediency while ignoring the practical limits of the agency tasked with passing rules. In recent emergencies, Congress has seemed

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6 *See generally* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. Pa. L. Rev. 923, 941 (2008) (finding that around eight percent of agency rulemakings were associated with a statutory deadline); M. Elizabeth Magill, *Congressional Control over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 Food & Drug L.J. 149, 154 n.17 (1995) ("The *United States Code* is littered with statutory deadlines requiring a particular agency to act within a time certain.").

7 For example, as part of the Oil Pollution Act of 1990 (passed in response to the *Exxon Valdez* oil tanker accident), Congress ordered the Coast Guard to issue regulatory standards for tank level and pressure monitoring devices within one year. *See* Nat'l Comm. on the BP Deepwater Horizon Oil Spill & Offshore Drilling, Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling 56–57 (2011), https://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf [https://perma.cc/W4LE-D7MW].

8 Phillip Ellis, *20 Years, Yet EPA Still Fails to Protect Us from Polluting Incinerators*, Earth Just. Blog (Oct. 6, 2014), https://earthjustice.org/blog/2014-october/20-years-yet-epa-still-fails-to-protect-us-from-polluting-incinerators [https://perma.cc/V8XT-5SH5].

9 Jessica Meszaros, *What's Next After Federal Wildlife Officials Missed a Deadline to Protect Florida's Ghost Orchids*, WUSF Pub. Media (Feb. 7, 2023), https://wusfnews.wusf.usf.edu/environment/2023-02-07/whats-next-federal-wildlife-officials-miss-deadline-protect-florida-ghost-orchids [https://perma.cc/U4U6-EA6S].

10 *See* Gersen & O'Connell, *supra* note 6, at 949–50 n.84 ("The mean difference in days between the completion deadline and the actual completion was 385.82 days (past the deadline) (standard error = 16.96); for significant actions, the mean difference was 508.26 days (standard error = 48.52)."); *see also* U.S. Gov't Accountability Off., GAO-05-613, Clean Air Act: EPA Has Completed Most of the Actions Required by the 1990 Amendments, but Many Were Completed Late (2005), https://www.gao.gov/assets/gao-05-613.pdf [https://perma.cc/38K9-ZSEC] (finding that the EPA missed statutory deadlines with respect to 256 of 338 (76%) actions required under the Clean Air Act); Admin. Conf. of the U.S., Recommendation 78-3, Time Limits on Agency Actions 2 (1978), https://www.acus.gov/sites/default/files/documents/78-3.pdf [https://perma.cc/XR35-YCDM] ("There has been a substantial degree of noncompliance with all the statutory time limits studied.").

to succumb to the temptation to set very short deadlines for a large number of important and complex regulations. For example, under the Dodd-Frank Wall Street Reform and Consumer Protection Act, which overhauled financial regulation in the aftermath of the Great Recession, financial reforms required numerous federal agencies to promulgate altogether more than 400 rules within one year of the bill's passage, only 224 of which were written (not all finalized) as of May 2023.[11] Many have attacked the agencies that missed deadlines set by Dodd-Frank, while the agencies and some legislators involved have argued that the deadlines were too short.[12]

Regardless of what you think is the right substantive answer in these two different policy settings, you might be able to see that Congress has to figure out how to set timelines with limited information, as well as how to create accountability for agencies that might be inclined to unreasonable delay. What is to be done in the face of persistent and extreme delays on legislative goals and timelines, on the one hand, and the possibility that Congress might sometimes be making unrealistic promises on behalf of the agencies, on the other? Scholars and policymakers have focused their attention on attaching additional penalties to statutory deadlines.[13] They have recognized benefits and costs to this penalty approach, and they have examined ways to best use penalties to incentivize agencies to meet deadlines. But the penalty approach has limitations that are hard to get around: It works best when Congress suspects the agency will actively shirk its duties, and when either the agency is not resource-constrained or Congress is willing to accept the downsides of a resource-constrained agency shifting resources away from other agency functions in order to meet the deadline.[14] And setting penalties can be difficult because of

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[11] *Dodd-Frank Burden Tracker*, House Fin. Servs. Comm., https://financialservices.house.gov/burdentracker [https://perma.cc/4YQ9-MZL3].

[12] *See, e.g.*, Ronald D. Orol, *The Dawdle-Frank Act: Regulators' Missed Deadlines*, MarketWatch (May 5, 2011, 7:00 AM), https://www.marketwatch.com/story/the-dawdle-frank-act-regulators-missed-deadlines-2011-05-05 [https://perma.cc/B7GW-TSUA] (covering missed deadlines but also noting that the Senate Banking Committee Chairman at the time, Senator Tim Johnson, stated that it was more important for the regulators to get the regulations right); Nicole Gelinas, *Too Convoluted to Succeed*, City J. (Autumn 2013), https://www.city-journal.org/article/too-convoluted-to-succeed [https://perma.cc/ZC2U-QXV2] (noting former Federal Reserve Chairman Paul Volcker's criticism of regulatory delay, and summarizing a Davis Polk & Wardwell report describing the slow pace of rulemakers as "remarkably consistent"); *CFTC Commissioners Beef About Demanding Dodd-Frank Deadlines*, Nat. Gas Intel. (Nov. 22, 2010), https://www.naturalgasintel.com/cftc-commissioners-beef-about-demanding-dodd-frank-deadlines [https://perma.cc/P3ZU-NU24] (reporting Commissioners' concerns that the CFTC needed to move too quickly to meet deadlines).

[13] *See infra* Section I.B.

[14] *See infra* Section I.C.

the underlying need to delegate action to the agency in the first place: If Congress could have specified the content of the agency's regulatory actions, it might have done so in the first place.[15]

These conditions will not always apply to instances when Congress might want to explicitly determine the timing of agency action. This Note argues that positive incentives are a way to achieve what penalties cannot. Although positive incentives are not a perfect enforcement mechanism—just as negative incentives are not—positive incentives can be more effective than penalties when there is a policy need for speed over other factors, when agencies experience resource constraints, and when there is no strong principal-agent conflict between Congress and the relevant agency.

One such type of "positive incentive" in inducing agencies to develop regulations is to conditionally relax judicial review of agency actions in return for faster promulgation of rules from agencies. Relaxing review can take a variety of forms, as this Note will discuss later in fuller detail, including complete waiver of review and circumscription of review of agency action to specific policy factors. The obvious downside of allowing for relaxation of judicial review is that agencies might make worse choices without the possibility of judicial oversight.[16] Although this Note cannot show that conditional waivers of review are definitively desirable in light of the downsides—nor is that my goal, since sometimes waivers will in fact not be appropriate—waivers of judicial review are hardly novel, and this Note will highlight the tradeoffs between the upsides and downsides of waivers.[17]

Part I of this Note will review doctrine and prior scholarship, describing how statutory deadlines currently operate in the context of agency rulemaking as a negative incentive mechanism for enforcing time requirements. This Note considers deadlines in the regulatory context in particular, because agency regulatory action—in particular, notice-and-comment rulemaking—is complex and the source of many agency delays. Therefore, Part I will also distinguish statutory deadlines in the regulatory context from deadlines in other contexts, such as jurisdictional deadlines, or requirements to spend appropriations. Part II will explain how relaxation of judicial review of agency action, conditional upon meeting statutory deadlines, acts as a positive incentive for agency

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15 *See infra* Section I.B.

16 In some ways, this is the foundation of the reason for a presumption of reviewability. *See generally* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014) (discussing the history and concerns that led to the presumption against relaxing judicial review, including the furthering of due process, values rooted in the nondelegation doctrine, separation of powers, and safeguards to agency abuse).

17 *See infra* Section I.D.

rulemaking, and how such relaxation can be effectively implemented. Part III of this Note will compare the use of relaxation of review as a positive incentive to the use of traditional penalties attached to statutory deadlines as a negative incentive. This Part will show the limitations and drawbacks of the current penalty-based approaches, and how and when positive incentives can be more effective. Finally, this Note identifies questions for further study, and concludes.

I
The Status Quo: Statutory Deadlines Operate as "Sticks"

This Part reviews relevant doctrine and prior scholarship regarding statutory deadlines and explains why the existing focus on attaching penalties to statutory deadlines falls short. As a preliminary matter, this Part defines "statutory deadlines," as opposed to other sorts of deadlines that appear. It then explains how these deadlines currently impose litigation risks and related costs on agencies that miss them, in order to push for faster action. It also explores the various ways that the courts and Congress impose additional penalties on agencies for missing deadlines. Then, this Part explains why statutory deadlines currently are not accompanied by relaxation of review, and discusses the comparative downsides of relaxation.

A. Definition of Statutory Deadlines for Rulemaking

This Note is concerned with statutory deadlines that require agencies to commence or complete regulatory actions by a specific date.[18] When exceeded, this type of deadline can provide grounds for a harmed party to sue the agency for delay.[19] There are other types of deadlines that can be included in legislation that apply to agencies and courts, including jurisdictional deadlines, "claim-processing rules[,]" and agency funding expiration deadlines, in addition to the regulatory action deadlines that this Note focuses on.[20] To avoid confusion, these other deadlines will be quickly reviewed. This review will also help to

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[18] For background on the prevalence of statutory deadlines in administrative law, see generally Gersen & O'Connell, *supra* note 6, at 927.

[19] *See* Kevin J. Hickey, Cong. Rsch. Serv., R45336, Agency Delay: Congressional and Judicial Means to Expedite Agency Rulemaking 2 (2018) [hereinafter CRS Report]; *see also* Biodiversity Legal Found. v. Badgley, 309 F.3d 1166 (9th Cir. 2002); *In re* Bluewater Network & Ocean Advocates, 234 F.3d 1305 (D.C. Cir. 2000); *In re* Barr Laboratories, Inc., 930 F.2d 72 (D.C. Cir. 1991).

[20] If Congress has not spoken clearly, the Court will presume that the requirement is a claim-processing rule—"mandatory" to be sure, but not "given the jurisdictional brand[.]" Henderson v. Shinseki, 562 U.S. 428, 435 (2011).

show that there is a doctrinal basis to treat statutory deadlines in the regulatory context differently than other types of deadlines.

Courts have addressed whether deadlines, particularly procedural rules, serve to deprive courts of jurisdiction ("jurisdictional deadlines"), or whether they serve to facilitate the processing of claims and do not automatically deprive courts of jurisdiction ("claim-processing" deadlines).[21] Deadlines can also operate to determine when agencies must spend their appropriations; bills routinely include deadlines by which funding must be spent, and if agencies do not obligate or disburse funding by that time (depending on the statute), they will no longer have the authority to spend the funding.[22]

For the purposes of this Note, it is enough to observe that courts recognize that statutory deadlines can be set for the purpose of requiring an agency to take complex regulatory action, even absent a clear statement from Congress declaring that the purpose of the deadline is to speed up action. The Supreme Court has recognized that statutory deadlines without a declared purpose can be interpreted as ones used to "seek speed" in *Dolan v. United States*, stating that in some instances, rather than being a jurisdictional deadline or claims processing rule, a "deadline seeks speed by creating a time-related directive that is legally enforceable but does not deprive the judge or other public official of the power to take the action even if the deadline is missed."[23]

Although this may seem controversial to some, it also makes clear practical sense: If statutory deadlines are set to prod an agency to do something, it is counterproductive to treat the deadline as jurisdictional. It is akin to someone telling you that the consequence of your failure to do a task that you were ordered to do by a set deadline is that you no longer *are allowed* to do the task that you never wanted to complete in the first place.

This Note focuses on statutory deadlines for regulatory action because they have been particularly important and troublesome, in part because they require an agency to take a complex set of actions,

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[21] *See* Hamer v. Neighborhood Hous. Servs. of Chi., 583 U.S. 17 (2017) (holding that the filing of a notice of appeal beyond the deadline set forth in Federal Rule of Appellate Procedure 4(a)(5)(C) does not automatically divest a circuit court of jurisdiction over the case, because it falls into the claim-processing category).

[22] U.S. Gov't Accountability Off., GAO-04-261SP, General Principles—Duration of Appropriations 5-1 (2018), https://budgetcounsel.com/wp-content/uploads/2018/01/chapter-05-principles-of-federal-appropriations-law-volume-i-third-edition-gao-04-261sp-january-2004.pdf [https://perma.cc/CC7G-GLLE].

[23] 560 U.S. 605, 611 (2010) (citing United States v. Montalvo-Murillo, 495 U.S. 711, 722 (1990)).

often over a long period of time.[24] When agencies fail to meet these deadlines—unlike with deadlines that relate to simpler agency actions (such as processing Social Security payments)—the choice and application of remedies and penalties are not straightforward. In this context, Congress has reasons to want agencies to act quickly, but also has diminished ability to control agency action. This sets the stage for situations where positive incentives are the most effective way to ensure that agencies act.

B. Judicial and Congressional Penalties Associated with Statutory Deadlines

Broadly speaking, when an agency misses a statutory deadline, it faces the penalty of litigation risk, potential additional judicial penalties for missing the deadline, and congressionally set statutory remedies that specify penalties for missing a deadline.[25]

Some might wonder if statutory deadlines do anything at all. There is some evidence that these deadlines work,[26] and without a statutory deadline, it can be difficult to challenge agency inaction or delay. Although the Administrative Procedure Act (APA) allows challenges for "unreasonably delayed" action,[27] it is far easier for a harmed party to show that the agency did, in fact, unreasonably delay action when it exceeds a statutory deadline.[28]

The APA generally authorizes suit by "[a] person suffering [a] legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[29] As a baseline, even without a statutory deadline, the APA requires that "each agency shall proceed to conclude a matter presented to it" "within a reasonable time."[30] Section 706(1) of the APA provides a specific remedy to enforce timely action in case of delay, stating that reviewing courts shall "compel agency action unlawfully withheld or unreasonably delayed."[31]

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24 *See* Gersen & O'Connell, *supra* note 6, at 936 (surveying statutory deadlines and their use).

25 *See generally* CRS Report, *supra* note 19, at 2 (describing these sources of penalties).

26 *See* Gersen & O'Connell, *supra* note 6, at 945 (finding that deadlines speed rulemakings by around 100 days on average, but noting that for many agencies "the effect is relatively modest").

27 5 U.S.C. § 706(1) (2018).

28 *See* Gersen & O'Connell, *supra* note 6, at 927 ("When agencies act slowly, or refuse to act at all, courts are rarely in a position to dictate specific outcomes.").

29 5 U.S.C. § 702.

30 *Id.* § 555(b).

31 *Id.* § 706(1).

However, without a specific statutory deadline, courts typically interpret the requirement to act "within a reasonable time" deferentially.[32] And there are many good reasons for agencies to take their time before they regulate, even though agencies may also delay for illegitimate or dubious reasons.[33] Agencies are often charged with administering complex statutory schemes,[34] and agency rulemaking processes generally follow the APA's notice-and-comment requirements,[35] which require agencies to solicit input from the public, subject-matter experts, and other stakeholders.[36] It takes time for the agency to analyze the information provided, respond to comments where necessary, and come to a decision on the right path forward in light of conflicting interests. Furthermore, agencies often have limited resources and multiple priorities.[37] Many cases of "agency delay" are simply cases in which the agency is taking the necessary amount of time to act, even though that time may not be as fast as the public or Congress desires.

Therefore, some courts employ a multifactor balancing test when there is a claim that agencies have unreasonably delayed action, and consider the length of the delay, the interests harmed, the agency's other priorities, and any evidence of bad faith by the agency.[38] The result, in

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[32] *Id.* § 555(b); *see* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 691–92 (2018) (describing cases of agency officials contravening congressional orders, describing informal incentives against doing so, and also finding that the federal judiciary is willing to issue contempt findings against agencies and officials, although sanctions are very rare).

[33] For example, agency delay might be the result of capture by special interests, or simple incompetence. An agency staffed by members of a new presidential administration may also directly disagree with the aims of legislation passed during the previous administration, and therefore deprioritize regulations required by that legislation. *See generally* Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013) (establishing an anticapture mechanism for OIRA review of agency inaction); *cf.* Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 2–5 (2019) (discussing incentives to rollback previous administrations' policies).

[34] *See, e.g.*, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (describing the statutory and regulatory scheme of the Clean Air Act and its amendments as "technical and complex").

[35] *See* 5 U.S.C. § 553(b)–(c) (2018) (providing procedures for notice-and-comment rulemaking by agencies).

[36] For general background of the process of agency rulemaking and notice-and-comment procedure, see TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW (2017).

[37] *See* Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 16–27, 33–34 (2008) (stressing the importance of resource allocation and priority setting as a justification for judicial deference to agency's decisions not to act).

[38] *See* Telecomms. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (creating six-factor standard for claims of unreasonable delay); DANIEL T. SHEDD, CONG. RSCH. SERV., R43013, ADMINISTRATIVE AGENCIES AND CLAIMS OF UNREASONABLE DELAY: ANALYSIS OF COURT TREATMENT 7 (2013).

practice, is that it can be quite difficult to challenge agency inaction without a clear statutory deadline.

By contrast, when a specific deadline is set in statute, it is far easier for harmed parties to challenge agency inaction and delay.[39] A statutory deadline therefore imposes a penalty of greater litigation risk onto the agency. A party harmed by the delay can more easily show that the agency has "unreasonably delayed" its action if the agency has missed a statutory deadline.[40]

However, there are also other informal penalties that agencies suffer when they miss deadlines, and other reasons that agencies meet deadlines. For example, agency officials may face negative press or personal career harms associated with missing deadlines, may genuinely view missing deadlines as impermissibly subverting congressional will about agency priorities, or may even suffer personal consequences in extreme circumstances.[41] For the purposes of this Note, additional informal penalties may intensify the effects of negative incentives to delay but do not directionally alter the analysis in the following sections.

While litigation risk serves as a penalty in itself, courts can also impose additional penalties on agencies for missing deadlines.[42] Harsh judicial penalties are not common, but they can occur.[43] When an agency misses a statutory deadline, courts generally "will not blindly enforce a time limit without regard to the reasonableness of the agency's action."[44] Some courts of appeal have required the court to issue an order compelling the agency to act if it misses the deadline, without the need to balance other considerations at all, but this is an outlier position.[45] Instead, courts can, without express authorization in the

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[39] *See* Gersen & O'Connell, *supra* note 6, at 929 (finding that in the context of administrative law "the presence of deadlines makes legal challenges both more likely to survive threshold questions, allowing litigation to proceed, and more likely to result in agency defeats").

[40] *See* Gersen & Posner, *supra* note 5, at 580 *(*"A deadline imposes low decision costs on the enforcing judge; compare a rule that requires agency action 'in a reasonable time period.'"); CRS Report, *supra* note 19, at 2, 6 (2018) (discussing judicial penalties).

[41] *See infra* notes 58–63 and accompanying text.

[42] *See* Parrillo, *supra* note 32, at 704, 730–31, 757–58 (discussing penalties such as contempt fines against the agency, imprisonment of the agency official, and fines against agency officials).

[43] *See id.* (noting that while contempt fines have been used against agencies and agency officials, these instances are rare and have been circumvented by courts).

[44] Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 Admin. L. Rev. 171, 178 (1987).

[45] *See, e.g.*, Forest Guardians v. Babbitt, 174 F.3d 1178, 1190 (10th Cir. 1999) ("[W]hen an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and courts, upon proper application, must compel the agency to act."); Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1178 (9th Cir. 2002) ("The Service's failure to complete the listing determinations within the mandated time

statute, use their discretion to set a new judicial deadline and give an agency more time to comply with a deadline if it would be impossible for the agency, operating in good faith, to meet it.[46] Although a missed deadline may spur a court to order the agency to act, courts generally will not specify the content of that action.[47] For example, if an agency is slow to promulgate water regulations, an overseeing court might order the agency to take certain steps or submit progress reports, but the court will not write the content of the regulations. When "the manner of . . . action is left to the agency's discretion," courts "can compel the agency to act, but [have] no power to specify what the action must be."[48]

However, judicial penalties can sometimes be more targeted towards the agency actors who cause delay. Sometimes—though thankfully not often—agencies directly and openly refuse to comply with legislation and judicial decisions compelling the agency to act.[49] In these cases, courts can issue contempt findings against agencies and officials, and even impose fines upon agencies or officials, although these are exceedingly rare.[50] Therefore, while it is rare for courts to directly punish agency actors for obstructing agency action, the possibility of these sanctions operates to deter complete noncompliance from the agencies.

In addition to judicially-set penalties, Congress can also specify additional penalties in authorizing legislation to punish an agency for delay, by setting "hammer provisions."[51] Hammer provisions impose

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frame compelled the [district] court to grant injunctive relief . . . . The exercise of discretion is foreclosed when statutorily imposed deadlines are not met."); *cf.* Parrillo, *supra* note 32, at 712, 745, 761 (discussing how courts are generally reluctant to impose harsh penalties such as sending agency officials to jail, imposing individual fines, or imposing fines on agencies).

46 For example, in *Natural Resources Defense Council, Inc. v. Train*, the D.C. Circuit noted two circumstances where the court could use its equitable powers to provide the agency additional time: when meeting deadlines would unduly jeopardize the implementation of other essential programs, and where compliance is technologically impossible. 510 F.2d 692, 712 (D.C. Cir. 1974).

47 *See* CRS Report, *supra* note 19, at 8 (noting that courts may order agencies to issue regulations after missing a deadline but cannot dictate the content of the regulation).

48 Norton v. S. Utah Wilderness All., 542 U.S. 55, 65 (2004).

49 *See* Parrillo, *supra* note 32, at 694 n.30, 745–49 (noting four instances where judges briefly imprisoned federal agency officials).

50 *See id.* at 697 (finding that the federal judiciary is willing to issue contempt findings against agencies and officials, although sanctions are very rare); *see also* Richard J. Pierce, Jr., *Judge Lamberth's Reign of Terror at the Department of Interior*, 56 Admin. L. Rev. 235 (2004) (criticizing Judge Lamberth's orders against the Department of Interior, which include ordering the department to disconnect its computers from the internet and to implement an elaborate accounting plan under supervision of the court, and Judge Lamberth's individual charges of contempt against over eighty government employees).

51 *See* Gersen & O'Connell, *supra* note 6, at 955–56 (describing hammer provisions); CRS Report, *supra* note 19, at 6–7 (noting examples of hammer provisions); Magill, *supra* note 6, at 150 (describing hammer provisions in the Nutrition Labeling and Education Act).

specific penalties (hammers) on the agency if the agency exceeds a deadline. For example, the Hazardous and Solid Waste Amendments of 1984 provided that if the EPA did not issue regulations of some waste disposal methods by the statutory deadline, those disposal methods would be prohibited outright.[52] Similarly, the Nutrition Labeling and Education Act of 1990 specified that if the FDA did not promulgate final rules regarding food labeling within 24 months, the agency's proposed regulations would be treated as the binding final regulations.[53] Hammer provisions need not be regulatory; such provisions can also use appropriations power to punish an agency. For example, the Department of Transportation and Related Agencies Appropriations Act specified that it would withhold a percentage of the budget for certain Department of Transportation agency offices until the agency issued a final rule.[54] Congress can, of course, also act generally to punish agencies on an *ex post* basis, after the delay has occurred, rather than on an *ex ante* basis.[55]

Unlike statutory deadlines, hammer provisions are self-enforcing. Parties do not need to sue to enforce deadlines, although they still have the option to challenge the agency for unreasonable delay; the penalty prescribed in the statute simply goes into effect if the agency fails to act by the specified deadline.[56] The force of the penalty attached to the hammer provision may entirely eliminate the need for individuals to file civil suit to compel agency action, and the penalty imposed by Congress through a hammer provision has the latitude to be more severe than court-imposed remedies.[57]

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[52] *See* 42 U.S.C. § 6924(d)(1)–(2) (2012) (prohibiting land disposal of certain hazardous wastes unless EPA determines within thirty-two months that "the prohibition on one or more methods of land disposal of such waste is not required in order to protect human health and the environment"); *id.* § 6924(f)(1)–(3) (prohibiting disposal of certain hazardous waste by underground injection into deep injection wells if EPA does not issue final regulations regarding such disposal within forty-five months).

[53] *See* Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535 § 2(b), 104 Stat. 2353, 2357 (codified at 21 U.S.C. § 434).

[54] *See* Department of Transportation and Related Agencies Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329, 358–59.

[55] *See* Abbott, *supra* note 44, at 200–04 (summarizing alternative remedies to deadlines such as self-set agency deadlines, statements of agency developed goals, and non-binding deadlines set by Congress); *see also* Matthew B. Lawrence, *Disappropriation*, 120 Colum. L. Rev. 1, 24–39 (2020) (discussing how cutting appropriations funding has become a prominent tool for obstructing legislative goals and signaling congressional intent).

[56] *See* Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking 15–16 (4th ed. 2006); Magill, *supra* note 6, at 153–57.

[57] This is true for somewhat obvious reasons, since they were designed to implement specific punishments and are an act of legislation rather than an interpretation of legislation, and courts often have fewer resources to determine a punishment scheme. *See* CRS Report, *supra* note 19, at 14–15.

Where does this leave us? Statutory deadlines do work sometimes, but they're not ideal. They aren't a silver bullet for making sure agencies put out rules on time, but courts are often unwilling (with good reason) to set harsher penalties without explicit legislative authorization. Explicit legislative penalties might be ideal, but relying on Congress to set specific alternatives for each delay seems unrealistic and inelegant (perhaps it negates the value of delegating action to well-staffed agencies in the first place).

C. Lack of Relaxation of Review for Statutory Deadlines

Oddly, statutory deadlines have not come with benefits in the form of relaxation of judicial review. Several scholars have argued that it would be appropriate for courts to relax arbitrary and capricious review when a strict statutory deadline—one that forces agencies to confront harsh resource constraints—is present. Such claims echo broader arguments favoring the relaxation of arbitrary and capricious review in light of agency resource constraints.[58] Some scholars have suggested that courts may, in fact, already relax review when there is a tight deadline.[59] Whether there should be more deference to agencies exercising discretion generally is beyond the scope of this Note, and there is a rich literature here.[60] But descriptively, it is worth examining whether there is relaxation of judicial review in the presence of a deadline, because if there were, it would cast doubt on the fact that statutory deadlines operate through negative incentives. I found that courts do not, and we operate in a world where statutory deadlines primarily operate through negative incentives.

At the federal appellate level, case law suggests that it is extremely rare for courts to formally act to "relax" arbitrary and capricious review

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[58] *See, e.g.*, Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 90 (1997); Biber, *supra* note 37; *cf.* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 662, 670 (1985) (distinguishing between instances where the legislature anticipates that the executive "will use its discretion to allocate funds to the most pressing problems" from ones where the executive is "refusing to carry out obligations that Congress has imposed on the executive").

[59] *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157, 180–81 (2014) (arguing that there may be an implicit understanding of deadlines as aspirational, rather than firm, in light of resource constraints); Gersen & O'Connell, *supra* note 6, at 962 (stating that courts could apply a "less searching standard for actions promulgated under deadline" and suggesting that limited case law supports the existence of this approach).

[60] *See, e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 947–58 (2017); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 447–54 (1986) (describing the early progressivism that gave rise to the passage of the APA and how judicial oversight over agencies was initially constrained).

when a statutory deadline is involved and evidence shows that an agency has acted quickly to meet the deadline.[61] Currently, statutory deadlines operate as an additional constraint upon agency action. That is, statutory deadlines require agencies to follow procedures and implement actions that would stand up under legal challenge for procedural adequacy and under arbitrary and capricious review—subject to an additional requirement, which is to implement that solution by a particular deadline (or face various legal consequences for exceeding it).

What is the problem here? In many cases, there may be none at all. But the current case law and statutory practices leave a gap. Because courts do not take an all-things-considered approach that relaxes standards of review by considering the speed with which agencies need to act, deadlines only serve to impose penalties. Therefore, this leaves Congress without a clear way to instruct agencies that speed is a policy priority in a way without negative incentives. Since agencies are inevitably resource-strapped in various ways, agencies simply might not be able to reach a policy decision under time pressure through the normal, extensively supported means that stand up to judicial scrutiny. In the status quo, Congress has little ability to enable agencies to adopt what may be less perfect decision-making measures, or "second-best" ways, to act more quickly.

It is useful to begin with the counterfactual. It is plausible that courts *could* relax substantive review when there is evidence that an agency has acted in order to meet a tight deadline. Section 706(2)(A) of the APA provides for arbitrary and capricious review of agency action, stating that the "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[62] In assessing whether the agency has acted arbitrarily or capriciously, courts will consider a number of factors, including whether an agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection

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[61] In a Westlaw search using the keywords "arbitrary" or "capricious" and "statutory deadline" as of March 2024, at the federal appellate level, only two cases out of 103 suggest that courts might consider deadlines in order to relax arbitrary and capricious review because the agency acted to meet a deadline. *See* Cal. Hum. Dev. Corp. v. Brock, 762 F.2d 1044, 1051 (D.C. Cir. 1985) (in which the court seems to give some weight to the fact that the Department of Labor had "[c]omplex decisions . . . to be made in a short time span" in allocating funds under the Job Training Partnership Act due to a statutory deadline); Hercules Inc. v. EPA, 598 F.2d 91, 129 (D.C. Cir. 1978) ("In our view, the presence of the statutory deadline and the consent decree deadline amply justify the Administrator's actions. The rulemaking in this case was characterized by voluminous submissions, a complex subject matter, and highly contested issues against the backdrop of judicial and statutory deadlines.").

[62] 5 U.S.C. § 706(2)(a) (2018).

between the facts found and the choice made.'"[63] However, courts have not generally held that the presence of a statutory deadline is relevant to arbitrary or capricious review.[64]

Courts do sometimes relax *procedural* requirements (as opposed to *substantive* arbitrary or capricious review) in the presence of a statutory deadline.[65] This is likely because there is a statutory distinction made between substantive and procedural relaxation of review. The procedural steps agencies are obligated to undertake in informal rulemaking can be extensive, including growing requirements to respond to the comments from the public on the proposal. Although the basis of these procedural requirements, to provide the public with information about the rulemaking, to allow them to comment, and to consider and respond to comments, is in statute, courts have fleshed out the full vision of what these statutory requirements entail over the years.[66] However, the APA exempts notice-and-comment requirements when "the agency for good cause finds" that notice-and-comment would be "impracticable, unnecessary, or contrary to the public interest."[67] Sometimes, Congress also sets deadlines and explicitly waives notice-and-comment requirements. For example, Section 161(d) under Title I of the Federal Agriculture Improvement and Reform Act of 1996 prescribed that the Secretary of Agriculture and the Commodity Credit Corporation promulgate regulations within ninty days "without regard to . . . the notice-and-comment provisions of Section 553 of title 5" of the United States Code.[68]

How does this all interact with deadlines? The existence of a deadline itself is not sufficient to establish good cause.[69] However, there is inconsistent treatment of agencies by the federal courts when it comes to the question of whether a tight statutory deadline itself creates "good cause" to waive notice-and-comment requirements. Some courts are

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[63] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal citations omitted).

[64] *See supra* note 59. Of course, it's possible that courts actually do consider deadlines without stating so in the text of their decisions explicitly, which would be difficult to observe.

[65] *See* Gersen & O'Connell, *supra* note 6, at 962–63 (collecting citations).

[66] *See* Admin. Conf. of the U.S., *Primer on Informal Rulemaking Process*, https://www.acus.gov/article/primer-informal-rulemaking-process [https://perma.cc/F3HU-HCSM].

[67] 5 U.S.C. § 553(b)(3)(B) (2018).

[68] 7 U.S.C. § 7281. As additional examples, 16 U.S.C. § 3831 requires regulations implementing the Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza to be issued within ninty days "without regard to . . . the notice-and-comment provisions of section 5," and 7 U.S.C. § 1522 mandates that "[n]ot later than August 1, 2001, the Federal Crop Insurance Corporation shall promulgate final regulations to carry out section 522(b) of the Federal Crop Insurance Act . . . without regard to . . . the notice-and-comment provisions of section 553."

[69] *See, e.g.*, Nat. Res. Def. Council v. Abraham, 355 F.3d 179, 205–06 (2d Cir. 2004).

willing to waive the requirement of notice-and-comment in the presence of sufficiently tight deadlines, and typically apply a multifactor test to assess whether an agency can forego traditional notice-and-comment procedures because of such a deadline. For example, such courts are often suspicious of cases where an agency creates its own emergency by not acting until close to the deadline.[70] Conversely, such courts may permit agencies to deviate from standard APA rulemaking procedures if the deadline is "very tight and where the statute is particularly complicated."[71] Courts are also more inclined to waive procedural mandates if the agency action is "of limited scope or duration" and when the deadline also imposes budget-cutting measures.[72]

Relaxing procedural review without relaxing substantive review will often provide agencies with scant comfort because agencies often use compliance with procedural requirements to show that they were not acting arbitrarily and capriciously.[73] Therefore, relaxing procedural review on the front end without relaxing substantive review on the back end may make it more difficult for agency action to withstand judicial scrutiny.

D. Downsides of Waiver of Judicial Review

The obvious downside of allowing for relaxation of judicial review is that agencies might make worse choices without the possibility of judicial oversight. This harm must be compared against the harms of delay, especially in instances where agencies may need to act quickly. These instances, as discussed above, may not be all that common compared to the bulk of legislative concerns but would include health, environmental, or financial disasters and emergencies. Anyone who has themselves complained of the lumbering pace of government action might insert their own favorite example of a case where it might be better for government to act quickly rather than perfectly.

While the downsides of waiving review are real, there is also reason to believe that the absence of judicial review—even in the extreme case where review is fully withheld—would not leave agency actors fully without constraint. Agencies still have a variety of internal governance

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[70] *See, e.g.*, Methodist Hosp. of Sacramento v. Shalala, 38 F.3d 1225, 1236 (D.C. Cir. 1994).

[71] *Id.* Courts have viewed 49 and 60 days as sufficiently "tight," but not 12 months, 14 months, and 18 months. *See* Nat'l Women, Infants, & Child. Grocers Ass'n v. Food & Nutrition Serv., 416 F. Supp. 2d 92, 106–07 (D.D.C. 2006) (citing cases mostly from the courts of appeals).

[72] Lubbers, *supra* note 56, at 111–12.

[73] *See* Pierce, *supra* note 1, at 61, 65–69 (explaining how judicial interpretation of the APA requires agencies to rely on extensive notice-and-comment procedures to demonstrate that they have engaged in reasoned decision-making).

structures, and significant agency actions would still go through inter-agency review.[74] Furthermore, Congress already does withhold judicial review in other contexts.[75] Although statutory preclusion of judicial review can lead to a dearth of legal protection against agency abuse, there need not be total lawlessness when there is statutory preclusion of review.[76]

Congress has statutorily restricted judicial review of agency action before, just not in the context of statutory deadlines. Some restrictions of review pertain to general time, place, and manner rules.[77] In other cases, Congress limits review by the dollar amount involved.[78] Other times, review is constrained by identifying the grounds on which an agency can be challenged in court, such as when the Immigration Act of 1990 limited the conditions under which a non-citizen could seek review of an agency decision.[79] Other statutes restrict judicial review of administrative fact-finding, or require certain standards of review for questions of law or mixed questions of law and fact.[80] Congress also sometimes restricts judicial review of actions by an agency before a certain time altogether. For example, Congress entirely precluded challenges related to the actions of the U.S. Department of Veterans Affairs prior to it becoming a cabinet-level agency in 1988.[81]

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[74] *Id.* at 69 (describing the advantages of review by the Office of Information and Regulatory Analysis over review by courts, due to its expertise, resources, and flexibility).

[75] *See infra* notes 82–84 and accompanying text (describing how congressional preclusion of judicial review is more widespread than previously suggested).

[76] *See* Kevin W. Saunders, *Agency Interpretations and Judicial Review: A Search for Limitations on the Controlling Effect Given Agency Statutory Constructions*, 30 ARIZ. L. REV. 769 (1988) (identifying areas of oversight of agency action, even in the context of judicial deference to agency discretion); 5 JACOB A. STEIN, GLENN A. MITCHELL & BASIL J. MEZINES, ADMINISTRATIVE LAW § 44.02, at 44–21 (2005) ("[E]ven when a statute cuts off judicial review, review will be afforded if the agency exceeds its statutory authority." (citing UAW v. Brock, 477 U.S. 274 (1986); Leedom v. Kyne, 358 U.S. 184 (1958))).

[77] For example, the Social Security Act places multiple time, place, and manner restrictions on access to judicial review: Parties must file an appeal within sixty days of notice, cannot file in state court, and can only appeal after a final agency decision. 42 U.S.C. § 405 (2018).

[78] For example, the Social Security Act allows for judicial review of a decision, but only when "the amount in controversy is $1,000 or more." Social Security Act, § 1869(b), 42 U.S.C. § 1395mm(c)(5)(B) (Supp. II 1984).

[79] Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990). In the Immigration Act, judicial review is precluded for Attorney General determinations with respect to temporary protected status. In contrast, final deportation orders are subject to judicial review as long as the petitioner files within thirty days of the determination (a decrease from the previous sixty-day limitation). *Id.* § 502.

[80] *See, e.g.*, Lindahl v. Off. of Pers. Mgmt., 470 U.S. 768, 780–82 (1985) (finding that the standard restricting courts from weighing evidence while reviewing disability determinations still applies).

[81] PAUL C. LIGHT, FORGING LEGISLATION 25 (1992) (describing the effort to include a provision for judicial review in the bill establishing the Veterans Affairs Department).

In the past, the dominant view among legal scholars who have examined congressional preclusion of review of agency action is that it rarely occurs.[82] However, recent empirical research on judicial review suggests that preclusion of judicial review, and other limitations on judicial review of agency action, is widespread and far more common than the previous consensus view suggested.[83] Although preclusions and limitations of review were once rare, they have become more common since the 83rd Congress. In a number of Congresses, the "combination of preclusions and limitations occurs more frequently than provisions allowing for review."[84]

It may seem a simple point, but the question of whether limiting judicial review is "good" or "bad" must be comparative to the counterfactual. Limiting judicial review could harm agency accountability by making it more difficult to draw attention to abusive delays. But the harms to lack of agency action can just as often lead to harms to health and welfare, and are sometimes even more insidious because there is less attention toward inaction.[85]

Ultimately, the comparison to consider is not between perfect, on-time agency action, and imperfect, on-time agency action. Congress faces uncertainty whenever either attempting to set negative or positive incentives, and it will make mistakes in both. In the case of Congress setting penalties, it acts with uncertainty about the full level of resources that the agency has available, but it gives the agency the option to act quickly to meet the deadline if the agency believes it can do so while crafting operable regulations and without sacrificing other resources, or act more slowly if it believes that it is worth it to face the penalties of delay. In the case of Congress setting the positive incentive of conditional relaxation of review, it also has uncertainty about whether it is practicable for the agency to craft a regulation on a shorter time scale, but gives the agency the option to act more quickly with relaxed review, or act slower with ordinary levels of judicial review. Keeping

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82 *See, e.g.*, Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014). *See generally* Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905, 905 (1975) ("Using the federal statutes as a measuring stick, one would search long and hard for an explicit congressional exemption of administrative action from judicial review.").

83 *See* Pamela J. Clouser McCann, Charles R. Shipan & Yuhua Wang, *Measuring the Legislative Design of Judicial Review of Agency Actions*, 39 J.L. ECON. & ORG. 123, 135–37 (2021) (finding that a number of Congresses wrote provisions precluding or limiting review more often than provisions allowing it).

84 *Id.* at 136.

85 *See* Bressman, *supra* note 1, at 1661 (arguing that an agency may be just as susceptible to corrosive influences in cases of inaction as when it decides to act); *see also supra* notes 1–4 and accompanying text.

that in mind, the next Part turns to consider how conditional relaxation of judicial review might be implemented.

II
Implementing Conditional Relaxation of Judicial Review

Although legal scholarship has examined the benefits of positive incentives compared to negative ones in many other contexts, serious attention has not been paid to the potential usefulness of positive incentives that encourage agencies to meet statutory deadlines.[86] This Part discusses ways to implement conditional relaxation of review to demonstrate that this would be a legally feasible solution. This approach would promise agencies less stringent judicial review in the scenario where agencies meet the statutory deadline, but leaves the option to have the default level of judicial review apply if the agency misses the deadline. This Part will lay out implementation mechanisms, and compare and contrast judicial as opposed to congressional implementation (without favoring one over the other, since as this discussion will show, the factors that affect when either actor might act are very similar), and Part III will compare the positive incentive of judicial review against the negative legal incentives that currently exist.

To be sure, there could be other types of positive incentives for agencies. For example, Congress could conditionalize additional appropriations for an agency to meet a statutory deadline. However, this Note focuses on the incentive of relaxation of judicial review for specific rulemaking for two reasons. First, relaxation of judicial review for a specific rulemaking could operate at the level of the particular agency action, rather than at a broader level of the agency—or even its parent department, where relevant—that is primarily responsible for the rulemaking. If the positive incentive were greater funding for the agency, for example, attaining it would still be conditional on meeting a deadline for rulemaking, but the reasons for the agency to meet that deadline would be unrelated to the rulemaking at hand. This mismatch would be bad because Congress may not view compliance with one deadline as important enough to warrant funding incentives, nor will it wish to distort agency priorities with respect to a specific rule by conditionalizing broader funding on compliance with one deadline.

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[86] *See, e.g.*, Gerrit De Geest & Giuseppe Dari-Mattiacci, *The Rise of Carrots and the Decline of Sticks*, 80 U. Chi. L. Rev. 341, 346 (2013) ("[W]hile the law traditionally focuses on sticks, there is a remarkable tendency to increasingly use carrots."); *id.* at 343–44 (collecting cases).

Second, relaxation of judicial review is a type of positive incentive that can neutralize the negative incentives that currently apply to deadlines. While there may be other positive incentives that are targeted to a specific agency action, they would not change the fact that there are background judicial penalties that apply when a deadline is missed.[87] This makes it possible to consider what statutory deadlines without penalties look like.

The most straightforward way to implement a conditional relaxation of review is via statute. Given that Congress already explicitly relaxes procedural requirements (such as notice-and-comment) in some cases where a statutory deadline is imposed, and already relaxes review unconditionally in other cases,[88] Congress could instead shield agencies from substantive review concurrent with the assignment of a statutory deadline. Congress could do so most straightforwardly by squarely barring arbitrary or capricious review. This could be accomplished with a narrow exemption, or exempting the action from judicial review more comprehensively by stating that the required action is committed to the sole and unreviewable discretion of the agency.[89] It could also limit such review to compliance with specific statutorily specified factors, but no other forms of review for reasonableness. In the context of a statutory deadline, Congress can condition limitation of review on meeting the relevant statutory deadline.

The APA itself cognizes such limits of judicial review of agency action. Specifically, the APA bars judicial review of an agency's action (1) when a particular statute precludes review of that action or, as noted previously, (2) when the action "is committed to agency discretion by law."[90] The first exception applies when a statute reflects an intent to preclude judicial review.[91] The second exception often requires a more complicated examination of the statute to determine whether it "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[92]

In precluding certain agency actions from judicial review, Congress must heed the constitutional limits on statutory limitations of judicial review, although the doctrine is not necessarily clear.[93] And a statute

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87 *Cf. id.* at 345 (discussing distortionary effects of positive incentive regimes).

88 *See supra* notes 58–68.

89 5 U.S.C. § 701(a)(2).

90 *Id.*

91 Heckler v. Chaney, 470 U.S. 821, 830 (1985).

92 *Id.* at 2. The APA also bars judicial review in other ways, including by limiting court review to "final" agency actions. *Id.* at 1–2.

93 *See, e.g.*, Michael J. Gerhardt, *The Constitutional Limits to Court-Stripping*, 9 Lewis & Clark L. Rev. 347 (2005) (capturing a disagreement between the author and another

must clearly specify the limitations of review in its text, because there is a presumption against preclusion of agency review unless legislative language is clear.[94]

It is also useful to consider whether a judicial implementation of relaxation of review as a positive incentive is viable. Courts may face some difficulty in relaxing review without a clear statutory directive to do so, as this Part will discuss. More importantly, in order for judicial relaxation of review to serve as a positive incentive for agencies to meet statutory deadlines, agencies need to be able to reliably predict when courts will relax review. Courts will therefore not be effective if they do not have predictable ways to determine when the speed of agency action justifies more leniency, in light of the other factors considered in substantive review. While there are instances where relaxation of review for meeting statutory deadlines is more appropriate than merely setting penalties for missing deadlines, these distinctions rely on policy tradeoffs between faster action and other factors, as discussed in Part III. Making such tradeoffs is more clearly the province of the legislature than the judiciary, as discussed below.[95] And even if federal courts were competent to make such tradeoffs, they would often be unlikely to do so consistently within and among circuits in a manner that would allow agencies to effectively plan regulatory action.[96]

However, courts might have some latitude here. Courts could choose to find the mere presence of a statutory deadline, in some contexts, as a signal from Congress to relax substantive review, though as discussed previously, there does not seem to be much evidence that this is a current practice at the federal appellate level.[97] This is not a surprise,

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professor on whether the Marriage Protection Act of 2004, an act of restricting access to federal courts, is constitutional).

[94] *See* Abbott Lab'ys v. Gardner, 387 U.S. 136, 139–41 (1967) (finding that the Federal Food, Drug, and Cosmetic Act did not deny pre-enforcement judicial review over drug labeling regulation because it did not explicitly grant pre-enforcement judicial review, stating "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review" (citation omitted)).

[95] However, the cases in which courts might relax review might dovetail with the analysis of when the legislature should relax review, as courts might attempt to find signals of congressional consideration of these same factors. Therefore, the analysis of this Note would apply to cases where courts should find congressional intent to relax judicial review in statutory analysis.

[96] *See, e.g.*, Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. Rev. 1193, 1220–21 (1992) (discussing unpredictability, inconsistency, and other effects of dispersed judicial authority over administrative law).

[97] There are a few potential exceptions. For example, the Ninth Circuit held that a statutory deadline could be considered in taking agency action. In *Wildwest Institute v. Kurth*, the court held that the Fish and Wildlife Service could consider budget limitations, court orders, and statutory deadlines in finding that the listing of whitebark pine as a threatened species under ESA was "warranted but precluded"; however, in this instance, the statutory

given the text of the APA and the canon of meaningful variation.[98] As noted previously, while there is a statutory basis for waiver of notice-and-comment procedures for "good cause" under the APA, there is no explicit basis for such waiver of substantive review in the text of the APA. Courts may also generally face additional uncertainty in making such a determination, as they would have to accurately distinguish cases where the statute set a deadline to prioritize speed of action, with possible trade-offs entailed in the substantive quality of the decisions the agency reached, from cases where the statute set a deadline to prevent agencies from shirking, without relaxation of quality. There is a substantial potential for courts to err in this judgment, relaxing or failing to relax substantive review in a manner inconsistent with the intended statutory scheme.

There are also reasons that it may be an unsound policy choice for courts, as actors, to interpretively relax substantive review without a clear signal from Congress. Using deadlines as restraints that loosen other requirements could allow legislators to use deadlines to make an end-run around existing procedural and substantive requirements without explicitly doing so. For example, the legislative rule doctrine in administrative law requires that certain types of agency decisions be promulgated through notice-and-comment rulemaking.[99] If legislators prefer not to require that agency actions comport with notice-and-comment requirements, but also prefer not to directly exempt the agency action from notice-and-comment requirements, imposing a deadline might allow them to indirectly subvert those requirements. The same logic would apply for preclusion of judicial review for substantive review. Agencies may also collude with Congress, or with the President, to subvert statutory schemes through impositions of deadlines, as there is evidence to suggest they have done through reductions in administrative resources.[100] Agencies may not even bother to conceal these efforts. For example, the

language allowed for an agency to find that a species qualified for protection but was precluded because of other pending proposals. Wildwest Inst. v. Kurth, 855 F.3d 995, 1005 (9th Cir. 2017).

98 *See generally* William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 834 (3d ed. 2001).

99 *See, e.g.*, John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, 917 (2004); William Funk, *Legislating for Nonlegislative Rules*, 56 Admin. L. Rev. 1023 (2004); William Funk, *When Is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 Admin. L. Rev. 659 (2002); Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. Chi. L. Rev. 1705, 1719 (2007).

100 *See* David L. Noll, *Administrative Sabotage*, 120 Mich. L. Rev. 753, 794 (2022) (examining how agencies and the President can coordinate to create budgeting and spending limitations that limit legislative agency programs).

Fish and Wildlife Service openly and explicitly asked Congress to cap its funding, believing that a reduction in resources would provide a source of defense against potential lawsuits seeking to enforce deadlines the agency believed it could not meet in the Endangered Species Act.[101]

In practice, the question of when courts should choose to relax review with a deadline might match precisely when it is wise for Congress to authorize relaxation of review. That is, Congress might decide it is better to restrict review in cases where it wants to prioritize speed over better action, and it has some factors to consider in doing so. Those same factors will also be informative for the courts. Ultimately, the factors that courts may use to decide whether or not to relax review in the context of a fast deadline may dovetail with the factors that Congress might consider in deciding whether to provide relaxation as a positive incentive for agencies to act to meet a deadline. Perhaps agencies will have clearer ex ante incentives in the case of a statutory mandate, but the analysis of the judicial question will also benefit from consideration of the same question in the legislative context.

III
A Comparison of Carrots Versus Sticks

This Part compares the positive incentive of relaxation of judicial review against existing negative incentives to argue that at least some of the time, policymakers should consider setting deadlines as "carrots," where agencies receive circumscription of arbitrary and capricious review, or are entirely shielded from judicial review, if they meet a fast deadline. This empowers an agency to make substantive choices that might be worse than the alternative that the agency would have selected if they spent longer (potentially unjustifiably so) because speed itself is an important policy priority.

In order to do so, this Part will first examine the shortcomings of a "stick only" scenario, considering what happens when an agency does or does not face binding resource constraints, and when there is conflict or alignment between the agency and Congress. It will then examine the comparative advantages and shortcomings associated with the implementation of the "carrot" of relaxation of judicial review, with examples throughout.

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101 *See* Kirti Datla, Note, *The Tailoring Rule: Mending the Conflict Between Plain Text and Agency Resource Constraints*, 86 N.Y.U. L. Rev. 1989, 1990 (2011); Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency*, N.Y. Times (Apr. 20, 2011), https://www.nytimes.com/2011/04/21/science/earth/21species.html [https://perma.cc/BTV9-RLPM] (quoting the Fish and Wildlife assistant director for endangered species as testifying to Congress that "[w]e would essentially use that as our defense for not doing more . . . so that we can balance among the various duties that we have").

First consider, for simplicity's sake, what statutory deadlines look like when agencies do not face binding resource constraints. This situation is definitionally one in which an agency can meet a statutory deadline without needing to reallocate resources away from other essential functions and comply with ordinary legally required procedural steps.[102] Such a scenario is likely to arise when Congress sets fairly lengthy deadlines, with the expectation that this will give sufficient time for the agency to act but also ensure they do not indefinitely delay the regulatory action.[103]

In most of the instances where Congress uses statutory deadlines, these deadlines may in fact not create problems, because they are long deadlines set for agencies in order to prevent complete shirking of agency duties, and therefore would not create difficult resource trade-offs for agencies.[104] Consider, for example, lengthy deadlines set for the EPA, which are exceeded by over ten years. In this case, it is fairly plausible to suppose that the reasons that the agency is failing to meet the statutory deadline include the agency simply shirking its duties because it strongly disagrees with the legislation or a consistent failure of prioritization (prioritizing other agency functions above meeting the deadline).[105] In these cases, from a congressional perspective, there may be little downside to setting a deadline and attempting to enforce it through penalties, since the alternative might be that the agency never achieves the legislative goal.

Statutory deadlines with penalties might therefore work best when the agency does not face binding resource constraints such that it would need to reallocate resources away from essential agency functions to meet a deadline.

But when Congress only has a hammer, it may be tempted to treat everything as a nail. Agencies often face binding resource constraints, sometimes exacerbated by short deadlines, that require them to

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102 For the alternative by inference, see Biber, *supra* note 37, at 49 (2008) (questioning whether statutory duties should trump an agency's decision about how to allocate its own resources but concluding that courts should enforce such duties against agencies).

103 *See, e.g.*, Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 Geo. Wash. L. Rev. 1381, 1391–93, 1397 (2011) (discussing some of the reasons that Congress sets deadlines and delegates to agencies, and some of the ways that agencies will prioritize actions that result in delay); *see id.* at 1415–17 (discussing the difficulties Congress has in setting deadlines and some of the factors they consider).

104 *See generally* Biber, *supra* note 37 (discussing difficulties of managing agency resources from Congress's position).

105 *See, e.g.*, Brady Dennis & Chris Mooney, *Neil Gorsuch's Mother Once Ran the EPA. It Didn't Go Well.*, Wash. Post (Feb. 1, 2017, 7:33 AM), https://www.washingtonpost.com/news/energy-environment/wp/2017/02/01/neil-gorsuchs-mother-once-ran-the-epa-it-was-a-disaster [https://perma.cc/8GND-HZWH].

reallocate resources away from essential agency functions to meet a statutory deadline.[106] The empirical question on how often Congress does do this is quite difficult to assess, as it requires determining the "right" amount of time to give an agency for action. But in these scenarios, a statutory deadline can end up putting agencies between a rock and a hard place.

For example, in emergency contexts, Congress is likely to set tight deadlines[107] and to prefer decision-making processes that favor speed over other dimensions (such as a better-defended or better-developed regulation that takes longer to implement). This runs into exactly the issue laid out above regarding penalty-only approaches: It will impose additional litigation risk on an agency for either missing a deadline or for meeting a deadline with a rule that is less likely to survive judicial scrutiny. Consider, for example, the Dodd-Frank scenario raised earlier, in which Congress seemed to succumb to the temptation to set very short deadlines for a large number of important and complex regulations.[108] But if it truly is implausible to think that an agency could design and promulgate over four hundred regulations in a year when ordinarily they do less than a hundred, then it might not make much sense to set that deadline and expect the agency to meet it absent some dramatic changes.

In the presence of a deadline and resource constraints, assuming that agencies can reallocate resources to meet a deadline, it makes sense that agencies will choose among the following options: (1) reallocate resources to meet the deadline; (2) not reallocate resources and miss the deadline; or (3) not reallocate resources, and meet the deadline, but produce a lower-quality decision that usually will be more likely to be struck down when subject to judicial review.[109] There is also a chance that even if agencies reallocate resources to meet the deadline, that the deadline is short enough that the agency will simply have a worse record with which to defend its decision.[110]

Therefore, when Congress only has the option to use "sticks," Congress needs to guess correctly at the optimal time it takes an agency

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106 *See, e.g.*, Datla, *supra* note 101, at 2018 ("Courts generally enforce deadlines strictly because any given court sees only the one challenge [before it] . . . . Each isolated challenge seems achievable by an agency in the context of the agency's overall budget, even when the aggregate burden on the agency might not be manageable.").

107 *See* Gersen & O'Connell, *supra* note 6, at 988 (describing how many deadlines that Congress sets are, in fact, quite long).

108 *See supra* notes 11–12 and accompanying text.

109 *See* Gersen & O'Connell, *supra* note 6, at 956 ("Deadlines impose significant constraints on agency resources, and, therefore, agencies often forego notice and comment rulemaking . . . for deadline-driven actions.").

110 *Id.* at 971.

to act when it sets a deadline, balancing the risks of an overly-short or overly-long deadline.[111] If Congress guesses wrong, it will risk—on one hand—forcing an agency to excessively reprioritize resources or reduce the quality of the decision and make it less likely to survive judicial review, or—on the other hand—allowing the agency to insufficiently reprioritize resources and act too slowly to address an ongoing harm. Guessing correctly may require information that Congress does not have, and forcing an agency to reprioritize resources is risky since Congress has to balance its interest in any particular legislation against other agency tasks that the agency may substitute away from.[112] If an agency does not sufficiently reprioritize resources and simply takes poorer-quality and more legally vulnerable actions to meet the deadline, then setting a deadline may have been counterproductive, at least if Congress would have preferred to have the agency have a greater chance of success (albeit on a longer timeline).

These risks, in conjunction, might work well to explain when Congress generally uses deadlines: either when it views an agency task as important enough to require reprioritization, or when it is primarily concerned that an agency will fail to act at all (or delay action well beyond when taking action would be feasible).[113] In the cases where Congress is concerned with agencies potentially *never* acting, Congress can set a modest deadline without fear of undershooting the time that the agency needs to act effectively.

There is reason to believe that emergency contexts are likely to be ones where Congress feels less concern about principal-agent conflict between itself and the relevant agencies. Statutory deadlines set in emergency contexts are often set to be completed (and often even lapse) during the existing administration because they are attached to emergency legislation, and emergencies tend to create bipartisan alignment on the need for urgent action both within Congress and the administration.[114] Although this sounds unlikely—and it is not the typical legislative environment—this has happened in a number of national emergency contexts, such as the Troubled Assets Relief Program bill

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111 *See* Bruce Bimber, *Information as a Factor in Congressional Politics*, 16 Legis. Stud. Q 585 (1991); Jonathan Bendor, Serge Taylor & Roland Van Gaalen, *Politicians, Bureaucrats, and Asymmetric Information*, 31 Am. J. Pol. Sci. 22 (1987).

112 *See* Todd Garvey & Sean M. Stiff, Cong. Rsch. Serv., R45442, Congress's Authority to Influence and Control Executive Branch Agencies (2023).

113 *See, e.g.*, Eric Biber, *Too Many Things to Do: How to Deal With the Dysfunctions of Multiple-Goal Agencies*, 33 Harv. Env. L. Rev. 1, 8–10 (2009).

114 Consider, for example, deadlines set for COVID-19-related assistance.

in response to the Great Recession in 2008,[115] or the Coronavirus Aid, Relief, and Economic Security Act in 2020.[116]

It is true that Congress can mitigate the harms of setting overly short deadlines by simply refraining from doing so. For example, Congress did not attach many statutory deadlines to major legislative packages in response to the COVID-19 crisis, although members of Congress and the press frequently remarked on agency delays in obligating federal relief funds intended to mitigate the health, economic, and other social effects of the COVID-19 crisis.[117] This could have been related to the lessons it learned from earlier crises, but this may have been because much of the COVID-19-related legislation focused on economic relief, and involved more spending and fewer major regulatory overhauls.[118]

But the sticky issue remains: What about cases where Congress seeks speed, but needs to do so under circumstances where the agency will necessarily face resource constraints? One answer might be to supply the agency with more resources and obviate the need to reprioritize, or accept that the agency will need to drop some other balls to handle an emergency. But what if Congress wants a middle-path solution to ensure that an agency implements a "second-best" solution quickly in order to meet a tight deadline that survives judicial review? Put differently, is there a way for Congress to direct the agency to act quickly, understanding that the agency might have acted more optimally, or with more complete reasons, if given more time and more resources—simply because sometimes it is more important as a matter of policy that something gets done quickly rather than perfectly?

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115 *See* Joshua Green, *TARP, the Forbidden Bipartisan Success*, THE ATLANTIC (Sept. 29, 2010), https://www.theatlantic.com/politics/archive/2010/09/tarp-the-forbidden-bipartisan-success/63803 [https://perma.cc/R3DE-AJ4G].

116 *See* Amber Phillips, *'Totally Unprecedented in Living Memory': Congress's Bipartisanship on Coronavirus Underscores What a Crisis This Is*, WASH. POST (Mar. 20, 2020, 12:35 PM), https://www.washingtonpost.com/politics/2020/03/26/totally-unprecedented-living-memory-congresss-bipartisanship-coronavirus-underscores-what-crisis-this-is [https://perma.cc/ZE8X-DWT7].

117 *See, e.g.*, Cheyenne Haslett & Laura Romero, *Tribes Will Begin to See Some of Coronavirus Relief Money Owed by Federal Government*, ABC NEWS (May 6, 2020, 5:09 AM), https://abcnews.go.com/US/tribes-begin-coronavirus-relief-money-owed-federal-government/story?id=70517234 [https://perma.cc/47T3-MT4T]; Lauren Clason, *Second Round of Emergency Medical Provider Funds Delayed*, ROLLCALL (Apr. 16, 2020, 7:59 PM), https://rollcall.com/2020/04/16/second-round-of-emergency-medical-provider-funds-delayed [https://perma.cc/7NZW-6TE2]; Kate Rogers, *After a Rush for More Small Business Funding, PPP Loan Money Remains Untapped*, CNBC (June 2, 2020, 3:14 PM), https://www.cnbc.com/2020/06/02/billions-in-ppp-loan-money-remains-untapped-by-small-businesses.html [https://perma.cc/KAP3-W3G9].

118 *See, e.g.*, Kelsey Snell, *What's Inside the Senate's $2 Trillion Coronavirus Aid Package*, NPR (Mar. 26, 2020, 5:34 PM), https://www.npr.org/2020/03/26/821457551/whats-inside-the-senate-s-2-trillion-coronavirus-aid-package [https://perma.cc/M2H4-RP8K].

Again, first consider the case of an agency that is not facing binding resource constraints, for simplicity's sake and to mirror the analysis above. As compared to "sticks," it might make much less sense to use "carrots" when there are no binding resource constraints. If an agency can meet a deadline without needing to reallocate resources in the context of a long statutory deadline, there may not be much need to additionally incentivize the agency to do so through relaxing review. The agency would presumably take conditional relaxation of review as a signal and, more of the time, dedicate fewer resources or take fewer procedural precautions to taking the required action in a faster timeframe.[119] The alternative would have been acting on time at the risk of experiencing the penalty. There may be other reasons for Congress to relax review, perhaps unconditionally, in cases where the agency is not particularly constrained but where Congress wishes to explicitly shield the agency from review along more dimensions.[120]

Conditional relaxation of review has more comparative upsides when agencies face binding resource constraints, as will typically be the case. As discussed above, setting a statutory deadline under conditions of binding resource constraints would ordinarily place an agency in a bind, requiring the agency to choose between acting quickly and facing greater risk of having the action struck down when subject to judicial review, or setting a regulation that the agency feels is inadequate, missing the deadline and facing judicial penalties, or else reallocating resources in a way that would harm other agency functions. Setting a condition by which substantive review is relaxed can undo this bind. Conditional relaxation of review allows Congress to specify time requirements and incentivize agencies to meet them, and also to still enforce those time requirements through penalties later in the case that an agency does delay beyond the deadline. Put another way, Congress could reserve the possibility of applying a carrot-and-stick set of incentives.

Conclusion

Attaching carrots to statutory deadlines is necessarily an incomplete solution to the problem of agency delay. There are other factors that might make both carrots and sticks of the kind that this Note has discussed ineffective. Regardless of whether Congress precludes judicial review, it may be necessary for Congress to appropriate additional funding for an agency to fix systematic delays that stem from insufficient resources.

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119 *See* Gersen & O'Connell, *supra* note 6 (generally describing uses of deadlines for agencies and surveying a large collection of deadlines).

120 *See supra* notes 58–68 and accompanying text.

However, given that there are downsides of setting short statutory deadlines, Congress can consider mitigating some of them. To reiterate, Congress should consider setting conditional shields that protect agencies from substantive judicial review if they meet statutory deadlines when there are binding resource constraints on the agency's time and energy such that reprioritization is not desirable and if there's a need for speed such that a "second-best" solution faster is better than a "first-best" solution at the cost of longer delay.