

IMPROVING THE ENVIRONMENT OF AGENCY RULEMAKING: AN ESSAY ON MANAGEMENT, GAMES, AND ACCOUNTABILITY

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I

INTRODUCTION

As late as the presidency of John F. Kennedy, the principal image of federal administrative action was the adjudication of a case—a prosecution by the Federal Trade Commission, an enforcement action by the National Labor Relations Board, a licensing proceeding before the Federal Communications or Federal Power Commissions, or a rate proceeding at the Interstate Commerce Commission.¹ Thirty years later, when U.S. citizens think of “regulation,” they tend to think of the adoption of general rules concerning workplace safety by the Occupational and Safety Health Administration (“OSHA”), or of rules governing air or water quality by the Environmental Protection Agency (“EPA”).² Nor is rulemaking the exclusive province of post-New-Frontier agencies designed with that regulatory technique prominently in mind. The politically salient activities of old line agencies—Federal Trade Commission regulation of charm school and funeral home practices or Federal Power Commission deregulation of natural gas pipeline prices—often feature rulemaking rather than adjudication.

This “paradigm shift” was in part evolutionary, but it also contained critical elements of conscious redesign of the administrative process. Regulatory reform movements in the 1960s emphasized rulemaking and extolled its virtues of

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This article has benefitted from comments by so many colleagues, workshop participants, authors of related literature and members of the Rulemaking Committee at “ACUS” that a listing would be unduly lengthy and inevitably incomplete. My thanks to them all. A special debt of gratitude is owed to Martha Girard at the Office of the Federal Register who supplied otherwise unavailable data and helped me to understand its import. The research presented here has not been updated to reflect any developments following the Duke Conference in October 1992 that provided the articles for this volume. The basic recommendations of the article have, however, been accepted as the background for a proposed recommendation by the Rulemaking Committee of the “ACUS.”

1. Thus, when Judge Friendly gave his influential Holmes lectures, his title defined a problem to which his answer was a clearer enunciation of agency policy in the course of rendering adjudicatory decisions. Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* (1962).

2. Here again Judge Friendly provides an instructive example. Eleven years after his exhortation to agencies to announce standards in adjudication, he reversed a decision of the National Labor Relations Board doing just that on the ground that the rulemaking process was a superior vehicle for policy development and that it was an abuse of discretion for the Board to announce new policies via adjudication. *Bell Aerospace Co. v. NLRB*, 475 F.2d 485 (2d Cir. 1973), *rev'd in part*, 416 U.S. 267 (1974).

efficiency, fairness, and political accountability.³ While Kenneth Culp Davis may have been more hyperbolic than most in characterizing rulemaking as “one of the greatest inventions of modern government,”⁴ he was hardly alone in the belief that a shift from adjudication to rulemaking would re-energize federal policymaking, while simultaneously making it more rational and more democratic.

Today’s reformers tend to view rulemaking by federal administrative agencies more as a problem than as a solution. From one perspective, rulemaking is a problem precisely because it has been the instrument by which large, previously unregulated sectors of the economy have been subjected to costly federal edicts.⁵ Regulatory reform from this perspective lies precisely in reducing the reach of rulemaking authority and in making it subject to a realistic appraisal of the costs and benefits of governmental intervention.

From a different substantive or political perspective, rulemaking is equally strenuously criticized as having failed to live up to its promise. The brave new agencies of the 1960s and 1970s may have imposed many costs on society, but they have made only halting progress toward the safer and healthier world that was then envisioned. Many regulatory programs are years, if not decades, behind in completing (sometimes addressing) their announced or statutorily mandated agenda. The older commissions that experimented with rulemaking in the 1960s and 1970s as a response to charges of inefficiency, unfairness, or lack of accountability have largely returned to their more familiar adjudicatory processes. The machinery of federal rulemaking is widely viewed as so creaky and accident-prone that administrators will resort to almost any other technique to attempt to get their jobs done.⁶

Although to some (perhaps a large) degree these competing visions describe a dispute about policy or politics, in which the troubles with “rulemaking” or

3. For a general description of this regulatory reform movement, see JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 4-7 (1990), and authorities therein cited.

4. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6.15 (1st ed. Supp. 1970). While it was recognized that rulemaking powers would enhance administrative authority by giving agency policies immediate and universal effect, rather than limited application, in a particular case, rulemaking was also thought to have important “rule of law” virtues. Universal application also produces equality before the law, constrains administrative discretion in future individual cases, and gives immediate and advance guidance to regulated parties concerning the government’s behavioral expectations. Moreover, because policy would be announced generally and in advance, agencies could be held accountable both politically and legally for their choices. Administrators would no longer be able to hide behind the complex and idiosyncratic “facts” of particular cases. They would be required to justify their exercise of rulemaking power by direct reference to their grants of statutory authority and to the general “legislative facts” that justified a particular exercise of policymaking discretion.

5. Perhaps the most famous of these critiques was Murray Weidenbaum’s estimate that the yearly costs of federal regulation total more than one hundred billion dollars. Murray L. Weidenbaum, *On Estimating Regulatory Costs*, *REG.*, May/June 1978, at 14. The estimate was hardly non-controversial. See MARK J. GREEN & NORMAN WAITZMAN, *BUSINESS WAR ON THE LAW: AN ANALYSIS OF THE BENEFITS OF FEDERAL HEALTH/SAFETY ENFORCEMENT* 33-40 (1981) (explicitly detailing the empirical flaws of Weidenbaum’s calculation).

6. See, e.g., Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, *REG.*, July/Aug. 1981, at 25.

“the regulatory process” are really procedural placeholders for some substantive disagreement, there is also a sense in which the two sets of critics might perceive a common problem. While pro-regulation forces are constant in their calls for a more effective and timely rulemaking process, deregulators often have a similar interest.⁷ The rulemaking processes of regulation are also the policy processes by which deregulation might be (sometimes must be) pursued. Thus, pro-regulatory laments concerning the inability of OSHA to generate rules regulating the large number of toxic substances found in U.S. workplaces might find a mirror image in deregulatory frustrations concerning OSHA’s torpidity in revising archaic, but statutorily mandated, rules adopted twenty years ago. The EPA may have missed hundreds of deadlines in issuing rules to protect the environment, but a regulatory process that drives the Federal Energy Regulatory Commission to virtually abandon its initiatives to reintroduce market discipline in energy pricing is no friend of “deregulation” either. If policymaking by rule has become moribund or “ossified” as some have argued,⁸ there is a need to reconsider the structure of agency rulemaking as a mechanism of governance, quite apart from that mechanism’s substantive effects in particular instances. This article seeks to address that general institutional question.

While for many the underlying theoretical assumptions of the following analysis will be relatively nonproblematic, it makes sense to state some of them at the outset. As the analysis proceeds, these assumptions may become increasingly controversial. The first assumption is that the rulemaking process in all administrative agencies is shaped by the interaction of the agency’s internal and external environments. More controversially, the external environment is assumed to be dominant.⁹ The signals that an agency receives from its external, legal and institutional environment will ultimately cause the internal procedural and managerial environment of the agency to adapt in order for the agency to survive or prosper. Although not stated in precisely this way, the basic idea that U.S. political and legal institutions can hold administrators “accountable” presupposes the efficacy of external controls.¹⁰ This assumption has two subsidiary consequences for the sort of legal-reformist analysis that is pursued here. First, it suggests that redesign of the external legal and institutional environment can produce desirable shifts in rulemaking or regulatory behavior.

7. See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507 (1985).

8. See generally Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

9. For an extended argument to this effect, see generally MASHAW & HARFST, *supra* note 3, at 172-201.

10. This position is explicit in much social science literature. See, e.g., WESLEY A. MAGAT ET AL., *RULES IN THE MAKING: A STATISTICAL ANALYSIS OF REGULATORY AGENCY BEHAVIOR* 49-50 (1986), and authorities therein cited. This assumption is also implicit in much legal literature about regulation and administrative law. See generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (describing modern administrative law as devoted largely to the task of promoting and equalizing the participatory opportunities of outsiders); see also Symposium: *Assessing the Environmental Protection Agency After Twenty Years: Law, Politics, and Economics*, 54 LAW & CONTEMP. PROBS. 1 (Autumn 1991).

Second, while there is no claim that internal, or managerial, reform is irrelevant to rulemaking performance (far from it), it is assumed (and sometimes argued)¹¹ that “good management,” while necessary to regulatory success, is insufficient in the face of sufficiently stringent external constraints.

A second major assumption is that all the participants in the regulatory or rulemaking process are boundedly rational and limitedly altruistic. These are modest and “realistic” assumptions, but they diverge from considerable segments of the political economy literature on bureaucratic, firm, and individual behavior. By “boundedly rational” I mean merely that individuals and institutions pursue interests or goals that are of value to them on the basis of available, but always partial, information. I assume that agents are doing the best they can to accomplish their objectives, “muddling through”¹² in Lindbloom’s famous phrase. That they are “limitedly altruistic” assumes that all rulemaking participants have some capacity to pursue goals or values (1) that they would define as the interests of a collectivity which is broader than themselves and (2) that are not immediately congruent or compatible with their own individual or group interests. But it also assumes that individual, firm, or bureau “self-interest” will play a role, often a crucial one, in shaping behavior.

These behavioral assumptions are of great importance in analyzing the current rulemaking process and in proposing reforms to mold that process for the future. They tell us that we are operating in a realm in which neither explanatory nor prescriptive theories will be perfect. Because agents are neither perfectly rational, nor relentlessly self-interested (or altruistic), we are unlikely to develop explanatory hypotheses about current behavior that fit all the cases or to prescribe a redesign of the legal and institutional environment of rulemaking that will cure all of its perceived ills. Law reform is a messy, empiric business where the facts matter, but are often unknown, seldom uncontroversial, and sometimes unknowable. Hence theory also matters, but it must be used with care.

This article’s third assumption is that the contemporary complaints about the costs, torpidity, and underperformance of the rulemaking process identify a real problem. It indulges the view that rulemaking is currently so difficult and time-consuming that agencies fail to accomplish missions (either of a regulatory or deregulatory sort) that are worthwhile. This assumption is heroic but necessary. Reliable information on the true costs and benefits of agency regulation or deregulation is usually unavailable. Many have firm views on the subject, but data are in short supply. Indeed, lack of “data” somewhat misstates the problem. Many of the costs and benefits of regulatory or deregulatory initiatives are not measurable in any conventional sense. The process of government defines who we are and influences what we want to be. Policymaking by rule is not just a process of instrumentally rational implementation of predetermined goals.

11. See *infra* at 216-19.

12. Charles Lindbloom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79 (1959).

The article begins with some evidence for a fourth assumption: that “the problem” with rulemaking in federal administrative law is one problem or a cluster of problems common to many agencies, rather than many distinct problems that should be differently defined for different agencies. It is this generic problem or problems to which this article seeks a solution. Ultimately, this assumption will need to be relaxed. It is made now only to simplify the analysis.

The final assumption is that the problem with federal agency rulemaking is not fundamentally a problem of broad political sentiment or sociology. There is surely something to the notion that the current political culture both expects and reinforces underperformance on the part of federal bureaucracies (including their rulemaking efforts). And this political sentiment translates into all sorts of actions—reduced fiscal support levels from the Congress; the scapegoating and demonizing of federal bureaucrats by politicians, the media, and ordinary citizens; adversarial styles of interaction by regulated or beneficiary interests, and so on—that hardly facilitate the rulemaking process. But because these broader currents of political culture or sociology are not malleable in the short term, this article views them only as constraints on the efficacy or political viability of solutions. In short, the article begins as if there were a “problem” that has an (imperfect) institutional design “solution.”

A final introductory note on the ambition of this project: the task at hand is to open up ways of thinking about the rulemaking process that may lead to more specific proposals for reform. The topic is vast because it entails no less than an attempt to better understand how government can be made to function both effectively and acceptably in an administrative state dedicated to liberal democratic ideals. The analysis that follows first attempts to define the “problem” with agency rulemaking by building on the previous literature. The essay then seeks to broaden or refocus discussion in three ways. The first is to identify a set of “internal” and “external” reform strategies and their interconnections. Both internal-managerial and legal-institutional reforms almost certainly have their place in an overall strategy, but the connections between the external environment of rulemaking and the internal environment subject to managerial controls suggests that while internal reform may make quicker marginal improvements, significant reform depends on changes in external circumstances.

The second conceptual reformulation is to bring some of the stylized analytic capacities of game theory to bear on the problem of agency rulemaking. Institutional arrangements create highly complex individual and organizational incentive structures. A little formal modeling—even if necessarily abstract and highly sensitive to its underlying quantitative assumptions—may help us to see old problems in a different and more productive way. This analysis suggests that the legal system currently provides opponents of policy changes via rulemaking with extraordinarily powerful incentives to delay or derail the process.

The article ends by sketching three different general approaches to reform of the politico-legal environment of administrative rulemaking. These sketches

are left at a very high level of abstraction, but seek to provoke further thought and discussion at both macro and micro levels. Strangely enough, while all the approaches ask us to decide how deeply we are committed to the Weberian-Progressive¹³ vision of "rational democracy" through bureaucratic governance, each reform program could begin with a similar, and apparently modest, initiative—a reversal of the now conventional presumption that affected parties are entitled to pre-enforcement (or pre-implementation) judicial review of agency rulemaking.

II

THE RETREAT FROM RULEMAKING

A. The Case Study Literature

1. *The National Highway Traffic Safety Administration*. In *The Struggle for Auto Safety*, Mashaw and Harfst provide extensive documentation of the progressive loss of rulemaking momentum at the National Highway Traffic Safety Administration ("NHTSA"). In their words:

NHTSA's regulatory behavior can be described concisely. Established as a rulemaking agency to force the technology of automobile safety design, NHTSA indeed functioned in a predominantly rulemaking mode until about 1974. NHTSA's promulgated rules, however, have had extremely modest effects in forcing the development of innovative safety technology. The rules that have become operational have required already-developed technologies, many of which were already in widespread, if not universal, use in the automobile industry at the time of the standards' promulgation. Since the mid-1970s, NHTSA has instead concentrated on its statutory power to force the recall of motor vehicles that contain defects related to safety performance. It has retreated to the old, and from the reformist perspective, despised form of legal regulation—case-by-case adjudication—which requires little, if any, technological sophistication and which has no known effects on vehicle safety.¹⁴

2. *The Consumer Product Safety Commission* ("CPSC"). In a 1984 article entitled *Backdoor Rulemaking: A View from the CPSC*, Terrence Scanlon, then

13. See generally ANTHONY T. KRONMAN, MAX WEBER (1983); KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.13 (2d ed. 1978); WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (Special Ed. 1993); William H. Simon, *Legality, Bureaucracy & Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

14. MASHAW & HARFST, *supra* note 3, at 10-11. The authors find that this shift from rulemaking to recalls began long before the Reagan Administration's regulatory relief program targeted on the automobile industry. Moreover, the decline in rulemaking effort is documented by a number of different indicators. Not only were the post-1974 numbers of newly proposed rules down dramatically, so were all rulemaking issuances. Even counting all minor technical amendments as "rulemaking," NHTSA's total rulemaking issuances in the Federal Register in its second decade were less than half of those in its first. NHTSA's retreat from rulemaking was further documented by data on the steady decline in the costs of compliance with NHTSA regulations and a dramatic decline in agency resources allocated to its rulemaking effort. The steep decline in NHTSA's rulemaking activity during the mid to late 1970s is particularly striking because the agency was then headed by a Ralph Nader associate, Joan Claybrook, who was (and is) a strong believer in automobile safety regulation.

a member of the CPSC, described an agency that was “easing itself out of rulemaking, [and] learning to use its adjudicatory powers to achieve the same results.”¹⁵ Indeed, the CPSC situation is even more dramatic than that at NHTSA. According to Scanlon, “[t]he informal consensus in the agency is that rulemaking is dead; it simply takes too much effort. The CPSC has started only one substantive rulemaking since 1981, and it withdrew that one in favor of a voluntary standard.”¹⁶ The CPSC retreat from rulemaking is confirmed by other commentators, although as we shall see, different analysts ascribe this retreat to different causes.¹⁷

3. *The Occupational Safety and Health Administration.* The glacial pace of OSHA rulemaking has been often and well documented.¹⁸ In the words of Shapiro and McGarity’s 1989 article,

OSHA, in particular, has been a disappointment. During its 17-year history, the agency has completed only 24 substance specific health regulations. Perhaps the best indication that this output falls below what its proponents expected is that OSHA has either no worker protection standards or inadequate standards for more than one-half of the 110 chemicals used in work places that the National Cancer Institute (NCI) regards as confirmed or suspected carcinogens.¹⁹

Unlike NHTSA or the CPSC, none of the case study literature suggest that OSHA has either abandoned rulemaking or relaxed its rulemaking effort. Indeed, OSHA has attempted to cut through the morass of hazard-specific rules by engaging in “generic” rulemaking. This strategy has not been very successful, however.²⁰ Although OSHA has an adjudicatory technique similar to the one available to the CPSC and NHTSA, it is not clear from the existing literature

15. Terrence M. Scanlon & Robert A. Rogowsky, *Back-door Rulemaking: A View from the CPSC*, REG., July/Aug. 1984 at 27.

16. *Id.* Like NHTSA, the CPSC remains active on the recall front. Unlike NHTSA, the CPSC has been able to use its recall authority to develop standards that are rather like an adjudicatory version of a rule. The Commission, for example, recalled all children’s squeeze toys of a particular description in 1981 after learning that there was a serious hazard that children might choke on them. This general recall created a de facto standard in the children’s toy industry.

17. See Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32 (1982).

18. See JOHN M. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA* (1988); Elinor P. Schroeder & Sidney A. Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation, and Information*, 72 GEO. L.J. 1231 (1984); Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1 (1989).

19. Shapiro & McGarity, *supra* note 18, at 2.

20. See generally MENDELOFF, *supra* note 18, at 126-29. Although OSHA was successful in adopting a generic rule providing workers with the results of medical exams and on workplace air monitoring, it was much less successful with more ambitious rules for generic chemical labeling and in establishing a set of general “cancer principles” that would facilitate the regulation of particular carcinogens. While OSHA did manage to get a general cancer policy promulgated after years of effort, its final form was one that provided little help in subsequent rulemaking proceedings seeking to regulate specific carcinogens. Moreover, after years of effort in setting generic exposures for 428 toxic substances, OSHA was recently sent back to the drawing boards by the Eleventh Circuit Court of Appeals. *AFL-CIO v. OSHA*, 965 F.2d 962 (11th Cir. 1992).

whether the agency has sought to substitute the use of this technique for rulemaking. It is clear, however, that the OSHA's prosecutions under the "general duty" clause of its statute increased during the 1970s.²¹

4. *The Federal Energy Regulatory Commission* ("FERC"). In his 1991 article,²² Richard Pierce provided an extremely pessimistic view of future rulemaking at FERC. In short, Pierce concluded that FERC is unlikely to attempt to muster the political and bureaucratic resources necessary to adopt several extremely urgent rules governing the structure of the electricity generation market. These policies were proposed in 1988 but have since languished. And, even if the rules are ultimately adopted, Pierce's view is that the delay will make them too late to save the economy from years of costly electricity shortages.

The FERC situation, while similar in predicted outcome, has some striking differences from those previously recounted at NHTSA, the CPSC, and OSHA. FERC, in its prior incarnation, the Federal Power Commission, was traditionally an adjudicatory agency. Indeed, during its first fifty years it issued virtually no rules whatsoever. This was not because adjudication had been discovered to be an efficient policymaking technique. Rather, in Pierce's account, it was because adjudication was the path of least resistance. FERC/FPC's adjudicatory process was so slow that virtually all policy disputes became moot before they were put in a posture that made them ripe for agency action.²³ Hence, if FERC has a preference for adjudication over rulemaking, it is not based on efficiency considerations.

A second major difference is that FERC's rulemaking initiatives have largely been concerned with deregulation rather than regulation. Its first foray into substantive rulemaking was in the natural gas area and was designed to undo a complex system of ceiling prices that it had created over years of adjudicatory proceedings.²⁴

21. See BENJAMIN W. MINTZ, *OSHA: HISTORY, LAW AND POLICY* 460 (1984).

22. Richard Pierce, *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 *ADMIN. L. REV.* 7 (1991).

23. *Id.* at 12.

24. According to Pierce:

FERC had spent the prior twenty years using adjudicatory decisionmaking to establish a variety of ceiling prices applicable to natural gas producers under the Natural Gas Act (NGA). By the time FERC completed that tedious process, it realized that its methodology was seriously flawed and that the data it relied upon were so stale that the ceiling prices were far below the cost of finding and producing new gas supplies. By establishing ceiling prices below marginal cost, FERC had created a massive shortage that was deepening rapidly in 1973. FERC responded with a Notice of Proposed Rulemaking in which it proposed to use a much-improved methodology to establish a new national ceiling price. By using rulemaking procedures and statistical analysis of current cost data, FERC was able to quadruple the ceiling price applicable to "new gas" within two years.

Id. at 13.

FERC was initially quite successful in adopting rules under the National Gas Policy Act of 1978, a further command from Congress to deregulate the natural gas market. FERC's rulemaking efforts, however, began to run into heavy weather in court. Indeed, in Pierce's view, the legal and political atmosphere has become so stormy that FERC cannot be counted upon to produce much-needed deregulatory activity in the electrical energy generating field. In his words,

[e]ven when a major change in regulatory policy is desperately needed, urged on an agency by the courts, welcomed by Congress, and implemented in a manner that yields enormous improvements in the performance of a regulated market, FERC's experience has shown that an agency and its staff can be publicly labelled lawless and incompetent for making such a change. By contrast, FERC's traditional pattern of behavior exposed it to much lower risks. By pretending to be a specialized court, "storing" policy issues by referring them to "nigh-interminable" adjudicatory hearings, and hiding policy issues under a mountain of idiosyncratic facts, FERC minimized its political risks.²⁵

5. *The Federal Trade Commission* ("FTC"). Like FERC, the FTC is historically an adjudicatory agency. Indeed, it long took the position that it had no substantive rulemaking powers other than those that had been granted in specific, limited jurisdiction statutes subsequent to the Federal Trade Commission Act.²⁶ Having come under sharp attack for regulatory lassitude by the unlikely partnership of Ralph Nader and the American Bar Association, the FTC moved in the 1960s to reenergize its regulatory program by flexing newly discovered rulemaking muscles. But the heyday of rulemaking at the FTC was short lived. In *The Federal Trade Commission and Consumer Protection Policy: A Postmortem Examination*,²⁷ Barry Boyer describes the rise and fall of rulemaking at the FTC in the following terms:

In 1975 Congress confirmed the FTC's power to issue binding rules backed by stiff penalties. . . . Armed with this new authority, the FTC launched an ambitious agenda of proposed rules designed to root out abuses in consumer credit transactions, hearing aid and used car sales, vocational school promotions, funeral arrangements, television advertising for children, and other fields as well. There were almost two dozen major rules in all. Within five years, the Federal Trade Commission's consumer protection policymaking program had been reduced to ashes.²⁸

25. *Id.* at 18. Since the time of Pierce's article, FERC has not returned to rulemaking in the electricity industry, but instead is attempting to establish some generic policies through adjudication. It is unclear whether this hesitancy is a result of its experience on judicial review or the uncertainties generated by Congress's active consideration of major statutory changes in this area. A voluminous bill that significantly alters FERC's powers over the electricity industry was recently passed. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776. Meanwhile, the agency received some significant reinforcement of its policy making authority in the natural gas field in *Mobile Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. 211 (1991), and it has taken new major rulemaking initiatives with respect to the gas industry. See 57 Fed. Reg. 13,267 (1992) (FERC Order No. 636, issued April 8, 1992).

26. See discussion in *National Petroleum Refiners Assoc. v. Federal Trade Comm'n*, 482 F.2d 672 (D.C. Cir.), *cert. denied*, 415 U.S. 951 (1974).

27. Barry Boyer, *The Federal Trade Commission and Consumer Protection Policy: A Postmortem Examination*, in MAKING REGULATORY POLICY 93 (Keith Hawkins & John M. Thomas eds., 1989).

28. *Id.* at 93-94.

Boyer's account of the FTC rulemaking and its demise, like Pierce's account of FERC, emphasizes the political dimensions of rulemaking failure. However, unlike Pierce's analysis of judicial delegitimation of FERC's deregulatory initiatives, Boyer's story describes a much more complex process of political failure. We will return to these causal explanations in the next section.

6. *The Environmental Protection Agency.* Perhaps no agency's rulemaking efforts have been as much studied as those of the EPA. Few who have examined the EPA's rulemaking history have been content with its performance. Some commentators are concerned particularly with the EPA's form of regulation. They fault the EPA for its inability to shift its focus from command and control techniques to the use of emissions and effluent charges and pollution permit trading devices.²⁹ Other commentators fault it for sacrificing environmental and economic values simultaneously.³⁰ Finally, environmentalist critics are quick to fault the EPA for its torpidity in regulating enormous numbers of pollutants and polluting processes and for choosing its targets badly. A recent special issue of this journal might be described as a 374-page orgy of hand-wringing concerning EPA's rulemaking performance.³¹

B. The Popularity of Non-Rule Rules

Rules and adjudications obviously do not exhaust the techniques by which administrators may make policy. Policy also appears in a host of other guises, as press releases, manual issuances, advice letters, enforcement guidelines, and the like. These techniques are hardly new. They have been in use by most agencies throughout their histories. They are part of the "informal" process that commentators have traditionally characterized as the "life blood" of administrative implementation.

Seasoned observers of the federal administrative scene, however, detect a contemporary tendency to overuse these informal techniques as ways of avoiding the laborious process of "informal rulemaking" under the Administrative Procedure Act.³² Although no study rigorously demonstrates a statistically

29. For a general discussion see Errol E. Meidinger, *The Development of Emissions Trading in U.S. Air Pollution Regulation*, in MAKING REGULATORY POLICY 153 (Keith Hawkins & John M. Thomas eds., 1989).

30. 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 (1981).

31. See Symposium, *supra* note 10.

32. Professor Michael Asimow has been particularly prominent in documenting this trend for federal agencies. See generally, Michael Asimow, *Nonlegislative Rulemaking And Regulatory Reform*, 1985 DUKE L.J. 381 [hereinafter *Nonlegislative Rulemaking*]; Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343 (1991); and in the California state system. Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43 (1992). Professor Robert Anthony has recently completed a major study for the ACUS describing the attempts of federal administrative agencies to formulate and implement binding policy in non-rule forms. For a preliminary report of these efforts, see Robert Anthony, *Well, You Want the Permit Don't You: Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31 (1992).

significant shift by federal agencies from the issuance of legislative rules to the employment of other, less formal, policy documents, there is virtually no dissent in the literature from the view that these techniques are on the increase and are a response to the “ossification” of rulemaking.³³

C. Other Evidence

The tendency of agencies to avoid rulemaking also finds support in recent administrative law jurisprudence. Some of the most prominent administrative law cases on the Supreme Court’s docket in recent years have involved claims concerning non-rule rules. *Bowen v. City of New York*³⁴ and *Lujan v. National Wildlife Federation*³⁵ are prominent examples. Similar suits claiming that policies should have been issued as rules, or that rules that should have been issued have not been, are also an extremely prominent part of the administrative law business of the federal courts of appeal. Indeed, it is this substantial mass of litigation that provides much of the evidence in the studies of non-rule rules. Once again, one cannot say that this litigation *demonstrates* a “retreat” from prior levels of rulemaking, but it does suggest widespread avoidance.

D. Evidentiary Difficulties and “Problem” Definition

The evidence of the decline of rulemaking in federal administrative agencies is not necessarily persuasive. Many have noted the sharp growth in *regulation* during the Bush Administration as compared with the Reagan Administration, at least as evidenced by the number of pages printed in the Federal Register.³⁶ And President Bush seemed to recognize this trend in issuing his moratorium on federal regulation, while requesting agencies to review and reassess all their currently published rules.³⁷ These gross statistics will surely give some solace to those who distrust case study evidence and wonder whether anything can be learned about the underlying administrative process by looking at reported judicial decisions. Others may also wonder whether we know enough about the qualitative nature of the problem, even if a retreat from rulemaking has occurred. Are we looking at a problem of government paralysis in either regulation or deregulation, or, instead, are we observing only a shift in the form of regulatory or deregulatory activity?

33. See, e.g., McGarity, *supra* note 8, at 1394 (describing the EPA’s struggle to keep its hazardous waste criteria current through what it calls its manual on “test methods for evaluating solid waste”). Commentators are also generally critical of these practices. The avoidance of the rulemaking process forgoes many of the informational, participatory, and accountability advantages that have been previously described as the major benefits of rulemaking.

34. 476 U.S. 467 (1986).

35. 497 U.S. 871 (1990).

36. On September 21, 1992, Robert D. Hershey, Jr., reported in the *New York Times* that while there were only 53,376 pages published in the Federal Register in 1988 before President Bush took office, by 1991 the total was 67,716, the third highest total for any year in U.S. history. Robert D. Hershey, Jr., *Regulations March on, Despite a Moratorium*, N.Y. TIMES, Sept. 21, 1992, at D1.

37. Memorandum on Reducing the Burden of Government Regulation, 28 WEEKLY COMP. PRES. DOC. 232 (Jan. 28, 1992).

There are, alas, no easy answers to these quite sensible queries. Nevertheless, I believe that serious skepticism about whether there is a *rulemaking problem* is misplaced. First, the gross data from the Federal Register are not interpretable. Over the period of the Bush Administration, for example, Congress passed a number of new and amended statutes which increased the demand on agencies for both regulatory and deregulatory action. Hence, even if we took number of pages in the Federal Register as an accurate proxy of rulemaking activity by federal administrative agencies, we would want to compare that activity level with the level of “demand for regulation” in legislation both prior to and during that particular time period. And, if we then went through every statute in the U.S. Code to attempt to determine whether regulatory or deregulatory “demand” (however operationalized) was going up or down during this period, there would be virtually no way of knowing, by simply looking at pages in the Federal Register, how great a percentage of this regulatory demand has been met by agency action. For example, an increase in the number of pages in the Federal Register is consistent with a lower level of rulemaking as well as with a higher level. If agencies are finding rulemaking more difficult because of external constraints, they may be engaging in ever-more elaborate justifications for the rules they publish. In short, what the Administrative Procedure Act laconically calls a “concise statement of basis and purpose” may be becoming an extended brief that seeks to anticipate objections from every quarter, both political and legal. If so, more pages is consistent with fewer rules.

Graphs 1 and 2 in the appendix suggest that numbers of pages filed in the Federal Register may not be a good indication of federal regulatory, particularly rulemaking, activity. First, Graph 1 reveals that while *total* numbers of pages published in the Federal Register increased during the Carter years, dropped precipitously in the early Reagan Presidency, and began to creep back up in the mid 1980s (with a very sharp upturn in the next-to-last year of the Bush Presidency), the changes in the number of pages of rules or proposed rules in the Federal Register have been much more modest. Indeed, looking at the pages of rules count, the Reagan Administration managed to hold proposed and adopted rules only to about the levels of the Carter Administration in the years 1977 and 1978. Moreover, the Bush Administration reduced the number of proposed rules published in its first two years, realizing an upturn only in 1991. The notion that the Reagan Administration dramatically reduced regulation or rulemaking only to see both turn up again sharply in the Bush Administration is not borne out very strongly when the Federal Register page counts are disaggregated to take account of the different sorts of materials that are filed with the Office of the Federal Register.

Second, a look at Graph 2 reveals that when one takes account of documents rather than pages, there was a substantial decline in issued rules over the period 1976 through 1991. Only in 1979 and 1980 did the Carter Administration get back to the level of rule publication of the final year of the Ford Administration. And, from 1980 to the early 1990's, there has been a steady decline in published

rules combined with a similar, but somewhat lesser, decline in proposed rules.³⁸

We should also like to know, of course, whether rulemaking by federal administrative agencies has been declining in the face of continued or increasing demands for rulemaking in either old or new statutory requirements for regulation or for deregulation. It is not easy to get persuasive data with respect to this question either. One might hypothesize that as statutes age, the requirements for regulatory activity under them will decline. Statutes often have action-forcing provisions with respect to the immediate adoption of certain consensus or other standards combined with early time limits for the completion of specified regulatory activities that cannot simply be premised on pre-existing standards. Hence, new statutes may induce a flurry of regulatory activity which then naturally subsides. New ideas for regulatory improvement under old provisions are not necessarily infinite.

While plausible, this story is not necessarily persuasive. As conditions change, agencies need to revisit their rules in order to amend and update them. Indeed, my in-depth study of NHTSA with Harfst suggests that a large inventory of rules is itself an impetus for further rulemaking. Petitions for rescission, modification, waiver, and the like were incessant at the NHTSA during the period that we reviewed its rulemaking product.³⁹ These activities probably demanded more staff time than did the development of new regulations. Hence, the "demand for rulemaking" may not necessarily atrophy over the life of a statute, even when Congress fails to revisit it.

But Congress does revisit old, and pass new, statutes. The Federal Register Office has been publishing a table of acts requiring publications in the Federal Register since 1936. Graph 3 plots the new requirements that appear in this table for each Congress, beginning with the first year of the Carter Administration (that is, 1977). These data certainly suggest that congressional demands for regulatory activity are not abating.⁴⁰

38. Constant or modestly increasing pages in the Federal Register rules sections combined with declining numbers of documents in those same sections lead to an obvious conclusion: the average length of documents filed with the Federal Register has been increasing from the mid 1970s until the present. Indeed, simple computation reveals that the average number of pages in the rules section of the Federal Register in 1991 as a percentage of that same average in 1975 is 218%. The parallel percentage for the proposed rules sections is 225%. Moreover, these changes were apparent in each administration. The growth in document size was 125% during the Carter Administration, 159% over Reagan's two terms, and 130% over President Bush's first three years. These data lend some credence to the notion that we are seeing fewer rules that are published with more supporting data and explanation. But the argument that can be made here should not be overstated. These data are consistent with the hypothesis that something is making rulemaking harder, which is in turn reflected in the average length of rulemaking documents, but it is hardly substantial independent support for that hypothesis.

39. See, e.g., MASHAW & HARFST, *supra* note 3, at 80-81.

40. They are not, however, easy to interpret. Counting Statutes at Large sections that require publication of *something* in the Federal Register may both overstate and understate new requirements for rulemaking. A single statutory section may require that multiple rules be issued. Hence, the number of statutory sections requiring publication in the Federal Register may understate the demand for rulemaking. On the other hand, demand for publication in the Federal Register is not necessarily a demand for the issuance of a rule. Hence, this count can overstate new requirements as well. It is

Other more indirect ways of getting at “regulatory” demand tell a confirmatory story. It is a virtual truism in the political economy literature that demands on government increase as a function of both population size and wealth. Recessions aside, or indeed included, GNP growth in the U.S. has been on a steep upward trajectory since the second World War. While it is now popular to believe that the United States economy is stagnant and has been since the oil price shocks of the early 1970s, a glance at Graph 4 in the Appendix reveals that this is not the case. Moreover, as Table 1 in the Appendix reveals, our population has grown by nearly 25% in the two decades between 1970 and 1990. By contrast, the ratio of federal employees to population dropped from 14.4 federal civilian employees per 1000 population in 1970 to 12.2 employees per 1000 in 1990. In short, while the growth in national wealth and population is reflected in congressional actions which increase the requirements for federal activity (at least as measured by the data in Graph 3), the Congress has not proportionately increased the size of the federal workforce available to respond to those new demands. Because we also know that over the same period, roughly 1970 through 1990, the procedural and analytic requirements for issuing rules have increased markedly, it would hardly be rash to conclude that the level of federal rulemaking capacity has been declining precipitously in relation to “rulemaking demand.”⁴¹

possible to get a count of new requirements for regulations manually by paging through the Statutes at Large for each year and counting the new regulatory requirements. This is facilitated somewhat by the inclusion of the word “regulation” as a marginal note wherever a statute imposes a regulatory requirement. These marginal notes, however, are not in the electronic database at the National Archives and cannot be retrieved electronically. The magnitude of the manual task has deterred me from attempting it for the 16-year period under discussion.

41. In the hope of getting better data from a different source, I made a preliminary foray into the Unified Agenda of Federal Regulations. The results were sufficiently disappointing that I have not pursued the analysis on a more “scientific” basis. First, no clear pattern emerged. In some agencies activity levels are arguably going up while in others they are arguably going down. But the data are virtually impossible to interpret even within a particular agency. For one thing, the Regulatory Information Services Center changed the way rules were categorized in 1986 so that no clear comparison between Reagan’s last term and the Bush Presidency can be made. Moreover, whether activity is going up or down may depend on whether you are looking at pre-rule activity, proposed-rule activity, final-stage-rule activity, or completed actions. And, cross agency comparisons are made virtually impossible by the different reporting approaches that have been taken. The Federal Aviation Administration, for example, seems to report all of its rulemaking activity along with its own indication of whether the rule is “significant.” The EPA, by contrast, does not report any rulemaking activity that it considers insignificant. The EPA’s criteria of significance are unclear, but they do not seem to be the same as those used by the FAA, and neither agency is using the “major rule” criteria of Executive Order 12,291 as a basis for its “significance” rankings.

Nor is it possible for the untutored eye to discern from the reporting in the Unified Agenda of Federal Regulations whether activity levels are primarily in a regulatory or deregulatory direction. The brief synopsis of the rule might well be enough for a sophisticated observer, who fully understands the regulatory status quo in a particular field, to classify the rules with some degree of accuracy. When I looked at three agencies with whose regulatory activities I am not particularly familiar, I found myself, in two of the three cases examined, unable to classify a majority of the rules as either regulatory or deregulatory. I found this exercise both disheartening and encouraging—disheartening because it obviously takes a specialist to interpret even the somewhat better data on rulemaking that is included in the Regulatory Agenda than in the Federal Register tallies. Hence any idea of doing some sort of quick and dirty random sample using the Unified Agenda as a database was lost. On the other hand,

Substantial case study and doctrinal evidence clearly suggest a general decline in the effectiveness of federal agency rulemaking processes. Those sources tell us little or nothing, however, about whether the reduction in rulemaking evidences an "ossification" of regulatory or deregulatory policymaking or whether, instead, it reflects a shift from rulemaking to other techniques and instruments for the enunciation of policy. What is known about that issue?

The suggestion that there has been such a shift receives further support from Hamilton and Schroeder's article in this volume.⁴² Another straw in the wind is a recent (October 14, 1992) proposal by the Department of Housing and Urban Development ("HUD") to abandon its prior commitment to issue policies that are exempt from section 553 of the APA⁴³ through the section 553 process. The proposal is quite an interesting document. The agency explains candidly that it now believes that its regulatory process using section 553 rulemaking "threatens to result in regulatory gridlock." HUD argues that its capacity to provide service and advice to the public will be improved dramatically by developing alternatives to notice and comment rulemaking and proposes "where legally permissible, to employ nonregulatory means of disseminating guidance concerning program operations."⁴⁴

Although the "circumstantial evidence" is convincing, if the goal is an airtight demonstration of a secular decline in rulemaking, and a persuasive analysis of whether this decline has resulted in inaction or a shift in regulatory or deregulatory technique, that question would have to be pursued in a series of agency case studies. Such studies are not easy. There is no unified agenda for manuals, guidelines, press releases, or enforcement actions, much less for actions not taken. Having made a serious inquiry into one agency to document its retreat from rulemaking and its shift in regulatory strategy to the use of recalls, Mashaw and Harfst estimated the resources needed for that undertaking at

the experience was heartening in the sense that it lent some support to the published case studies of agency rulemaking behavior. If it takes a specialist to interpret the data, perhaps we should believe what the case study literature is telling us.

42. James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, 57 LAW & CONTEMP. PROBS. 111 (Spring 1994) (By "formal" Hamilton and Schroeder mean promulgated through the § 553 procedure; "informal" captures all other policy statements.).

43. Administrative Procedure Act, 5 U.S.C. § 553 (1988).

44. Rulemaking Policy and Procedures — Expediting Rulemaking and Policy Implementation, 57 Fed. Reg. 47,166 (1992) (to be codified at 24 C.F.R. pt. 10). The Department's proposal is based upon a study of its regulatory process during the eight years in which it has maintained a computerized record of its rulemaking. HUD estimates that on average the § 553 process costs it one year for every policy promulgated and concludes that this delay is without corresponding improvement in the quality of the policies developed.

It is clear from the HUD proposal that the Department has not fully determined how it will go about shifting from the § 553 process to other policy processes. It declares itself willing, however, to experiment with a number of new ways for receiving public input and for disseminating information about agency policy. One such high-tech idea is the use of electronic "bulletin boards" which are generally accessible to HUD program participants.

roughly 1.5 person years per agency.⁴⁵ In short, the magnitude of the task of providing convincing scientific documentation leads to the conclusion that it is sensible to resolve any lingering doubts in favor of a belief in the current conventional wisdom, that is, that rulemaking has, over the last twenty years, become more difficult and less utilized than the regulatory reformers of the 1960s and 1970s taught us to believe is desirable.

III

COMPARING CAUSAL HYPOTHESES

The literature that attempts to document a contemporary retreat from rulemaking by federal administrative agencies also discusses the “internal” and “external” environmental reasons for that retreat. Prominent among the external environmental factors are judicial review, executive oversight, and congressional-agency interaction. General public or constituency acceptance of the legitimacy of agency rulemaking is also suggested as an external constraining factor. The aspects of the internal environment most often discussed are the internal incentives and procedures for rulemaking within agencies and the structure and management of the agencies’ rulemaking process.

The multiple causal hypotheses discussed below are not mutually exclusive reasons for the retreat from rulemaking. Agency unwillingness to go through the rulemaking process may be overdetermined. Each asserted “cause” may have been sufficient in itself, and all may be mutually reinforcing.

A. External Factors

1. *Judicial Review.* A number of commentators have identified judicial review as a major contributing factor to the abandonment of rulemaking by federal regulatory and other agencies. According to Mashaw and Harfst,⁴⁶ losses in court because of uncertainties concerning the “practicability” of its rules has made NHTSA cautious about using any safety technologies that are not already “road-tested.” This has been particularly debilitating for an agency whose statutory mission is to “force the technology” of automobile safety.

In addition, the courts’ insistence on responsiveness to outside commentators has caused NHTSA to structure a highly iterative, and therefore time-consuming, rulemaking process. Delay in turn affects outcomes. Remands of certain crucial rules have altered the political timing of the agency’s policy development. Rules that might have been successful at one period have become impossible to

45. See MASHAW & HARFST, *supra* note 3, at 10-14. Agencies engage in different levels of record keeping and have internal impressions of their own activities which may or may not be borne out by the available data. Harfst and I, for example, found that NHTSA had no statistical data on its rulemaking output and that interviews with staff were quite unreliable. Agency staff responsible for rulemaking, for example, insisted that rulemaking activity was going up during periods in which we later determined that it demonstrably was going down.

46. *Id.* at 69-105, 121-23.

promulgate and implement as administrations and congressional personnel change. The willingness of the courts to second-guess the agency has also reinforced the adversarial posture of parties who would be adversely affected either by the agency's rules or by its inaction or vacillation. The Mashaw and Harfst analysis is supported in part by other NHTSA observers,⁴⁷ and the same complaints about judicial review are echoed by other commentators with reference to other agencies.⁴⁸

While Professor Boyer, in his study of the FTC's rulemaking history, does not give judicial review a major role in derailing the FTC's programs, his description demonstrates the uncertainty created by relatively uninformed judicial intervention. In his view "the courts reviewing trade regulation rules not only failed to create a strong incentive for high quality data and analysis; in some respects, they seemed to reward poor empirical analysis."⁴⁹ Echoing Mashaw and Harfst's account of NHTSA, Boyer's analysis suggests that an informed observer of judicial actions at the FTC could not have predicted which rules would be reversed by the courts or even what issues the reviewing courts would find important.

Commentators have described judicial review as having had a very substantial adverse effect on the EPA's rulemaking as well. Professor McGarity concludes that

[t]he fact that nearly all of EPA's first round of technology based standards resulted in remands on one or more technical issues, had a profound impact on the agency. Rather than respond to the remands, the agency in all but one case decided to give up, and it failed to promulgate national "best practicable technology" standards for most of the pollutants in most of the industries for which it had suffered a judicial remand.⁵⁰

47. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 393 n.93 (1986).

48. Professor Pierce, for example, lays the blame for FERC's hesitancy to adopt needed deregulatory policies concerning the structure of electricity rates directly at the doorstep of the judiciary. Here again, the mechanism of effect is somewhat complicated. In Pierce's view, the role of the courts has not been to stop FERC initiatives directly, but, by their lack of hospitality to other rulemaking actions, to demoralize and delegitimize the agency's policy processes. See Pierce, *supra* note 22, at 10-11.

Similarly, Professor McGarity describes judicial review as having had "a debilitating effect on the rulemaking efforts of the FTC in the 1970s." McGarity, *supra* note 8, at 1413. He recounts a series of early opinions evaluating the FTC's re-energized consumer protection efforts which took a very dim view of the FTC's justifications for its rules, often finding that they lacked "substantial evidence" in the rulemaking record. McGarity notes further that during this same period the courts were routinely validating the FTC's traditional adjudicatory actions in much the same fashion that the courts ratified NHTSA's recall efforts.

49. Boyer, *supra* note 27, at 102.

50. McGarity, *supra* note 8, at 1417. In a similar vein, Rosemary O'Leary concluded: "From an agency-wide policy perspective, however, the impact of court decisions on the EPA is problematic. Compliance with court orders has become the agency's top priority, at times overtaking congressional mandates and threatening representative democracy. Clearly litigation is not the best way to formulate environmental policy or to set our nation's environmental priorities." Rosemary O'Leary, *The Impact of Federal Court Decisions on the Policies and Administration of the U.S. Environmental Protection Agency*, 41 ADMIN. L. REV. 549, 569 (1989).

R. Shep Melnick's book-length study of judicial review of EPA air quality decisions suggests a more complicated but still, in his opinion, dysfunctional pattern of judicial review.⁵¹ While Melnick does not find that judicial review directly frustrated EPA rulemaking efforts, he does find that judicial actions were often misinformed and constant sources of unintended side effects. While judicial review actually forced the agency in some cases to initiate or to speed up its rulemaking activity, the allocation of resources necessary to satisfy these judicial mandates has caused the agency to ignore other areas of its environmental protection agenda—arguably areas of greater importance. In Melnick's view, judicial review also warped the substance of agency air quality policy and often obscured the real issues. And, ironically, the federal district courts repeatedly refused to allow the EPA to enforce the regulations that the courts of appeals had required that it promulgate. In the end, Melnick observes:

Taken as a whole, the consequences of court action under the Clean Air Act are neither random nor beneficial Court action has encouraged legislators and administrators to establish goals without considering how they can be achieved, exacerbating the tendency of these institutions to promise far more than they can deliver. The policymaking system of which the federal courts are now an integral part has produced serious inefficiency and inequities, has made rational debate and conscious political choice difficult, and has added to frustration and cynicism among participants of all stripes.⁵²

Yet the effects of judicial review on the EPA, and other agencies, are hardly noncontroversial. Professor E. Donald Elliott, recently General Counsel of the Environmental Protection Agency, has said, "I would take issue with the assertion that we know that the effects of judicial review on the administrative process and on the internal deliberations within agencies are huge."⁵³ Elliott's skepticism is to some degree borne out by his study, with Peter Schuck, of the effects of the *Chevron* case and of remands by courts of appeals to federal administrative agencies.⁵⁴ Unfortunately, rulemaking proceedings were a small portion of the sample of cases and remands that Schuck and Elliott reviewed. Hence, their study cannot provide a firm basis for general conclusions.⁵⁵

51. R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* (1983).

52. *Id.* at 345.

53. *Administrative Law Symposium: Question and Answer With Professors Elliott, Strauss, and Sunstein*, 1989 DUKE L.J. 551, 553.

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

55. It is worth noting, however, that rules were overturned more often than were any other agency actions picked up in the Schuck and Elliott sample. *Id.* at 1022. Rules were overturned or remanded to the agency in 56% of the cases picked up in the sample whereas agencies lost only 42% of their review proceedings involving adjudications.

Professor McGarity also finds that judicial review has had a serious negative effect on rulemaking at the Consumer Products Safety Commission. His argument is constructed primarily on the basis of *Gulf South Insulation v. Consumer Products Safety Comm'n*, 701 F.2d 1137 (5th Cir. 1983), in which the court overturned the CPSC's ban on the use of urea formaldehyde insulation in residences and schools. That remand was particularly demoralizing for the agency because it viewed its data base as more than

Virtually all commentators seem to agree that OSHA's poor rulemaking record is ascribable in substantial part to its unhappy experience in judicial review. Shapiro and McGarity blame the high standard of "substantial evidence" that was included in the OSHA statute and embellished by judicial precedent.⁵⁶ These authors note that at one point in the 1970s, "all OSHA decisionmaking was brought to a halt while OSHA awaited the outcome of a series of important court cases."⁵⁷

John Mendeloff agrees with the basic Shapiro and McGarity analysis, but according to his account OSHA's standards are actually being made tougher by the power that judicial review gives to interest group proponents of stringent health regulation. This strictness, in Mendeloff's terms "overregulation," however, inspires the regulated industry to oppose the standards more vigorously, thereby virtually ensuring judicial review of the rules. Because the courts will run OSHA through a procedural and substantive gauntlet on review at the behest of industry, Mendeloff argues that the agency will pick its fights very carefully and spend excessive resources on the development of a record that it hopes will adequately support a rule on review. In short, says Mendeloff, "OSHA leaders hesitate about issuing standards for the same reasons that graduate students postpone taking their comprehensive exams: They aren't sure that they will pass."⁵⁸

While some commentators argue that some courts are simply too strict with respect to some agencies in reviewing their rules, most commentators seem to argue that the real impediment created by judicial review is uncertainty. Because the courts are relatively uninformed about what is important amongst the many issues thrown up by parties seeking review of a rule, and because they are technically and scientifically unsophisticated in analyzing the issues that they perceive to be critical to a rule's "reasonableness," the perception in the agencies is that anything can happen. This produces defensive rulemaking, if not abandonment of the rulemaking process.

It is important to note here that the influence of judicial review on agency rulemaking efforts is also controversial in a different sense than the one suggested by Professor Elliott's earlier skepticism. While many commentators believe that judicial review reinforces other impediments to rulemaking,⁵⁹ and

usually comprehensive and sound. Nevertheless, the CPSC found itself second-guessed by the court of appeals on both the composition of its statistical sample and on the use of animal studies to demonstrate carcinogenicity. The fifth circuit's opinion has been uniformly criticized by expert commentators. See e.g., Howard Latin, *Good Science, Bad Regulation, and Toxic Risk Assessment*, 5 YALE J. ON REG. 89 (1988). McGarity notes that thereafter the CPSC went out of the rulemaking business with respect to toxic products. Indeed the only regulation adopted by the CPSC since *Gulf South* is a ban on hazardous lawn darts. Different observers, however, have tended to believe that other factors were more influential in shifting the CPSC from rules to recalls. See Scanlon & Rogowsky, *supra* note 15, at 27; Schwartz, *supra* note 17.

56. Shapiro & McGarity, *supra* note 18, at 9-10.

57. *Id.* at 12 n.70.

58. MENDELOFF, *supra* note 18, at 21.

59. See e.g., MASHAW & HARFST, *supra* note 3, at 225-28.

others argue that judicial review delegitimizes agency action and destroys its political acceptability,⁶⁰ yet others have argued that judicial review is itself a function of the general political atmosphere and is influenced both by public opinion and by the tendencies of other governmental institutions.⁶¹ In this view, judicial review has been inhospitable to rulemaking because other political and institutional processes have been. The negative effects of judicial review should therefore be self-correcting. As a public recognition of the need for “deregulating” the rulemaking process emerges, more deferential judicial review is likely to follow. Indeed, some commentators already find a trend toward increasing deference.⁶² Others conclude that it is too soon to tell whether the judiciary has adopted a less intrusive attitude and how that will affect agency rulemaking.⁶³

2. *Executive Oversight.* While judicial review arguably has been evenhandedly intrusive or constraining with respect to agency regulation and deregulation,⁶⁴ executive oversight has generally pressed agencies only in the direction of deregulation or nonregulation. As such, it has been a sharp battleground between pro- and anti-regulatory partisans, and the academic and popular literature on the subject is extensive. The debate is waged at all levels, from the technical soundness of cost-benefit analyses to the constitutionality of both executive oversight and congressional interference with it. Heavy political armament is also brought to bear. Presidents have given OMB directors and vice-presidents considerable power to delay or quash agency initiatives. Congress meanwhile fights back with confirmation delays, funding quarantines, failure to reauthorize legislation facilitating executive review, and statutory provisions purporting to exempt agencies from all executive consultations.⁶⁵

Whether these delays and displacements are good or bad depends importantly on one's perspective on the overall OMB regulatory review process. If one's view is that the process produces better coordination of federal policy, more thoughtful regulation, and less costly intrusions into private activity, then delay and displacement are worth their costs. On the other hand, if one believes that

60. See, e.g., Pierce, *supra* note 22, at 18.

61. See Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS. 249 (Autumn 1991).

62. See Schuck & Elliott, *supra* note 54. Similarly, Levy and Glicksman find an apparent increase in judicial deference toward EPA rulemaking. Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343 (1989). However, a good bit of that deference is in cases in which the EPA has scaled back the ambition of its regulatory initiatives or has developed new policies which might be described as “pro-development.” The authors thus suggest that what may appear to be increased deference may only be increased substantive agreement.

63. See McGarity, *supra* note 8, at 1451. MASHAW & HARFST, *supra* note 3, suggest that judicial review is part of a general legal culture that is and will remain skeptical of bureaucratic policy development in the form of legislative rules.

64. See generally Garland, *supra* note 7; MASHAW & HARFST, *supra* note 3.

65. For a review of the literature and the controversy, see Robert Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127 (Autumn 1991).

OMB oversight replaces expert regulation with political expediency, provides preferential access to the regulatory process by regulated interests, and subverts the congressional (and presumably the general political) will, the consequences of executive oversight appear negative.

Outside of the environmental regulation which has been the OMB's major target, it is unclear whether regularized executive review through the OMB has had a dramatic impact on agency rulemaking. Because the Office of Information and Regulatory Analysis ("OIRA") in the OMB has limited capacity to review agency rules, most rules, even those that satisfy the criteria for "major federal actions," pass through with little OIRA input.⁶⁶ Yet it is hard to judge just what impact OMB oversight has by looking at OIRA review patterns. As in the case of judicial review, agencies may organize themselves internally to avoid surprises at the OMB. If so, they will engage in a form of "self-censorship" that gives OMB review an enhanced impact.⁶⁷

3. *Congressional Action.* While the actions of the federal judiciary and executive establishment are often viewed as delaying or derailing agency rulemaking efforts, much congressional activity is ostensibly directed toward forcing their pace. Over the past two decades Congress has included hundreds of action-forcing mandates, principally rulemaking deadlines, in federal agency legislation. The congressional tendency to demand action is in part a response to 1960s' perceptions of a moribund and often "captured" agency regulatory process. That tendency has been sustained and consistently re-energized by Congress's institutional competition with the Executive Office of the President as that Office, mostly through the OMB, has increased its oversight and review of the agency regulatory process. An almost continuous history of Republican presidents and Democratic Congresses has given partisan political impetus to this constitutionally sanctioned institutional competition. If ever there were an instance of the fulfillment of Madison's expectation that "ambition [would check] ambition," the last two decades of regulatory politics have provided that example.

66. See GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM: REAGAN'S REGULATORY DILEMMA (1984).

67. For the conclusion that OMB review exerts substantial influence over the content of agency regulations by a scholar who agrees in principle with the need for presidential review, see Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443 (1987).

There is even some uncertainty whether OMB review causes delay at EPA. In a statistical analysis of all EPA rules completed between October 1, 1986 and September 30, 1989, Cornelius M. Kerwin & Kenneth Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113 (1992), found that in two of their three statistical models of the rulemaking process, OMB review had no significant effect on the time required for rulemaking. On the other hand, one of their models predicts that OMB review increases the length of time required for any stage in the rulemaking process by two days for every one day that the OMB holds the rule. Judged by the existing literature, both the "casual empiricism" of outside observers and the experience of EPA officials support the latter statistical finding. The magnitude of the effect may be small, however. Don Elliott argues in this volume that while OMB review affects EPA more than judicial review, that effect should not be overstated. E. Donald Elliott, *TQM-ING OMB: or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It*, 57 LAW & CONTEMP. PROBS. 167 (Spring 1994).

Yet, it is also possible to see congressional action as responsible for agency underperformance in policymaking by rule. For one thing, many observers agree that Congress has routinely over-promised in its modern regulatory legislation.⁶⁸ Statute after statute has declared that problem after problem would be solved through agency regulatory action, with scant appreciation of the scientific or political complexity of the task that was being set. Moreover, as it became increasingly clear that many of the objectives sought in this legislation would require massive research and development efforts, Congress has not responded with funding levels that would make accomplishment of its objectives feasible. But neither has it relaxed the statutory time tables nor reduced the agenda previously set for agency attention. To some extent, therefore, the sense that agency rulemaking is faltering is the result of ambitions that cannot possibly be met with the resources provided.⁶⁹

Congress also has acted directly to constrain the pace and direction of agency rulemaking. Before it was ruled unconstitutional, and indeed afterward as well, Congress appended legislative veto provisions to hundreds of agency statutes. Many of these were attached to rulemaking provisions, thus suggesting serious congressional concern with the good sense of agency proposals or likely proposals.⁷⁰ Congress has also used highly specific "appropriations riders" to partially repeal or to delay agency rulemaking activities,⁷¹ and it has matched the executive branch in its willingness to impose analytic review requirements on agency regulatory activity.⁷²

68. John S. Applegate, *Worst Things First: Risk, Information, and Regulatory Structure in Toxic Substances Control*, 9 YALE J. ON REG. 277 (1992); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233 (1990); Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms*, 37 STAN. L. REV. 1267 (1985); David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 U.C.L.A. L. REV. 740 (1983).

69. For example, Mashaw and Harfst, *supra* note 3, at 81-82, report that NHTSA was given the statutory mandate to "force the technology" of automobile safety design by a Congress that delayed funding for its research and test facility for nearly a decade and that subjected that agency, with all others, to continuous hiring freezes, if not outright staff reduction requirements, for most of its history.

70. See generally Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671 (1992); Mathew D. McCubbins et. al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

71. See Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456.

72. All agencies must comply with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1982), and the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (1982). Compliance with the former is subject to judicial enforcement, but routine compliance with the latter is also expected. These general analytic requirements in broad framework statutes are added to the specific and sometimes highly technical analytic requirements built into particular agency statutes. For example, the EPA labors under a statutory mandate when it sets a requirement for the use of "best conventional control technology," to demonstrate that it has analyzed the cost of taking a unit of pollution out of an industrial effluent stream using the prescribed technology in comparison to the cost of removing an equivalent unit of pollution from a municipal sewerage treatment works. And, in addition, the agency must compare the incremental cost of the prescribed technology with the incremental cost of installing a somewhat less stringent "best practicable control technology." McGarity, *supra* note 8, at 1416. It is hardly only the executive branch that is concerned about the cost-effectiveness of agency rulemaking.

While overpromising, underfunding, and contributing to analytic overkill in its legislation, Congress's oversight activities seem directed primarily at chastising agencies for the slow pace of their regulatory efforts. The specter of administrative agencies failing to protect the public health and safety, as they have been ordered to do by congressional legislation, can often capture media attention and promote particular legislators' personal agendas. If some suggestion of bad faith or scandal can be added to agency laxity in the face of an environmental or health crisis, so much the better. As a consequence, the oversight exposé is a popular form of Capitol Hill recreation. And, while obviously necessary and useful to some degree, congressional bureaucrat-baiting has tended to delegitimize the administrative process politically and to further hamper the agency rulemaking process.⁷³

Congress also has a tendency to combine statutory analytic demands with procedural complexity. Not only must an agency analyze a problem itself, it must provide opportunities for outsiders to challenge its analyses and provide analyses of their own. The comments of outsiders, or their testimony and cross-examination, must then be taken into account by the agency in justifying the rationality or reasonableness of its rules. Some commentators argue that procedural complexity in administrative rulemaking is the result of a congressional desire to maintain control over the bureaucracy in the interests of the coalition that passed the agency's statute.⁷⁴ Others suggest that procedural complexity is a legislative bone thrown to the unsuccessful opponents of regulatory legislation. Whatever the motivation, procedural complexity may render the regulatory program "cumbersome and unworkable."⁷⁵

4. *Public Acceptance.* As was noted at the outset, this article will not spend many lines discussing impediments to federal agency rulemaking that are not subject to improvement by some change in the institutional design of the rulemaking process. General public acceptance of rulemaking is clearly one such impediment. However, a brief discussion seems necessary for two reasons. First, it is important to remember that the possibility that delay and inefficacy in the rulemaking process are just the flip side of valued aspects of our constitutional

73. See generally Richard Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54 LAW & CONTEMP. PROBS. 205 (Autumn 1991).

74. See, e.g., Mathew D. McCubbins et al., *supra* note 70.

75. Asimow, *Nonlegislative Rulemaking*, *supra* note 32, at 424. The Consumer Product Safety Commission is perhaps the best example of congressional mandating of innovative procedural requirements that ultimately proved disabling. Apparently hoping to infuse the new CPSC both with the zeal of outsiders for safety regulation and with the expertise of those who have long experience with particular products, the Congress gave the CPSC unique procedures by which members of the public could petition for the promulgation of rules and through which outside "offerors" could develop the substance of those rules. Both the petition and the offeror processes turned into procedural nightmares (for a description, see Schwartz, *supra* note 17, at 35), and both were ultimately repealed by a Congress dissatisfied with the pace of CPSC regulation. But that same Congress then substituted new and additional procedures and analytic requirements that, according to some commentators, doomed rulemaking thereafter. See Scanlon & Rogowsky, *supra* note 15.

democracy. Desire for improvement in the rulemaking process must be mediated by an appreciation of the degree to which "improvement" implicates multiple political values. Second, it is important to distinguish between types of public acceptance, or perhaps the differences in the meaning of "public" that may bear on institutional design solutions. The "public" is both the general electorate and the "special interest" public that is directly affected by particular rulemaking efforts (the "directly-affected public"), and they each participate in one way or another in distinct rulemaking processes.

On the first point, it may be enough simply to point out that many of the impediments to rulemaking previously discussed with respect to executive oversight and congressional action seem to be driven, not just by political or ideological conviction, but also by the positive political acceptance of these activities in the electorate. Since at least 1976, presidential politics has contained a very substantial element of running against the federal bureaucracy. Moreover, the congressional penchant for overpromising and underfunding can be described as a penchant for giving the electorate what it seems to want. The U.S. citizenry apparently sees no contradiction in demanding that the government achieve a high level of effective performance in the pursuit of collective ends while reducing governmental size, scope, and expenditure.

Finally, the ability to call bureaucrats to account legally for their actions through judicial review seems to most U.S. citizens a basic constitutional right. And, as both executive and legislative departments have fallen into disrepute over the last several decades, the courts have appeared to many to be symbols of rectitude—a last line of defense against the depredations of politicians and bureaucrats. Any attempt to redesign the rulemaking process so that it functions better will have to take into account these general aspects of public acceptance. To some degree the institutions that now complicate the external environment of rulemaking are but vehicles for the expression of both general public sentiment and long-term constitutional commitments.

Public acceptance has, however, another dimension. The general public has quite diffuse ideas about what it demands from and how it wants to limit the federal rulemaking process. General public opinion thus often supports more vigorous health and safety regulation while simultaneously decrying "big government" and "bureaucracy." In this political milieu, an act of rulemaking can redirect public attitudes. In *The Struggle for Auto Safety*, for example, Mashaw and Harfst describe the process of agency rulemaking that produced the current passive restraints requirements.⁷⁶ Getting the rule into its "final" form took two decades. The rule's progress was often derailed by one or another institutional manifestation of public antipathy to NHTSA's regulatory proposals. Yet, the passive restraints mandate having finally emerged, public tastes seem to have been transformed. Safety that automakers long contended would not sell is now a prime element of their advertising campaigns.

76. See generally MASHAW & HARFST, *supra* note 3.

On the other hand, the manufacturers that are now making a virtue of necessity have not necessarily reduced their resistance to new safety requirements. Nor have safety partisans decreased their demands for further agency action. In the domain of special interest publics, NHTSA is still either an underperforming or an overbearing bureaucracy. And it is these special interest publics who tend to mobilize the use of congressional, executive, or judicial techniques to promote or retard rulemaking activity. Consideration of the "public acceptance" of rulemaking must address these consistently adversarial publics as well. These parties have long-term economic, political, or ideological interests that are considerably less malleable than the preferences of the general public. Their tastes and values will not be reshaped, although they might be effectively managed, by reorganizing the external environment of rulemaking. This is true because the rulemaking process exacerbates the level of adversariness that might be expected from the "special interests" and makes the politics of policymaking more difficult.

It has long been hypothesized, for example, that several of the old line adjudicatory agencies resisted rulemaking because of its political costs. This was the conventional wisdom with respect to the National Labor Relations Board,⁷⁷ which was for many years exhorted by commentators to utilize its rulemaking powers.⁷⁸ Barry Boyer's study of the FTC's rulemaking⁷⁹ suggests that the NLRB and FTC agencies were not just being timid. While the FTC had hardly lived a nonadversarial life prior to its attempts to shift to rulemaking, the political adversariness of those efforts were orders of magnitude beyond anything the Commission had previously experienced. Moreover, as Boyer acutely observes, the tasks and processes of rulemaking are not nearly so effective at keeping the agency well informed about the attitudes and activities of directly affected publics as is the adjudicatory process.⁸⁰ The close and continuous association with directly affected parties that is the hallmark of adjudication tends to be lost in the context of rulemaking.

In Boyer's view, this is an important explanation of why the FTC mistook its political mandate and destroyed the efficacy of its rulemaking initiatives with respect to the "publics" that counted. Ironically, it would appear that while agency adjudication exalts adversariness as a process value, it also controls the form of adversary combat and limits its scope. To manage effectively the level of rulemaking adversariness generated by the special interest publics in their immediate regulatory environment, agencies may need some institutional devices by which they can reduce the perceived stakes in rulemaking proceedings and

77. See Merton C. Bernstein, *The NLRB's Adjudication-Rulemaking Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970).

78. That the NLRB has finally done so is, of course, no guarantee that it will ever do so again. The commentators, therefore, continue the exhortation. See Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 (1991).

79. Boyer, *supra* note 27.

80. *Id.* at 118-22.

constrain the armaments of the combatants. It is not obvious that any such techniques exist, but this article will suggest some possibilities.

A concern with directly affected publics also throws into sharp relief the problem of any proposal for institutional reform, that is, getting there from here. John Mendeloff's discussion of OSHA rulemaking is particularly pertinent.⁸¹ In Mendeloff's view, OSHA rulemaking is rendered almost impossibly adversarial by the requirement that it regulate risks extremely stringently. Mendeloff argues that this statutorily and judicially imposed requirement lies behind both the fierce opposition of industry to OSHA regulation and judicial demands for a very high level of proof that OSHA's requirements are both needed and helpful.

Mendeloff concludes that both workers and employers would be better off with a system that permitted milder regulation and lower standards of evidentiary proof. But, as he explains in some detail, the institutional reforms that would permit this more moderate approach might also permit stringent regulation on little proof or the abandonment of effective regulation in the face of employer opposition.⁸² Hence, the directly affected publics, and OSHA itself, seem locked into a suboptimal regulatory scheme. Mendeloff's analysis therefore pointedly reminds us that any institutional reforms of rulemaking must take account of the difficulties in getting acceptance of those reforms by the directly affected, special-interest publics.

B. Internal Factors

Not all problems with agency rulemaking can be attributed to the external environment. Some problems result from factors within the agencies themselves. For present purposes we will group these internal factors into four sets: incentives, procedures, structures, and management. There is some overlap amongst these categories. Choices of procedures, internal structures, and employee incentives might be viewed as managerial decisions. Hence, all of these topics might be treated under the heading "management." Since certain aspects of the internal environment are not easily subjected to managerial reform or restructuring, however, it seems useful not to lump everything into the management category. Indeed, as the next section discusses, a number of aspects of the internal environment of agencies are either loosely or tightly connected to the external environment.

1. *Incentives.* Students of bureaucracy have identified a number of issues relating to the incentives of bureaus or bureaucrats. For present purposes this article will focus on three aspects of the incentives of bureau employees that are recognized to have a direct bearing on the efficacy of agency rulemaking efforts.

81. See MENDELOFF, *supra* note 18.

82. *Id.* at 231-45.

The first of these is professional orientation. It is now customary to recognize that bureau employees who are hired because of their particular professional expertise are likely to bring parts of their professional culture with them. The pursuit of values that are a part of their professional culture may inhibit performance within the bureau, including rulemaking performance. Mashaw and Harfst, for example, discuss the competition between safety engineers on the one hand and lawyers and economists on the other in the formulation of rules at NHTSA.⁸³ Safety engineers tended to believe in technological fixes for safety problems; economists tended to believe that government specification of performance or design standards in competitive markets were problematic; and lawyers tended to insist that all doubts about the legality of agency actions should be cured before going forward with a rule. These differing perspectives have been a major cause of delay and dissatisfaction within the agency's rulemaking process. At times, professional competition has seriously impeded the cooperation necessary to complete rulemaking proceedings successfully. This adversarial atmosphere amongst professionals has been documented at other agencies by other observers.⁸⁴

But internal adversariness is not only a function of professional orientation. Institutional roles may also cause noncooperation. A constant complaint in regulatory agencies is the failure of the research arm of the agency to provide information that is directly relevant and useful for the rulemaking branch.⁸⁵ This may occur even when the offices are staffed by people of similar professional background. Again, Mashaw and Harfst document the competition and controversy that plagued relationships between the research personnel and the rulemaking staff at NHTSA.⁸⁶ Both staffs were populated primarily by safety engineers. Their institutional roles, however, drove them to have strikingly different priorities. The research arm of the agency wanted to do high quality research that produced valid scientific findings. The rulemaking staff was more interested in having research that was timely and directly relevant to the support of its contemporaneous rulemaking efforts. As a result, some of the agency's rules had poor factual support and much of the agency's research never found its way into the rulemaking docket.

Finally, rulemaking may be inhibited by agency employees' continuous desire to maintain control over the policymaking process. In virtually every agency, the initiation of a rulemaking project means beginning a process that will involve many offices and many levels of the bureau. Staff committed to policy change may avoid the rulemaking process not only to avoid delays or stalemate, but also because the policy that ultimately emerges from internal discussions, not to mention internal struggles, may bear little resemblance to the policy that they

83. MASHAW & HARFST, *supra* note 3, at 203-04.

84. FRED EMERY, RULEMAKING AS AN ORGANIZATIONAL PROCESS (report prepared for the ACUS, 1982).

85. See Cornelius M. Kerwin, *The Management of Rulemaking* (mimeo, 1992).

86. MASHAW & HARFST, *supra* note 3, at 172-200.

believed necessary when they initiated the rulemaking process.⁸⁷ These considerations may have a direct bearing on the form that policy takes. If career staffs can issue “guides,” “memoranda,” or “manuals” without going through the tiers of the agency bureaucracy, then by avoiding rules they may simultaneously avoid delay and political oversight by non-careerists.⁸⁸

2. *Procedures.* Professor Strauss’s analysis⁸⁹ of the Interior Department suggests the need to focus on internal procedures. Part of the reason that Interior’s employees avoided the rulemaking process was that the internal procedures for the adoption of a rule were so complex and laborious.⁹⁰ Other aspects of procedure have also been identified as impeding rulemaking success.⁹¹ It is commonplace, for example, to complain that agencies have done a bad job of setting agendas or priorities for rulemaking. The failure of the agenda-setting process may lead either to inaction or to decentralized priority setting that squanders the agency’s resources on unimportant issues or spreads its resources so thin that important rulemaking tasks cannot be accomplished.

Inadequate procedures for the compilation of needed information has also been identified as a major procedural flaw in some agency’s rulemaking processes. The basic complaint is that the process fails to integrate the research and rulemaking arms of the agency in ways that make research relevant to the rulemaking effort. As we have seen, this problem may be differently characterized as a problem of competition between bureaucrats having different institutional roles. Yet, obviously, agency procedures can do a better or worse job of integrating these roles and producing cooperation. A similar problem has been identified with respect to agencies that use outside contractors rather than internal research organizations to generate information. The failure to integrate the work of the contractor into the agency, and to monitor performance effectively, often produces inadequate results for purposes of developing or supporting rules.

Procedures for internal consultation both horizontally and vertically within agencies have also been criticized. “Horizontal consultation” involves the

87. Peter L. Strauss, *Rules, Adjudications and Other Sources of Law in an Executive Department: Reflections on the Interior Department’s Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1245-47 (1974).

88. Other more general incentives held by bureau employees may impede rulemaking as well. Employees’ desires for leisure, or for nonstressful work lives may sometimes intrude. Bureaucrats also may have personal axes to grind, political ideologies that hamper their functioning, or unreasonable desires for fame or reward. These, however, are personal idiosyncracies that are likely to respond to specific managerial initiatives, not to broad reform policies. The adversariness and noncompetition endemic in conflicting professional cultures and institutional roles, and the avoidance techniques that may be developed to preserve staff policy autonomy are more systematic internal bureaucratic incentives that might be thought to afflict, to some degree, every rulemaking process.

89. See Strauss, *supra* note 87.

90. Peter Hutt (and others) have also noted that the addition of levels of review of FDA rules within HHS seriously compromised that agency’s commitment to policymaking by rule. Letter from Peter Hutt to Douglas Castle, Chair, Carnegie Task Force on Regulation (on file with author).

91. On these procedural difficulties see generally Kerwin, *supra* note 85; Neil R. Eisner, *Agency Delay in Informal Rulemaking*, 3 ADMIN. L.J. 7 (1989).

cooperation of suborganizations at essentially the same level of authority within the agency that are effected by or interested in a rule. "Vertical consultation" relates to the relationship between the line staff that carries the primary responsibility for policy development and high level executives that must "sign off" for the rule to be approved. Ineffective processes for horizontal consultation may produce either endless bickering amongst subunits of the agency (followed by the overloading of officials at higher levels who have to iron out the difficulties) or poor substantive policy because all of the units having relevant information and perspectives on the problem were not included in the process. Poor vertical consultation is blamed for low moral levels and inertia amongst line bureaucrats and for significant delays in the rulemaking process generally. Delay may result from the slowness with which all of those levels that must "sign off" do so, or from what is known as a "late hit" in the approval process. A late hit is an objection to the rule that is raised at a high level, late in the process, and that sends the rule back to the drawing board, often for complete and lengthy rethinking.

Finally agency procedures are faulted for lack of clarity. Delay and failure, it is claimed, may result from the inability of agency employees to know exactly when they are expected to carry out and complete their rulemaking functions or how those functions are integrated into the overall rulemaking process. They may thus make decisions which are perfectly sensible from the point of view of their subunit, but which have serious delaying effects or resource costs for other entities that are involved in the rulemaking effort.

3. *Structures.* Although it is to some degree artificial to separate structures from procedures, commentators on the internal rulemaking process have tended to think of the "structure" of rulemaking as relating to the choice of a general model of organization for the rulemaking effort. McGarity, for example, identifies five different models (team, hierarchical, outside adviser, adversarial, and hybrid) for the rulemaking process at the EPA (and elsewhere).⁹² Because the structure of agency rulemaking is so closely linked to procedures, it seems obvious that the choice of one or another of these models of rulemaking will have a crucial effect on the procedures that are chosen to set the agenda, generate information, facilitate consultation, and maintain a rulemaking schedule. Moreover, because every model has both strengths and weaknesses, and because the strengths of one model tend to be the weaknesses of another, it seems unlikely that a single approach will make sense for all agencies at all times in their rulemaking efforts.

The studies of internal agency processes and structures for rulemaking seem to justify the basic position of the so called "contingency theory" of bureaucratic

92. Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57, 90-107 (Autumn 1991) [hereinafter McGarity, *Internal Structures*]. For a much more extensive discussion of the whole question of organizing regulatory analysis in the rulemaking process, see THOMAS O. MCGARITY, *REINVENTING RATIONALITY* (1991).

organization. According to that theory, about all that can be said by way of theoretical generalization is that not all organizational techniques are as good as all others, but no organizational technique is clearly best. McGarity echoes this contingency theory view in his conclusion that “[t]he foregoing analysis of the five most prominent models for structuring regulatory analysis into the decisionmaking process suggests that no single model is best for all regulatory programs.”⁹³

We cannot here proceed down the many highways and byways that this contingency approach to organizational design entails. One caveat may be useful, however. While McGarity assigns his model types to certain domains of regulatory or rulemaking activity at the programmatic level—suggesting for example that the hierarchical model might be appropriate in standard form economic regulation, whereas the team or adversarial models are more suitable to social regulation — one might wonder whether the unit of analysis chosen is too abstract. Programs whose rulemaking processes may seem generally well-suited to hierarchical organization, for example, rulemaking for benefits administration at the Social Security Administration, may change complexion radically around particular issues (the relationship between AIDS and the disability definition, for example) or in differing time periods.⁹⁴ But this merely illustrates another general tenet of the contingency theory of organization: rules of thumb will not always work because successful organization design must constantly shift with context and subject matter.

4. *Management.* Certain aspects of the internal operations of the agency are not directly related to the structures and procedures of the rulemaking process but they nevertheless bear critically on it. Rulemaking agencies thus have been criticized for “poor management” in several categories. One is the recruitment and development of staff who can operate effectively in the agency’s rulemaking environment. In particular it is urged that agencies understand that some of their middle level staff will function primarily as “rulemakers.” Hence, they should be trained in a manner that gives them all the necessary perspectives on the rulemaking process as well as the skills to bring together the disparate parts of the agency necessary to complete an effective rulemaking proceeding.⁹⁵

93. MCGARITY, *supra* note 92, at 263. He nevertheless makes a number of suggestions about “rules of thumb” in choosing an appropriate rulemaking model. These suggestions, which vary with the degree of routinization complexity, uncertainty, and political divisiveness in programs, also parallel some conclusions of the organizational theory literature. For example, agencies that engage in relatively routine tasks under statutes setting clear policy goals and leaving only modest agency discretion might best operate through a hierarchical model. By contrast, where tasks are complex and program instructions uncertain, the team and adversarial models will provide a much better chance for coordinating the differing sorts of expertise and perspectives that are necessary for successful completion of the rulemaking task. *Id.* at 263-267.

94. See generally Jerry L. Mashaw, *Disability Insurance in an Age of Retrenchment: The Politics of Implementing Rights, in SOCIAL SECURITY: BEYOND THE RHETORIC OF CRISIS* 151 (Theodore R. Marmor & Jerry L. Mashaw eds., 1988).

95. See EMERY, *supra* note 84.

Agencies are also faulted for failing to have strategic norms to guide the agency rulemaking staff in dealing with unexpected contingencies. In short, agencies are urged to attend to those contingencies in their environment that, while unpredictable in particular proceedings, are relatively likely to occur in a substantial number of instances. The idea is to develop strategies for dealing with impediments before they arise.⁹⁶

Finally, agencies are criticized for their failure to develop a set of shared values that can both motivate personnel and reduce internal competition and noncooperation. This is a vague but recognizable complaint in many organizations. It is often described simply as a failure of "leadership."

C. Connecting the External and Internal Environments

Other things being equal, an agency's structuring and management of its internal environment will affect the quality and timeliness of its rulemaking effort. There is little to be said in favor of ignoring systematic problems of employee incentives, failing to attend carefully to the construction of an appropriate consultative process, or setting no clear agenda to guide and motivate staff. For two important reasons, however, these truisms may not translate directly into satisfactory proposals.

First, the current state of our knowledge concerning the efficacy of particular managerial techniques is quite limited. In the most recent survey of the literature on the management of rulemaking, Cornelius Kerwin, Dean of the School of Public Affairs at American University, concludes that "[e]xisting case studies are better at identifying what their authors consider shortcomings in the management of rules than at establishing which structures and techniques materially improve rulemaking."⁹⁷ Moreover, Kerwin's assessment of the only statistical study on the management of the timeliness of rulemaking, of which he was co-author, was that little could be concluded from it.⁹⁸ The reason is one that has plagued many statistical efforts in the past: "Some of the independent variables included in the model . . . were effective surrogates for certain management variables, but most were not. The model . . . used would have to be respecified and tested in a larger number of agencies before any conclusions about the efficacy of selected management devices could be reached."⁹⁹ Dean Kerwin says nothing about whether he believes that effective surrogates for management variables could be specified.

Moreover, as was previously mentioned, few scholars in the field of organizational theory believe there is a single best way to organize and manage bureaucratic undertakings. General recommendations or conclusions tend to be poorly supported, subject to so many exceptions that they provide little guidance,

96. *Id.*

97. Kerwin, *supra* note 85, at 69.

98. See Kerwin & Furlong, *supra* note 65.

99. Kerwin, *supra* note 85, at 69.

or bromides that do little more than repeat the conventional wisdom. The first three conclusions in the Emery study done for the Administrative Conference are illustrative.

Conclusion one, for example, states that “[s]tructural reorganizations frequently do not result in any fundamental improvement to internal systems.”¹⁰⁰ This statement is poorly supported by the study. It is based on one episode. Moreover, it seems to contradict the only strong recommendation the study makes, that the team structure is the only effective one for the rulemaking process. This is not, of course, to say that the conclusion might not be correct. Indeed, since the conventional wisdom is that most structural reorganizations in bureaucracies are for personnel reasons, it would be unlikely for them to make “fundamental improvements” in internal systems. On the other hand, surely some level of structural inappropriateness must inhibit rulemaking, or any other task-oriented process.

The second conclusion is that “[a]n adversarial atmosphere often develops among technical experts, legal counsel, and other staff offices working together on a regulatory project.”¹⁰¹ In one sense this is a bromide—it is well understood that professional roles and institutional roles create conflicting perspectives. The implicit suggestion may be, however, that “adversariness” is the ill to be avoided. Which, of course, is true—except to the extent that adversariness is needed in order to plumb the depths of particular policy issues and ensure that agency processes do not become exercises in “group think.” In short, organizations should have enough adversariness, but not too much.

Conclusion three states that “[t]o ensure accountability, federal agencies frequently retain signature authority at the higher levels. This results in inefficiency and staff/line coordination problems.”¹⁰² Perhaps. But, as the first phrase of the conclusion states, retaining high-level authority ensures accountability. There is a trade-off here, and the conclusion tells us little about how to deal with it.

Indeed, one might imagine the first three conclusions of the Emery study as giving an agency rulemaking manager the following advice: “Don’t bother with structural reorganizations; avoid adversariness and decentralize decisionmaking in order to increase efficiency.” A particular manager might sensibly respond, “I intend to reorganize my agency to preserve my authority and to ensure adversarial presentation of differing opinions. Why? Because, given my agency’s external environment, ensuring accountability is the most critical managerial issue that I face and, believe me, I am going to be held personally responsible for whatever policy emerges.”

This contextual approach leads us to the second problem with focusing on managerial reforms, their obvious importance notwithstanding. As my

100. EMERY, *supra* note 84, at iii.

101. *Id.*

102. *Id.*

hypothetical agency manager's response suggested, many managerial moves that may seem internally dysfunctional are a response to the external environment. When I said earlier that all else being equal, management matters, I was really saying that given a particular external environment, management of the agency's internal structure and processes may have substantial effects on the agency's success. But this is also to say that internal structure is a function of the external environment. When one looks inside an agency and finds certain internal conditions that seem dysfunctional in pursuing the agency's rulemaking task, one may be looking at simple bad management. Or one may be looking at a response to some external stimulus or requirement. Because agencies must structure themselves and operate internally in order to succeed or survive in the external environment, the latter explanation will often be promising. Indeed, the Emery study's third conclusion, by referring to accountability, recognizes the influence of external factors on internal arrangements. But it then ignores these effects by suggesting that agencies should reduce accountability in order to improve efficiency and staff/line coordination.¹⁰³

Mashaw and Harfst, for example, describe in great detail the ways in which the power structure and rulemaking processes within NHTSA were reshaped over the course of two decades to protect the agency against these external threats.¹⁰⁴ In the process, lawyers and economists achieved at least parity with, and perhaps dominance over, safety engineers.¹⁰⁵ That these changes thwarted the rulemaking process and shifted the agency's enforcement strategies toward a recall regime having little safety payoff was not the result of "bad management." At least according to the Mashaw and Harfst story, these internal changes were necessary in order for the agency to survive in its political and legal environment. And the threatening nature of that environment for other agencies seems to be well documented by the literature previously reviewed. It is plausible to conclude, therefore, that if one wants to improve rulemaking performance one would do well to attend first to external environmental factors.

This conclusion is, of course, both tentative and qualified. Even in a highly threatening environment, good management is better than bad management. And, given a benign external environment, managerial initiatives might be the most important elements of a reform strategy. They may even be of signal importance if it is determined that the external environment of rulemaking is too entrenched to be subject to any significant reform. But everything cannot be

103. *Id.* at 23-25. Actually, the same point can be made in relation to the Emery study's second conclusion concerning adversarial competition between "technical experts, legal counsel and other staff offices." The obvious question is why the agency doesn't let the "technical experts" get on with the job and tell the other staff offices, including the Office of General Counsel, to facilitate their work or otherwise get out of the way. The all too obvious answer is that this might not be a successful strategy given the external environment. The economic analysis staff must have real power and input in order to defend the agency's policies effectively when they are reviewed at OMB. Similarly, a general counsel's office without clout in the rulemaking process is likely to be ineffective in ensuring that the agency's rules will withstand judicial review.

104. See generally MASHAW & HARFST, *supra* note 3.

105. *Id.* at 203.

analyzed simultaneously (at least not in prose), however closely interconnected. For the moment, therefore, the external environment is the issue that will hold our attention.¹⁰⁶

IV

FOCUSING REFORM ENERGIES

A decision to emphasize external rather than internal environmental factors in rulemaking narrows the field of inquiry, but leaves it very large indeed. Prior commentators have identified a large number of external causes for the torpidity and ineffectualness of the federal agency rulemaking process. Assuming that all of these factors make some contribution to the overall problem, there is much to be said for pursuing a strategy of multiple remedies.

This strategy would, however, produce a very diffuse reform agenda. A series of problems have been identified with respect to both political control by Congress and executive and legal control by the judiciary. Each of these "problems" may have multiple solutions, or less ambitiously, multiple ameliorative strategies. Any analysis of the costs and benefits, and advantages and disadvantages, of the alternative strategies for addressing these numerous problems would go on for hundreds of pages. We need somehow to narrow our topic.

One way to focus reform energy would be to consider only those alternatives that seem politically feasible. For example, a recommendation to Congress that it unify its oversight activities so that agency rulemaking efforts are neither overburdened nor whipsawed by contradictory oversight instructions sounds like a good idea. Indeed, it is a good idea. But, since it probably requires a reorganization of Congress (eliminating overlapping committee and subcommittee jurisdictions)¹⁰⁷ that contradicts the imperatives of most congressional reelection strategies (being seen to have power about issues of moment),¹⁰⁸ this sort of reform is almost certainly not in the cards.

On the other hand, with respect to a large proportion of possible remedies, political feasibility is anyone's guess. Can Congress make better strategic use of

106. In other contexts, in particular the reform of a high volume and relatively routine adjudicatory system, I have concluded just the opposite. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983).

107. See RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* (1973); KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* (1991); STEVEN SMITH & CHRISTOPHER J. DEERING, *COMMITTEES IN CONGRESS* (1984). See also Thomas W. Gilligan & Keith Krehbiel, *Asymmetric Information & Legislative Rules With a Heterogeneous Committee*, 33 AM. J. POL. SCI. 459 (1989); Keith Krehbiel, *Sophisticated Committees and Structure-Induced Equilibria in Congress*, in *CONGRESS: STRUCTURE AND POLICY* (Mathew D. McCubbins & Terry Sullivan eds., 1987); Keith Krehbiel, *Why Are Congressional Committees Powerful?*, 81 AM. POL. SCI. REV. 929 (1987).

108. There is, of course, much dispute about what politicians "maximize" and how they seek to maintain their positions. See RICHARD F. FENNO, *CONGRESSMEN IN COMMITTEES* (1973); RICHARD F. FENNO, *HOME STYLE* (1978); MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977); MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* (1981); DAVID MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

time limits, hammers, and other action-forcing legislative devices? Can the Executive Office of the President be convinced to reform the OMB (or Council on Competitiveness) review process? Can judicial review be made more focused and effective and, therefore, less disabling? There are surely concrete circumstances under which each of these questions might easily be answered either yes or no. How they are answered depends very much on the predisposition of the observer. Reform skeptics are likely to think that politics will hamper any effective effort; reform optimists may believe that a well-constructed case can eventually produce reform, apparent political obstacles notwithstanding. Analysis of political feasibility tends either to leave all potential targets of reform on the agenda or to shrink the agenda to the politically trivial and, therefore, the predictably ineffectual.

There is, moreover, a more serious difficulty with setting reform priorities on the basis of political constraints. Such an approach tends to treat the external political forces that surround the rulemaking process as mere obstacles to the accomplishment of sensible rulemaking goals. But this is a cartoon of the real situation. Pressures exerted on rulemaking in the Congress, the Judiciary, or the Executive represent distinct, but important, political values. What is needed is some normative vision of rulemaking that will assist us in identifying targets in the external environment that are serious impediments to rulemaking *and* that are inconsistent with our political values.

Such a normative vision is not very difficult to articulate. The development of agency rulemaking processes over the past twenty-five years highlights two major concerns: that rulemaking be structured (1) to provide fair opportunities to participate by affected interests and (2) to produce reasonable policy choices given the goals of the program and the relevant facts (however complex and uncertain these may be). Built into these notions of fairness and reasonableness are subsidiary norms of timeliness and resource conservation. A process too long delayed or too expensive may become both unfair and unreasonable.

In a polity that seeks to promote these norms for administrative rulemaking, the external environment should be structured to promote a fair and reasonable rulemaking process. Private participants should have equal access to decisionmakers and be able to use that access to inform the agency concerning the facts and the proper contextual understanding of the goals that the particular program should promote. External political institutions (Congress and the Executive) should seek to assure both diligent implementation and that the pursuit of particular programmatic missions do not become ends in themselves—so disconnected from broader understandings of the place of the program in overall societal values that they produce unreasonable results. Legal review by the courts should assure that the authority exercised is authority legitimately conferred, that it is neither misused nor neglected, and that the basic norms of participatory fairness and substantive nonarbitrariness are respected.

The challenge, of course, is to design the procedural and institutional mechanisms that will facilitate this ideal external environment without simultaneously encouraging the abusive use of multiple mechanisms for external

influence or control. How can checks and balances be established without creating "obstacles" instead? How can we deal with the all-too-obvious tendency of seriously affected parties to manipulate these needed external constraints for personal or partisan advantage? Or to put the matter more cheerfully, how can private interest be harnessed to the public purpose of a fair and reasonable rulemaking process?

I want to suggest that this last, more positive formulation of the institutional design issue may also give us some analytic purchase on the problem. If "abuse" of the rulemaking process is thought of as a natural outgrowth of private interests, the problem is then defined as a problem in the management of incentives. The goal is somehow to structure procedures and institutional relationships such that the incentives to exert influence by information and persuasion are maintained, as are checks on legality and political "tunnel vision," while opportunities for strategic obstructionism are eliminated. Not so easy, as any institutional architect knows, but there may be some insights to be garnered here nonetheless. While incentives do not translate directly into behaviors,¹⁰⁹ careful attention to the incentives built into current arrangements might convince us that improvements are possible, that is, that some opportunities for abuse can be eliminated without simultaneously losing the valuable checks and balances that the external environment of rulemaking provides.

In order to get a grip on this analytic handle on rulemaking reform, I have developed something called the "rulemaking review game." The basic idea of the game is so simple as to be obvious. It assumes that to the extent that an opponent of rulemaking (regulatory or deregulatory) perceives the use of an external obstacle to rulemaking to have a higher expected value than failing to use it, that external constraint will have a higher probability of being activated. The question then will be whether we can discover, in current rulemaking processes, situations in which we would like to change the incentives of actors and thus change their calculations about whether to actuate some external constraint. If so, we have found a place that we would like to reshape the rules of the game in the interests of a better rulemaking process.

To make this abstract idea more concrete, this article first explores the rulemaking review game in the context of judicial review. As it shows, the focus on the incentive structure of actors may lead to rather different proposals for reform than are current in the literature. The article then explores what the rulemaking review game has to teach us with respect to external political controls.

109. Indeed, I have argued elsewhere that this is one of the most serious mistakes that a policy analyst can make. See THEODORE R. MARMOR, JR. ET AL., *AMERICA'S MISUNDERSTOOD WELFARE STATE* 219-22 (1990).

A. A Game-Theoretic Analysis of Judicial Review

Game theory is a subdiscipline in mathematics and economics which seeks to model the way in which choices should be made by rational actors, that is, actors who are seeking to maximize their own returns given certain available alternatives.¹¹⁰ There is no claim by game theorists that actors will *necessarily* behave rationally. The game theoretic structure merely makes clear what an actor's incentives are and how that actor might maximize expected returns.

Obviously, when deciding whether to bring a legal action, or whether to comply with an agency regulation, a regulated party may not behave in accordance with a simple game theoretic structure. Hence, for example, a party who objects ideologically to any and all regulation might have very high negative payoffs from compliance, whereas a party that prides itself on being a "good citizen" might have high negative returns from resistance to legal requirements. The illustrations that follow do not attempt to capture these sorts of preferences, although in most cases the game structure could be modified to take account of them. Instead, the illustrations speak in terms only of straightforward economic costs and benefits assumed to influence the modal person or firm.

1. *To Comply or Not to Comply.* Imagine for illustrative purposes that we are considering a regulation by NHTSA which requires that certain equipment be included in new passenger cars. Under current law such a regulation is immediately appealable to a court of appeals. Because NHTSA regulations almost always allow significant lead times for compliance, failure to comply pending an immediate appeal will usually impose no costs on the manufacturers. The question for the manufacturers, then, is whether to begin immediately to work toward compliance or to challenge the rule in court.

To simplify matters further, we ask first only whether a manufacturer will comply or not. We then consider whether the manufacturer will bring an action to seek to invalidate the rule. The two questions are obviously connected, because if the rule remains in effect a noncomplying manufacturer will at some point begin to incur penalties. For present purposes, however, we assume that some firm will attack the rule and that during the pendency of that action there will be no penalties for noncompliance.

Because there are no penalties for noncompliance, the strategic situation is not one in which the manufacturers view themselves in a "game" with the federal agency. The important question for them, instead, is what their competitive position will be *vis-à-vis* other manufacturers should they comply or not comply with the rule. Pre-enforcement Review Game Number One illustrates this competitive situation. It makes the following assumptions: compliance is costly, and costs are relatively uniform across time and among manufacturers. Here we assume that there is a compliance cost of five for each model year. There is a

110. For an accessible introduction, see ERIC RASMUSSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY (1990).

further cost of two if the manufacturer is the only one to comply, because that manufacturer's costs and prices will go up relative to its competitors, and it will lose some market share. These numbers are arbitrary, but the structure of the current game does not make that important so long as no manufacturer receives benefits from compliance. The direct costs of compliance have been made greater than the market share losses from sole compliance, because that represents the usual structure of demand elasticity in the automobile market—manufacturers do not lose a dollar for every dollar in increased price of their automobiles.

CHART 1

Pre-enforcement Review Game #1

Assumptions: Appeal stays enforcement
Compliance costs = 5 for each time period
Sole complier loses additional 2 in market share

		Chrysler (others)	
		Comply	Not Comply
G.M.	Comply	-5, -5	-7, 0
	Not Comply	0, -7	0, 0

Payoff (G.M., Chrysler or others)

Looking at the two-by-two game set out in the chart, it is not hard to see where G.M. and Chrysler (who is a placeholder for the other members of the industry) will end up. No one will comply. The lower right-hand quadrant is what is called a "dominant strategy" for each player. This is the action that each player will take no matter what the other player in the game does. To be sure, G.M. would prefer to be in the lower left-hand quadrant and Chrysler in the upper right-hand, but competitors have no reason to give each other the satisfaction of complying and losing market share when noncompliance is costless. It would appear that with pre-enforcement review no manufacturer would ever comply prior to the compliance deadline. Presumably they would always seek judicial review because a suit at least delays, and may eliminate, the need to comply.

2. *But Will They Sue?* The assumption that manufacturers will always sue, however, is unrealistic. To be sure it is always in a manufacturer's interest for *someone* to sue, but it is in the interest of each manufacturer not to be the manufacturer who does sue. If someone else sues, all manufacturers get the benefit of the litigation (assuming it is carried out competently), and only those

who join the litigation as parties will have to pay for it. This is a classic “free rider” problem in which everyone wants to free ride on somebody else’s effort.¹¹¹ In some circumstances, the free rider aspect of the situation will mean that no one will sue. How likely are we to see that result?

The answer is not very likely, and for a number of reasons. First, this free rider problem can be solved by creating an industry association that will bring suit on behalf of everyone. If there is a pre-commitment to the association sufficient to give it litigating funds, the free rider issue is solved. Also, in industries, like the automobile industry, where there are few manufacturers, and top executives are well-known to each other, there are significant social (and perhaps ultimately economic) costs to welching on one’s fair share of expenses necessary to promote the “common good” of the industry. Finally, even in the absence of an effective association, or a small number of manufacturers, the likelihood of suit is quite high. We can see this by looking at the Who Will Sue game. Here we have kept the compliance cost equal to five and added an assumption concerning litigation costs, that is, that they would be at most twenty percent of compliance costs. In addition we have assumed that the probability is .5 that the rule will be held invalid. Recent experience suggests that this is not an unrealistic probability where no manufacturer has yet complied.

CHART 2

Who Will Sue Game

Assumptions: Pre-enforcement review with stay of enforcement
 Compliance costs = 5
 Litigation costs = 1
 Probability rule invalid on pre-enforcement review = .5
 Probability of agency enforcement = 100%

	Chrysler (others)	
	Sue	Not Sue
G.M. Sue	1.5, 1.5	1.5, 3.5
Not Sue	3.5, 1.5	1.5, 1.5

Payoff (G.M., Chrysler or others)

The logic of the payoffs in the chart is just this: If a manufacturer sues it will pay litigation costs of one but will avoid compliance costs of 2.5, that is, compliance costs of five multiplied by the probability that the rule will be held

111. Here the basic arguments parallel, MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 53-65 (1971).

invalid. Hence, the total payoff from immediate suit is 1.5. Obviously the manufacturer is better off if someone else sues, but it does not. In that scenario it gets the 2.5 avoidance of compliance costs and also avoids paying its share of the litigation costs (in a two-manufacturer world: $1 + 2 = .5$). If nobody sues the probabilistic payoff for everybody is 1.5. The agency will sue to enforce with a .5 probability of winning, yielding probabilistic compliance costs savings of 2.5 ($5 \times .5$) and litigation (defense) costs of one. ($(5 \times .5) - 1 = 1.5$). Costs of defense are not shared because each manufacturer will be sued separately.

Given this set of payoffs, the outcome of the game is indeterminate, but the probability of suit is quite high. No player has a dominant strategy. G.M. would like not to sue if Chrysler is going to sue, but G.M. does not know whether Chrysler will, and vice versa for Chrysler. The situation is rather like the infamous teenage game of "chicken." G.M. and Chrysler would like to bluff each other into suing while not suing themselves. However, given that each is better off if it sues than it would be if no one sues, it is rational to chicken out and bring suit yourself. But, in order to maintain credibility or "face" for future bluffs, there is also some possibility that neither will sue even though it would be individually rational for them to do so.

There is, however, a mathematical equilibrium to the game. Indeed, there are three. If one or the other sues, then its competitor need not. We end up in either the lower left- or upper right-hand boxes. These are stable positions once reached; neither player could individually change its mind and make itself better off. Of course, both could sue out of solidarity, pre-commitment, or stupidity, but this is not a stable equilibrium because either could withdraw and make itself better off. Because both parties know all this *ex ante*, the best strategy for each player, that is, the strategy that has the highest expected value, is a randomized approach that has each manufacturer sometimes sue and sometimes not. Whether a party sues does not have to be "random" in the statistical sense so long as it is not predictable by the other party. It is also possible to calculate the probability that someone will bring suit. The probability is quite high—ninety-six percent.¹¹²

The incentives created by immediate pre-enforcement review of rules are fairly straightforward. If there are no penalties for noncompliance, it is in one's interest to comply. And, even with a free rider problem, the chances are extremely high that litigation will ensue.¹¹³

112. Let G = Probability that G.M. sues and C = Probability that Chrysler sues. If GM is to be willing to mix in equilibrium, it must find the two alternatives over which it is mixing (randomizing) equally desirable; that is, its expected profit from suing, $1.5C + 1.5(1-C)$, must equal its expected profit from not suing, $3.5C + (-3.6(1-C))$. Solving this equation yields $C = .78$. By a symmetrical argument, $G = .78$ as well. Hence the probability of at least one suit is $.96(1-.22^2)$.

113. Looking at these games and the incentives that they create for the parties, we should not be surprised that there is an extremely high rate of litigation against federal agency regulations that can be reviewed prior to their enforcement. That the rate does not reach 100 % suggests only that there are some other forces are at work here that are not captured by the games we have thus far defined. Manufacturers might be disinclined to sue when the returns are small, thus hoping to induce cooperative behavior from the Government in the future. Or, as we noted earlier, they may get returns to "good

Thus far, of course, we have only been talking about suit by regulated parties. But beneficiaries may sue as well if they think that the rule is too weak. How should we model their possible payoffs in the pre-enforcement review game combined with the Who Will Sue Game? It would seem that the structure of the games beneficiaries play should be similar to that modeled for regulated parties. Beneficiaries have immediate losses from their failure to achieve greater protection (by a stronger rule) that give them incentives to sue that are symmetrical to these incentives given regulated parties to avoid compliance costs. If we assume that, on average, benefits equal costs, and that litigation is equally costly for each side, then the games are identical and we should expect a similar ninety-six percent probability that some beneficiary will sue if the rule is recognized as weak. And, of course, the rule could easily look both too weak to beneficiaries and too strong to regulated parties.

We know that the chances of suit cannot be over one hundred percent. The chances that a beneficiary group or regulated party will sue must, however, approach that probability because the "review or not game" between beneficiaries and regulatees should look very much like the basic Pre-enforcement Review Game 1. Not challenging a "compromise" rule may be the best cooperative result, but it is not a dominant strategy if the "payoffs" to regulated and benefitted parties of overturning the rule are equivalent.

3. *The Power of Penalties.* The game theoretic situation changes drastically if there is a penalty for noncompliance pending the determination of the validity of rule. Pre-enforcement Review Game 2 alters the situation of Pre-enforcement Review Game 1 by simply adding a penalty that is sufficient to deter, that is, one that exceeds the gains from noncompliance. Because compliance costs are five and market share losses from sole compliance are two, the penalty would have to be more than seven to provide a deterrent. With this structure of payoffs, the dominant strategy in the game shifts from the lower right-hand corner to the upper left-hand—everyone complies.

citizenship" that dissuade them from compliance delays that would otherwise be economically rational. But these "cooperative" proclivities have little or nothing to do with the legal structure confronting regulated parties. The long and short of the matter is that a pre-enforcement review regime with no penalties for delay in compliance pending the outcome of a lawsuit creates strong incentives for litigation rather than regulatory compliance.

CHART 3

Pre-enforcement Review Game 2

Assumptions: Appeal does not stay enforcement
 Compliance = -5
 Market share loss from sole compliance = -2
 Penalty = -8

		Chrysler (others)	
		Comply	Not Comply
G.M.	Comply	-5, -5	-7, -8
	Not Comply	-8, -7	-8, -8

Payoff (G.M., Chrysler or others)

But once again, this game is too simple. First, it is not certain that the penalty will be incurred. After all, the rule might be declared invalid and no penalty would be due. At the very least, we need to modify the game to reflect the probabilities of success on appeal. Moreover, success on appeal in this game may be more complicated than the situation described in the Who Will Sue Game. It seems likely, given the payoffs in Pre-enforcement Review Game 2, that some member of the industry will comply rather than sue. And, in the face of compliance, a substantial number of legal arguments concerning the validity of the rule will lose credibility. Many attacks on agency regulations are based on their "unreasonableness," and by "unreasonable" or "arbitrary" the affected parties often mean that the rule requires conduct that is technically infeasible or unreasonably costly. Neither of those grounds will be very plausible to a reviewing court in the face of compliance by one of the regulated parties. Hence, the probability of success changes if someone complies. The question of whether to comply or sue becomes a more complex, probabilistic issue.

4. *The Comply or Sue Calculation.* The simplest way to illustrate the situation facing a member of the regulated industry where there is no pre-enforcement review, or where such review does not toll the accrual of penalties, is by a "decision tree." The assumptions underlying this decision tree build on our prior ones. Once again the assumptions are arbitrary, but hopefully not unreasonable.

alternative action, and then see what the total expected value is of a decision to act in a particular way, here either to sue or to comply. We assume in this decision tree that the actor, G.M., cannot know at the time that it makes a decision to comply or to sue whether it will be successful in its suit or whether some other party may comply in the meantime. Because the actor has no information about the other party's decisions, it simply views the probability that someone else will comply as a chance probability, or .5. Hence Chrysler, who is the first mover in this game, may comply or not comply with a probability of .5 for each action. If Chrysler complies, then the probabilities are .9 that the rule will be held valid and .1 that it will be held invalid. But on the branch of the tree where Chrysler does not comply, the probabilities of either validity or invalidity are .5. The task then is simply to trace out the values for each branch of G.M.'s possible actions. G.M. can decide only to comply or to sue, but it will be doing so in one of four different worlds.¹¹⁴

When all the values are multiplied by the probability that that action is taken in a particular state of the world, one can then total up the expected value of suing and the expected value of complying. Given the total values that emerge from this particular decision tree, G.M. would be almost indifferent as between suing or complying. A slight change in the values that are plugged into the decision tree would shift the balance in one direction or another. The decision tree thus teaches several important lessons. First, once again, it illustrates that without a penalty for noncompliance the balance of the benefits or costs from litigating or complying will strongly favor litigation. For here the question is close even with penalties. But, second, it does not follow that putting a penalty into the system ensures that no one will ever challenge agency action. Indeed, even with a penalty that is greater than the sum of compliance costs and market share losses, an actor whose costs from compliance were only slightly greater than those we have assigned G.M. in this example would still find it rational to bring suit, or, what is the same thing, to fail to comply and resist enforcement by raising the potential invalidity of the rule as a defense.

There is a third lesson here that has been implicit in the whole analysis and that should now be brought front and center: to the extent that judicial review is a contributing factor in "ossifying" the rulemaking process, that problem may not lie in the conventional direction most often debated, that is, the relative stringency of the standard or scope of review. Judicial stringency is but one

114. To see how the computation has been done, consider the top branch. There G.M. decides to comply and the expected value of this decision is its actual cost or benefit (here -5 in compliance costs) times the probability that that state of the world is in fact the one in which Chrysler is complying. To get the probability for that state of the world, one takes the probability that Chrysler has complied (.5) times the probability that the rule will be valid given that Chrysler has complied (.9) and multiplies that fraction times the compliance costs. In the branch that is second from the top, the probabilities remain the same because it is still the comply/valid world. However, the payoffs are modified to reflect the fact that in this state of the world G.M. would lose the lawsuit incurring penalty costs of 8 and litigation costs of 1. The only situation in which there are positive returns from any action is when G.M. sues and the rule is held invalid. In those circumstances, it pays the cost of litigation (-1), but it gains by foregoing the costs of compliance (+5).

factor bearing on the likelihood of success in appealing a rule and on the payoffs to appeal versus compliance. The timing of review and the conditions on its availability also shape that calculation, as does the level of compliance cost. There are potentially a large number of policy options here for recalibrating the game so that it has an “appropriate,” or “balanced,” set of incentives.¹¹⁵

B. Evaluating Policies

Assume for the moment that we believe the charge that judicial review debilitates rulemaking in roughly the ways that prior researchers have described. What policy levers would we like to pull to rectify the situation—remembering all the while that judicial review is a good as well as a bad; that in addition to inducing error, aggravating obstructionism, and demoralizing policymakers, judicial review may also protect against unfairness, irrationality, and non-accountability.

1. *Attacking “Scope” or “Stringency” Problems.* Lawyers argue interminably over the appropriate scope of judicial review of agency action.¹¹⁶ Congress has many times attempted to modulate the stringency of judicial review by changing the verbal formulae on scope of review. Contrary to the APA formulation, “substantial evidence” review was made part of the review provisions for informal rulemaking in a number of the newer regulatory agencies.¹¹⁷ And a completely different formulation from those found in the APA was utilized when

115. Some sort of “penalty” or “bonding” mechanism might also be made applicable to beneficiary suits in order to shift the calculus there.

116. The recent outpouring of articles concerning *Chevron* is illustrative. The loss of forests necessary to make the paper to print all of the articles written on the proper standard of review in interpreting statutes following this case might well have justified requiring the Supreme Court to issue an environmental impact statement along with the opinion. See, e.g., Eric M. Braun, *Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC*, 87 COLUM. L. REV. 986 (1987); Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron U.S.A. v. Natural Resources Defense Council*, 1991 WIS. L. REV. 1275; Gary J. Edles, *Has Steelworkers Burst Chevron’s Bubble? Some Practical Implications of Judicial Deference*, 10 REV. LITIG. 695 (1991); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990);

117. The Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1988), and the Consumer Product Safety Act, 15 U.S.C. §§ 2051-2083 (1988), are prominent examples. It is hardly clear what Congress had in mind in applying the substantial evidence rule to informal proceedings. It was perhaps merely a compromise between those who supported the bills, along with their logical corollary of informal rulemaking subject only to review for “arbitrariness,” and those who opposed the legislation and wanted at least to hamper its effectiveness through the use of formal procedures for rulemaking that would actuate the “substantial evidence” rule under the APA. The judges who had to deal with this compromise were not pleased. See *Industrial Union Department, AFL-CIO v. Hodgson*, 499 F.2d 467, 469 (D.C. Cir. 1974), where Judge McGowan lamented that “[t]he federal courts . . . surely have some claim to be spared additional burdens deriving from the illogic of legislative compromise.”

judicial review was made available for veterans' claims.¹¹⁸ In at least some cases, the famous *Universal Camera*¹¹⁹ case being perhaps the premier example, the courts have believed that legislative reformulation of the review standard was telling them something important about the political branches' expectations concerning the scope of judicial surveillance of agency decisionmaking.

Yet, some commentators would argue that it is unclear whether "arbitrary and capricious" actually means anything different than "substantial evidence."¹²⁰ And, where some find the general tenor of judicial review reveals continuing, if episodic, "hard looks,"¹²¹ others see "soft glances"¹²² or some other metaphoric judicial posture as the new trend. Meanwhile, some of our most experienced judges have told us that how hard they look at any particular agency's determinations depends on a whole host of historical and contextual factors that outrun legislative formulation.¹²³ There thus seems much wisdom in John Mendeloff's quoted suggestion that the real question in any review proceeding is reasonableness, and that "[r]easonableness, in turn, is largely in the eye of the beholder."¹²⁴

Do not overread the argument here. It would certainly make a difference in the judicial review game to change the probabilities of success in one way or another. The payoffs in the game are highly contingent upon those probabilities. Yet it seems a virtually forlorn hope that we might reduce the uncertainties that drive the adversarial litigation process by working hard on the question of the scope or stringency of judicial review. Legislative language might put a spin on

118. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105, Div. A (1988) (to be codified at 38 U.S.C. § 101 (1988))

119. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

120. Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. REV. 899, 934 (1973).

121. Pierce, *supra* note 116.

122. Glicksman & Schroeder, *supra* note 61, for example, claim that there is a recent trend toward deference with respect to EPA decisionmaking. A small but statistically significant trend toward deference was identified by Schuck and Elliott immediately following the *Chevron* decision. See Schuck & Elliott, *supra* note 54. But the deference may not hold up our time, particularly since the Supreme Court arguably has been less deferential in practice, whatever its pronouncements, post-*Chevron* than immediately prior to *Chevron*. See Linda Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 65 (Spring 1994).

123. Here one is reminded of Judge Harold Leventhal's suggestion in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), that courts reviewing agency actions are looking for some "combination of danger signals" that might justify close scrutiny and perhaps a reversal or a remand. In his view, the review function "combines judicial supervision" with a salutary principal of judicial restraint, an awareness that agencies and courts together constitute a "partnership" in the furtherance of the public interest and are "collaborative instrumentalities of justice." These sentiments are echoed in the Attorney General's committee in administrative procedure, administrative procedure and government agencies, S. DOC. NO. 8, 77th Cong., 1st Sess. 75-76 (1941).

The difficulty of combining deference and skepticism in the proportions that Congress intended through some verbal formulation of the scope of judicial review was put in rather exasperated form by Judge Brown in *American Petroleum Institute v. EPA*, 661 F.2d 340, 349 (5th Cir. 1981): "In summary, we must accord the agency considerable, but not too much deference; it is entitled to exercise its discretion, but only so far and no further; and its discretion need not be ideal or even, perhaps, correct so long as not 'arbitrary' or 'capricious'"

124. See MENDELOFF, *supra* note 18, at 115-16.

the process, but, given the other contextual factors that influence the scope of judicial review, even that spin might not be very long lasting.

Moreover, we know from the literature on civil litigation¹²⁵ that the number of suits brought to trial is a function, not of the standard for judgment, but of the degree to which plaintiffs and defendants similarly assess the “stakes” in the lawsuit and plaintiff’s likelihood of success, that is, the expected value of going to trial. Given the multitude of issues available to be litigated in almost any rulemaking pre-enforcement review proceeding and the vagueness of any applicable review standard, the chances that regulated parties, beneficiaries and the government will differentially assess the likelihood of a successful review seems high. In addition, all of these “players” are “repeat players” so that the “stakes” may be different for each, leading to different expected values of litigation even when probability estimates concerning a plaintiff’s success are identical. In short, “settlement” of pre-enforcement review proceedings seems deeply problematic.

There is the additional concern that attempts to reduce the intrusiveness of judicial surveillance, by telling judges to be more respectful of administrative discretion, is neither politically popular nor constitutionally appropriate. To the extent Congress has seriously debated any general change in the scope of judicial review of rulemaking, it has largely been changes in the opposite direction. The many versions of “Bumpers”¹²⁶ and the fall of that last significant bastion of nonreviewability—VA claims—all tell the same story. As a nation we are committed to judicial control of agency action. Telling the courts to lay off may be a political non-starter, even if we believed that altered verbal formulae were efficacious or appropriate.¹²⁷

2. *Changing the Stakes.* The preceding game theoretic models, however arbitrary their quantitative assumptions, also demonstrate quite graphically how changing the stakes in the game matters. Almost no better engine for promoting litigation rather than compliance can be imagined than a scheme that permits immediate review while avoiding all compliance and penalty costs. For while

125. George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527 (1989); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

126. For a discussion of successive versions of the Bumpers Amendment and its rationale, see, e.g., Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1162-68 (1977). In its original version, S. 86, 95th Cong., 1st Sess., 123 CONG. REC. 639 (1977), the Amendment called for the elimination of any presumption that the rule or regulation of an agency was valid and required courts to invalidate rules unless supported by “clear and convincing” evidence.

127. On the other hand as we will suggest later, *see infra*, at pages 246-47, some attempt to have the courts reduce their role in agency policy choice may be the linchpin of a strategy for deossifying the rulemaking process. In some sense the Supreme Court seems to have been doing just that, although the lower courts are not necessarily getting the message. *See, e.g.*, Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation: CNI v. Young and the Aflatoxin Dance*, 44 ADMIN. L. REV. 131 (1992). And the Supreme Court itself has hardly been consistent in this matter. *See, e.g.*, JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 719-37 (3d ed. 1992). *See also* Cohen & Spitzer, *supra* note 122; Merrill, *supra* note 116, at 969.

lawyers and litigation are expensive, most major rulemaking proceedings involve issues of such importance to at least *some* firms or individuals that the compliance burden imposed or potential benefits foregone dwarf the expected costs of litigation.

There might, therefore, be much wisdom in John Mendeloff's further suggestion that trench warfare in the rulemaking process might be avoided by systematic attempts to ease compliance burdens.¹²⁸ There are obviously many ways to reduce compliance burdens. Lengthening time periods for compliance tends to reduce costs, as do less stringent or less broadly applicable standards. Market-like devices for trading amongst regulated parties to minimize overall compliance costs also have much to recommend them. Yet, this "reduce the stakes" strategy has some severe problems. One is that it seems to argue that the solution to the problem of too little rulemaking is to set fewer regulatory goals, or fewer significant ones. In many cases, reducing the stakes is a strategy for solving a problem by surrendering to it.¹²⁹

There is, however, a deeper difficulty. Mendeloff's argument and the stylized game structures that have been portrayed here both tend to assume homogenous compliance costs. The clear fact of the matter, however, is that regulation disfavors (or benefits) some parties more than others.¹³⁰ Indeed, for some parties, compliance costs may not be "costs," if by that we mean deadweight losses. Sometimes they are investments in future profitability. General Motors did not join with its U.S. automotive competitors/colleagues in attacking the original passive restraints rule, for example, because it held the patents on the airbag technology and expected to reap significant competitive advantage from the regulation. It later waged religious warfare against NHTSA over that same rule, in part because the agency's vacillating prescriptions (through no particular fault of its own) denied G.M. some very handsome profits.

The differential costs of compliance have particular relevance to deregulatory rulemaking. Existing regulations may have radically different effects within industries, and their removal will benefit some parts of an industry more than others. Hence, reducing the stakes would have to mean something more than simply reducing regulatory burdens in order to have a significant impact on the use of the legal process to wage regulatory warfare. The Investment Company Institute, for example, is surely one of the most litigious trade associations ever formed. Its efforts in the judicial arena, however, are more often directed at

128. He is particularly critical of the OSHA statute, which seems to leave the administrator no choice but to impose extremely costly regulatory requirements.

129. And surrender may not work, as the recent removal of OSHA's very watered-down toxic exposures rule demonstrates. See 29 C.F.R. § 1910 (1989). See also Jerry L. Mashaw, Book Review, *Mendeloff's The Dilemma of Toxic Substance Regulation: How Overregulation Causes Underregulation*, 19 RAND J. OF ECON. 489 (1988); Sidney A. Shapiro & Thomas O. McGarity, *Not So Paradoxical: The Rationale for Technology-Based Regulation*, 1991 DUKE L.J. 729.

130. BRUCE M. OWEN & RONALD BRAEUTIGAM, *THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS* (1978); Mashaw, *supra* note 129, at 489.

maintaining regulatory burdens on financial intermediaries outside the scope of its membership list than at fighting battles for a freer market.¹³¹

Thus, policies that attempt to reduce adversarial obstructionism by reducing the stakes in regulation might virtually have to mimic legislative logrolling. In order to assure non-adversariness, agencies would really be looking for rules or rule relaxations that “fairly” distributed the benefits and costs over all the affected interests, including various classes of regulatory beneficiaries. In this guise, the proposal begins to look either like agency surrender (or “capture”) or, more optimistically, a proposal for regulatory negotiation. And, while “reg neg” clearly has its place, no one believes that most of the far flung rulemaking activities of the federal bureaucracy can be reshaped into a negotiating format.¹³²

We surely should be concerned about the imbalance in the stakes that results from significant discontinuities in the burdens of complying and litigating. However, given the differential benefits and burdens borne by regulated parties or by the potential beneficiaries of regulations that have been delayed or repealed, it will not be easy to design systems that place the right amount of weight on one or another side of the scales. Incentives for legal combat seem ubiquitous whether rulemakers are regulating, deregulating, or not regulating.

3. *Timing.* Looking at the timing of judicial review is in some sense just another way of stating the stakes problem. The modern penchant for immediate pre-enforcement review will often mean that regulated or deregulated parties can choose between litigation and compliance at a time when the litigation alternative is relatively costless. Regulations often have lead times that extend well beyond the point at which an appeal would predictably be concluded, and stays of the effective date of a rulemaking action may be available to protect parties against potentially wasteful compliance efforts in the interim. A concentration on timing as a discrete issue may nevertheless suggest problems and reform opportunities that would otherwise be missed.

In certain circumstances, for example, the timing of review has complex interactions with the probabilities for a successful appeal. If the availability of immediate review eliminates the incentives of all parties to begin compliance efforts, then it also eliminates the incentives that might otherwise exist to solve some of the feasibility and practicability issues that may loom large in the

131. See, e.g., *Board of Governors, Fed. Reserve Sys. v. Investment Co. Inst.*, 450 U.S. 46 (1981); *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971); *Investment Co. Inst. v. FDIC*, 815 F.2d 1540 (D.C. Cir.), cert. denied, 484 U.S. 847 (1987); *Investment Co. Inst. v. Conover*, 790 F.2d 925 (D.C. Cir.), cert. denied, 479 U.S. 939 (1986).

132. See generally Frederick R. Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261; Neil Eisner, *Regulatory Negotiation: A Real World Experience*, 31 FED. B. NEWS J. 371 (1984); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 7-8 (1982); Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1637-43 (1986).

litigation. Time and again, NHTSA regulations foundered on the shoals of practicability or reasonableness. Over time, though, it became clear that many of the technological problems that convinced courts to remand rules to the agency could be solved. Moreover, they might have been solved much earlier had attempts at compliance preceded resort to the judiciary.¹³³

The timing of review also radically reshapes the focus of litigation. Review in an enforcement context often concentrates on one or a few issues of particular moment to a particular firm. Pre-enforcement review invites, and usually produces, the invocation of a laundry list of potential frailties in a rule's substantive content or procedural regularity. The multiplicity of issues available, combined with the unavailability of evidence concerning genuine attempts to comply with the rule, dramatically increase the uncertainties of judicial review.

Paul Verkuil warned us nearly twenty years ago about the shift in the quality of review that would likely result from shifts in timing.¹³⁴ In Verkuil's words:

One consequence of the early pre—enforcement review of rules in the courts of appeal is a new focus on rulemaking that, it is believed, will contribute to the creation of a new rulemaking model. In the past, when a rule was reviewable only after enforcement, considerable time could elapse before the rulemaking procedures and the factual basis for the rule were tested. As a result, review of the circumstances surrounding the rule's enactment was secondary and somewhat obscured by time; the main issue was the rule's application to the particular respondent before the court. But, with a final order requirement tied more closely to notions of finality and ripeness, rulemaking review can take place almost instantly and the focus on the rulemaking process may be much sharper. In this sense early review means closer review, which itself leads to a vigorous judicial scrutiny of the rulemaking model.¹³⁵

The critical insight in Verkuil's analysis is his location of the focal point of judicial interest as the "model" of agency rulemaking. Much later, Mashaw and Harfst dubbed this approach "proceduralized rationality review."¹³⁶ Rather than take on the *Lochnerian* task of substantive rationality review, the courts have "proceduralized" the issues as questions of the adequacy of the agency's explanation; or its responsiveness to objections raised by the rule's opponents; or the adequacy of the "notice" afforded parties, who claim that they would have responded differently had they but known the agency's true plans or the facts or "methodologies" upon which it intended to rely.¹³⁷ The irony, of course, is that these attempts at *avoiding* judicial intrusion on administrative agencies' substantive judgments may have produced uncertainties and "defensive" rulemaking that have contributed much to its "ossification."

133. See MASHAW & HARFST, *supra* note 3, at 87-103.

134. Paul M. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

135. *Id.* at 205.

136. MASHAW & HARFST, *supra* note 3, at 156-63.

137. See, e.g., *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240 (2d Cir. 1977) (remanding FDA smoked fish regulation for failure to reveal scientific methodology underlying its proposals in notice of proposed rulemakings).

All of this suggests that there may be something more to the notion of changing the timing of review than merely its potential strategic significance in shifting incentives toward compliance rather than litigation. It has some "appropriateness" advantages over attempts to alter the scope of review toward soft glances or, even more ambitiously, to reintroduce "non-reviewability" of policy choices as a serious option.¹³⁸ To deny immediate review is not to deny review totally. The traditional individual "right" to independent judicial judgment is preserved. Timing also seems more amenable to legislative control than does an attempt to alter scope by revised verbal formulae. In addition, review at the application stage tends to ameliorate the "political" aspects of review (the sense that it is little more than a policy dispute fueled by competitive rent-seeking), while simultaneously focusing issues and providing a better information base. "Enforcement" or "implementation" review thus puts the judiciary in a better position to defend its judgments against claims of either incompetence or "political" interference.

There are surely problems with this approach to reform. First, recent developments in congressional legislation and judicial lawmaking have tended almost uniformly in the opposite direction.¹³⁹ Pre-enforcement review has been

138. The Supreme Court attempted to deal with this general class of problems in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), by instructing lower courts to respect agency interpretations of statutes that in effect delegate interpretive authority to agency decisionmakers. But the *Chevron* solution is both incomplete and unstable. There is no formula for determining when interpretive authority has been delegated, and commentators have rightly protested the bald recognition of a virtually unreviewable power in administrators to interpret their own statutes, whatever the historic, deferential realities of agency-court partnership in this regard. Cynthia R. Farina, *Getting From Here to There*, 1991 DUKE L.J. 689; Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071 (1990). Much of our trust in the "rule of law" in administration hinges on a belief that administrators act under law as interpreted finally by an independent judiciary. Hence, the Court itself has been ambivalent, if not simply inconsistent, in applying the *Chevron* principle and the circuit courts can hardly do better. See discussion in MASHAW ET AL., *supra* note 127, at 734-39.

There is also the usual difficulty of characterizing what form a legal issue takes. Many have thought that the Supreme Court's opinion in *State Farm Mutual Insurance Co. v. Dole*, 802 F.2d 474 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987), was at loggerheads with its *Chevron* analysis. The first suggests a "hard look" while the second favors a "soft glance." There is, of course, a technical distinction between the way in which the issues were posed in the two cases. (Indeed, a distinction which suggests to some that the results are backwards, not just inconsistent.) The *State Farm* attack was on the rationality of an NHTSA regulation, thus calling into question its factual predicate and regulatory explanation. The question could have been recharacterized, however, as a question of the interpretation of the Motor Vehicle Safety Act. Under a statute which simply directs the administrator to "meet the need for automobile safety" by regulating "unreasonable risks," it would be child's play to make a persuasive argument that the administrator had been delegated the authority to make essentially political judgments about what risks were to be regulated when, and through what methods. (Peter Strauss has, nevertheless, argued persuasively that *Chevron* and *State Farm* are consistent from a deeper, institutional perspective. See Peter Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).) The inherent difficulty of determining whether the issue is one of statutory interpretation or regulatory reasonableness obviously further confounds any attempt to "regulate" the scope of review that will be exercised.

139. An impressive catalogue of legislative pre-enforcement review provisions was provided a decade ago in Frederick Davis, *Judicial Review of Rulemaking: New Patterns and New Problems*, 1981 DUKE L.J. 279. The Davis catalogue was incomplete at the time and numerous pre-enforcement review

the norm, and with increasing frequency later review in enforcement proceedings has been barred.¹⁴⁰ The congressional impulse has been to provide an opportunity for quick resolution of claims of invalidity on the theory that legal certainty would benefit both the agency and affected interests.

But inattention to the way in which this resolution of the timing issue shapes the incentives for litigation may have produced perverse results. Not only has the resolution of controversy not been particularly swift, but many resolutions may have been unnecessary and the usual disposition, remand, produces uncertainty plus delay. A period of attempted compliance, experimentation, and negotiation between the agency and affected parties, induced by the unavailability of immediate review, might well produce better rules, swifter compliance, and less litigation. Moving back toward the older regime of rulemaking review primarily at the time of enforcement thus has much to recommend it, for unnecessary judicial review simultaneously stultifies the policy process while imperilling judicial *and* administrative legitimacy.¹⁴¹

Second, we must be careful about the generality of such conclusions. While pre-enforcement review may have been particularly dysfunctional in the context of standard setting at NHTSA, it may be extremely important to permit pre-enforcement review of other regulations, such as EPA air quality standards. Those regulations set goals that are implemented through a complex state-federal process and that may demand legal certainty in order to mobilize political resources, whatever the costs in legal adversariness. Nor does pre-enforcement review structure compliance/litigation incentives in the same fashion in other programs. Changes in FERC or SEC accounting rules can be implemented with very short lead times. Here the option to litigate rather than to comply is sharply constrained, absent a stay¹⁴² of the rule pending the judicial outcome. In other programs, affected parties may find almost any rule providing legal certainty preferable to an unstructured licensing or prosecutorial system. Hence, the prospect of unbalanced incentives to litigate rather than to comply is much less prominent. Moreover, with respect to deregulatory rulemaking, there may be little choice but to view the rule as either ripe for review when issued or effectively non-reviewable.

An additional difficulty with attempts to modulate the timing of judicial review is that timing is not just a function of congressional policy. The *Abbott*

provisions have been passed or amended since.

140. The 1972 Amendments to the Federal Water Pollution Control Act are typical. 86 Stat. 891, § 509(b)(1), (2) (codified at 33 U.S.C. § 1369(b)(1), (2) (1982 & Supp. 1991)). They set a short deadline (90-120 days) from promulgation within which a rule may be challenged. Further challenge may be based only on grounds which arose after the prescriptive period, and review in any civil or criminal proceeding for enforcement is explicitly prohibited.

141. There is also, of course, the prospect that the leverage of delayed review will permit agencies to impose costly and unreasonable regulations on industry or deny beneficiaries the promise of regulatory legislation.

142. The foregoing analysis suggests, at the very least, that judges should be very cautious about granting such stays—the obvious cost of compliance with invalid rules notwithstanding.

*Laboratories*¹⁴³ case was the culmination of a rather long line of Supreme Court jurisprudence that reinterpreted the provisions of both the Administrative Procedure Act and other generic legislation to permit pre-enforcement review.¹⁴⁴ Later congressional statutes that provide for pre-enforcement review

143. *Abbott Lab. v. Gardner*, 387 U.S. 136 (1967).

144. Prior to *Abbott Laboratories* and to the rise of rulemaking as a preferred form of policymaking in both new and old agencies, the customary provisions for judicial review of agency action authorized, but also limited, judicial review to “final orders” of the agency. This sort of language was used as early as the Communications Act of 1934, 48 Stat. 1093 (codified at 47 U.S.C. § 402(a)), and was made applicable to a number of agencies pursuant to the Administrative Order’s Review Act (known as the Hobb’s Act), 64 Stat. 1129 (1950) (codified as amended at 28 U.S.C. §§ 2341-2352 (1978 & Supp. 1992)). So long as virtually all “orders” were either adjudications, licensing decisions, or rate orders, the question of whether general policymaking rules could be immediately reviewed never arose.

The first major step toward pre-enforcement review of policy rules was made by the Supreme Court in *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942). Having promulgated chain broadcasting rules in a proceeding involving all the major networks (to that degree this particular “rulemaking” was rather similar to a multi-party adjudication), the FCC claimed that the rules adopted could not be challenged until applied in an enforcement proceeding. Recognizing that the broadcasters would be virtually certain to conform their conduct to the regulations to avoid the unpleasant legal consequences of noncompliance, the Supreme Court informed the FCC that it had to take the bitter with the sweet:

Instead of proclaiming general regulations applicable to all licensees, in advance of any specific contest over a license, it might have awaited such a contest to declare that the policy which these regulations embody represents its concept of the public interest. As a matter of sound administrative practice, both the rule-making proceeding and the specific license proceeding undoubtedly have much to commend them. But they are by no means the same, nor do they necessarily give rise to the same kind of judicial review. Having adopted this order under its rule-making power, the Commission cannot insist that the appellant be relegated to that judicial review which would be exclusive if the rule-making power had never been exercised

Id. at 421.

The notion that rules might be reviewed immediately, and exclusively in that form, was given the Supreme Court’s imprimatur in the famous *Yakus* case, *Yakus v. United States*, 321 U.S. 414 (1944), decided under the Emergency Price Control Act of 1942, 56 Stat. 23 (codified at 50 U.S.C. § 901). Under that statute the administrator could promulgate price ceilings which were reviewable in an Emergency Court of Appeals within 60 days of their promulgation. The statute also made that route of review exclusive. The Supreme Court upheld this provision in the face of a due process challenge to a *criminal* prosecution of a meat wholesaler who had failed to seek review of the administrator’s price ceilings within the statutory 60-day time limit.

The courts, however, did not immediately move to the proposition that all rules were “final orders” and therefore reviewable under the conventional statutory language of the New Deal and immediately post-New Deal period. *See, e.g.*, *United Gas Pipe Line v. Federal Power Comm’n*, 181 F.2d 796 (D.C. Cir.), *cert. denied*, 340 U.S. 827 (1950). Nevertheless, in *Frozen Food Express v. United States*, 351 U.S. 40 (1956), and *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), the Supreme Court made clear that it would view rules as “final orders” whenever they had the present effect of requiring complaining parties to change their conduct or bear the legal consequences of noncompliance. *Abbott Laboratories* and its companion cases were important primarily in extending these principles to a situation in which the legal risks from noncompliance were less draconian than the loss of a license or certificate without which the firm could not do business.

The liberalization of ripeness doctrine implicit in *Abbott Laboratories*, however, has had a double effect. First, it has tended to read liberal ripeness doctrine back into the older statutes, which spoke to the review of “final orders” and which were drafted in an era populated largely by adjudicatory, licensing, or rate setting orders. Second, *Abbott Laboratories* has also set a tone for the interpretation of modern pre-enforcement review statutes that speak directly to general rules of policy, thereby all but foreclosing the question of whether ripeness is still a significant issue under a statute making an agency’s rule immediately reviewable. Although Justice (then Judge) Scalia once authored an opinion holding

of the rulemaking efforts of specific agencies might be viewed as an effort by Congress to regulate the availability of pre-enforcement review rather than a legislative attempt to broaden and deepen the Supreme Court's initiative. At the very least, pre-enforcement review of rules should not be seen as a legislative demand forced upon an unwilling judiciary. Significant congressional action will be required to shift the current conventional view that pre-enforcement review is presumptively available.¹⁴⁵

C. Games, Presidents and Congresses

A game theoretic approach to the political environment of rulemaking can use an approach similar to that of the judicial review game to deal with problems encountered in executive and legislative oversight of administrative rulemaking activity. The use of that analysis, however, should be recognized as resting on a fundamental political assumption: that in a pluralistic polity the other institutions that form the external environment of agency rulemaking respond to constituent claims in something like the same way that the judiciary responds to litigant claims. In short, the institution analyzed, whether OMB, the House, the Senate, or some legislative committee or subcommittee, is presumed to attempt to influence the rulemaking process only at the behest of some other person, firm, or interest group. From this perspective, the political institutions are passive until called upon by others, just as the courts are generally viewed as passive institutions for dispute resolution.

This assumption is, of course, to some degree—sometimes to a considerable degree—false. It is equally false, however, to imagine that the judiciary is entirely passive with respect to the claims of outside litigants. Judicial doctrine frames the conditions under which litigants may appeal to it, and the judiciary exercises considerable discretion in hearing or not hearing cases. Moreover, from the discussion that we have previously traversed, it is clear that the judiciary has institutional interests at stake—at the very least its own legitimacy as a lawgiver. Its actions respond in part to incentives built into our constitutional conception of the judicial role. Hence, viewing litigation as litigant-instigated and uninfluenced by the courts, and the outcome of litigation as either a chance probability or a probability influenced solely by the existence or nonexistence of pertinent information, is also somewhat unrealistic.

After first looking at the institutions that control the political environment of rulemaking in this active-constituent passive-institutions framework, we will

that ripeness issues were as pertinent under specific statutory review provisions as they had been in "non statutory review" in the *Abbott Laboratories* context (*Air New Zealand Ltd. v. Civil Aeronautics Board*, 726 F.2d 832 (D.C. Cir. 1984)), it is hard to find that sentiment echoed elsewhere in the jurisprudence. Indeed, the D.C. Circuit has warned litigants not even to make their own judgments about the ripeness of claims subject to review under the now standard form of pre-enforcement review statute, lest they find that their claims were barred by the statute's pre-enforcement time limits. *Eagle-Picher Indus. v. EPA*, 759 F.2d 905 (D.C. Cir. 1985).

145. Such a shift has recently been proposed by the ACUS. Recommendation #93-2, 58 Fed. Reg. 4510 (1993).

reconstruct the game to take account of the strategic reality of institutional competition between the executive and legislative branches. It is surely also the case that the agencies' nonjudicial, political controllers must be looked at as active participants in policymaking in ways that courts seek to avoid. That analysis, while featuring a discussion of legislative versus executive power in molding rulemaking, will also illustrate something about the crucial importance of the way in which existing states of the world, judicial decisions, and prior agency decisions determine the outcomes of the rulemaking process.

1. *Active Constituents—Passive Institutions.* We need not here engage in any further formal constructions in order to say something about the important policy parameters that result from either what we might call the "executive coordination game" or "the legislative oversight game." We know from looking at the judicial review game that there are three important factors bearing on whether claimants or constituents have powerful incentives to attempt to actuate the influence of institutions in an agency's external environment: benefits (usually the avoidance of compliance costs or the achievement of competitive advantage), costs (in the judicial review game the out-of-pocket costs of litigation, the possibilities of paying penalties, and some subtler costs of achieving or losing future agency cooperation), and the probability of success on appeal.

One of the principal implications of this prior analysis was that the current structure of pre-enforcement review skews the incentives of participants fairly strongly in the direction of litigation rather than compliance. One's intuitions are likely to be that the same would be true for appeals to an executive superagency like the OMB or to some part of Congress. Most such appeals would be made prior to the adoption of a rule, much less its implementation. Moreover, since these sorts of petitions for political intervention might easily result in delay (if not derailment) of the agency's rulemaking process, benefits from delayed payment of compliance costs or the continuation of some competitive advantage from existing regulation (or its absence) should almost always be available. As a former EPA general counsel is reported to have said, "anybody representing a client who did not use [the OMB] route would be damn negligent."¹⁴⁶

On the other hand, one should not overstate the case. There are clear costs involved in appealing to either the executive or legislative branches that are not incurred when seeking judicial review. The first is that there are some political constraints on making these sorts of individualized appeals. Claimants before courts are presumably seeking their "rights." Persons seeking intervention by the OMB or by a representative may well appear to be (or be portrayed by their opponents or the press to be) seeking quasi-corrupt, political favors, even if they avoid arguing anything save the merits of their position. Our political culture has become somewhat cynical, but cynicism is the posture of disappointed idealists.

146. McGarity, *supra* note 8, at 289.

Individuals and organizations have not stopped caring about their reputations for responsible civic behavior.

That the process is political rather than legal also entails a second form of cost. The firm that seeks intervention from the Council on Competitiveness, or from the home-state representative on OSHA's appropriations committee, would do so with the virtual assurance of incurring a political obligation. If the firm or individual is hesitant about owing an uncertain (and certainly undefined) political debt, he or she may be dissuaded from making the appeal. There are also direct costs to pursuing the legislative or executive option just as there are litigation costs associated with appealing to the judiciary. Given the modern tendency to make such appeals through lawyers, the direct costs may be very nearly the same.

There are opportunity costs to making political appeals as well. The constituent who constantly begs for favors may believe, quite rightly, that it will soon be perceived as a pest. Hence, what is asked for now may limit what could be asked for in the future. This sense of the opportunity costs of appeal will have some dampening effect on the willingness to use legislative or executive levers, a consideration that may well not apply at all to litigation. The litigant is generally going before different courts, or at least different judges and different panels, seeking its "rights," not favors. Also, a reputation for being willing to litigate may actually be a negotiating advantage. Finally, the likelihood of a successful political appeal may be rather limited. Scandal-mongering to the contrary notwithstanding, reports on the actual effects of OMB review of agency regulations suggest that the overloaded Office of Information and Regulatory Affairs ("OIRA") can pay scant attention to most rules,¹⁴⁷ even major ones. That someone outside the OMB is importuning it to take a particularly close look at a regulation may help, but influencing the OIRA's agenda may be extremely difficult.

As noted earlier, however, a targeted approach with respect to particular agencies and important rules can have an impact. Analysts who have concentrated on the OMB's relationship with the EPA find substantial intervention, considerable substantive effect, and constant problems of delay.¹⁴⁸ Moreover, experienced participants in the rulemaking processes of agencies that have little or no fear of judicial reversal report that executive branch oversight, aided and abetted by congressional analytic requirements, have been sufficient to cause the virtual abandonment of rulemaking.¹⁴⁹

The extent to which OMB involvement is predicated on appeals from privileged constituencies is unclear. One does not have to look far in the environ-

147. See GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA (1984).

148. See Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 2 (1984); see also McGarity, *supra*, note 67, at 147.

149. Letter from Peter Hutt to Douglas Castle, Chair, Carnegie Task Force on Regulation (on file with author).

mentalist community to find those who suspect that much of the OMB's interest in EPA regulations is stimulated by potentially or already regulated industry. That the OMB and other parts of the Executive Office of the President or the White House establishment act as "conduits" for ex parte representations or lobbying in informal rulemaking also shows up in litigation¹⁵⁰ and is vividly portrayed by the press.¹⁵¹ Whatever the difficulties of using executive branch contacts to influence rulemaking, it seems clear that a skillful lobbyist can bring a large number of pieces of the executive establishment to bear on a particular rulemaking proposal and can thereby make the life of the proposing agency very complicated indeed.¹⁵²

Playing the "political card" to delay or derail rulemaking activity is surely common on the Hill, but it too faces obstacles. The individual congressperson may often be able to do little beyond passing on the constituent's complaint to the relevant agency. Powerful committee and subcommittee chairs are, of course, differently situated and may importune the agency with greater effect.¹⁵³ Nevertheless, we have virtually no data on the degree to which congressional intervention has delayed, derailed, or substantially altered agency rulemaking. The political science literature is in sharp disagreement concerning the influence of congressional oversight on agency action.¹⁵⁴ The legislative veto threat is gone, and while there are numerous appropriations riders sprinkled about in the Statutes at Large,¹⁵⁵ many seem symbolic rather than instrumental.¹⁵⁶ Congress's power to hassle administrators and to claim credit with constituents for intervening with the bureaucracy is legendary, but there is virtually no hard data on the degree to which this external political force is a major impediment to effective rulemaking activity.¹⁵⁷

150. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

151. See, e.g., Bob Davis, *What Price Safety? Risk Analysis Measures Need for Regulation, But It's No Science*, WALL ST. J., Aug. 6, 1992, A1.

152. *Id.* at A5.

153. Ackerman & Hassler argue that a fair amount of the delay and incoherence of the EPA's wet scrubber rule resulted from political influence exerted by two powerful senators. ACKERMAN & HASSLER, *supra* note 30, at 44-48.

154. Compare KENNETH W. CLARKSON & TIMOTHY J. MURIS, *THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR* 34 (1981) (discussing surveys of members of Congress that revealed dissatisfaction with oversight activities) and BERNARD ROSEN, *HOLDING GOVERNMENT BUREAUCRACIES ACCOUNTABLE* 21 (1982) with Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 774-93 (1983) (finding that empirical analysis of recent FTC history supports congressional control hypothesis).

155. See Devins, *supra* note 71.

156. For example, for several years, Congress passed appropriation riders prohibiting the NHTSA from utilizing any of its funds to enforce a passive restraints regulation that was not in effect and could not have been enforced in any event.

157. It is clear, however, that agencies are better able to protect themselves from congressional intervention if they shift policymaking into a formal adjudicatory format. See, e.g., *Pillsbury Co. v. F.T.C.*, 354 F.2d 952, 963-65 (5th Cir. 1966). Only in the extreme case in which congressional intervention forced an agency to decide on grounds not authorized by its governing statute is congressional political interference likely to be considered illegal. See, e.g., *District of Columbia Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1245-49 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972).

That Congress passes vague and overambitious statutes, gives agencies too little resources with which to implement them, and constantly revels in the suggestion of bureaucratic laziness and skulduggery is well-known. By common consent, the general politics of congressional policymaking is an amorphous drag on the rulemaking process. The persistence of substantial congressional lobbying about agency regulatory activity, however, can be attributed more to the ignorance of constituents, the credit-claiming/blame-avoiding craftiness of congresspeople, and the public relations skills of Washington lobbyists, than to a political structure that provides major incentives for such activity by those who keep a rationally calculating gaze on the benefits of seeking congressional assistance, discounted by the probability of success and compared with the inevitable costs.

Even if the intense lobbying of the executive and legislative branches that surrounds major rulemakings is instrumentally irrational, there surely seems to be a lot of it. The executive coordination and legislative oversight games attract hordes of players. For most "behaviorist" analysts, that in itself would be sufficient to prove that the participants were adopting rational strategies, and for them to conclude as well that these games, like the judicial review game, were providing major incentives for adversary political warfare. Further, if this sort of ubiquitous struggle is, as some commentators argue, undermining the timeliness and rationality of rulemaking, then the incentive structures of these games are also ripe for reform.

Indeed, even if all this political pulling and hauling is really much sound and fury, signifying nothing of rulemaking substance, it may nevertheless signify much concerning the perceived fairness and rationality of the rulemaking process. After all, a widespread belief in the body politic that the process of agency rulemaking is "just politics," and subterranean politics at that, will undermine the legitimacy of agency policy directives and simultaneously erode administrators' will to resist political blandishments that diminish rather than enhance the quality of the rulemaking product.

Once again, one should not press this argument too far. The notion that agencies are "in politics" is necessary to the belief that agencies are politically accountable. Hence, the rulemaking design issue is how to integrate agencies into the political structure in a fashion that promotes *appropriate* political accountability without detracting too substantially from the perception or the reality of fairness and rationality.

Many commentators seem to believe that the most important reform in this direction is to increase the transparency of political contacts in the rulemaking process.¹⁵⁸ Agencies could bind themselves by rule to include all outside communications, whether written or oral, in their rulemaking dockets. They

158. See Margaret Gilhooley, *Executive Oversight of Administrative Rulemaking: Disclosing the Impact*, 25 IND. L. REV. 299 (1991); McGarity, *supra* note 67, at 147; Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980).

might, of course, make exceptions for communications from the president directly or from those acting with clearly delegated power to represent the president.¹⁵⁹ It may well be that agencies should avoid such exceptions save where they are insisted upon by the White House. That would at least lodge the political responsibility for secrecy in the appropriate place. Of course, with respect to Congress, no claim of executive privilege would prevent agencies from memorializing all congressional contacts and including them, along with written communications, in the rulemaking record. Once again, Congress might make certain exceptions by statute, but it also would have to take political responsibility for maintaining that level of confidentiality.

Suspensions concerning the OMB might also be dissipated by further opening up the OIRA review process. The OMB might itself request that its transmission of communications be included in the rulemaking record;¹⁶⁰ it could avoid the appearance of substantive bias by refusing to waive the necessity for review only because proposals are "deregulatory" in nature; and it could better coordinate its demand that agency regulatory impact analysis ("RIA") documents contain sufficient relevant information by coordinating that demand with its regulation of agencies' capacities to demand information from regulated parties. An OMB that refuses to allow the gathering of cost and compliance data that it then faults the agency for ignoring in its RIA hardly inspires confidence in the notion that it is attempting to improve, not just impede, rulemaking.

All of these movements towards transparency would raise the costs of inappropriate political importuning of the regulatory process without necessarily impeding legitimate policy oversight and argument. They would also provide incentives for the executive and legislative branches to explain why particular appeals for agency changes of policy are either technically appropriate or politically sensible from the wider perspective that necessarily adheres in the Congress and the Office of the Chief Executive.

Increased transparency concerning the relationships between the political branches and the bureaucracy would have a further salutary effect: it would lessen the burden now borne by the judiciary to attempt to ferret out those circumstances in which apparently rational analytic policymaking has in fact been driven by subterranean political importuning.¹⁶¹ The perceived necessity to

159. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) (holding that presidential ex parte contacts need not be docketed or disclosed where their content is not relied upon to support the rule).

160. The OMB had made considerable strides in regularizing its own processes and eliminating opportunities for undisclosed "conduit" communications by the mid-1980s. The recent breakdown in president-Congress relations and the new activist posture of the (Quayle) Council on Competitiveness have, however, rekindled suspicion and internecine warfare. See Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform*, 75 JUDICATURE 244 (1992); J. Danforth Quayle, *Quayle: Are There Too Many Lawyers in America?*, 128 N.J. L.J. 1283 (date?) (address before the American Bar Association, Aug. 13, 1991); Kirk Victor, *Quayle's Quiet Coup*, 23 NAT'L J. 1676 (1991); *Quayle Council Recommends Killing Recycling Provision in Incinerator Rule*, 21 Env't Rep. (BNA) 1595 (1990).

161. *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

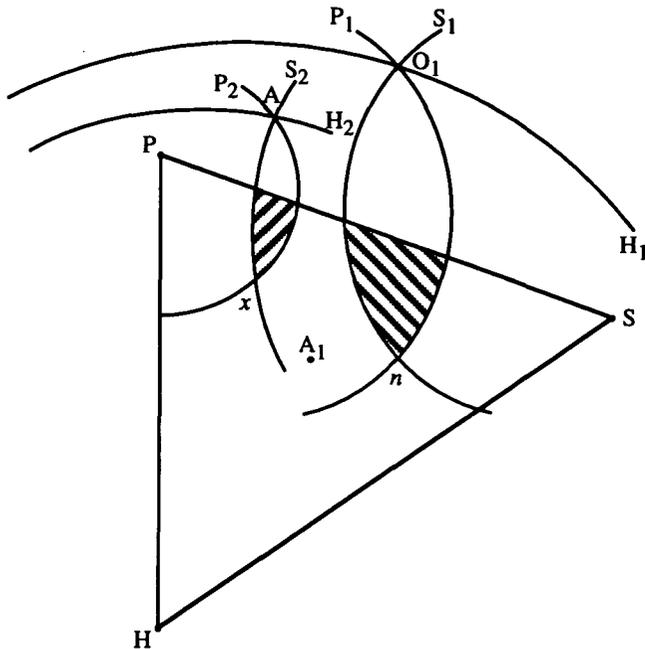
allow parties to repair immediately to the judiciary to complain of the general rationality or fairness of rules would correspondingly be reduced. It would be a mistake, however, to leave the game theoretic analysis of legislative oversight and executive coordination of agency rulemaking without thinking about these aspects of the external environment of rulemaking from a different perspective. The "game" here is not just one in which outside claimants or constituents appeal to different political institutions for help in waging their adversary battles for the hearts and minds of federal agencies. The political institutions also have constitutional roles that structure a two-century-long competition for control over the policy process. In performing in those roles, the political actors respond to normative considerations of constitutional design concerning separated powers in a liberal democracy that harness the desire to please constituents and reward supporters of broader conceptions of the public good. Looking at the problem in this way suggests some quite different insights about (1) the relative power of different institutions to mold the rulemaking process and rulemaking product, and (2) why, over time, Congress and the courts have "proceduralized" and "legalized" the forms of internecine warfare that now surround the rulemaking process. This institutional analysis also throws into sharp relief the differing directions in which reformers might proceed in improving the environment of agency rulemaking.

2. *The Legislative-Executive Separation of Powers Game.* The spatial model that describes this game imagines that policy is defined by a two-dimensional space in which the president, the House, and the Senate each have preferred points.¹⁶² These are represented on Figure 1 by the dots labelled P, H, and S. Q is the status quo or the present state of the world. Q obviously does not conform to the preferred position of any of the three institutions. It lies, however, at the intersection of an indifference curve for each body.¹⁶³

162. The basic model is borrowed from McCubbins, et al., *supra* note 70.

163. An indifference curve is simply a curve connecting all the points that are equidistant from the institution's most preferred point. It is called an "indifference curve" because it is presumed that an institution or actor is indifferent with respect to points that are equidistant from that institution or actor's most preferred point.

FIGURE 1



Because the House, Senate, and president each in effect have a “veto” over any legislative proposal, they must bargain about policy. The possible bargains that will make them all better off are defined by the lens QN. All the points within that lens are closer to the preferred positions of *all* of the actors than is Q. Hence, it is rational for them to make an agreement to enact legislation that defines a policy somewhere within that lens. Indeed, because the House (whose indifference curve is labelled H_1 as it runs through Q) can always propose some policy within the half lens that is inside the triangle, and that makes it better off and neither the president nor the Senate worse off, there is no reason for the House ever to agree to a bargain that lies outside of the line PS. The relevant policy space within which a bargain should be struck is, therefore, the half lens inside the triangle. Any legislation agreeable to all the parties will define a point somewhere within that half lens. Alternatively, given that all legislation is vague to some degree, it might be more realistic to imagine statutes as defining the half lens as the jurisdiction of agencies which can then choose policies within that space.

From a normative perspective, the external environment of rulemaking should be structured to force administrative policy choice within the half lens. That is the democratically approved bargain embodied in the legislation. Ideally we should want the House, the Senate, and the president to nudge the agency toward policy choice within this domain and to press it back into the area defined by the presidential-legislative bargain whenever an agency’s policies, for our present purposes embodied in rules, stray from the half lens of approved policy. Judicial review, not yet represented in the model, should have the same purpose. Though the model appears sound, a little further analysis reveals that

it is not so easy to make the system work well. Indeed, the absence of a one-house legislative veto of rules can substantially skew policy outcomes over time.

Assume, for example, that the administrative agency chooses a policy that lies at A. A lies closer to the president's preferences than any policy within the half lens defined by the legislation, and further from the House and Senate's. If Congress had a legislative veto, it could quash the agency's choice and presumably any other choice that lay outside the half lens. Without the legislative veto, it must use other techniques to try to force the agency to live up to the original legislative bargain, or rely on the judiciary to invalidate the agency's action at the behest of some adversely affected person. As our continuous experience with administrative governance has demonstrated, however, it may be quite difficult for Congress to enact legislation that will not leave a broad range of discretion to an agency—discretion broad enough to make judicial policing for legality a problematic device for assuring the integrity of legislative-presidential bargains.

In the absence of effective judicial review to maintain the original bargain, or some other technique for pressuring the agency not to choose A, the House and Senate can legislate to revoke the agency's policy choice and adopt a policy more pleasing to them. Note, however, that the new legislation will define a policy somewhere in the half lens defined by X and the intersection of the lens with the line PS. Any legislation seeking to move policy back into the lens defined by N-Q will be vetoed by the president. And, as the history of attempts to override presidential vetoes reveals, Congress is seldom successful in that enterprise.

The stakes involved in the constitutionality of the legislative veto may thus have been somewhat higher than they appeared at first blush, even to those like Justice White who believed that Congress needed that weapon to maintain parity with the president in the modern administrative state.¹⁶⁴ It is not just that without the legislative veto Congress will have to act by legislation (and perhaps by a supermajority) to overturn a policy with which it is displeased. Because policy choice in a bargaining situation is a function of both the preferences of the actors and the status quo point, Congress literally cannot, in the face of presidential opposition, get back to the policy space that it thought it and the president had defined in the preexisting statute. This may help to explain why Congress has developed a multitude of other techniques to try to regain the political control that it had with the legislative veto threat, notwithstanding its extremely sparing use of the veto where available.¹⁶⁵

Another interesting aspect of looking at policy choice in this fashion is that it reveals something more about the power of an administrative agency under

164. *INS v. Chadha*, 462 U.S. 919, 967-1003 (1983) (White, J., dissenting).

165. See generally Stephen Breyer, *Reforming Regulation*, 59 TUL. L. REV. 4 (1984); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L.J. 671 (1992).

different assumptions about the efficacy of judicial review. Thus, for example, if the agency were to choose a policy like the one indicated at the dot labelled A_1 , there would be nothing that any of the political actors could do about it through legislation and only a modest prospect for correction on judicial review. The political actors are disabled from changing the policy by legislation because a policy anywhere within the triangle defines a point from which it is not possible to move without making one of the three actors worse off. The disadvantaged institution will thus veto that move and preserve the policy.¹⁶⁶ Any policy inside the triangle is stable.

We might imagine that judicial review could be invoked to move agency policy back within the lens. However, if we think for a minute about the task of discerning exactly where the original legislative-presidential bargain came to rest, we may be doubtful about any court's capacity in this regard. Looking at the terms of the statute and the initial statements (or bills favored) by the House, the Senate, and the president might well define a general space like the triangle PHS. Hence the choice of A_1 , outside the triangle, might well be invalidated. It seems, however, quite optimistic to imagine that the much smaller policy space defined by the lens will appear with clarity to a reviewing court. Therein lies the wisdom of *Chevron* deference: if the court mistakes legislative intent, then *it* will, through its interpretation, define a new status quo point which will also either be stable (if within the triangle) or will lead to a wholly new policy (if outside the triangle) that was not the intent of the legislative-presidential bargain in the first instance.

The likelihood, then, is that agencies will have significant power to make policy choices within the broad boundaries of the political space defined by the preferred positions of the three political institutions to which they are accountable. The separation or "balance" of powers stakes in rulemaking are thus high, even if we assume that each institution is acting out of its own sense of good public policy, not as a simple conduit for private interests. From this "institutional" perspective, it is hardly surprising that agency rulemaking is a major constitutional battleground. What we need now to address is why this political-institutional competition has resulted in a rulemaking process that provides a major example of what Bob Kagan has called "adversarial legalism."¹⁶⁷ Put another way, why has the "legislative-executive separation of powers game" produced the "judicial review game" and all its analogous political checks and balances (the executive coordination and legislative oversight games) that empower rulemaking opponents and ossify the rulemaking process.

166. Were we to draw indifference curves for P, H, and S that run through A_1 , it would be clear, for example, that any move back toward the lens defined by N and the line PS would make both the president and the House worse off and only the Senate better off.

167. Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL. ANALYSIS & MGMT. 369 (1991).

V

CONCLUSION:
FROM GAMES TO INSTITUTIONAL DESIGN

Indeed, the legislative separation-of-powers game and adversarial legalism leveraged by ubiquitous pre-enforcement judicial review seem closely connected. It is not mere coincidence that the examples of agency choice in Figure 1's spatial model are all tilted toward presidential preferences. Appointment and removal powers, OMB review, and the simple fact of agencies generally being a part of the administrative "team," all tend to give presidents an advantage in molding agency behavior.¹⁶⁸ Without an easily exercisable veto over agency rules, Congress must fight back either directly (with much more specific legislation) or indirectly (through oversight, jawboning, or the empowerment of surrogates), even if all of these techniques may do more to clutter the landscape of rulemaking with legal obstacles than to improve its fairness, rationality, or conformity to legislative-presidential policy compromises.

In particular, recent political science scholarship suggests that much of the procedural complexity and legal control that Congress now builds into rulemaking statutes has its origin in a congressional need to empower its constituents to police legislative bargains that it cannot monitor or enforce on its own.¹⁶⁹ While I have argued elsewhere that I think this analysis somewhat overdrawn if taken as an attempt to explain the overall structure of administrative procedure,¹⁷⁰ there is surely some power to the argument as well. Arbitrary time limits, hammers, procedural complexity, analytic requirements, heightened evidentiary demands, and instantaneous access to judicial review all give legislative constituents (and others) levers with which to press agency policies in the direction of the original legislative-presidential bargain. Whether they are well-designed for this task is, of course, a different question.

Thus, however much administrative law responds to deeper currents in our constitutional culture, the political scientists' story surely suggests that Congress has powerful incentives to institute or continue potentially debilitating and delegitimizing "legal rights" for various constituencies to challenge agency policy choice. Other means of policy control at its disposal are either weak (oversight) or have all-too-obvious risks of political or policy disaster (specific legislative commands adopted under enormous uncertainty about their consequences).

Although the positive political theory literature has tended to ignore the presidential role in creating legal checks and balances on agency rulemaking, the

168. Using a different game theoretic model, Eskridge and Ferejohn reach similar conclusions. William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J. L. ECON. & ORG. 165 (1992).

169. See, e.g., Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J. L. ECON. & ORG. 93 (1992), and authorities therein cited.

170. Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive and Critical Stories of Legal Development*, 6 J. L. ECON. & ORG. 267 (1990).

president seldom vetoes legislation because it provides too much in the way of judicial review or rulemaking procedure. And even though the president or the Executive Office of the President generally seems to attempt to influence the rulemaking process through administrative or political means, proceduralized rationality review may well leverage the positions of both executive departments and their constituencies. While the analytic requirements embodied in various executive orders concerning major rulemakings explicitly exclude judicial review of the quality of those analyses, the analyses nevertheless become a part of the rulemaking record, as do analyses provided by other executive departments. Judicial review of agency rulemaking on “the whole record” thus reinforces the necessity for agencies to respond cogently to the positions put forward by executive department agencies and superagencies.

In this sense, then, the courts’ struggle to “relegalize” the legislative-executive political warfare surrounding rulemaking—to make it fit the judicial role by creating the contemporary technique of review for “process rationality”—leverages the weight that political warfare between legislative and executive institutions adds to the inertia of the whole rulemaking system. Hence, once again, a strategy for reforming the rulemaking process seems to direct our attention toward the legal controls that statutes and judicial opinions construct and that operate through judicial review. If the story that we have been recounting is to some degree true, there may be a mismatch between political motivations and constitutional purposes on the one hand, and legal technique on the other. Legal leverage is being employed to conduct political-institutional warfare about administrative policy in ways that disempower the policy process.

A. General Strategies for Reform

Assume for the moment that we now believe the following things: First, the federal rulemaking process is in trouble. Whether regulating or deregulating, it is torpid and potentially irrational. Second, these “problems” are, however, in some sense constitutionally appropriate. The administrative state, after all, can be considered as a design to evade constitutional checks and balances. Third, the agenda for rulemaking reform, therefore, should not be limited to attempts to free the rulemaking process from restraint. Reform instead should lie in the direction of avoiding an inappropriately legalistic and adversarial rulemaking environment. Finally, and critically, the legal stranglehold that can be put on the rulemaking process by the ever-present shadow of judicial review for “process rationality” should be relaxed to some degree.

What then is to be done? In broad outline there are three strategies available for decoupling legal and political accountability for administration. The first is to “democratize” the processes of administrative rulemaking. This strategy might include such mechanisms as expanded use of regulatory negotiation and specialized constituency voting on agency proposals. The second strategy is a move toward macro-political accountability for bureaucratic policymaking. Congress could either enact rules itself on the proposal of expert

bureaus empowered to initiate, but not to decide, or it could develop agency and superagency structures that placed policy accountability clearly at the doorstep of the Chief Executive.¹⁷¹ The third strategy is to recognize the political authority of the bureaucracy itself.¹⁷²

This is obviously not the place to attempt to begin an analysis of the strengths and weaknesses of each strategic approach. That again is a task that would take scores, perhaps hundreds, more pages. I will attempt, therefore, in a short compass to do only two things. First, I will argue that none of these strategies should be taken as the single correct pathway toward reform. Our ingrained political traditions do not counsel, nor are they likely to countenance, such stark institutional choices. Second, I want to suggest that our inability to choose amongst these strategies need not counsel despair concerning useful, incremental reforms in the rulemaking process, for if I am correct, none of these strategies need rely upon the sort of legalized and proceduralized rulemaking process into which we have blundered. A rulemaking process crippled by adversarial legalism is simply unnecessary to support the claim of rulemaking agencies that they are acting both according to law and within the political framework of democratic accountability that our constitutional traditions teach us is our birthright. Indeed, incremental reforms in all of these directions should further reduce the need for adversary legalism's crucial weapon—pre-enforcement review of rulemaking—as a prop for the constitutional legitimacy of the administrative state.

Let me address the second point first. The political legitimacy of rulemaking in a radically democratized rulemaking process would depend upon its responsiveness to the basic liberal democratic value of consent, either via negotiation to consensus or citizen voting. This is the “republican”¹⁷³ or “strong democracy”¹⁷⁴ strand of U.S. constitutionalism. The macro-political accountability approach, by contrast, depends for its legitimacy on the authority of constitutionally empowered and democratically elected political institutions. This is, of course, the “Federalist” notion of checked and balanced institutions.

171. Lloyd N. Cutler, book review, *Regulatory Mismatch and Its Cure*, 96 HARV. L. REV. 545, 551-54 (1982) (reviewing STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982)); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1317-19 (1982).

172. STEPHEN G. BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 61-79 (1993) (Oliver Wendall Holmes Lectures, 1992).

173. See generally WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1988); Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 41 DUKE L.J. 561 (1991); Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663 (1988); Frank Michelman, *The Supreme Court, 1985 Term: Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

174. BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984).

Rules made in either of these forms should have the substantive legal insulation now accorded to legislation, contracts, or executive "political" judgment. In none of these situations do courts ask, except in the most cursory, elliptical, and hesitant fashion, whether the resulting policies are substantively sensible or procedurally fair to all affected interests. Political judgments clearly allocated to the Chief Executive by statute or the Constitution are non-reviewable.¹⁷⁵ Review of legislative judgments for rationality is virtually moribund if decoupled from some other more specific constitutional claim.¹⁷⁶ Nor do courts ever inquire into the *procedural* fairness of executive political judgments or of legislative enactment processes beyond strictly formal indicia of regularity.¹⁷⁷ With respect to contracts, whether made by public institutions or private parties, the reasonableness of the bargain is more an interpretive aid than a monitoring criterion.¹⁷⁸ On the procedural side, only extreme unfairness (fraud, coercion, or "unconscionability") will delegitimize a formally concluded bargain.¹⁷⁹

From this perspective, it is perhaps understandable why judicial review for process rationality has emerged as the touchstone for the legitimacy of bureaucratic policy judgment. We have taken seriously the Weberian argument that the legitimate authority of bureaucracy derives from its claim to wield power on the basis of knowledge. Because we distrust bureaucracy, we have provided legal techniques through which it must demonstrate that it has the knowledge it claims. However, this knowledge-based understanding of bureaucratic authority need not link bureaucratic rationality to *judicial* approval of the reasonableness of administrators' policy judgments. Indeed, Justice Brandeis seemed to have had the political science right in *Pacific States Box & Basket Co. v. White*,¹⁸⁰ when he stated for the Court that the authority of the administrator flows from the legislative judgment that bureaucratic rationality should be applied to the problem at hand. For that reason, Brandeis found that the scope of rationality review to be applied by a court to an administrative judgment is precisely the same as that applied to a judgment of the legislature. In short, although the three reform strategies that have been suggested look in radically different directions, none requires an abstract *judicial* judgment concerning the reasonable-

175. *Morris v. Gressette*, 432 U.S. 491 (1977); *Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948).

176. *Compare Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955) *with* *Roe v. Wade*, 410 U.S. 113 (1973).

177. *Chadha* in no way impugns the federal "enrolled bill rule," under which legislation will be overturned for a procedural irregularity only if that procedural flaw is constitutionally based and patent on the face of the legislation itself. *Field v. Clark*, 143 U.S. 649 (1892); *United States v. Ballin*, 144 U.S. 1 (1892).

178. Indeed, here the inquiry into rationality is tautological. The contractual behavior of market actors defines economic rationality.

179. See RESTATEMENT (SECOND) OF CONTRACTS § 162 (1986) (when misrepresentation is fraudulent or material); *id.* § 175 (when duress by threat makes a contract voidable); *id.* § 177 (when undue influence makes a contract voidable); *id.* § 208 (unconscionable contract or term); see also U.C.C. § 2-302 (unconscionability).

180. 296 U.S. 176 (1935).

ness or fairness of the underlying decisional process as a basis for the constitutional legitimacy of an administrative rule.

Our legal culture has had particular difficulty, however, in recognizing or accepting the Brandeis thesis. Whether this is a "pathology" endemic to pluralistic polities, as Theodore Lowi argues,¹⁸¹ or simply an incremental reaction to disappointments with various administrative regimes, as Richard Stewart suggests,¹⁸² is unclear. It does seem clear, however, that the Supreme Court has been focused for nearly two decades on a project of reinforcing administrative authoritativeness. It cut off the strong proceduralizing tendencies of the lower courts in cases like *Florida East Coast Railway*¹⁸³ and *Vermont Yankee*.¹⁸⁴ It tried to make the world safe for administrative interpretation in *Chevron*. Finally, in cases like *Lujan*,¹⁸⁵ *Bell Aerospace*,¹⁸⁶ and *Chaney*,¹⁸⁷ it has seemed determined to protect possibilities for administrative policy judgment outside the rulemaking context.¹⁸⁸

Obviously, none of these strategies have been entirely successful in creating a legal environment that facilitates administrative rulemaking. Process rationality review forces proceduralization on administrators even if the lower courts are prevented from mandating specific procedural requirements. Also, as we have noted, *Chevron* is too ambiguous to serve as a rule of decision. A return to the "passive virtues," à la *Lujan*, may do more to stimulate litigation about the propriety of litigation than it does to protect the authority of administrators to make policy by rule. Without going further into the politico-cultural reasons for the limited success of the Supreme Court's now two-decade-long campaign, it seems reasonably clear that the reform strategy of bolstering the authoritativeness of agency policy choice confronts considerable resistance.

One might conclude, therefore, that if deossifying rulemaking requires delegating it by reducing the intrusiveness of judicial review, we are constrained to emphasize reforms featuring the legitimating strategies of "democratization" or "macro-political" accountability. Yet, it is hard to believe that these

181. THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979).

182. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

183. *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973).

184. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

185. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990).

186. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

187. *Heckler v. Chaney*, 470 U.S. 821 (1985).

188. Peter Strauss agrees that the Supreme Court seems to be attempting to find ways to take "serious account of political controls over agency behavior as alternatives to judicial controls." Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1319 (1992). The court's recent decision in *United States v. State of Alaska*, 112 S. Ct. 1606 (1992) is another straw in the wind. There the court read into § 10 of the Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1151 (codified at 33 U.S.C. § 403), a very broad authority on the part of the Secretary of the Army to take the political interests of the United States into account when ruling on a request for a federal permit to built port facilities.

approaches could provide an overall solution either, even if combined and selectively applied to different parts of the rulemaking universe.¹⁸⁹

For complex reasons, well described in James Marone's *The Democratic Wish*,¹⁹⁰ the first strategy seems relatively implausible as a general remedy. Our continued flight from bureaucracy in the name of democracy has just as continually increased both bureaucracy and bureaucratic-adversarial legalism.¹⁹¹ A demand for actual consent through multi-party negotiation seems a formula either for stalemate or capture, unless it is highly selectively applied. It is also hard to be attracted to governance by focus groups, Ross Perot's imagined electronic plebiscites, or those special interest plebiscites currently conducted in small pockets of the administrative state (such as the marketing orders of the Department of Agriculture).

Nor does the macro-political accountability stratagem seem capable of general applicability. The consensus both inside and outside Congress has been that a general provision for legislative vetoes of administrative rules would be unworkable, even if it were constitutional. If so, adopting rules by congressional legislation on the proposal of expert bureaus seems an even less plausible candidate for a general reform strategy. Developing agency or superagency structures that place political accountability for agency rulemaking clearly with the Chief Executive is a technically more realistic candidate. The constitutional politics of institutional competition limits this approach as well. While Congress has come close to some general validation (combined with reform) of executive oversight mechanisms, it has never been able to reach closure on the issue. Congress seems destined, in any event, to leave the independent agencies outside the ambit of any accountability structure that it will either devise or agree to, and may well be growing more, rather than less, attached to the independent agencies idea.

Let me hasten to add that by suggesting that neither micro-democracy nor macro-political accountability provides a general path toward reforming all agency rulemaking, it seems clear that selective applications of both have been used, and will continue to be used, as regulatory or rulemaking reform mechanisms. Moreover, while our politico-legal culture is anti-bureaucratic,

189. For a general proposal along this line but with a "corporatist" spin, see IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992).

190. JAMES A. MARONE, *THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT* (1990).

191. Marone describes an extended four-stage process as the general dynamic of U.S. political action. First, the process begins with the political stalemate of checks and balances or institutional fragmentation. In the second stage, there is a call for reform in the name of "the people." These calls often fail, but, if they succeed, they move on to a third stage which institutionalizes the power of "the people," or more precisely, the new organizations or groups that articulated and benefitted from the process of reform. These new institutions redirect energy into conflicts about their policies and activities. Thus, while they expand the bounds of government power, they do so largely by restructuring conflicts and shifting the balance of pluralistic competition. Over time these new institutions become encrusted with new checks and balances that seek to redress or equalize competition over the new public powers and new political privileges that are available to newly legitimated groups. This institutional stasis recreates the inertia of institutional stalemate that is the characteristic of stage one of the process. See generally *id.*

congressional statutes, supported by Supreme Court doctrine, consistently empower (or attempt to empower) administrators to make political decisions by delegating them broad powers combined with vague criteria for action. If our political ideology were defined by what we do rather than by what we say, the political authority of bureaucracies to make legitimate policy, that is, policy as free from judicial second-guessing as the policies made by other political institutions, would already be well established in our constitutional folklore.

B. Playing the Timing Card

The first step toward making our ideology consistent with our practice, therefore, may be to launch a sustained attack on the notion of the *general* availability of pre-enforcement judicial review of agency rules. A persuasive case can be made that this relatively recent development in our administrative jurisprudence is normatively unnecessary, institutionally incapacitating, and, given its effect on the role of the courts in governance, constitutionally inappropriate. Recognizing that Congress may choose means of policy choice that combine micro-democracy, macro-political accountability, and bureaucratic authority, and that none of these need be backed by adversarial legalism at the point of abstract policy choice, should put no particular strain on our constitutional order.

The game theoretic analysis that we earlier employed suggests the obvious difficulty of getting from where we are now to the sort of understanding of pre-enforcement review that the last few paragraphs advocate. The constituencies currently empowered by the structure of that game will resist. However, that does not necessarily foreclose pursuit of this direction for reform. Not only do most modern foreign nations decompose political and legal control of administration, applying legal controls largely at the stage of implementation, but there is much state practice within the United States that looks in the same direction. The apparent recognition in the new Model State Administrative Procedure Act of the political nature of rulemaking and of the good sense of making choices among and between political and legal controls, rather than throwing all types of each at every problem, is at least some authority for the proposition that such an approach is possible in the U.S. legal culture. Whether and how the last three decades' movement toward pre-enforcement review of administrative agency policy choices can be undone—or at least selectively applied within the context of particular agency tasks and the overall framework of political control—is a topic that deserves much more detailed analysis.

APPENDIX
TABLE 1
GOVERNMENT EMPLOYMENT AND POPULATION, 1960-90

Fiscal year	Government employment				Population	
	Federal executive branch (thousands)	State and local governments (thousands)	All governmental units (thousands)	Federal as percent of all governmental units	Total United States (thousands)	Federal employment per 1,000 population
1960 ²	2,371	6,073	8,444	28.1	180,671	13.1
1961 ²	2,407	6,295	8,702	27.7	183,691	13.1
1962	2,485	6,533	9,018	27.6	186,538	13.3
1963 ³	2,490	6,834	9,324	26.7	189,242	13.2
1964 ³	2,469	7,236	9,705	25.4	191,889	12.9
1965	2,496	7,683	10,179	24.5	194,303	12.8
1966	2,664	8,259	10,923	24.4	196,560	13.6
1967	2,877	8,730	11,607	24.8	198,712	14.5
1968	2,951	9,141	12,092	24.4	200,706	14.7
1969 ⁴	2,980	9,496	12,476	23.9	202,677	14.7
1970 ²	2,944	9,869	12,813	23.0	205,052	14.4
1971 ²	2,883	10,372	13,255	21.8	207,661	13.9
1972	2,823	10,896	13,719	20.6	209,896	13.4
1973	2,775	11,286	14,061	19.7	211,909	13.1
1974	2,847	11,713	14,560	19.6	213,854	13.3
1975	2,848	12,114	14,962	19.0	215,973	13.2
1976	2,832	12,282	15,114	18.7	218,035	13.0
1977 ⁵	2,789	12,704	15,493	18.0	220,904	12.6
1978	2,820	13,050	15,870	17.8	223,276	12.6
1979	2,823	13,359	16,182	17.4	225,779	12.5
1980 ²	2,821	13,542	16,363	17.2	228,468	12.3
1981 ²	2,806	13,274	16,080	17.5	230,848	12.2
1982	2,768	13,207	15,975	17.3	233,184	11.9
1983	2,819	13,220	16,039	17.6	⁶ 235,439	12.0
1984	2,854	13,504	16,358	17.4	⁶ 237,663	12.0
1985	2,964	13,827	16,791	17.7	⁶ 239,951	12.4
1986	2,967	14,157	17,124	17.3	⁶ 242,295	12.2
1987	3,030	14,402	17,432	17.4	⁶ 244,627	12.4
1988	3,054	14,766	17,820	17.1	⁶ 247,039	12.4
1989	3,064	15,144	18,208	16.8	⁶ 249,493	12.3
1990 ²	3,067	15,377	18,404	16.7	⁶ 252,145	12.2

¹ Covers total end-of-year civilian employment of full-time permanent, temporary, part-time, and intermittent employees in the executive branch, including the Postal Service, and, beginning in 1970, includes various disadvantaged youth and worker-trainee programs.

² Includes temporary employees for the decennial census.

³ Excludes 7,411 project employees in 1963 and 406 project employees in 1964 for the public works acceleration program.

⁴ On Jan. 1, 1969, 42,000 civilian technicians of the Army and Air Force National Guard converted by law from State to Federal employment status. They are included in the Federal employment figures in this table starting with 1969.

⁵ Data for 1956 through 1976 are as of June 30; for 1977 through 1989, as of Sept. 30.

⁶ U.S. population data for 1984-1990 are the latest available from the Census Bureau.

* From U.S. Budget, 1992, Part 4 at page 203.

Figure A1

Agency Filed Pages: Federal Register

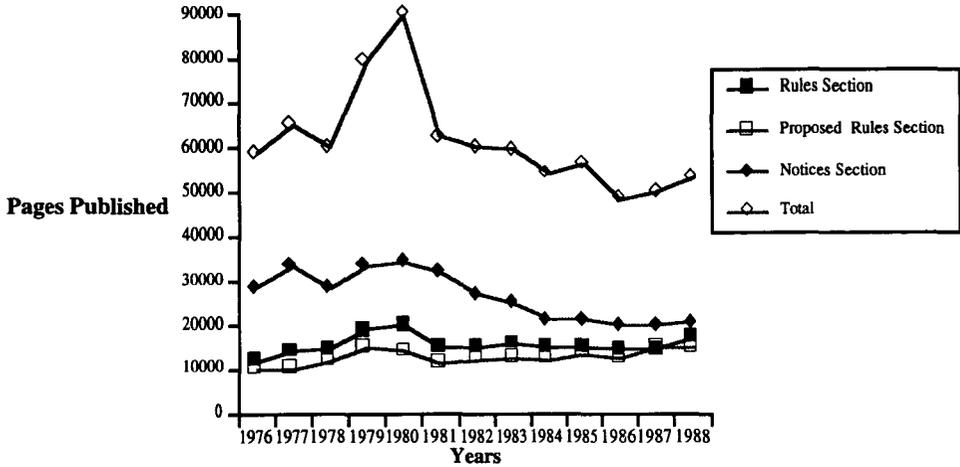


Figure A2

Agency Filed Documents & Federal Register

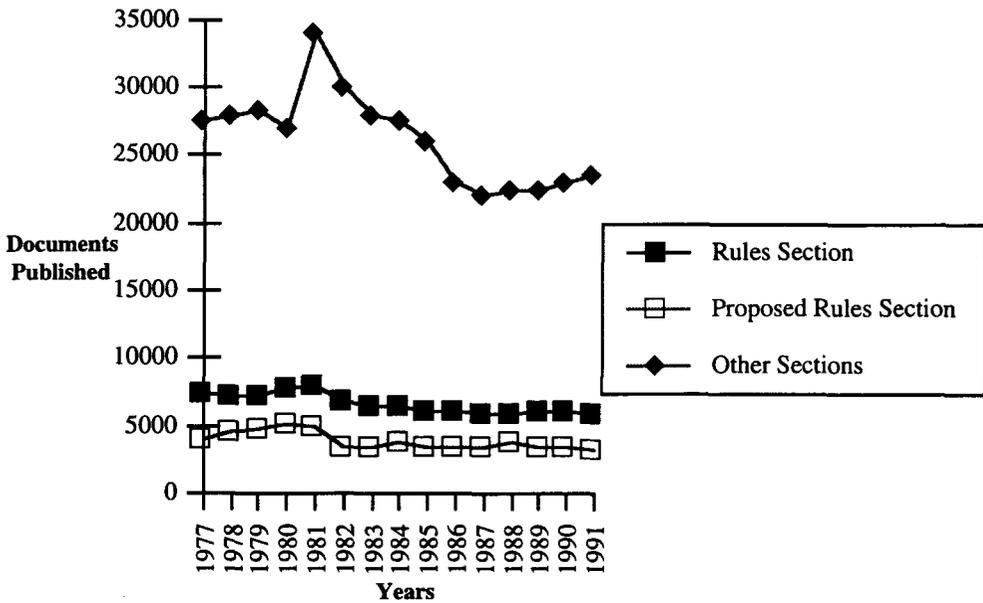
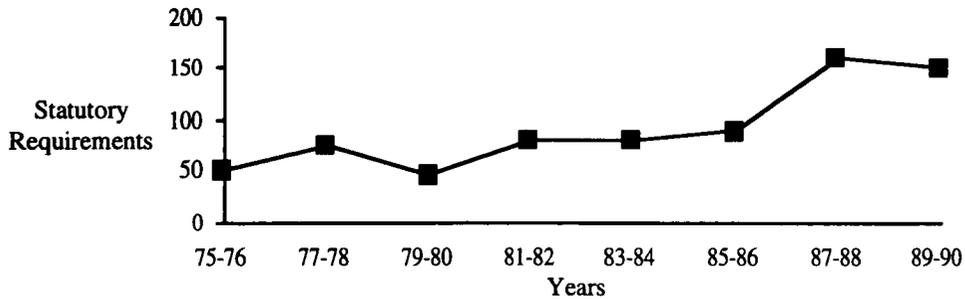


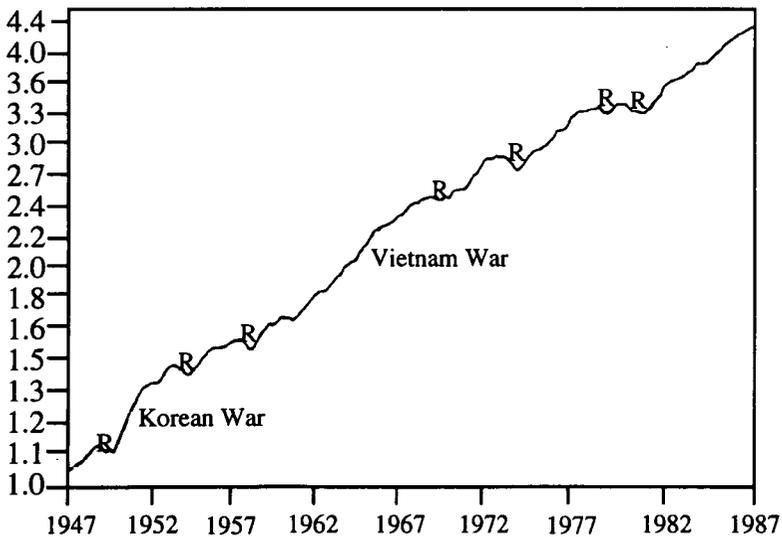
FIGURE A3
Statutes or Statutory Sections Demanding Agency Publication in the Federal Register



Beginning in the 1981-82 Congress numbers relate to discrete sections of the statutes at large requiring publication of some action in the Federal Register. Prior to that time reference is to whole statutes.

Figure A4

GNP Growth, 1947 to 1989² (1982 dollars, trillions, log scale).



SOURCE: *National Income and Product Accounts*, table 1.2; *Survey of Current Business*, July issue yearly, table 1.2.

²R = Recession

