From Expertise to Politics: The Transformation of American Rulemaking

Peter L. Strauss
Columbia Law School, strauss@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the Administrative Law Commons, Constitutional Law Commons, and the Law and Politics Commons

Recommended Citation
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/298

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact cls2184@columbia.edu.
FROM EXPERTISE TO POLITICS: THE TRANSFORMATION OF AMERICAN RULEMAKING

Peter L. Strauss*

In this speech to be given on November 15, 1996, as the American contribution to the week-long conference on administrative law sponsored by the Fundación Estudios de Derecho Administrativo in Caracas, Venezuela, Professor Peter L. Strauss addresses the history and developing political character of rulemaking in federal law over the fifty years since enactment of the Administrative Procedure Act. As a framework, Professor Strauss sets forth a hierarchy of institutional rulemaking, from constitution through informal advising. He then develops his discussion of rulemaking by tracing the federal process of rulemaking through time, beginning with the enactment of the Administrative Procedure Act of 1946 and the formative years of its application. He then turns to the active rulemaking era that began with the administration of John F. Kennedy and ran through the Nixon-Ford administrations. Next, Professor Strauss relates the process of rulemaking during the era of “running against big government” that began with the Carter administration and ran through the Reagan and Bush years. Finally, Professor Strauss considers the present state of rulemaking. He argues that, appropriately, the political character of rulemaking has been receiving increasing attention. For a variety of reasons, today’s rulemaking concerns are increasingly with the period before a formal notice of proposed rulemaking has occurred. Regrettably, the developments he chronicles have not been accompanied by concern for their overall effect on the fairness, accuracy, efficiency, and democratic characteristics of what has been a highly useful procedural device. He sees as the result a fairly profound disincentive to use rulemaking, and calls upon Congress and the courts for more careful assessment of the need for and impact of various elements of their approaches.

Probably every society has a discernible hierarchy of legislative forms, varying in their generality and political grounding. In the United States, as elsewhere, this hierarchy has both a geographic and an institutional expression.

* Betts Professor of Law, Columbia Law School. The author would like to thank John Manning, Todd Rakoff, Roy Schotland, and Sidney Shapiro for their very helpful comments on earlier drafts.
Geographically, one may distinguish among legislative forms that are national, statewide, or local in their application. The tendency, certainly problematic in some cases and complicated by American ideas of federalism, is for the largest social issues to be dealt with at the national level, those where greater variety of outcome may be sustained at the state level, and the least important (or at least most variable) issues at the local level. National legislation, where it exists, dominates state legislation; and state legislation, where it exists, dominates local. Probably a similar geographic hierarchy exists, with or without the complications of federalism, in any complex society.

Institutionally, at each of the geographic levels, one can also describe a hierarchy that I suspect must be quite general in complex political societies. At the apex, one places the constitutional document—the charter, in the case of municipalities; then ordinary legislation produced by a representative legislature; then “regulations” adopted by governmental organs other than the legislature—“subordinate legislation,” as it is often called; and, even less formally, declarations of policy or interpretation, or documents offering guidance for compliance with the foregoing. It may be useful to outline the general legal and political characteristics of this hierarchy, as an introduction to our specific discussion of rulemaking.

Constitutional documents are brief in comparison to the general mass of legislative activity, extremely general in their pronouncements, and—of particular importance here—adopted by special procedures that suggest both relative permanence and the highest degree of political legitimacy. In the United States, this entails ratification by super-majorities, both nationally and at the state level, and a declared source (not quite born out by the elaborate and demanding ratification procedures) directly in “We the People.” We imagine our Constitution, not as an act adopted by authorized agents, but as a direct expression of popular will. In the states, typically, constitutional amendments must be ratified by popular vote. For municipal charters, the situation is somewhat more complex, but the same characteristics of relative brevity, generality and permanence, and of special procedures for adoption, prevail. Once adoption has occurred, that fact establishes the legitimacy of the prescription, unless a superior form of law is inconsistent—thus, federal law could control the validity of a provision of the Constitution of New York State, but within New York’s own law, the adoption of a constitutional provision is in itself sufficient to establish its validity.

One function of the constitutional documents is to establish legislative bodies empowered to adopt ordinary legislation and to define the spheres within which they are authorized to do so. Typically the bodies

1. If parliamentary democracies, such as England’s, do not invariably recognize a formal, special constitutional form of enactment, the behavior of those democracies is nonetheless as if such principles existed; whatever its technical authority (for example, to alter the legislation determining the frequency of Parliamentary elections or the status of the Monarchy), the English Parliament behaves as if these would be extremely special matters, action on which would require extraordinary attention to the public will.
thus authorized are composed of officials elected for that purpose, agents of the people who periodically must have their agency renewed through the political process. National and state legislatures, and local councils, are composed of persons elected from geographical subunits of the legislating jurisdiction for the responsibility of adopting ordinary legislation. These are generalist institutions, and their work product is typically both transitive and intransitive in character. That is, in some instances—as in enacting a criminal statute or a commercial code—their legislation directly resolves the substantive issues that give rise to the need to legislate; in others, the legislature instead creates a loose framework of policy and establishes expert bodies (agencies) to deal with issues that may appear too unpredictable, complex or specialized for direct legislative resolution. While it is sometimes argued that the subdelegation of authority to fix rules of conduct is illegitimate, the practice is universal in America, as I suspect it is in most if not all complex societies. A legislature can more easily decide the relative importance of safety in the workplace to other issues, and direct an agency to assure that it be achieved, than specify the elements of safe practice for each industrial situation in a constantly changing economy. One may fairly raise questions in particular cases whether legislators have acted as fully as they might to define the field within which subordinate legislation will be adopted by a given agency, or what parameters they have set for the political and legal responsibility of the agencies they have thus empowered; but the phenomenon of subdelegation is an inevitable by-product of a complex society and the limits of time and resources available to a generalist legislature.

While constitutional provisions are validated by the fact of their adoption, the practice of reviewing legislation for constitutionality reflects the existence of judicial controls over the validity of formally proper legislation. Although courts do not inquire into the procedural adequacy of legislative actions that satisfy the few specified constitutional formalities, the vote of the legislature does not inevitably establish a statute’s formal adequacy. Rather, any statute is subject to judicial inquiry into its consistency with constitutional empowerments and prescriptions. Issues of substantive authorization, in this respect, are not seriously inquired into; a


3. In American jurisprudence, the classic theoretical statement of this position, often evoked but never enforced, is the following passage from John Locke, Second Treatise of Government § 141 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690):
   
   The people alone can appoint the form of the common-wealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but, such as are enacted by those whom they have chosen, and authorized to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.
court will sustain a legislative judgment that a given statute is within the substantive authority of the legislature to enact, unless persuaded that no state of social fact could support that judgment. Assertions that statutes conflict with constitutional guaranties of individual liberties, however, will generally produce a more intense inquiry into the justification for the statute and the seriousness of its impact upon the claimed rights.

At the third level, beneath constitutions and legislation, is the practice of adopting regulations. We can describe this rulemaking in idealized terms as the more-or-less expert filling in of details in the specification of rules for private conduct, for which the legislative process is poorly suited or has insufficient time. A given jurisdiction will have many rulemakers, and only one legislature. If that one legislature can annually produce a book's worth of politically ratified work, all the jurisdiction's rulemakers taken together are capable of generating several library shelves worth of rules. These regulations have the force and effect of statutes (although as we shall see their legitimacy is differently established). A construction company must obey the rules of the Occupational Safety and Health Administration (OSHA) respecting the storage of potentially explosive gases or the safety measures required for persons working on exposed surfaces, at the risk of fines or other sanctions for having failed to do so. Thus, rules may be subordinate legislation, but are unmistakably legislative in their impact.

External oversight of rulemaking is much more extensive and demanding than external oversight of statutes. Valid adoption of a rule requires compliance with statutorily prescribed procedures for rulemaking, action within the extent of statutory authority delegated to the agency, and a judgment supported by the materials generated in the course of the rulemaking. In contrast with statutes, each of these issues is subject to fairly close examination on judicial review—a substitute, as one might characterize it, for the political legitimacy characterizing the adoption of constitutional and statutory prescriptions. In addition, as might be imagined, a variety of devices for political oversight of rulemaking are available to both the President and the Congress—the elected actors of American government—and to the corresponding actors at the state and local levels. The body of this essay is an examination of these matters, and the way in which they have been changing over past decades—in response, one may believe, to concerns about the legitimacy of this important lawmaking activity.

Before turning to these matters in detail, however, it is appropriate to mention a fourth level of legislative activity—more guidance than prescription—that also occurs, less formally, at the agency level. Agency rules themselves require interpretation and open a variety of issues. A rule of the Federal Aviation Administration (FAA) may specify the parameters that an aircraft component must meet to establish its safety, but

5. Id. § 1926.403.
not precisely show how this can be accomplished. Once again, time and resources do not permit the resolution of all questions through the rulemaking just briefly described; other issues seem better left to private initiative than encased in the hard matrix of actual prescription. Indeed, current American politics tends to favor rules that set performance standards—that is, rules that tell the subjects of regulation what they have to accomplish, leaving the precise means of doing so to their initiative—over rules that command the use of particular designs. If the costs of making and qualifying one's own design are moderate, the result is to promote efficiency and innovation. For some enterprises, however, perhaps especially smaller enterprises, the costs and uncertainties of design may be quite substantial in relation to these possible gains. To meet these needs, in addition to legislative rulemaking, agencies—or more properly their professional staffs—may engage in a much less formal process of offering guidance as to meaning and possible means of compliance. Thus, supplementing the FAA's rule setting the performance standards a certain aircraft component must meet, its staff may provide a quite technical document outlining one or more concrete ways in which it has already concluded the safety of the component can be assured. This practice leaves other possibilities open, but also can reduce compliance costs for those attracted to what already has won probable staff approval. Those subject to regulation often solicit this advice-giving activity eagerly, as an efficient means of resolving uncertainties that could be quite costly to them. The resulting interpretive and policy documents are not formally binding; their adoption is extremely informal, usually not penetrating the upper echelons of the responsible agency; and—continuing the pyramidal metaphor already suggested—their volume, in the agencies that employ them, dwarfs that of regulations in about the same proportion as regulations dwarf statutes. They serve the invaluable functions of revealing agency thinking on controversial questions, and pointing toward what might not otherwise be obvious paths of compliance.

Precisely because these instruments are not legally binding and procedures for their adoption are not specified, questions of their legitimacy are subdued, and judicial review is infrequent. Courts are occasionally persuaded that an agency has used ostensible "guidance" to evade the procedural and other obligations of legislative rulemaking—that an agency has acted towards those it regulates as if its interpretation or policy were formally binding "law." In some cases, too, the announcement

---

6. In 1992, I reported that formally adopted tax regulations take about 30 centimeters of shelf space; revenue rulings and similar advisory documents, seven meters; the rule of the Federal Aviation Administration, five centimeters; but the corresponding technical guidance material, in excess of six meters. Peter L. Strauss, The Rulemaking Continuum, 41 Duke L.J. 1463, 1468-69 (1992).

of an interpretation will have such consequences for the private community that the courts can be persuaded to consider whether it is valid. In general, however, the interpretation or policy will not become a subject of inquiry until it has actually been applied in a particular case.

It may be useful to sum up the preceding paragraphs in a pair of tables:

<table>
<thead>
<tr>
<th>Constitutional</th>
<th>Statutory</th>
<th>Regulatory</th>
<th>Advisory</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Constitution</td>
<td>State constitution</td>
<td>Council or board adopts ordinances</td>
<td>Agency staff issues non-binding guidance (interpretation or policy)</td>
</tr>
<tr>
<td>U.S. Congress enacts statutes</td>
<td>State legislature enacts statutes</td>
<td>State agency adopts legally binding regulations</td>
<td>Agency staff issues non-binding guidance (interpretation or policy)</td>
</tr>
<tr>
<td>Federal agency adopts legally binding regulations</td>
<td>Agency staff issues non-binding guidance (interpretation or policy)</td>
<td>Local agency adopts legally binding rules</td>
<td></td>
</tr>
</tbody>
</table>

The preceding may be sufficient to suggest that questions of legal and political legitimacy about rulemaking are both important and unsettled in American jurisprudence. What seemed to me possibly interesting for this occasion would be to look at the answers we have been developing over time—a course of development that one may well believe has overshot the mark, but also one that unmistakably reflects the importance of this device for the development of law, and the felt necessity of finding political as well as legal warrant for it. I will tell this story at the federal level, where it is both the most complex and the most familiar. Yet I am confident similar trends could be found at all political levels of rulemaking activity.

I.

A. 1946-61

Nineteen forty-six is the year in which, with enactment of the federal Administrative Procedure Act (APA),8 the United States first adopted

---

8. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946). The APA was recodi-
general statutory procedures for rulemaking at the national level. The noted scholar Kenneth Culp Davis called this possibly the most important aspect of that Act; he is often quoted and never contradicted in this regard. While 1946 marked the beginning of specified procedures for rulemaking, however, government agencies had long been adopting rules; and the courts, when confronted with the evidence of this subordinate lawmaking, had in general found it unremarkable. In 1911, for example, the United States Supreme Court had no difficulty upholding the fine imposed on a rancher for grazing sheep in a national forest without a permit, in violation of a regulation the Secretary of Agriculture had adopted under quite general authority “to make provision for the protection against . . . depredations upon the public forests.” This statute made no specific mention of livestock or grazing permits, but did provide the penalties for violating any regulations the Secretary might adopt. The unanimous Court characterized the Secretary’s permit-requiring rule, without which there would have been no offense, as not legislating, but only exercising, a “power to fill up the details.” Congress had legislated sufficiently when it permitted the making of regulations for a specified public purpose and set the penalties that could be assessed on their violation. In 1935, reviewing a state agency’s rule defining the kinds of containers that could be used to package fresh raspberries and strawberries, the Court found the fact that this legal requirement had resulted from an agency, and not the state legislature, was irrelevant to its reviewing function. Again unanimously, it rejected the idea that an agency exercising delegated authority was subject to procedural requirements (in this case, the making of findings) greater than would be imposed on a legislature.

Where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes . . . and to orders of administrative bodies. . . . [T]he statute did not require special findings; doubtless because the regulation authorized was general legislation, not an administrative order in the nature of a judgment directed against an individual concern.


12. Id. at 509.
13. Id. at 516.
14. Id. at 517.
16. Id. at 186.
17. Id.
The 1946 APA's informal rulemaking procedures applied only to legislative rulemaking,\(^{18}\) the third category in the hierarchy of legislative activity set out above. Policy and interpretive guidance instruments, although understandably defined as "rules,"\(^{19}\) were exempted from any procedural requirements beyond simple publication.\(^{20}\) In relation to the prior law, the new APA procedures for legislative rulemaking, although apparently undemanding and so intended at the time, enlarged both agency responsibilities\(^{21}\) and the possibilities of judicial control.\(^{22}\) There were now general procedures for rulemaking,\(^{23}\) compliance with which could be enforced;\(^{24}\) a mild requirement of findings to accompany rulemaking,\(^{25}\) quite unlike statutes; and, indeed, the APA defined the tasks of courts reviewing agency actions, including rulemaking, quite differently from what courts would expect to do when considering the constitutionality of statutes.\(^{26}\) Since these procedures set the baseline for our analysis, it will be useful to state them explicitly.

The APA established three basic procedural requirements for informal rulemaking: first, the publication of general public notice of proposed rulemaking; second, an opportunity for any concerned individual to file written commentary about the proposal with the proposing agency; and, finally, a concise, general explanation by the agency of its basis for adopting a rule.\(^{27}\) In addition, the subtitle of the APA providing generally for judicial review of agency action established the eventual possibility of judicial review to determine the lawfulness of an act of rulemaking in at least three respects: first, the agency's compliance with procedural requirements; second, its legal authority to adopt the rule; and, finally, to some extent, the factual support for and the rationality of the agency's judgment.\(^{28}\)

As late as 1958, when Kenneth Culp Davis published the first edition of his famous treatise on Administrative Law,\(^{29}\) rulemaking was a somewhat undervalued procedure in practice, and the requirements for its exercise were quite permissively viewed. The requirement of notice, in statutory terms, could be satisfied by inclusion of "either the terms or substance of the proposed rule or a description of the subjects and issues involved."\(^ {30}\) The statute gave no indication of how long the agency must provide for interested persons "to participate in the rule making through

---

19. Id. at 237.
20. Id. at 239.
21. Id. at 238.
22. Id. at 239-40.
23. Id. at 238-39.
24. Id. at 242-44.
25. Id. at 239.
26. Id. at 243-44.
27. Id. at 239.
28. Id. at 243-44.
29. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE (1958).
submission of written data, views, or arguments, and one or two months was as long as any provided. The two provisions, taken together, fairly suggested the parameters of a hearing on legislation, conducted by a legislative committee: participants were volunteers whose contributions might aid (or perhaps influence) the work product and were not parties with rights of control over the evaluation process or the outcome. And the statutory requirements for findings, that “the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose,” were literally understood; a one or two page statement of the agency’s reasoning was understood to suffice to meet a findings requirement much less stringent than the APA stated for the results of formal adjudication.

To the extent rules were subjected to judicial review, which does not seem to have been often, its demands were not great. The formulation of the notice provision in the alternative, and the specific invitation of the findings requirement to brevity and generality were taken at face value. Rules, like statutes, were rarely challenged “in the abstract,” but rather in connection with enforcement proceedings—and in that context issues like procedural regularity in rulemaking, and record support for the rulemaking judgment would naturally recede into the background. Nor at this time did the political branches make concerted efforts to control or participate in rulemaking. Rulemaking was an ordinary agency activity. The dominant understanding was that agency action was “expert,” intended to operate at some remove from politics; and both Congress and the White House tended not to get involved. Thus, while we can see some movement in the APA to increase the responsibility and responsiveness of agency rulemaking, it was at the outset a highly informal and “free” activity.

31. Id.
32. Id. (emphasis added).
Rulemaking, 1946-61

It may be useful for any reader used to parliamentary systems to pause here and note to herself some particular characteristics of American government that shape this presentation. Recall that, in our practice, the President and Congress are radically separated. The heads of government agencies are not responsible to the legislature in the parliamentary sense; they may be called up for oversight hearings, but they are not permitted to be members of Congress, and the only formal means available to Congress to control their actions is through the enactment of legislation or, in very rare cases, impeachment. Even the President's controls over their actions are somewhat indirect, particularly in the case of the independent regulatory commissions. It is for this reason that the preceding paragraphs, and those that follow, can be written from the perspective that political controls over rulemaking are not inevitable. One's impression is that in parliamentary systems, the development of subsidiary legislation (rules) is highly disciplined by the party controlling the government, and is generally a strictly confidential, internal, bureaucratic
process. In the United States, which lacks a political government in that strong, coordinated sense, the development of rules is a public process on which politics may operate as an external force, but which it does not wholly determine. Indeed at times, as just noted, Americans have behaved as if rulemaking were an expert more than a political process. While a mixture of the two has perhaps always been present, one result has been to animate an expectation of rationality in rulemaking that few would ever anticipate in legislation.

B. 1961-77

The period beginning with the election of John F. Kennedy and running through the Nixon-Ford administration marked a tremendous expansion in the ambition of American government and, in particular, in the prominence, use, and development of rulemaking. Many of the new governmental initiatives begun at the time—regulation of environmental, health, and safety issues—not only pointed toward rulemaking as the most sensible means for implementing the policy responsibilities that were being assigned, but also entailed regulation that would have a sweeping impact across the American economy. Where previously the predominant national regulators tended to focus on particular concerns (such as the securities industry or transportation sectors), the Environmental Protection Agency (EPA) and OSHA were issuing rules affecting all industries, in every state.

Scholars, in the meantime, were awakening to the advantages of informal rulemaking over case by case adjudication (the usually available alternative) for policy formation, and encouraging the broader use of this underappreciated procedure. While the procedures of rulemaking were less demanding than those of adjudication, they were also more democratic; rather than leave an important policy issue to the accident of who happened to be the parties to a particular adjudication (and their lawyers), all interested persons received notice of the issues at stake in rulemaking and were entitled to participate on an equal footing. The requirements of adjudication for objectivity and dispassion in decision often constrained agencies to highly artificial allocation of decisional responsibilities and participation rights within themselves. In contrast, informal rulemaking permitted the agency to bring all its resources to bear on decision in an institutionally efficient and productive way. And the public found it easier to know the applicable law in a system of rules—definitive and easily located textual prescriptions—than in a system of case law, where the governing rules emerged from the somewhat obscure and temporally extended processes of common law development.

The democratic part of these arguments, we can now see, drew force from a general social trend that came to view agencies less as apolitical "experts" administering a strictly rational process, and more as political

bodies making choices among alternatives in response to social needs and political inputs. The literature of the time is filled with concerns about the “capture” of administrative agencies by those they were intended to regulate. Regulatory beneficiaries, those on whose behalf the agencies were intended to act, were much less likely to appear in adjudicatory proceedings—both as a reflection of the political difficulties of organizing a diffuse group of citizens for that purpose, and as a result of participation rules for adjudication that made the participation rights of regulatory beneficiaries hard to establish. One finds in the cases of the time not only an appreciation of the virtues of rulemaking from this perspective, since in rulemaking anyone was free to participate, but also an increasing insistence that room be made even in adjudication for participation by regulatory beneficiaries—to balance the pressure on the agencies, as it were.

Responding to similar impulses, regulatory reform legislation of the time tended to stress openness—the Federal Advisory Committee Act, Freedom of Information Act, and Government in the Sunshine Act all sought to pull information about government functioning into public view, and to do so in ways that either paid no heed to the particular claims of the persons who might seek this information, or explicitly sought in the outcome political balance among possibly interested groups.

As rulemaking became more prominent, important, and popular, courts began to encounter it more frequently. A series of interpretations developed, captured in the phrases “paper hearing” and “hard look,” that significantly heightened both the procedural demands of rulemaking and the intensity with which courts would review rulemaking outcomes. The Freedom of Information Act permitted participants in rulemaking easy access to documentary and other information agencies possessed. As a result both of this development and of judicial reasoning about what one would have to know in order to make intelligent comments on a proposal turning on disputable propositions of (generally scientific) fact, the APA’s requirement of notice of “either the terms or substance of the proposed rule or a description of the subjects and issues involved” came to be understood to require agencies to share with the public, as part of their

34. See Bernard Schwartz, Administrative Law 23 (1976).
rulemaking proposals, the significant data in their possession. Even if new data was developed in the course of a rulemaking, it might be necessary to make that new data available, so that it too could be commented on. Moreover, the dimensions of "a concise general statement of basis and purpose" similarly expanded, to include requirements to meet all "significant" comments filed in the rulemaking and to reveal in some detail the agency's reasoning process. If comments had produced significant changes from the proposal—a possibility one might think the major reason to provide for notice and comment in the first place—participants needed the chance for a second round of commentary to react to this shift in direction. In court, on review, it began to be noticed that agencies' judgments did not have the political legitimacy of legislative judgments. Consequently, an agency would be well advised to write its statement of basis and purpose in a manner clearly demonstrating the factual basis for and reasonableness of its judgments, and that it had taken a "hard look" at any matters that had proved controversial. And judicial review immediately upon adoption of a rule, in the abstract rather than after particular enforcement proceedings had been brought, became common after the Supreme Court, in a 1967 case, stressed the "presumption" that final agency actions—which completed rulemakings undoubtedly were—were subject to immediate APA review.

To some extent, these and other developments were the product of mistaken judicial analogies between the newly important rulemakings and what were for judges the more familiar forms of adjudicative action. When courts began reasoning about the need for "adversarial comment" or for opportunities to challenge witnesses or data presented by other participants (notably the agency), their thinking smacked of the courtroom rather than the legislative hearing room. These aspects were emphatically disowned by the Supreme Court in a 1978 judgment that reiterated the properly institutional character of rulemaking and stressed the inappropriateness of judicially requiring procedures that had not been statutorily provided for. This judgment did not, however, result in a return to the understandings of 1946. The Court's warnings could not obviate the new appreciation of rulemaking as a political as much as expert process, that could not claim the electoral legitimacy a legislature would enjoy. In addition to the Freedom of Information Act and other like legislation, one could easily see that whenever Congress had recently consid-

42. For a discussion of the development of the "hard look" standard, see supra note 39 and accompanying text.
ered rulemaking issues (always in the context of particular, prominent rulemaking agencies such as the EPA), it had specified additional procedures like those the courts had been developing. Consequently, the “paper hearing” and “hard look” elements, and the relatively heightened character of judicial review, remained in place.

In the same time frame, the new political importance of rulemaking was also generating increased presidential and congressional interest in controlling its outcomes. Rules requiring the investment of tens or even hundreds of millions of dollars in environmental protection or safety equipment could have a significant effect on the economy at a time when inflation was a major concern; and in any event the private investments thus required were large enough easily to attract the attention of politicians and their friends. The National Environmental Policy Act of 1969 had for the first time required agency actors to think forward about the probable consequences of their major actions in coordination with the White House—in that case, environmental consequences—and to consider modifying proposals to reduce their negative impacts. It was not hard for the White House to see that it would also be useful for agencies to think forward about the possible economic consequences of (and justifications for) their major regulatory actions, again under the supervision of a White House office that could serve a coordinating function. The White House began experimenting with these requirements. At about the same time, Congress—realizing the large public and private consequences of some rulemakings—began including in statutes that authorized rulemaking a requirement that any rules the agency adopted be submitted to the Congress for possible legislative veto. Under these provisions, the rules would be deprived of effect if they were disapproved by vote of one or both houses of Congress. Ordinary political oversight activities also began to escalate at this time; a striking pair of graphics shows how during the period 1961-1977, the number of pages published in the Federal Register (a reasonable index of rulemaking activity) and the size of congressional committee staffs and the number of congressional days devoted to oversight activities each grew exponentially, along parallel lines.

Rulemaking, 1961-77

A professional colleague, upon reading an earlier draft of this essay, remarked that one could argue that the democratic character of rulemaking thus revealed rivals that of the legislature.49 While lacking the vote with which, in theory, she controls her legislative representative(s), the citizen’s right to comment connotes a different disciplinary device—if her comment is germane, the agency must respond to it or risk frustration in adopting its rule. No citizen can force attention to her views upon her legislature in quite this way; even if she appears at a legislative inquiry, the permitted chaos of the legislative action will not be measured against the cogency of her testimony. Requirements of rulemaking “rationality” thus serve to impose practical bounds on agency judgment that do not exist for legislatures; Congress can with impunity amend a statute in self-

49. Letter from Professor Sidney Shapiro, Rounds Professor of Law, University of Kansas Law School (June 28, 1996) (on file with author).
contradictory ways, but an agency trying to "have it both ways" will likely fail the judicial test of rationality. From a perspective that puts a high value on the place of reason in even political discourse among citizens, this virtue might be thought to counterbalance the missing discipline of the ballot box.

C. 1977-93

Jimmy Carter may have been the first presidential candidate after the New Deal to have successfully run his campaign against Washington and the "big government" it represented; each of his successors has followed his lead. It is perhaps not too extreme to find one explanation in the explosion and changed character of rulemaking during the preceding period; political campaigns of the time were rife with advertisements mocking the detail and stringency of workplace and environmental rules. In any event, the Carter, Reagan, and Bush administrations were characterized by increasingly stringent efforts to gain presidential control over rulemaking in the agencies. Congressional and judicial developments were more mixed in character, owing in part to political choices by the American electorate that generally placed control of White House and Congress in the hands of different political parties. Still, one can say that the political character of rulemaking and the legitimacy and importance of effective political controls over it continued to gain recognition. At the agency level, and among scholars, the judicial innovations of the preceding period were being noticed and seen to be exacting a price: "paper hearings" generated mammoth records and "concise general statement[s] of basis and purpose" expanded into the hundreds of pages to meet the demands of "hard look review." As a result, rulemaking became more and more expensive to complete; "ossification" was the description increasingly heard of the consequences. In fact, we did not lower our demands for the kinds of regulation agencies like OSHA and EPA generated; threats to health and safety continued to engage a perhaps disproportionate share of the public's concern. But the combined effects of changes in rulemaking and its control slowed the effective pace and volume of rulemaking considerably.

It is useful to start an account of this period with the presidential innovations, both because they were the most striking and because they

51. A particularly dramatic example is given in The Struggle for Auto Safety. Id. Following the bureaucratic shocks of this development, the National Highway Transportation Safety Agency essentially ceased to initiate new rulemakings. In its first two decades, OSHA averaged about one completed rule per year for protecting workers from hazardous contaminants of the air; when it attempted to set moderate, more-or-less consenses-based standards for 428 toxic substances in one rulemaking, whose explanation spans 652 pages in the Federal Register, 54 Fed. Reg. 2332 (1989), challenges by persons concerned with eleven of those chemicals brought down the whole rule. AFL-CIO v. OSHA, 965 F.2d 962 (11th Cir. 1992).
served to focus attention on the procedural period before the APA procedures take hold, the time leading up to publication of a notice of proposed rulemaking. One effect of the developments of the preceding era, including somewhat misconceived judicial censoriousness towards political contacts and private conversations occurring between agency staff and outsiders during rulemaking processes, had been to make the notice and comment period more of a formality than a formative event. In settings where an agency could expect controversy, those controversies were dealt with before the notice and comment period, and that period consequently often came to serve confirmatory more than informative purposes. Having to give full notice of its data as well as its thinking, fearing restrictions on its ability to change once a proposal had been made without having to provide for a second round of comments, and believing informal conversations with affected interests during rulemaking might be disapproved, an agency had every incentive to complete its inquiries, to make whatever accommodations with competing interests it was going to make, and to reach near-final conclusions, before rather than after it issued its notice of proposed rulemaking. And it was during this preliminary period, while the agency was deciding just which of many possible rules it should pursue and how to frame its proposal, that the presidential measures had their most forceful impact.

While President Carter first established by Executive Order a broadly applicable requirement of analysis and consultation respecting so-called major rules—those an agency could expect to have an annual impact of $100 million or more on the economy—an analysis of President Reagan's more developed orders will give a clearer picture of the new structures introduced into the pre-notice period. Under one, actually the second adopted in point of time, agencies were required to develop an annual rulemaking agenda, justified on projected economic grounds, in consultation with a bureaucratic element of the President's immediate staff, known as the Office of Information and Regulatory Affairs (OIRA).52 OIRA is located within the Office of Management and Budget (OMB), the White House office that serves as the President's principal institutional arm for contact with the agencies. Thus, the President—and the highest levels of politically responsible officials in the agency itself—would be certain to be involved at the initial stages of setting agency priorities for action. The order was obscure about the President's ability to preclude an agency undertaking any given rulemaking effort; in some cases, at least, that agenda was set by legislative obligations the President could not negate.53 But the very fact of a consultative process introduced regular opportunities for influence that previously had been, at best, accidental. Moreover, as rulemakings were placed on an agency's agenda, that commitment to consider action, taken months if not years in

53. Id.
advance of publishing an APA notice of proposed rulemaking, was made public through semi-annual publication of a new document, a *Unified Agenda of Federal Regulation.* The more important and earlier of the two Reagan orders took effect later in the process of developing a proposal for rulemaking. Before issuing a notice of proposed rulemaking for a “major rule,” itself a characterization over which OIRA exercised substantial control—an agency was obliged to complete and clear with OIRA a draft regulatory impact assessment. This assessment was an elaborate document that explored the economic justifications for the rule to be proposed, identified possible alternative approaches, and sought to specify that approach that would maximize social utility and minimize the expense to be inflicted. This perhaps sounds like an appropriate inquiry—and indeed most American scholars concede it to be so—but the questions to be resolved often involved very substantial uncertainty and judgment. Moreover, putting the questions as the executive orders did gave an unmistakably economic cast to the consideration of policies the legislature may have considered in other terms. Many social goods are not readily monetized—the value, for example, of environmental amenities or freedom from discrimination—and others, such as the value of human life, are, to say the least, open to the most profound debate. In fact, the executive orders were careful always to state that this form of cost-benefit analysis was to be employed only to the extent consistent with law. Yet the underlying political reality, as one will quickly see, is that this analytic requirement both heightened the general influence of economically oriented policy planners over rulemaking and propelled the agencies into very detailed and technical discussions of their projects with the White House, at their most formative stage, with correspondingly manifold opportunities for influence and delay. A notice of proposed rulemaking could not be published until OIRA was satisfied that the agency’s draft analysis was satisfactory, and that analysis then became a part of the rulemaking “rec-

54. The *Unified Agenda of Federal Regulation* is a reprinting of selected provisions of the *Federal Register.*


56. *Id.*

ord" informing the comment period. Once comments had been received, agencies were obliged to make their draft analysis final—again through an OIRA vetting process—and that final analysis, once approved, also became a part of the agency record, against which any eventual rule might be assessed.

More for political than legal reasons, these regimes were limited to "executive agencies," and not extended to the independent regulatory commissions (although a number of them probably engaged in similar analyses and cooperated with the presidential process in a variety of ways). They were established as bureaucratic control regimes, that created no legal rights in private persons who might be interested in a rule. Of course, there was no barrier to private interests attempting to bring political pressure to bear on the White House. Indeed, most of the suspicions expressed about these regimes resulted from the belief that they had resulted in "special interest" influence over rulemaking outcomes. Private communications of this character, it will be evident, run counter to the openness themes to be found in such statutes and the Freedom of Information Act, and threaten one's capacity to regard the process as a rationalistic one. Despite occasional evidence of presidential strong-arming of the agencies, Congress generally tolerated the OIRA institution, even when the White House and Congress were controlled by opposing political parties. However, it directed its continuing oversight and efforts to control the process to securing openness about agency-OIRA contacts, and to obtaining agreements with OIRA and the White House that significantly reduced political access to OIRA staff. Some elements of the OIRA process—the periodic agenda of regulations under development and requirements of pre-proposal analysis—found their way into legislative enactments of the period; through this legislation and other executive orders, analytic requirements proliferated to a degree many found risible. As a practical matter, however, only the OIRA economic impact analysis requirements were seriously pursued during this period. The net effect of these developments, again, was to heighten considerably the importance of the time before a notice of proposed rulemaking was published, and to make the President a significant participant in agency rule development then.

Congress was somewhat more frustrated as a "player" in rulemaking during the Carter, Reagan, and Bush presidencies. An important Supreme Court decision found that the legislative veto was constitutionally invalid; if Congress wished to disapprove of a rule an agency adopted, it would have to do so by statute, subject to the possibility of presidential veto. During the Reagan and Bush administrations, when a Democrat Congress was more likely than the Republican President to want government to achieve positive regulatory ends, Congress frequently enacted

61. Id.
quite detailed legislation, specifying, for example, just which chemicals EPA should regulate and setting very short and judicially enforceable time frames within which it was obliged to act.\textsuperscript{62} Yet Congress can produce a 700-page set of amendments to the Clean Air Act only if it engages in subordinate legislation in another form: detailed staff work is capable of producing legislation of this character; a deliberative political process engaging the whole of a representative legislature is not. Moreover, the experience of Congress, too, was that the detailed specification was often unavailing. Even if a timetable might serve to reduce the White House's capacity to inflict delay on unwanted rules, agencies could not or would not adopt all the rules required within the very brief times given, and the courts were essentially incapable of providing effective relief. Several efforts to "reform" the rulemaking process sought to put in statutory form the "paper hearing" and "hard look" developments of the preceding era that we have already discussed;\textsuperscript{63} these failed of enactment for political reasons.

The one successful legislative development, enactment of a regime of "negotiated rulemaking,"\textsuperscript{64} served to confirm the importance of the pre-notice period. Under this regime, one that many hoped would reduce the growing contentiousness and expense of rulemaking, agencies were encouraged to form balanced private-public negotiating groups, representative of all interests likely to be involved, that could, with a facilitator's aid, develop consensual proposals for rulemaking.\textsuperscript{65} This is an important and hopeful development, yet one should notice where it fits in the timeline of rule development. Regulatory negotiation occurs before public notice of proposed rulemaking. The very idea is to develop a proposal that, when made public, will attract no significant opposition. In this respect, it mirrors the shift in emphasis from the post-notice to the pre-notice period that the presidential regimes and incentives provided by judicial review have helped to bring about.

Judicial review during these years was characterized by growing awareness and acceptance of rulemaking's political cast and responsibility. "Hard look" review continued, and indeed was endorsed by the Supreme Court in 1983, over a partial dissent that stressed the properly political elements of some rulemaking judgments.\textsuperscript{66} But in perhaps its most influential case of this period, the Supreme Court enunciated principles of substantial deference to agency interpretation of ambiguous statutory language, appearing to state in its peroration that it did so precisely because the agencies' place in politics and responsibilities to the Presi-


\textsuperscript{63} For a discussion of the "paper hearing" and "hard look" developments of the preceding era, see supra note 39 and accompanying text.


\textsuperscript{65} Id.

dent made them the more appropriate determiner of what necessarily would be policy issues. When they encountered the possibility that White House consultations occurring under the executive orders might have persuaded agencies to reach results different from those they would have reached strictly on their own, the courts expressed concern only to prevent the use of the process as a "conduit" for private special interests. They saw the President's possible influence as an appropriate working out of his responsibilities as chief executive, for which he could be held responsible by the electorate. The courts also accepted the possibility of congressional pressures—at least outside of circumstances that unmistakably demonstrated the injection of a statutorily irrelevant factor or factors into the decisionmaking process.

**Rulemaking, 1977-93**

The collective result of presidential, congressional, and judicial scrutiny, and of the clogging of the pre-notice period as well as complexification

---

67. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984). While the Court stressed "policy" and the political connection, the position can also be understood as a concession that, as to matters of expert assessment of social and technological needs, the agencies are also superior actors (and, in general, are appointed for this purpose).


69. Id. at 400-01.
tion of APA procedures, has been further ossification of rulemaking. Yet it is also possible that we are now beginning to see a substitution of political for judicial controls, that in the longer run could again free up the rulemaking processes. Judicial review has real weaknesses for controlling the outcomes of rulemaking, not so far from its deficiencies in relation to review of statutes. It is wholly retrospective and frequently does not reach completion until years after a rule's adoption. Invoked by particular parties with focused complaints, it is not well suited to conveying to the court a balanced picture of the issues and proceedings, but rather tends to give distorting influence to details taken out of context. To the extent courts can be engaged by the issues of judgment and policy presented, one risks substituting the judgment of persons particularly unsuited by training and position for either expert or political understandings. In light of these difficulties, courts may find it possible to retract some of their attentiveness to rulemaking as political controls—controls which by and large are prospective and operate before final agency decision—develop and are accepted as legitimate. To a degree, American scholars believe, the intensification of judicial review during the '60s and '70s came in reaction to the absence of other controls over what had become very high-consequence decisionmaking. A number of recent statements by the Supreme Court about the different domains of political and judicial controls could be understood as being in support of just such a partial retraction.70

D. 1993—

The most recent period is identified for convenience with President Clinton's election, but is as strikingly connected with the Republican congressional "revolution" of November 1994. It has been characterized by continued growth in political control mechanisms over rulemaking and debate over the virtues of judicial review. Presidential and scholarly attention to the rulemaking process has tended to focus yet earlier in the process on the point at which priority choices are made and then preliminary steps are taken towards the development of rules. Particularly for the agencies responsible for health, safety, and environmental regulation, finding suitable procedures and principles for comparing the various risks to which regulation might be addressed has emerged as an issue of central importance. The difficulty of this task is a function of both the inevitable

70. The dominant arguments are for a lighter judicial touch in assessing agency interpretations of factual and policy issues. See Mashaw & Harfst, supra note 50; McGarity, supra note 10, at 1440; Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 ADMIN. L. RSV. 59, 65 (1995). One scholar has suggested a substitution of congressional (political) for judicial review, by requiring formal adoption of all rules as statutes—which would then have the benefit of the light judicial touch that characterizes constitutional review of social statutes. Paul R. Verkuil, Rulemaking Ossification: A Modest Proposal, 47 ADMIN. L. RSV. 453 (1995). Congress, however, has proved unwilling to make such a firm commitment of its political capital and, indeed, has, in effect, instructed the courts to stay their present course. See infra text accompanying note 82.
uncertainties of assessment and the public's widely varying attitudes toward risk. Congress has been considering a wide range of "regulatory reform" measures, only some of which deserve that description and most of which clearly would tighten controls over rulemaking at all stages. In this brief time, no notable new judicial trends can be discerned, although the Supreme Court's emphasis on the political character of rulemaking, with the consequence of narrowing the opportunities for judicial review, appears to be continuing.

A number of other influences affecting rulemaking might also be noted. The pressures for balancing the federal budget have resulted in stringent limitations on agency resources, with obvious implications for their capacity to make and enforce rules. Increasingly, too, agencies are being pressed periodically to review their existing body of rules—as legislatures never do—with an eye to pruning out those rules that through aging or change in social conditions have lost their continued utility. This, too, diverts time and resources. These developments, however, have not found reflection in changes in rulemaking process, and so will not be spoken of further here.

President Clinton has continued the "regulatory analysis" regimes of his predecessors, but with changes whose stated intention is to reduce what had previously been experienced as its somewhat reactive character. In the prior administrations, early stages of regulatory development were in fact given relatively little attention; OIRA became deeply involved only after a draft regulatory impact statement had been delivered to it. By that time, directions had already been set, relations tended to be somewhat adversarial, and OIRA was reduced to an essentially reactive function to the particulars of rules in which major investments of effort had already been made. The stated ambition of the Clinton order is to put OIRA's emphasis on working with agency personnel in a more general way at earlier stages, to assure that appropriate intellectual processes for target selection and analysis are in place; much less attention is to be given to the particular analyses that may result from these processes, if the processes themselves are found to be appropriate and generally reliable. While President Clinton's OIRA has not foregone post-event review, it has emphasized the coordinative and oversight functions of presidential review; the effect of the new Executive Order is to subordinate the potential of OIRA review for supplanting particular exercises of agency discretion that many thought had too fully realized under earlier regimes. A variety of measures for assessing risk (as a means of influencing agencies')

71. That is, we are much more tolerant of risks that are individual and that we think we control—those of driving or cigarette smoking, for example—than we are of those that are shared, possibly catastrophic, and beyond our individual control—flying, or residual pesticides in food. Thus, it is trivial to show that the public insists on many more government dollars being spent to prevent each aviation death than each death occurring on the highways.


73. Id.

74. Id.
initial choices of rulemaking targets) are in developmental stages, and are reflected in proposed legislation that has not yet been enacted.\textsuperscript{75}

Focusing just on legislation that has been enacted, one can say that Congress has embraced the analytic requirement—to the point of making it a matter of legal right for at least some private participants in rulemaking—while also providing a mechanism for itself to oversee both the agency's general implementation of these requirements and any rules that may result. The Unfunded Mandates Reform Act of 1995\textsuperscript{76} and amendments to the Regulatory Flexibility Act\textsuperscript{77} enacted in 1996 achieve the first of these ends. While principally concerned with the impact of federal regulation on state and local governments,\textsuperscript{78} the Unfunded Mandates Reform Act also requires something very like economic impact analysis for any major rule affecting the private sector, and imposes on the rulemaking agency the obligation to select the “least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule,” absent some very good explanation why this cannot be done as a matter of law or important policy.\textsuperscript{79} OIRA, rather than the courts, was enlisted to secure compliance with this Act.\textsuperscript{80} A year later, however, when Congress amended the Regulatory Flexibility Act (which requires the making of special analyses to identify and avoid any disproportionate impact of regulation on small business), it made that Act judicially enforceable on behalf of its small business beneficiaries.\textsuperscript{81} The availability to small businesses, at least, of after-the-fact judicial enforcement of analytic requirements seems likely to increase agency caution in rulemaking significantly.

The most striking measure, however, is subtitle E of Title II of the recently enacted Contract with America Advancement Act,\textsuperscript{82} which puts in place a regime for formal congressional review of all agency rulemaking. It has, of course, always been possible for Congress to react to the adoption of any particular rule by enacting a statute that, if it secures final passage with presidential approval or over a presidential veto, reaches a different result. What this statute does is to create an automatic process for generating legislative consideration of disapproval in every case of agency rulemaking, that brings all rules before Congress for review immediately upon their adoption.\textsuperscript{83} For major rules, in particular, agencies must supply both Congress and its professionalized oversight bureaucracy, the GAO, with copies of all analyses made in the course of the rulemaking—under the Executive Orders, the Unfunded Mandates Re-

\begin{itemize}
\item \textsuperscript{75} Id.
\item \textsuperscript{78} 2 U.S.C.S. § 1513.
\item \textsuperscript{79} Id. § 1535.
\item \textsuperscript{80} Id.
\item \textsuperscript{81} Small Business Regulatory Enforcement Fairness Act § 244, 110 Stat. at 867-68.
\item \textsuperscript{82} Id. § 251, 110 Stat. at 868.
\item \textsuperscript{83} Id. at 868-71.
\end{itemize}
form Act and the Regulatory Flexibility Act, in particular. The GAO is instructed quickly to report its conclusions on their adequacy to the relevant congressional committees. Within a period of time that is brief in relation to what either rulemaking at the agency level or judicial review of rulemaking consume, the appropriate committees in either House may generate a resolution of disapproval in a prescribed form. If that occurs, and the resolution is adopted by both Houses of Congress and signed by the President (or enacted despite his veto), the rule ceases to have legal effect and the agency is deprived of authority to adopt a similar rule in the future unless new legislation is enacted authorizing that. If no resolution is passed, the statute says, a court reviewing the rule is instructed to ignore any congressional consideration such a resolution may have received.

There is a good deal more to the Act than this, of course; and the uncertainties that lie in the details of its provisions for the timing of congressional review, in particular, promise to add further discouragement and expense to rulemaking at the agency level. In the framework of this report, however, what seem especially notable are two elements: first, how well and even appropriately, viewed in the large, this statute fits the pattern of development towards finding regimes for creating political as well as legal responsibility for the high-impact rules that have become so much a part of the American legal landscape; second, how in its details the Act will probably frustrate this development, inviting irresponsible rather than responsible agency and legislative behavior. The first point is probably evident. With passage of this statute, Congress as well as the President is positioned to oversee significant rulemaking and the intellectual integrity of the activity that produces it; the political accountability of agency rulemaking could be heightened by the regular (and also institutional) oversight the use of GAO and the resolution-of-disapproval process entail. In this way, as with the already established processes of presidential oversight, the political legitimacy of adopted rules could be considerably enhanced.

A number of elements of the statute undercut this rosy view, however. First, the statute is not limited to the major rules, however defined, whose influence and impact have generated the developments we have been following. Every action an agency takes that fits the APA’s definition of “rule,” not only legislative rules but also the much larger volume of interpretive rules, statements of policy and other forms of guidance, must be provided to Congress for consideration under the disapproval process. Even though major rules are in some respects singled out for more intensive assessment, the much greater volume of referrals thus called for threatens to distract Congress in two respects: first, by spreading thin its resources for considering any particular effort; second, by

84. Id. at 869.
85. Id. at 871-72.
86. Id. at 871.
87. Id. at 888-89.
threatening that (as in today's gargantuan statutory enactments) special interests will find it easier to slip by a resolution of disapproval, than would likely be the case if only the relatively few prominent and large-consequence rulemakings offered such targets.

Second, the statute fails to pay the coin of political responsibility for the process that has been undertaken. Probably most rules will not be disapproved; the question of disapproval will be resolved within a few months, surely faster than the years judicial review typically consumes, and so the result will be known by the time the courts finally pronounce on the legality of the agency effort. As we have seen, judicial review has become significantly more intense over the past quarter century, largely in reaction to the major consequences of major rules and the absence, at the time this development occurred, of real political institutions for control of the process. Scholars of the time talked openly of the judicial review process as a kind of substitute political process, in which "representation" and other such issues were central elements. Many attribute much of the ossification of rulemaking at the agency level to this intensification of judicial review, leading agencies to practice "defensive medicine" against the quite exquisite assessments of factual support and judgment "hard look" review can often entail. One might have hoped that, seeing that agencies must now defend their judgments to both White House and Congress, and do so in a time frame much more intimately connected with their action than judicial review can hope for, courts would conclude that their efforts outside the strictly legal arena could be somewhat relaxed. However, the statute explicitly instructs them to pay no heed to Congress's consideration of a rule. In doing so, it both frustrates this hope and permits Congress itself to be irresponsible for the review process; the provision is a denial that Congress has undertaken any political accountability for rules that are left in place. While one can understand its preference to act in this selfish way, the result is to suggest that this enactment is just another obstacle, further increasing the costs and uncertainties of rulemaking, rather than a sound movement toward enhanced political accountability for rulemaking.

Third, the consequence of a successful resolution of disapproval is, in effect, an irresponsible act of legislation generating possibly unwarranted uncertainty about an agency's legal authority. Recall that the statute is explicit that if any rule is disapproved, the agency may not adopt a substantially similar measure unless it has been freshly authorized by statute to do so. Even if disapproval necessarily entailed a judgment that the agency's action was or ought to be outside its legal authority, it would be objectionable to delegate to the courts, retrospectively on review of fol-

89. E. Donald Elliott, Re-Inventing Rulemaking, 41 Duke L.J. 1490 (1992); Pierce, supra note 70; Sidney A. Shapiro, Political Oversight and the Deterioration of Regulatory Policy, 46 Admin. L. Rev. 1 (1994).
90. Stewart, supra note 88, at 871-72.
low-on rules, the task of deciding just how an agency's enabling statute had been amended. That is the effect of this curious provision, which subtracts "some" authority that might be thought to have been previously granted, but leaves it to later judicial decision to say just what that subtraction has been. And of course we know that disapprovals will not necessarily entail such judgments. Members of Congress need neither to have nor to express any particular reason for voting for them. "Hands off the funeral industry just now!" can be the governing impulse. Moreover, before the courts have any chance to pass on a subsequent rule that arguably tries to do again what once failed, the proposal will again have to be submitted to Congress for possible disapproval. But to see matters this way is also to see that the resolution of disapproval, if it has this result, is another diminution rather than enhancement of Congress's political accountability. The public can understand and respond at the polls to a statute that says "Hands off the funeral industry!" Resolutions of disapproval are much more opaque. And if impulses like these do explain resolutions of disapproval, it is particularly unwarranted to give them the consequence of (uncertainly) diminishing legal authority.
These impacts, together with the uncertainties about rulemaking effectiveness introduced by the simple fact of this process and the varying delays in effective date it may entail, will raise the costs of rulemaking further. Particularly at a time when government’s resources generally are straitened, one can expect agencies to look for alternative means of accomplishing their business. They may be motivated to substitute a large number of lower-consequence rules for “major” ones, if that can lower their oversight exposures and costs; or to imitate congressional practice in dealing with the President by bundling vulnerable rules with others Congress would find politically difficult to disapprove; or to move from legislative rulemaking, if they can, to the issuance of guidance and policies that, although not binding, may nonetheless help to shape desired conduct; or, most dramatically, to achieve what they can through case-by-case adjudication. With any of these consequences, note, the public will have lost engagement, responsibility, and accessibility to law at the agency level; and the agency’s own processes for communicating its demands to the world it regulates will have become markedly less efficient.

II.

When administrative adjudication developed, the model of the courtroom trial against which it developed was clear. Over the course of a century or more, we have been working out what elements of that model are essential to fairness, and which can be displaced in the interests of improving efficiency and gaining (or at least not losing) accuracy.\footnote{Roger C. Cramton, A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 VA. L. REV. 585, 592 (1972). A particularly elegant evocation of the tradeoffs inevitably involved in procedural choices appears in Jerry L. Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims 21-23 (1983).} Notably, we have produced not one, but several workable models of agency adjudication, depending on the particular context; and among them we can find commonalities of concern with notice, opportunities to be heard, to know and respond to opposing evidence, and to an impartial, reasoning decider who acts on the basis of the developed record. The APA specifies procedures rather close to the trial model for the most important of adjudications, but acknowledges the possibility of less formal proceedings; and both particular statutes and due process case law over the years have supplied a spectrum of procedurally less demanding alternatives.\footnote{With characteristic insight, my casebook colleague, Roy Schotland, points out that changes in court trial practice since that time, in pre-trial procedures particularly and also in the mix of alternative dispute resolution techniques, suggest we should be examining our trial models as well.}

The history of rulemaking, which has captured our attention for a much shorter span, has been one of adding rather than subtracting procedures in relation to the starting point model, the legislative process. To be sure, the governing constitutional holding concerning rulemaking, voiced in typically epigrammatic style by Justice Holmes, is that politics provides the citizens’ only refuge; the interests of those affected by rules

\footnote{With characteristic insight, my casebook colleague, Roy Schotland, points out that changes in court trial practice since that time, in pre-trial procedures particularly and also in the mix of alternative dispute resolution techniques, suggest we should be examining our trial models as well.}
are to be "protected in the only way they can be in a complex society, by
their power, immediate or remote, over those who make the rule."93 But
the legitimacy of statutes is anchored by citizens' votes for those who en-
act them; remote controls over those who make rules has proved more
problematic—particularly as we have come to accept that politics as well
as expertise is often, in fact, a central element in rulemaking judgment. In
the half-century's developments we have been reviewing, it is not hard to
discern a working out of answers to that quite general and important
problem, alongside the arguable obstructionism of those who wish simply
to prevent rules, or the misguided analogy to trials of courts who do not
accept the difference of this enterprise.

It would be surprising, too, if those answers did not vary in relation
to the nature and importance of the rule at issue. When the Supreme
Court seemingly rebuffed the judicial procedural developments of the
1970s in its Vermont Yankee decision94—in the event, it proved to have
disapproved only the most trial-like of them—then-Professor Antonin
Scalia remarked that one could not expect a single procedural model to fit
all needs, that the project of an APA would make sense only if it con-
tained a range of procedural models among which Congress could choose
in creating particular programs.95 When the focus of rulemaking shifted
from specialized, industry-embedded economic regulators setting details
for their particular industries to general-competence agencies making na-
tionwide judgments about health, safety and the environment, the nature
of the questions asked and the stakes in their answers changed as well.
The distinctions between "major" and other rules that have emerged in
the decades following, and the heightened interest in problems of priori-
tization and risk assessment reflect these changes. So, too, the emergence
of settings in which rulemaking inevitably had a high science content dur-
ing the 1970s helped to identify public knowledge of an agency's
database—a subject entirely unaddressed in 1946—as an essential ele-
ment of rulemaking. For a rule that threatens to impose significant costs
on the private sector on the basis of estimates entailing the resolution of
scientific uncertainties projecting decades into the future, the importance
of requiring public exposure for underlying studies, models, and factual
assessments (mirroring scientific methodology) is quite independent of
misplaced concerns about "adversariness." This element is missing when
the issue is what choices of berry basket local fruit packers should have.

The original model of notice and comment rulemaking may remain
entirely adequate for the latter sorts of judgments. It is not simply that
such rules have lesser impact. A frequent characteristic of high-conse-

93. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (empha-
sis added). The State Equalization Board, whose order raising all Denver assessment rates
by 40% was at issue in the case, was, it is not always noted, an elected body.
95. Antonin Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme
quence health, safety, or environmental regulation is that it seems to turn on factual issues that ought to be ascertainable, within the limits of scientific uncertainty that ought to be expressible. The proposition underlying a benzene exposure rule, for example, is that human exposure to benzene at a given number of parts per million for a given number of hours or weeks or years will produce a given number of cancers; the problem is finding out what these facts are. This apparent grounding in (hard-to-determine and controversial) propositions of general fact is not a characteristic of questions about berry baskets. Moreover, rules about berry baskets may be produced within a regulatory community that, on the whole, accepts the enterprise as a legitimate, even needed one; if individual outcomes may be in error, the community does not experience the process as one requiring special political legitimization. Indeed, in practice the traditional model appears still to be effectively in use for small-consequence, industry-specific rulemakings (such as may characterize the Department of Agriculture’s regulation of particular commodities).

Palpably, simple notice and comment rulemaking is not adequate for rules like those that require the private sector to expend many millions of dollars to avoid exposing workers or the public to relatively slight concentrations of particular chemicals thought to cause cancer over long periods of exposure. Given both the uncertainties and the stakes, exposure of the agency’s data and reasoning to public view and response, alongside the simple fact of its proposal, seems essential. The consequences for large sectors of the economy, perhaps varying state to state or region to region, invite political as well as legalistic controls. A contemporary legislature redesigning American rulemaking should recognize the need for political legitimacy as well as legality, the evident differences between settings in which the citizen’s power over those who make the rules is “immediate” and those in which it is “remote.”

Moreover, it seems right that, for the most portentous rules, the issue of prioritizing must be faced. Society has limited resources for action, a limited capacity to sustain the costs of regulation. Any particular chemical that is regulated is just one among thousands that could have been chosen for response; which ones should be chosen? How do we value the effort to avoid cancer deaths through chemical exposures, at a given cost per life saved, against that to avoid cancer deaths from radiation exposures (nuclear power), or more immediate deaths through airplane or automotive accidents? Setting priorities in rulemaking, the earliest stage, is not simple. Even if we could eliminate uncertainties about such questions

96. This aspect is particularly well-developed in relation to control of sulfur compound emissions from coal-fired electric generating plants. What tradeoffs are made between the type of coal burned (high-sulfur, low-sulfur), the controls exercised over emissions (wet or dry scrubbing), requirements that old plants adjust or not to new controls, and issues of new plant location have profound effects on the mining economies of different states, whose coal has a sulfur content fixed by nature and whose generating facilities are already in place. See, e.g., BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR: OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT 32 (1981).
as how much “investment” would be required to save each human life for the various rules that might be pursued, choosing the best target(s) among them would be complicated by our distinctly non-linear attitudes toward the reduction of risk—by the fact that we accept levels of risk from activities that are voluntary, individual, open, immediate, mechanical, accidental, and the source of personal pleasure, that we do not tolerate in contexts that are involuntary, shared or potentially catastrophic, covert, delayed, health-related, and lacking in personal gratification. We regularly spend more to prevent distant, statistical cancers than immediate accidental deaths; more on relatively safe school buses than our personal automobiles; and so forth—choices that must be regarded as political rather than irrational.

Whatever procedures we choose for selecting rulemaking targets or acting on those targets we select, our choice must also recognize the need for the advantages of rules and rulemaking over their alternatives. Our choices will inevitably create incentives for the agencies themselves, and the possibility that agencies will react to some approaches by overspending on procedures, or by choosing alternative approaches that entail fewer procedural risks or costs to them but also disadvantage the public, requires forethought as careful as we now devote to the substance of the rules themselves. Procedural impact analysis is as necessary for a government of constrained resources as regulatory impact analysis is for the economy as a whole. Our challenge is to find means of encouraging attention and responsibility without imposing debilitating costs, either directly or by putting into the hands of those who would simply prefer to deprive government action the means of inflicting them.

The burden of the current literature, briefly reviewed above, is that current rulemaking procedures taken as a whole fail this test. That analysis appears to be sustained in the dramatically slowed pace of rulemaking and in the straitened realities of American government. Current procedural requirements produce a procedural matrix so clogged and expensive that agencies are driven to evade, to seek out alternatives. As has already been suggested, Congress’s recent actions and some of the current proposals threaten to complicate this picture further. Finding the “sweet spots” in the competition among the demands of fairness, accuracy, and efficiency—for the case of rulemaking, one might add “democracy”—in establishing rulemaking procedures would be a significant challenge however earnestly one was seeking to learn the lessons of the past half century. There are few signs, however, that this challenge has yet been the “reformer’s” guiding star.

Some contemporary American analyses effectively deny the possibility of a broadly public-spirited approach. “Public choice,” a currently influential, economics-based approach to understanding political behaviors, explains legislators’ behavior in terms of their wish to stay in power—to be re-elected, little more. Public choice theorists find little surprising, in these terms, either in legislators’ evasion of political responsibility for the outcomes of government action or their willingness to deal with issues of public policy strategically; here, the legislator will make an apparent com-
mitment to a given policy, while there she will provide others the means with which to obstruct its realization, hoping in this way to secure the votes (support) of both groups. To these analysts, it was only to be expected (and, by implication, is not even an appropriate occasion for criticism) that Congress's recently enacted procedures for reviewing rulemaking will result in hidden, uncertain amendments to the statute if they are successful, and denial of any responsibility for having reviewed the rule, if they are not. Professor Scalia drew on these analyses when he noted that procedures are not invariably sought as ends in themselves. Rather, interest group lobbyists seek procedures strategically—not for their procedural values as such, but because procedural rigor is all that their clients (who would prefer to oppose proposed legislation outright) can reasonably hope to achieve.9 Public choice theory teaches the bleak lesson that nothing more is to be expected, that this is simply the natural working out of a situation in which securing re-election is the central motivator for legislators, and special interests can claim a disproportionate share of legislators' attention.

In my judgment, these are counsels of despair, premised on assumptions about human conduct that cannot be verified, and that lead inevitably to the bleakest views of human society. The description even of inevitable tendencies in human behavior need not invite normative acceptance of them. And the descriptive power of public choice analyses is limited; it cannot explain altruistic behaviors we encounter daily. Of course, the tendencies must be taken to be present; appreciation of them animated the Federalists and underlies the theoretical arguments against delegation.88 But, in this complex world, we will not escape delegation; the trick, as the Federalists themselves knew, is to structure it to promote its responsible exercise. And surely one of these secondary defenses is public disapproval. In their excesses and irresponsible elements, if not in their general direction, these outcomes reflect failures of a politically responsible legislative process. We can make the normative claims upon a legislature that it assume political responsibility for its acts, and that it fashion its procedural judgments from judgments about their quality as procedures (and not adventitious substantive program benefits they may confer upon special interests), even if we know that legislators will often be tempted, and sometimes act, otherwise.

The pursuit of such claims would produce a procedural set more like the current realities than the simple, single model of 1946. One cannot credibly argue against an agency's obligation to expose the facts it thinks it knows (including their associated uncertainties); and some analytic structure for the pre-notice period in important rulemaking, that includes formal opportunities for political inputs from the White House if not the Congress, seems equally called for. Yet recognizing the developments in public and political responsibilities these developments entail, we need to

---

97. Scalia, supra note 95, at 404-08.
98. See supra note 3 and accompanying text.
think carefully about the extent to which judicial review may now have become redundant or may enable types of strategic behavior whose costs (including the costs of agency defensive actions or of incentives to avoid rulemaking) may exceed any expected benefits. Just as we now argue for reliance on market-based incentives in lieu of command-and-control regulation in many (but not all) industrial circumstances, we need to consider in what circumstances pro-active political guidance that can be provided by the President, and/or forms of congressional oversight, will supply adequate assurance that procedural values will be respected, and sound decision pursued. It is appropriate to limit the role of judicial review in contexts where the President or Congress has taken political responsibility for agency outcomes, in part to avoid placing in private hands procedural weapons readily adapted to adventitious use.

Our judiciary already recognizes the fact of political control as an alternative to judicial control in a number of settings; Congress and the President, too, have each shown that they prefer to make this tradeoff in particular circumstances. The challenge we face, unsurprisingly like the rethinking of regulation generally, is to make such inquiries a routine part of our consideration. Doubtless the conclusions we reach will differ between environmental, health, and safety rules (where both the economic stakes and the science/technology content of required judgment are high), and those of a more routine, berry-basket character. The important point, in my judgment, is that the inquiry be made. Politicians' efforts to substitute procedural specification for limitations on authority over substance will not disappear, because the former is politically easier to achieve, and can be disguised in the rhetoric of fairness. What we must find are means to brand those efforts as the service of special interests, a departure from normatively desirable legislative practice. We shall not otherwise continue to be able to govern.