Book Review

The Battle to Protect the American Public Will Become Even More Difficult

The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment
by Rena Steinzor and Sidney Shapiro.
University of Chicago Press 2010. Pp. 272. $45.00.

*Richard J. Pierce, Jr.**

This excellent book is compulsory reading for anyone who is interested in the performance of regulatory agencies. It is well structured, well researched, well reasoned, and well written.

The authors analyze the performance of five agencies they call the "protector agencies"—the Consumer Product Safety Commission, Environmental Protection Agency, Food and Drug Administration, National Highway Traffic Safety Administration, and Occupational Safety and Health Administration ("OSHA").[1] They paint a bleak picture of the performance of these agencies over the past few decades, but they place little, if any, of the responsibility for that poor

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1 Rena Steinzor & Sidney Shapiro, The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment, at vii (2010).

performance on the agencies themselves.[2] Instead, the authors attribute the disappointing performance of the agencies to other institutions. For instance, they devote chapters of the book to discussion of the President's requirement that agencies engage in cost-benefit analysis before issuing a major rule, as well as other forms of presidential interference with agency decisionmaking. The authors also discuss partisan gridlock and other dysfunctions in Congress, ossification of the agency rulemaking process created by excessively intrusive judicial review of agency actions, the weakening of the civil service, and inadequate funding and staffing of the agencies.

Each chapter includes an analysis of the ways in which the institutional malfunction at issue adversely affects the performance of the agencies, the authors' beliefs with respect to the sources of the malfunction, and their proposed ways of eliminating or reducing the effects of the malfunction. Each chapter also includes case studies that illustrate those effects.

For example, the chapter on the weakening of the civil service discusses all the symptoms and sources that have been identified by scholars like Paul Light[3]: antipathy toward civil servants expressed by political leaders,[4] increases in political appointees coupled with reductions in the power of civil servants,[5] "thickening" or adding layers of supervision to civil servants,[6] salaries that are inadequate to attract and retain enough of the best people, and a compensation system that fails to reward good performers or punish bad performers.[7] The authors' proposed cures respond logically to the sources of the malfunctions they identify: reduced reliance on political appointees, increased appointment of career civil servants to senior positions in agencies, reduced layers of supervision, increased salaries, and changes in compensation policies and procedures that give managers the flexibility to improve the incentives of civil servants.[8]

The book is so well researched and well written that I learned a lot even from the chapters with which I disagree. Thus, for instance, I continue to believe that an agency should engage in cost-benefit analysis of a proposed major rule before it issues a final rule, notwith-

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2 *Id.* at 4.

3 *See, e.g.*, PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY (1995).

4 STEINZOR & SHAPIRO, *supra* note 1, at 193.

5 *Id.* at 214.

6 *Id.* at 211.

7 *Id.* at 210.

8 *Id.* at 214–19.

standing the authors' passionate argument to abolish that requirement.[9] Yet, Steinzor and Shapiro do such a good job of criticizing the cost-benefit analysis requirement and of documenting its bad effects that I am forced at least to acknowledge the need for major changes in the ways in which agencies and the White House implement the cost-benefit-analysis requirement.

I agree with most of the arguments the authors make. Yet, I find one recurrent theme of the book so distracting that it interferes with my ability to internalize the many good points they put forth. The book is extremely partisan in its tone. For instance, it attributes a high proportion of the protector agencies' poor performance to a quartet of archvillains: Ronald Reagan, George W. Bush, Dick Cheney, and Newt Gingrich.[10]

There is no question that liberal Democrats generally support government regulation more than conservative Republicans. There is also no doubt that conservative Republicans often use rhetoric that erodes public support for regulatory agencies and that they often take actions that interfere with the ability of agencies to perform their missions effectively. I do not fault Steinzor and Shapiro for identifying and documenting those tendencies of conservative Republican politicians and for delivering the clear, if implicit, message that anyone who wants agencies to improve their performance should vote for liberal Democrats and against conservative Republican candidates for office.

The authors put so much emphasis on this good-versus-evil theme, however, that they often overlook or discount causes of the poor performance of agencies that cut across political lines. That tendency, in turn, sometimes causes them to misdiagnose maladies and to urge cures that are unlikely to be effective. I will illustrate this weakness of the book in five contexts: the presidential requirement that agencies engage in cost-benefit analysis, partisan gridlock, political interference with agency decisionmaking, activist judges, and inadequate funding.

Steinzor and Shapiro devote a chapter to a scathing and comprehensive critique of the requirement, first imposed by President Reagan, that an agency must determine whether a major proposed rule is likely to yield benefits that exceed its costs before the agency can issue the rule in final form.[11] They acknowledge that Presidents Clinton and Obama embraced and reimposed the cost-benefit-analysis re-

9 *See id.* at 72–93.

10 *See id.* at 126–29.

11 *Id.* at 72–93.

quirement,[12] but they never grapple seriously with the obvious implications of that fact. When a requirement enjoys the support of the leaders of both parties for many decades, it is time to abandon the effort to persuade politicians to eliminate the requirement. The authors' efforts to implement much-needed reform to the cost-benefit-analysis requirement would have a much better chance of success if they were not commingled with futile arguments to eliminate cost-benefit analysis altogether.

Steinzor and Shapiro's chapter on congressional dysfunction focuses heavily on the phenomenon of partisan gridlock.[13] They explain this phenomenon in several ways, but they place particular emphasis on the "Gingrich revolution."[14] They do not discuss at all the phenomenon that most political scientists consider to be the primary source of the increase in partisanship in U.S. politics—redistricting to implement the one-man, one-vote mandate that the Supreme Court announced in the 1960s.[15] Politicians of both parties seek to create congressional and state legislative districts that are "safe" for incumbents. Thus, if the incumbent is a Republican, they try to create a district in which the population is at least sixty percent Republican; if the incumbent is a Democrat, they try to create a district in which the population is at least sixty percent Democratic.

This judicially mandated redistricting process has produced sea changes in the politics of this country. Most candidates for state and federal legislative office are much more concerned about a potential loss in a primary than they are about a potential loss in a general election. As a result, Democrats are driven ever further left while Republicans are driven ever further right.[16] Moreover, a legislator is reluctant to compromise with members of the opposite party for fear that his opponent in the next primary will defeat him by arguing that he is not a "real Democrat" or a "real Republican." There is no reason to be optimistic about the chances of eliminating partisan gridlock unless and until we can devise and implement a method of changing the process of redistricting. Political scientists and law professors have been searching for a solution to that problem for decades, with no reason for optimism so far.

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12 *Id.* at 92.

13 *See id.* at 97–121.

14 *See id.* at 101–04.

15 For a description of this phenomenon and its effects, see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002).

16 *See id.* at 627–28.

Steinzor and Shapiro chastise President George W. Bush for interfering with agency decisionmaking for political reasons and for allowing politics to trump good science in the agency decisionmaking process.[17] They seem not to realize that all Presidents engage in this process. Indeed, no one could become or remain President without frequently elevating politics above principle and science in the agency decisionmaking process.

There are myriad illustrations of this common practice in every Administration, including the Obama Administration. For instance, President Obama supports maximum production and use of corn-based ethanol[18] even though the science is crystal clear: switching from gasoline to corn-based ethanol will increase global warming.[19] The Obama Administration's strong support for corn-based ethanol is easy to explain. President Obama has no chance of being reelected in 2012 unless he can win many of the farm states, and Democrats have no chance of retaking control of the House and Senate unless the party keeps many of its seats in these states. That is impossible unless President Obama and the Democratic Party support maximum production of corn-based ethanol.

Anyone who supports President Obama's agenda should be pleased that he is taking the kinds of actions that maximize the probability that he will be able to implement his agenda. Those actions necessarily include placing politics above the merits and above

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17 STEINZOR & SHAPIRO, *supra* note 1, at 132–40.

18 The White House's blog and website are packed with statements in support of maximizing production of corn-based ethanol. *E.g.*, Press Release, Office of the Press Sec'y, The White House, President Obama Announces Steps to Support Sustainable Energy Options, Departments of Agriculture and Energy, Environmental Protection Agency to Lead Efforts (May 5, 2009), http://www.whitehouse.gov/the_press_office/President-Obama-Announces-Steps-to-Support-Sustainable-Energy-Options/ (describing President Obama's commitment to advance biofuels research and commercialization); Press Release, Office of the Press Sec'y, The White House, Background on the President's Events Today in Missouri and Illinois (Apr. 28, 2010), http://www.whitehouse.gov/the-press-office/background-president-s-events-today-missouri-and-illinois (praising a Missouri ethanol plant's high yield in light of President Obama's recent visit); Christina Romer & Ann Wolverton, *Strengthening the Rural Economy*, WHITEHOUSE.GOV (Apr. 27, 2010), http://www.whitehouse.gov/blog/2010/04/27/strengthening-rural-economy (describing one of the Administration's policies as incentivizing biofuel production and renewable energy generation in rural areas).

19 *E.g.*, Timothy D. Searchinger et al., *Fixing a Critical Climate Accounting Error*, 326 SCIENCE 527, 527–28 (2009) (noting that it is erroneous to treat bioenergy from biomass as carbon neutral); Timothy Searchinger et al., *Use of U.S. Croplands for Biofuels Increases Greenhouse Gases Through Emissions from Land-Use Change*, 319 SCIENCE 1238, 1238–40 (2008) (finding that corn-based ethanol nearly doubles greenhouse gas emissions over thirty years).

good science when the political stakes are high in an agency decision-making context.

Steinzor and Shapiro are harshly critical of judges who overreach in the process of reviewing agency actions. For instance, they refer to the "paralyzing failure of will" OSHA suffered as a result of the "merciless thrashing administered by the courts."[20] They attribute this tendency primarily to conservative judges and Justices,[21] and they express their belief that this judicial overreaching has increased over the last two decades.[22] They also decry the "[i]deological and partisan voting patterns" of some judges.[23]

The empirical studies of judicial review of agency actions tell a more complicated story. The problem of excessively intrusive judicial review of agency actions has not increased over the last two decades. Some studies have found that the rate at which courts uphold agency actions has increased over the last fifty years,[24] while others have found no change in that rate.[25] Thus, the problem of excessively intrusive judicial review has been with us at about its present level for half a century.

Moreover, while some studies have found that conservative Republican judges and Justices reject agency actions more often than liberal Democratic judges and Justices,[26] the worst culprits often are liberal Democrats. For instance, the author of the opinion in which the Court "mercilessly thrashed" OSHA was Justice Stevens,[27] the leader of the liberal bloc in the Supreme Court until his retirement in 2010. Furthermore, the Justices who rejected agency actions most frequently over the last thirty-five years were Justices Brennan and Marshall. They upheld only 52.6% and 55.6% of agency actions, respectively.[28] By contrast, the conservative Justice who is hardest on agencies—Justice Scalia—upheld agency actions in 64.5% of cases.[29]

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20 STEINZOR & SHAPIRO, *supra* note 1, at 149.

21 *See id.* at 147, 153.

22 *Id.* at 153.

23 *Id.* at 155.

24 *See, e.g.*, Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1057.

25 *See, e.g.*, William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1098–100 (2008).

26 *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 832–33 (2006).

27 *See* Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607 (1980).

28 Eskridge & Baer, *supra* note 25, at 1154.

29 *Id.*

Justices Brennan and Marshall also had by far the most partisan voting patterns of any modern Justices. The difference between the rate at which they upheld liberal agency actions versus conservative agency actions was approximately 45%.[30] Again, the contrast with Justice Scalia is telling. He has upheld conservative agency actions only 18% more often than he has upheld liberal agency actions.[31]

To their credit, Steinzor and Shapiro intersperse high-quality, ideologically neutral analysis with their morality tale about the perpetual battle between good Democrats and bad Republicans. In their chapter on the role of the judiciary, they attribute a significant part of the poor performance of the protector agencies to well-intentioned but ill-conceived judicial decisions.[32] They are particularly critical of the "hard look" doctrine—the judicial requirement that an agency must take a hard look at a problem and its potential solutions before it issues a rule.[33]

Steinzor and Shapiro provide an accurate and persuasive account of the many adverse effects of the hard look doctrine. It imposes decisionmaking burdens on agencies that are so great that they create "ossification" of the rulemaking process—i.e., agencies must devote so many resources to the process of issuing a single major rule that they can issue only a small fraction of the rules Congress requires them to issue, and virtually none of the discretionary rules they need to issue to fulfill their broader statutory responsibilities.[34] Moreover, the hard look doctrine is so malleable that it inevitably yields partisan patterns of judicial decision in which conservative judges reject liberal agency actions on the basis that the agency has not taken a sufficiently hard look at the problem, while liberal judges reject conservative agency actions on the same basis.[35] Moreover, it systematically biases the decisionmaking process in favor of regulatees and against the beneficiaries of regulation by imposing demanding decisionmaking procedures that advantage the much-better-funded regulatees.[36]

Steinzor and Shapiro illustrate this phenomenon with several good case studies. For instance, a court rejected an agency rule on the basis that the agency had not taken a sufficiently hard look at the

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30 *Id.*

31 *Id.*

32 STEINZOR & SHAPIRO, *supra* note 1, at 146–69.

33 *Id.* at 165.

34 *See id.*; *see also* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995).

35 STEINZOR & SHAPIRO, *supra* note 1, at 166.

36 *See id.* at 165.

problem even though the agency had devoted massive resources to the study of the problem and provided a 1600-page explanation of its action.[37] The court was implementing a statutory provision that instructs an agency to incorporate with a final rule a "concise general statement" of the rule's basis and purpose.[38] It is easy to conclude that judicial review has become extreme when a court concludes that a 1600-page explanation of an agency's action is not sufficient to comply with the statutory requirement of a "concise general statement of [its] basis and purpose."

Steinzor and Shapiro urge the Supreme Court to respond to this major source of the protector agencies' poor performance by announcing a new, less intrusive, and more determinate review doctrine to replace the open-ended and infinitely malleable hard look doctrine.[39] They also urge the Supreme Court to issue one or more opinions in which it instructs lower courts to engage in appropriately deferential review of agency actions; moreover, they urge the Court itself to set an example for lower courts by consistently engaging in deferential review.[40]

I agree completely with Steinzor and Shapiro's diagnosis and prescription for this source of the poor performance of agencies. I am not optimistic that the Supreme Court will respond with anything approaching the solution Steinzor and Shapiro urge, however. They are not the first scholars to urge the Court to curb its tendency and that of the lower courts to engage in inappropriately intrusive review of agency actions. Paul Verkuil famously made an impassioned plea to that effect in 1981.[41] He has since been joined by a large chorus of scholars who have repeated and expanded on his argument to no avail.[42] There has been no change in the rate at which courts uphold or reject agency actions in the last thirty years.[43] As Steinzor and Shapiro recognize, they are calling for the Supreme Court to experience an "epiphany"[44]—that is a rarity for a judicial institution.

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37 *Id.*

38 5 U.S.C. § 553(c) (2006).

39 STEINZOR & SHAPIRO, *supra* note 1, at 169.

40 *Id.* at 168.

41 Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for* Vermont Yankee II, 55 TUL. L. REV. 418, 418–21 (1981).

42 *See, e.g.*, Richard J. Pierce, Jr., *Waiting for* Vermont Yankee *III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902 (2007).

43 *See supra* text accompanying notes 24–25.

44 STEINZOR & SHAPIRO, *supra* note 1, at 168.

I am mystified by the alternative way of addressing the problem of excessively intrusive judicial review that Steinzor and Shapiro support. They express their belief that Congress could reduce the judiciary's "penchant for reinterpreting its intent" by writing "better reasoned, more detailed statutes."[45] My forty years of observing the process of creating and interpreting legislation have persuaded me that "better reasoned" and "more detailed" are antonyms. One of our major problems today is enactment of statutes that are so long and detailed that no one has any idea how the many inconsistent provisions will be interpreted by agencies and courts.

It is absurd to imagine that anyone understands a statute that is a thousand or more pages long, that has never been subjected to any hearing or committee report, and that is made available for consideration by the public only a few days before it is enacted.[46] I am confident we could improve the performance of government if Congress were to impose a rule that no statute can exceed twenty pages. That is about the length of each of the landmark statutes that originally created the protector agencies and described their important missions.[47] It is also about the limit of anyone's ability to draft a statute that is coherent and sensible.

Steinzor and Shapiro's chapter on agency funding is both the most persuasive and the most frustrating part of their book. They do a great job of documenting the extent to which the level of financial support for the protector agencies has fallen over the past few decades, as well as the existence of a large and growing gap between the funding the agencies need to perform their missions and their actual levels of funding.[48] Steinzor and Shapiro argue that, even if we could miraculously eliminate all the other sources of the agencies' poor performance, they could not possibly succeed with their present meager budgets.[49] I agree.

Steinzor and Shapiro express optimism that Congress will increase funding for the protector agencies. They premise that optimism on a combination of two factors—the protector agencies account for only a tiny fraction of the budget, and the public consist-

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45 *Id.*

46 *See* Hanah M. Volokh, *A Read-the-Bill Rule for Congress*, 76 MO. L. REV. (forthcoming 2011), *available at* http://ssrn.com/abstract=1597281.

47 *See, e.g.*, Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified at 15 U.S.C. §§ 2051–2089 (2006)) (twenty-six-page statute establishing the Consumer Product Safety Commission).

48 *See* STEINZER & SHAPIRO, *supra* note 1, at 54–71.

49 *See id.* at 67.

ently supports the missions of the protector agencies.[50] I do not share the optimism of Steinzor and Shapiro on this critical issue because both of their premises are faulty.

Steinzor and Shapiro assert that the protector agencies account for only "$10.3 billion, or 0.29 percent of the $3.5 trillion budget Congress approved on April 2, 2009, and 0.89 percent of the $1.2 trillion deficit projected for FY 2010—[a] truly small [amount] by any measure."[51] But the measure they have chosen is irrelevant to the budget debate. The five agencies they call the protector agencies are only a tiny fraction of the more than one hundred agencies that Congress has created to protect us from various sources of danger. The missions of those five agencies are important, but I doubt that Steinzor or Shapiro would be willing to increase their level of funding by reducing the funding of agencies like the (former) Minerals Management Service or of the myriad agencies that regulate financial markets. Those are just a few of the hundred-plus other protector agencies that are underfunded and whose poor performance of their missions has cost the country trillions of dollars over just the last couple of years.

When the term "protector agencies" is defined in a more realistic manner to encompass all of the agencies that are assigned missions to protect the public, the protector agencies account for most of the part of the budget that is traditionally referred to in the budgeting process as "[o]ther appropriated programs."[52] That title distinguishes that category from the other two broad categories of spending: "defense" and what is accurately referred to as "mandatory programs"—i.e., Medicaid, Medicare, and Social Security. "Other appropriated programs" accounted for $695 billion in the 2010 budget.[53] That is 19.6% of the total budget and 59.4% of the projected 2010 deficit.[54] Those amounts are large by any measure.

Steinzor and Shapiro's other premise for their optimism is equally faulty. They express the belief that "the public is not at all ambivalent about the government's role in policing dangerous products, drugs, and pollution."[55] That is false. As the constant cycling in public opin-

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50 *See id.* at 220–22.

51 *Id.* at 222.

52 OFFICE OF MGMT. & BUDGET, A NEW ERA OF RESPONSIBILITY: RENEWING AMERICA'S PROMISE 119 (2009) [hereinafter BUDGET], *available at* http://www.gpoaccess.gov/usbudget/fy10/pdf/fy10-newera.pdf.

53 *Id.*

54 *See id.*

55 STEINZOR & SHAPIRO, *supra* note 1, at ix.

ion polls and the outcomes of elections demonstrates, the public is both ambivalent and fickle about the role of government regulation.

Steinzor and Shapiro describe their reasons for optimism in the following passage:

> The major reason for optimism about the future of the five agencies is the resonance that we discern in the nation's current affairs with this history. The majority of the people, as exemplified by the campaign themes and promises of the president elected in 2008, believe that the government's approach to business and the regulation of the economy must change profoundly. Because a majority of Americans are angry at what they perceive to be the rapaciousness of private sector financial institutions and anxious about what the future holds, the door appears open to profound changes in the way government is configured and operates.[56]

Their description of the political mood in America was accurate when Steinzor and Shapiro finished their book in 2009. By the time I wrote this review of their book, however, that political environment had been replaced by a dramatically different environment. Looking at a May 2010 poll, I saw a country that bears no resemblance to the country Steinzor and Shapiro described accurately in 2009. People remain angry at financial institutions, but most are even angrier at government. As of this writing, the latest poll found that 56% of likely American voters want Republicans to control Congress, while only 36% want Democrats to control Congress.[57] Even more remarkable, 60% of Americans want the government to authorize increased offshore drilling for oil and gas in the midst of the most disastrous oil spill attributable to offshore drilling in history.[58] The May 2010 poll depicted a country in which a large majority of the public believed that the government was playing too large a role in managing the economy.

Of course, I have no idea what the political mood of the country will be in the future. For all I know, the description Steinzor and Shapiro provide in their book will be accurate again by the time this review is published. My point is that the public is so ambivalent and so fickle about the proper role of government regulation that no politi-

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56 *Id.* at 220–21.

57 Peter Wallsten, Naftali Bendavid & Jean Spencer, *Voters Shifting to GOP, Poll Finds*, WALL ST. J., May 13, 2010, at A1.

58 Louise Radnofsky & Jean Spencer, *Public Still Backs Offshore Drilling*, WALL ST. J., May 13, 2010, at A4.

cian can count on consistent public support for any position he takes with respect to an issue like the appropriate level of funding for the protector agencies.

By contrast, the public is not at all ambivalent about the factors that compete with funding for those agencies. The public consistently wants low taxes and high benefits in the form of entitlements like Social Security, Medicare, and Medicaid.

In 1997 I described the budget debate that was ongoing at that time:

> The parties to the debate have agreed to balance the budget by 2002. Their high-visibility debate has focused on two issues: whether taxes will be reduced by $87 billion or by $203 billion over a seven-year period and whether the rate of increase in Medicare and Medicaid spending will be capped at 7.3% or 7.9% per year during that period. Either level of spending will ensure that health care costs consume a constantly increasing share of total revenues every year. Moreover, because both parties have removed social security from the debate, spending for that entitlement also will continue to increase at a rate far above the rate of increase in total revenues.
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> Both parties to this historic debate have treated discretionary spending as a residual category unworthy of debate or analysis. Discretionary spending, the appropriations supporting agency operations, is simply the amount left over when the parties deduct the constantly increasing level of entitlement spending from total revenues, which may be reduced by a large tax decrease. The net result is an unarticulated bipartisan consensus in support of dramatic reductions in discretionary spending.[59]

Important elements of the budget debate of 1997 remain constant today. Americans continue to insist on low taxes and high entitlements. Both Presidents Bush and Obama have responded to those preferences by reducing taxes and increasing entitlements. Both have also increased spending on national security by large amounts in the wake of the 9/11 attacks. Moreover, President Obama has committed not to raise taxes on anyone who makes less than $250,000 a year,[60] and the government's ability to extract additional revenue from tax

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59 Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 65–66 (1997) (footnotes omitted).

60 David Kocieniewski, *Definition of Rich Now a Tax Issue*, N.Y. TIMES, Sept. 30, 2010, at B1.

increases on individuals who make more than that amount was virtually exhausted by the tax increases that were included in the healthcare-reform statute Congress enacted in 2010.[61]

The context of the modern budget debate is much worse than the context of the 1997 debate, however. We now have a deficit of $1.2 trillion.[62] There is a broad consensus that we must reduce that deficit significantly to avoid the fate of Greece—an international financial bailout coupled with mandatory draconian reductions in government spending. Our options are extremely limited. We cannot increase taxes significantly or reduce entitlement spending significantly because the public will not tolerate either of those actions.

We may be able to reduce defense spending as we gradually withdraw forces from Iraq and Afghanistan. Even a complete elimination of all defense spending would be insufficient, however. The deficit is $1.2 trillion, while defense spending is only $673 billion, and the Obama Administration projects a $16 billion *increase* in defense spending by 2019, in part to pay for President Obama's increase in the U.S. commitment to the war in Afghanistan.[63]

Revenues will increase gradually as the economy improves, but even the Obama Administration's optimistic forecast predicts a budget deficit of $712 billion in 2019.[64] The Administration also predicts discretionary spending of $745 billion in 2019.[65] Those predictions are almost certainly inconsistent with the United States' ability to sustain large budget deficits without suffering catastrophic results.[66] We will have to take steps to reduce significantly or eliminate the deficit before 2019.

If we were to decide to balance the budget by replicating the budget deal of 1997 today, we would need to reduce discretionary spending to $33 billion, or by 95.37% of the level of discretionary spending in 2010. I do not expect that to happen, but it is inconceivable that we will *increase* spending to support the protector agencies any time in the next decade. We almost certainly will continue to reduce spending for that residual purpose.

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61 *See* Paul Sullivan, *What Higher Taxes Will Really Mean*, N.Y. TIMES, May 21, 2010, http://www.nytimes.com/2010/05/22/your-money/taxes/22wealth.html.

62 BUDGET, *supra* note 52, at 119.

63 *Id.*

64 *Id.*

65 *Id.*

66 *See* FISCAL AFFAIRS DEP'T, INT'L MONETARY FUND, FISCAL MONITOR: NAVIGATING THE FISCAL CHALLENGES AHEAD 5 (2010), *available at* http://www.imf.org/external/pubs/ft/fm/2010/fm1001.pdf.

Given fiscal realities, implementation of the changes in judicial review and presidential involvement in the regulatory process urged by Steinzor and Shapiro would not be nearly enough to improve the performance of the protector agencies. To have any chance of even allowing those agencies to perform at their present low levels, we would have to implement far more radical changes. The changes that come to mind include elimination of all statutorily mandated decisionmaking procedures, elimination of all judicial review of agency actions, and a dramatic reduction in the number of agencies and the number of missions assigned to agencies. That would return us to the administrative state that existed in the nineteenth century.

That might not be a bad result, as Jerry Mashaw's comprehensive description of the nineteenth century administrative state shows.[67] Mashaw's revealing account includes a description of the most effective "protector agency" in U.S. history.[68] In the 1820s and 1830s, accidental deaths and injuries from frequent explosions of steamboats rose steadily.[69] Congress responded to this problem by passing the Steamboat Safety Act of 1852, which was implemented by the Board of Supervising Inspectors.[70] Within two years, that "protector agency" had issued rules that reduced the incidence of steamboat explosions and the attendant loss of life by over eighty percent.[71] It accomplished that task with a modest budget and a small staff that included no lawyers. It did not need lawyers because its actions were not subject to judicial review, and the only decisionmaking procedure it was required to use was a brief written explanation for each rule or order it issued.[72]

Justice Scalia once said that "Administrative law is not for sissies—so you should lean back, clutch the sides of your chairs, and steel yourselves for a pretty dull lecture."[73] I highly recommend that

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67 Mashaw published his study in four articles in *The Yale Law Journal*: Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636 (2007); Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568 (2008) [hereinafter Mashaw, *Administration and the Democracy*]; Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362 (2010).

68 Mashaw, *Administration and the Democracy*, *supra* note 67, at 1628–66.

69 *Id.* at 1629–30.

70 *Id.* at 1638–40.

71 *See id.* at 1659.

72 *Id.* at 1641–43.

73 Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 511.

anyone who is interested in the future of administrative law and government regulation read Steinzor and Shapiro's important book. But to paraphrase Justice Scalia, you should not read the Steinzor and Shapiro book in conjunction with this review unless you are prepared to "lean back, clutch the sides of your chairs, and steel yourselves for" a serious encounter with depression. Oh, and you should make sure there are no sharp objects in the vicinity if you take seriously both the points Steinzor and Shapiro make in their book and the points I make in this review.