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## RULEMAKING AND THE ADMINISTRATIVE PROCEDURE ACT

Richard J. Pierce, Jr.†

Government agencies have been issuing rules since the earliest days of the Republic. Congress instructed the President to issue rules to provide pensions for disabled veterans of the Revolutionary War in an Act of September 29, 1789. The tremendous increase in the size and scope of the federal government during the twentieth century has increased dramatically the number of rules issued by federal agencies.<sup>1</sup> The Code of Federal Regulations now occupies many feet of library shelf space, and it contains only the most important agency rules. Every major agency has a file room full of interpretative rules, characterized variously as staff manuals, design criteria, advisories, policy statements, enforcement guides, etc.

As Peter Strauss has shown, the history of rules and rulemaking in the U.S. legal system is characterized by powerful ambivalence rooted in two conflicting characteristics of our political and social culture.<sup>2</sup> We place a high value on efficiency, fairness, and accountability. Rules and rulemaking further those values.<sup>3</sup> Yet, we harbor a deep distrust of government and government officials. That distrust induced the Framers to create a government that consists of three independent branches, each with enough power to serve as an effective check on the exercise of the powers conferred on the other two branches. Our distrust is particularly apparent in the procedures required to enact a statute. A

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1. See 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.4 (3d ed. 1994).

2. See Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463 (1992).

3. See 1 DAVIS & PIERCE, *supra* note 1, § 6.7.

bill can become law only by navigating a tortuous course through both Houses of Congress and the President. It should come as no great surprise that our distrust of government also manifests itself in the context of agency rules and rulemaking. The most important category of agency rules, legislative rules, have effects that are functionally indistinguishable from those of statutes.<sup>4</sup>

The history of rulemaking reflects the tension between the cultural values that lead us to place a high value on rules and the cultural values that cause us to distrust the individuals and institutions that are the source of rules. In this brief historical overview, I will describe the ebbs and flows in the U.S. legal system's treatment of rules and rulemaking with reference to periods in which we appear to embrace rules enthusiastically and periods in which we appear to erect insurmountable obstacles to the issuance of rules. A careful reader will detect a high degree of artificiality and overlap in my historical treatment, however. In truth, at all times there exist powerful social forces that are simultaneously pulling the legal system toward polar extremes: maximizing the issuance of rules to enhance efficiency, fairness, and accountability, and minimizing the issuance of rules to guard against the risks of tyranny. There is no reason to expect the future of rules and rulemaking to differ materially from its history in this respect.

#### THE APA'S TREATMENT OF RULES AND RULEMAKING

The Administrative Procedure Act<sup>5</sup> ("APA") legitimized the issuance of rules,<sup>6</sup> provided a taxonomy of rules,<sup>7</sup> prescribed the procedures for issuing rules of various types,<sup>8</sup> and established standards applicable to judicial review of rules.<sup>9</sup> The APA recognizes several categories of rules. Legislative rules have effects that are indistinguishable from statutes.<sup>10</sup> Interpretative rules and general statements of policy bind agency employees but do not bind members of the public.<sup>11</sup>

The APA does not require an agency to use any procedures before it issues an interpretative rule or a general statement of policy.<sup>12</sup> An agency must use one of two three-step procedures before it issues a legislative rule.<sup>13</sup> The first procedure, referred to as informal rulemaking, requires: (1) the issuance of a notice of proposed rulemaking; (2) the provision of an opportunity for submission of comments by interested members of the public; and (3) the issuance of

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4. See *id.* § 6.5.

5. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

6. See 5 U.S.C. §§ 551(4), 552(a)(1)(D) (1994).

7. See 5 U.S.C. § 553(b)(3)(A).

8. See 5 U.S.C. § 553.

9. See 5 U.S.C. § 706.

10. See 1 DAVIS & PIERCE, *supra* note 1, § 6.5.

11. See *id.* §§ 6.2-.3.

12. See 5 U.S.C. § 553(b)(3)(A).

13. See 5 U.S.C. § 553. See also 1 DAVIS & PIERCE, *supra* note 1, §§ 7.2-.4.

the rule, incorporating a concise, general statement of its basis and purpose.<sup>14</sup> The second procedure, referred to as formal rulemaking, is identical to the first with one critical exception: the agency must provide an opportunity for an oral evidentiary hearing instead of an opportunity to submit written comments.<sup>15</sup> The APA subjects rules issued through use of informal rulemaking to judicial review through application of an arbitrary and capricious standard,<sup>16</sup> while it subjects rules issued through use of formal rulemaking to the presumably more demanding requirement that the agency's findings of fact must be supported by substantial evidence.<sup>17</sup>

The APA does not address explicitly many of the questions that have become important to the viability of rules and rulemaking, however. These include: When can an agency use informal rulemaking rather than formal rulemaking? Can a reviewing court compel an agency to add procedural safeguards to those required by the APA? What does the arbitrary and capricious test require in the context of agency rulemakings? When can a court review a rule? At whose behest can a court review a rule? Courts have provided definitive answers to some of these questions while others continue to be subject to vigorous debate today.<sup>18</sup>

#### AGENCY USE OF RULEMAKING AFTER ENACTMENT OF THE APA

Agencies made little use of rulemaking in the first two decades following enactment of the APA. The New Deal agencies viewed themselves as akin to special purpose courts. They eschewed the opportunity to issue rules in favor of near exclusive reliance on adjudicatory proceedings.<sup>19</sup> Their choice of procedures has been implicated as one of the major causes of their poor performance.<sup>20</sup> Their pattern of decisionmaking was often ad hoc and unprincipled. The Supreme Court criticized their adjudicatory hearings as "nigh interminable."<sup>21</sup> By the time they completed a case, the "facts" the agencies "found" were ancient history. When they acted on the assumption that those "facts" bore some relation to current reality, their actions had severe adverse effects.<sup>22</sup>

14. See 5 U.S.C. § 553(c). See also 1 DAVIS & PIERCE, *supra* note 1, § 7.2.

15. See 5 U.S.C. § 553(c). See also 1 DAVIS & PIERCE, *supra* note 1, §§ 7.3-4.

16. See 5 U.S.C. § 706(2)(A). See also 2 DAVIS & PIERCE, *supra* note 1, § 11.2.

17. See 5 U.S.C. § 706(2)(E). See also 2 DAVIS & PIERCE, *supra* note 1, § 11.2.

18. See *infra* text accompanying notes 40-108.

19. See generally JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960); 1 DAVIS & PIERCE, *supra* note 1, § 1.5.

20. See Richard J. Pierce, Jr., *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 HASTINGS L.J. 1, 48-53 (1979); SENATE COMM. ON GOVERNMENTAL AFFAIRS, 4 STUDY ON FEDERAL REGULATION, DELAY IN THE REGULATORY PROCESS, S. Doc. No. 95-72 (1st Sess. 1977); STEPHEN G. BREYER & PAUL W. MACAVOY, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION 7-10, 66-71 (1974); Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 578-81 (1970); LANDIS, *supra* note 19.

21. *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378, 389 (1959).

22. FPC's reliance on adjudication, for instance, contributed significantly to the gas shortage of the 1970's. See BREYER & MACAVOY, *supra* note 20, at 7-10, 66-71.

The New Deal agencies' choice of procedures had two other unfortunate consequences. First, by using judicial-type trials, the agencies focused their attention on firm-specific, narrow historical facts as the primary basis for resolving all disputes. Effective regulatory systems depend instead on creation of rules of conduct that are forward looking and instrumental. The agency should not be asking: What did regulated firm A do five years ago? Instead, it should be asking: How can I influence the future conduct of all regulated firms in socially beneficial ways? Second, by choosing to rely on lengthy, labor intensive decisionmaking procedures, the New Deal agencies created a regulatory environment in which regulated firms were the only entities with the incentive and ability to participate effectively in regulatory proceedings.<sup>23</sup> That, in turn, contributed greatly to the phenomenon of "capture," i.e., the agencies became the de facto agents of the industries they were assigned to regulate.<sup>24</sup> In this environment, agencies organized industry cartels that were effective in extracting monopoly rents from the public;<sup>25</sup> precisely the opposite of the agencies' statutory missions.

#### INCREASED AGENCY USE OF RULES AND RULEMAKINGS

Agency use of rulemaking began to increase significantly in the 1960s and 1970s in response to two major developments. First, scholars documented the poor performance of the New Deal agencies, linked that poor performance in part to the agencies' choice of procedures, and urged the agencies to switch to primary reliance on rules and rulemaking to improve their performance.<sup>26</sup> The writings of Kenneth Culp Davis were particularly influential in this effort.<sup>27</sup> He recognized the critical distinction between adjudicative facts and legislative facts and explained how agencies could improve their performance and reduce dramatically the cost and length of regulatory proceedings by applying that distinction to support issuance of instrumental, conduct-shaping rules.<sup>28</sup> He also documented the high risk that agencies would abuse their discretion in the absence of rules and illustrated the many ways in which rules can enhance fairness and predictability by limiting agency discretion.<sup>29</sup>

Scholars documented an impressive encyclopedia of the advantages of rules and rulemaking.<sup>30</sup> Those advantages can be summarized under the fol-

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23. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971).

24. See 3 DAVIS & PIERCE, *supra* note 1, § 16.12.

25. See ROBERT C. FELLMEYER ET AL., *THE INTERSTATE COMMERCE OMISSION: THE PUBLIC INTEREST AND THE ICC* 311-325 (1970); David Boies, Jr., *Experiment in Mercantilism: Minimum Rate Regulation by the Interstate Commerce Commission*, 68 COLUM. L. REV. 599, 606 (1968).

26. See sources cited *supra* in note 20.

27. See generally KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* (1st ed. 1958 & 2d ed. 1984).

28. See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-23 (1942).

29. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

30. See 1 DAVIS & PIERCE, *supra* note 1, § 6.7.

lowing general headings: (1) rules provide a valuable source of decisional standards and constraints on agency discretion; (2) rules enhance efficiency by simplifying and expediting agency enforcement efforts; (3) rules enhance fairness by providing affected members of the public easily accessible, clear notice of the demarcation between permissible and impermissible conduct and by insuring like treatment of similarly situated individuals and firms; (4) rulemaking enhances the quality of agency policy decisions because it focuses on the broad effects of alternative rules and invites participation by all potentially affected groups and individuals; (5) rulemaking enhances efficiency by allowing an agency to resolve recurring issues of legislative fact once instead of relitigating such issues in numerous cases; (6) rulemaking enhances fairness by allowing all potentially affected members of the public to participate in the decisionmaking process that determines the rules that apply to their conduct; and (7) rulemaking enhances the political accountability and legitimacy of agency policy making by providing the general public, the President, and members of Congress advance notice of an agency's intent to make major policy decisions and an opportunity to influence the policies ultimately chosen by the agency.

Many judges and justices joined with scholars in urging agencies to increase their reliance on rules. In part, they were influenced by the scholarly writings that demonstrated the benefits of rules and rulemaking. In part, they were influenced by their own frustrating experiences with agencies whose performance vasculated between ineffective and counterproductive because of their reliance on judicial-type trials in inappropriate contexts. For a decade, Justices Douglas and Harlan waged a campaign to convince a majority of the Court to announce a doctrine that would compel an agency to act by rule in all circumstances in which that option was available.<sup>31</sup> That effort ultimately failed for purely pragmatic reasons,<sup>32</sup> but the judiciary put agencies on notice that they should rethink their choice of procedures and increase their use of rules and rulemaking.

The second major development that increased agency use of rules and rulemaking was the enactment of a plethora of statutes that created many new agencies with missions quite different from those assigned the New Deal agencies.<sup>33</sup> The new health, safety, and environmental regulatory agencies did not share the New Deal agencies' traditional attachment to judicial-type decisionmaking procedures. These agencies were led by a new generation of technocrats who had already internalized the advantages of rules as the primary means of shaping conduct. Their missions did not lend themselves to adjudication in any event. It is hard to imagine the Environmental Protection Agency

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31. See, e.g., *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 777-78 (1969) (Douglas, J., dissenting); *id.* at 781-82 (Harlan, J., dissenting); *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 376-77 (1965) (Harlan, J., dissenting).

32. See 1 DAVIS & PIERCE, *supra* note 1, § 6.8.

33. See *id.* § 1.6.

("EPA"), for instance, attempting to pursue its mission to improve the nation's air quality through use of the procedures traditionally employed by the New Deal agencies. The EPA would have to conduct a separate trial-type hearing to determine the emissions limits applicable to each of millions of sources of air pollution — an impossible task.

Moreover, the Congress that created the new agencies had become frustrated with the poor performance of the New Deal agencies. It recognized the powerful relationship between that performance and the agencies' choice of procedures.<sup>34</sup> The statutes that created the new agencies and assigned them new missions specifically instructed the agencies to make extensive use of rules and rulemaking. Indeed, the Clean Air Act includes explicit instructions to the EPA to issue hundreds of rules to govern myriad circumstances within statutorily imposed action deadlines.<sup>35</sup>

Agency reliance on rules and rulemaking increased dramatically in response to these two developments.<sup>36</sup> Even most of the New Deal agencies began to rely primarily on rules to further their assigned missions, often with outstanding results. The Federal Energy Regulatory Commission ("FERC") and its New Deal predecessor, the Federal Power Commission ("FPC"), provide a particularly good illustration of the socially beneficial effects of this shift in decisionmaking procedures. The FPC's use of adjudication to regulate the natural gas industry produced a decade long gas shortage that cost the U.S. economy billions of dollars per year.<sup>37</sup> By abandoning reliance on adjudication and issuing a series of carefully crafted rules, FERC has now created a gas market in which robust competition yields aggressive innovation, unparalleled efficiency, abundant supplies, and low prices.<sup>38</sup>

The proponents of rules and rulemaking were euphoric about the apparent complete acceptance and successful implementation of their innovation. Kenneth Culp Davis issued a jubilant proclamation of victory in 1978 that typified the spirit of the times.<sup>39</sup> He referred to his 1970 assertion that the procedure for administrative rulemaking is "one of the greatest inventions of modern government."<sup>40</sup> He then rejoiced over the developments between 1970 and 1978:

Indeed, of all the tools that government has for carrying out programs enacted by the legislative body, rulemaking procedure is rapidly becoming the dominant one. During coming decades, the prospect is that govern-

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34. See BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR*, chs. 1-4 (1981).

35. See *id.*

36. See 1 DAVIS & PIERCE, *supra* note 1, § 1.6.

37. See BREYER & MACAVOY, *supra* note 20, at 7-10, 66-71.

38. See Richard J. Pierce, Jr., *The State of the Transition to Competitive Markets in Natural Gas and Electricity*, 15 ENERGY L.J. 323 (1994); Richard J. Pierce, Jr., *Reconstituting the Natural Gas Industry from Wellhead to Burnertip*, 9 ENERGY L.J. 1 (1988).

39. See 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6.1 (2d ed. 1978).

40. *Id.* at 448.

ments all over the world will adopt American ideas about rulemaking as a mainstay of governmental machinery.<sup>41</sup>

Alas, that declaration of complete victory was to prove overly optimistic. It is certainly true that rulemaking was enjoying a period of rapid ascendance, driven by pursuit of the traditional U.S. cultural values of efficiency, fairness, and accountability. At the same time, however, the competing cultural force, distrust of government, was beginning to manifest itself in the form of doctrinal developments and legislative actions that would place in severe jeopardy the continuing viability of "one of the greatest inventions of modern government."

#### THE DOCTRINAL AND POLITICAL SEEDS OF RULEMAKING OSSIFICATION

Modern administrative law scholarship devotes extensive attention to the phenomenon referred to as ossification of rulemaking: the increasing agency aversion to use of the rulemaking procedure.<sup>42</sup> Scholars began to document that phenomenon in the 1980s,<sup>43</sup> but its roots lie in a series of judicial and legislative actions that took place in the 1960s and 1970s, the very period in which most administrative law scholars believed that rulemaking had achieved unstoppable momentum. Moreover, with the benefit of hindsight, it is now easy to describe those changes in legal doctrine and statutes as symptomatic of powerful political, social, and cultural forces that are likely to render impossible any complete and enduring victory by the proponents of rulemaking procedures as an efficient and dominant component of the machinery of government.

The Supreme Court announced two major changes in administrative law doctrines in 1967 and 1970, that had profound effects on the viability of rulemaking. In *Abbott Laboratories v. Gardner*,<sup>44</sup> the Court announced a presumption that rules are subject to pre-enforcement judicial review.<sup>45</sup> In *Association of Data Processing Service Organizations, Inc. v. Camp*,<sup>46</sup> the Court announced a new standing test that had the effect of expanding dramatically the categories of individuals, firms, trade associations, and public interest groups that could obtain judicial review of agency rules.<sup>47</sup>

In combination, these two doctrinal changes transformed completely the legal environment in which agencies conducted rulemakings. Before *Abbott* and

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41. *Id.* at 448-49.

42. See, e.g., Paul R. Verkuil, *Rulemaking Ossification — A Modest Proposal*, 47 ADMIN. L. REV. 453 (1995); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); CARNEGIE COMMISSION, *RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISIONMAKING* 107 (1993); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990); JOHN M. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION* (1988).

43. See, e.g., Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 303.

44. 387 U.S. 136 (1967).

45. See *id.* at 139-48.

46. 397 U.S. 150 (1970). See also *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 342 (1977) (holding that associations have standing to assert the interests of their members).

47. See *Camp*, 397 U.S. at 153-54.

*Camp*, agency rules rarely were subjected to judicial review. Review was available only at the behest of regulatees. They could obtain review only by defying the agency, violating the rule, and then attempting to defend their conduct by challenging the validity of the rule. That strategy rarely worked and almost invariably produced intolerable costs and risks for the regulatees. Moreover, on those rare occasions when a court reviewed an agency rule, it did so in the context of a proceeding to enforce the rule against a particular regulatee. The only "record" the court used as the basis for review was the record of the enforcement proceeding. Given the manner in which agencies exercised their enforcement discretion, that record provided a poor basis for an argument that the rule was invalid. Typically, the regulatee had violated a rule in circumstances in which the violation produced obvious significant harm to the public. A court was unlikely to hold a rule invalid in such circumstances.

The doctrinal changes announced in *Abbott* and *Camp* changed every aspect of that environment. Henceforth, agencies had reason to expect that every major rule would be the subject of judicial review, usually at the behest of numerous parties with widely disparate interests. A major rule issued today often is subject to scores of petitions for review filed by parties who challenge the validity of the rule on scores of theories. Moreover, agencies could anticipate that reviewing courts would begin to insist that agencies provide some form of "record" to be used as the basis for pre-enforcement review of a rule.

As Paul Verkuil predicted,<sup>48</sup> reviewing courts responded to *Abbott* by demanding that agencies support rules with increasingly elaborate records.<sup>49</sup> The required rulemaking record consisted of the notice of proposed rulemaking, the comments submitted in response to the notice, the statement of the rule's basis and purpose, and all studies the agency relied upon to support the factual predicates of the rule.<sup>50</sup> In a particularly significant opinion, the D.C. Circuit cautioned agencies not to take literally the adjectives "concise" and "general" used in the APA to describe the required statement of a rule's basis and purpose.<sup>51</sup> The court referred to the far more extensive support required by the realities of the process of judicial review.<sup>52</sup> In other opinions, circuit courts held that an agency rule was arbitrary and capricious unless the agency responded adequately to all well-supported objections, criticisms, and alternatives contained in the comments submitted in response to an agency's notice of proposed rulemaking.<sup>53</sup> Those judicially-imposed obligations provided parties who are interested in the outcome of a rulemaking a powerful incentive to submit voluminous comments that include multiple objections, criticisms, and proposed

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48. See Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 198 (1974).

49. See 1 DAVIS & PIERCE, *supra* note 1, §§ 7.3-.4.

50. See *id.* §§ 7.3-.4.

51. See *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

52. See *id.*

53. See, e.g., *National Tire Dealers & Retreaders Ass'n v. Brinegar*, 491 F.2d 31, 35 (D.C. Cir. 1974); *Chrysler Corp. v. Department of Transp.*, 472 F.2d 659, 665 (6th Cir. 1972); *Scenic Hudson Preservation Conf. v. Federal Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965). See generally sources cited *supra* note 42.

alternatives, each supported by lengthy studies and arguments. Rulemaking records soon mushroomed from a few hundred pages of comments to tens of thousands of pages of comments, including many conflicting studies that challenged the major factual predicates for the proposed rule. In order to have any chance of defending the validity of a major rule in this legal environment, agencies had to issue "concise, general" statements of basis and purpose hundreds of pages long addressing at length the scores of issues raised in comments. This approach to judicial review of agency rules became known as "hard look" review.

Some courts, most notably the D.C. Circuit, concluded that even "hard look" review, and the voluminous record it created, was inadequate to support a major rule. Courts began to demand that agencies supplement that record with the transcript of an oral evidentiary hearing in which the agency and the interested parties presented testimony, subject to cross-examination, on the most important and controversial issues raised in the proceeding.<sup>54</sup> This method of judicial review created something called "hybrid rulemaking" in which the agency combined the features of the informal rulemaking process with many of the features of a formal adjudication. This method of review also created a legal environment in which agencies were extremely reluctant to initiate a rulemaking for fear that the proceeding would require a decade or more to complete in a manner that offered any realistic prospect of a favorable outcome on judicial review.

Congress also began to lose its enthusiasm for the informal rulemaking procedure, at least in the context of some agencies. As agencies began to make increasing use of rules and rulemaking, some did so in a manner that angered powerful constituencies. The Federal Trade Commission ("FTC"), for instance, initiated several rulemakings in the same time period in which it proposed to regulate the practices of soft drink bottlers, used car dealers, and funeral homes. Its proposals may have been justified in each case, but its decision to take on three powerful constituencies at the same time proved to be political suicide. In a statute euphemistically entitled the "FTC Improvement Act," Congress effectively withdrew the FTC's power to issue rules by requiring the agency to supplement informal rulemaking procedures with oral evidentiary hearings that address "disputed issues of material fact."<sup>55</sup> Congress enacted similar amendments to the statutes that govern rulemakings conducted by several other agencies whose actions had triggered that traditional U.S. cultural value, distrust of government.<sup>56</sup> Each of these efforts to destroy rulemaking by claiming to im-

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54. See, e.g., *Mobil Oil Corp. v. Federal Power Comm'n*, 483 F.2d 1238, 1250 (D.C. Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 629 (D.C. Cir. 1973); *Appalachian Power Co. v. EPA*, 477 F.2d 495, 501 (4th Cir. 1973); *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1015 (D.C. Cir. 1971).

55. 15 U.S.C. § 57(a) (1994).

56. See I DAVIS & PIERCE, *supra* note 1, § 7.7.

prove it was successful.<sup>57</sup> Each was inspired by Senator Fullbright's successful effort to destroy the Walsh-Healy Act in 1952.<sup>58</sup> He sponsored an amendment to the Act that required the Department of Labor ("DOL") to use formal rulemaking procedures to issue rules to implement the Act. The DOL quickly discovered that it is impossible to use rules to implement a statute if the required rulemaking procedure includes the right to an oral evidentiary hearing.<sup>59</sup> That has been the universal experience of agencies that are required to provide oral hearings as part of the procedure for issuing a rule.<sup>60</sup>

### THE SUPREME COURT RESCUES RULEMAKING

The Supreme Court issued two landmark opinions in the 1970s that had the effect of eliminating the two most serious judicial threats to the continued viability of rulemaking. Until 1973, most agencies believed that they were required to use formal rulemaking procedures, including an oral evidentiary hearing, if a statute authorized them to act only after providing an opportunity for a "hearing." This belief, reinforced by some judicial decisions,<sup>61</sup> acted as a powerful deterrent to the use of rulemakings by the many agencies whose statutes conditioned their power to act on provision of a "hearing." In *United States v. Florida East Coast Railway*,<sup>62</sup> the Court eliminated this powerful deterrent to the use of rulemaking by holding that the requirement of a "hearing" can be satisfied by provision of informal rulemaking procedures.<sup>63</sup>

After *Florida East Coast*, however, circuit courts continued to coerce agencies into using formal rulemaking, or "hybrid rulemaking," by insisting that agencies provide the kind of "record" in support of a rule that could only be created by conducting an oral evidentiary hearing.<sup>64</sup> The Court brought that practice to a halt with its 1978 decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>65</sup> The Court held that courts lack the power to compel agencies to use procedures for rulemaking beyond those required by the APA.<sup>66</sup>

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57. See generally Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32 (1982); Barry B. Boyer, *Trade Regulation Rulemaking Procedures of the Federal Trade Commission*, 1979 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS 41; Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 416-17 (1996).

58. See Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276, 1306 (1972).

59. See *id.* at 1305.

60. See Mashaw, *supra* note 57, at 416-17.

61. See, e.g., *Cates v. Haderlein*, 342 U.S. 804 (1951); *Riss & Co. v. United States*, 341 U.S. 907 (1951).

62. 410 U.S. 224 (1973).

63. See *id.* at 240.

64. See cases cited *supra* note 54.

65. 435 U.S. 519 (1978). See also *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 40 (1983) (stating that motor vehicle safety standards are to be promulgated under the informal rulemaking provisions of the APA).

66. See *Vermont Yankee*, 435 U.S. at 520.

Without the Court's decisions in *Florida East Coast* and *Vermont Yankee*, rulemaking probably would have disappeared as a viable mechanism by the early 1980s. The Court's efforts to salvage rulemaking were only partially successful, however. It left intact the extraordinarily demanding "hard look" doctrine. As Paul Verkuil demonstrated in his analysis of *Vermont Yankee*, the "hard look" doctrine is functionally equivalent to judicially-mandated use of hybrid rulemaking.<sup>67</sup> Reviewing courts can apply the infinitely malleable "hard look" doctrine to create conditions in which rulemaking is not a viable option because it is too expensive, time-consuming, and labor-intensive,<sup>68</sup> particularly when the resulting rule has less than a fifty percent probability of being upheld by a reviewing court.<sup>69</sup>

### RULEMAKING OSSIFICATION

Jerry Mashaw and David Harfst concluded a meticulous study of the National Highway Traffic Safety Administration ("NHTSA") in 1990.<sup>70</sup> That study demonstrated the devastating effect that "hard look" review of rules had on one agency's ability to use rules and rulemakings to implement a regulatory statute.<sup>71</sup> Over time, the unrealistic demands imposed by reviewing courts created an environment in which the NHTSA was extremely reluctant to use rulemaking. The NHTSA substituted for rulemaking substantially less cost-effective forms of regulation.<sup>72</sup> Studies of numerous other agencies have documented analogous effects.<sup>73</sup> The Carnegie Commission's 1993 report of its study of the phenomenon summarizes well the many effects of "hard look" review of rulemakings: (1) agencies require five years to issue, amend, or rescind a major rule; (2) many needed rules are never issued; (3) many obsolete rules are never amended or rescinded; and (4) agencies substitute for rules a variety of other regulatory devices that are inferior to rules in all respects.<sup>74</sup> Tom McGarity's term "rulemaking ossification" captures nicely the situation that exists today.<sup>75</sup>

Many scholars have proposed methods of restoring rulemaking as a viable option.<sup>76</sup> There are numerous potential ways of deossifying the rulemaking process, but each imposes some collateral costs and each confronts a variety of other obstacles.<sup>77</sup> There are some modest signs of improvement in the legal

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

68. See sources cited *supra* note 42.

69. See Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1022.

70. See MASHAW & HARFST, *supra* note 42.

71. See *id.* at 95-103.

72. See *id.* at 100.

73. See sources cited *supra* note 42.

74. See CARNEGIE COMMISSION, *supra* note 42, at 106-09.

75. See McGarity, *supra* note 42.

76. See sources cited *supra* note 42.

77. See Pierce, *supra* note 42.

environment. The Supreme Court has issued two opinions in which it has reduced the discretion of reviewing courts to impose open-ended versions of the "hard look" doctrine.<sup>78</sup> Circuit courts seem to be exercising greater self-restraint in apparent recognition of the ossification phenomenon. In the meantime, however, the suspicion of government that is deeply embedded in U.S. cultural values is manifesting itself in another form that represents a serious threat to the viability of rulemaking.

"REGULATORY REFORM" AND THE POTENTIAL FOR  
PETRIFICATION OF RULEMAKING

In 1995, the House of Representatives passed, and the Senate fell only one vote short of passing, an amendment to the rulemaking provision of the APA.<sup>79</sup> The proposed "regulatory reform" amendment is considerably longer than the entire original APA. It would subject all "major rules," broadly defined, to detailed, elaborate new decisionmaking procedures. At its core, the amendment mandates cost-benefit analysis and risk assessment for all major rules. If that were all the amendment required, it probably would not add much to the pre-existing burdens of the rulemaking process, and its benefits, in the form of better rules, might justify that modest incremental burden. Most agencies have been routinely using cost-benefit analysis and risk assessment in the process of issuing major rules for many years.<sup>80</sup>

The proposed amendment goes much further, however. It prescribes in meticulous detail elaborate procedures and criteria applicable to each of the many new analytical steps an agency must take before it can issue a major rule. Moreover, each step and criterion is to be interpreted and applied by reviewing courts. This version of "regulatory reform" would have the effect of transforming rulemaking ossification into rulemaking petrification.<sup>81</sup> Good faith agency efforts to comply with the proposed new amendment would significantly increase the already daunting cost of the rulemaking process, measured both in years and in staff resources. At the same time, as Judge Wald has pointed out, the proposed amendment inevitably would increase the proportion of major rules that reviewing courts reject.<sup>82</sup> Generalist judges, with little understanding

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78. See *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. 211 (1991); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990).

79. See Job Creation and Wage Enhancement Act, H.R. 9, 104th Cong. (1995); Comprehensive Regulatory Reform Act, S. 343, 104th Cong. (1995).

80. See Sally Katzen, *Administration Perspectives on the 1995 Regulatory Reform Legislation*, 48 ADMIN. L. REV. 331 (1996); Sylvia K. Lowrance, *Risk Assessment Perspectives from the Agency View*, 48 ADMIN. L. REV. 345 (1996).

81. See Richard J. Pierce, Jr., *The APA and Regulatory Reform*, 10 ADMIN. L.J. AM. U. 81 (1996); Mashaw, *supra* note 57, at 416-417; Peter Strauss, *Risk Assessment Perspectives*, 48 ADMIN. L. REV. 341, 347 (1996); Ronald Levin, *Judicial Review of Procedural Compliance*, 48 ADMIN. L. REV. 359, 361 (1996).

82. See Patricia M. Wald, *Judicial Review: Talking Points*, 48 ADMIN. L. REV. 350, 351 (1996).

of cost-benefit analysis or risk assessment,<sup>83</sup> would feel obliged to attempt to insure that agencies have performed those functions in conformance with the detailed, technical specifications in the proposed amendment. The present fifty percent rate of judicial rejection of agency rules would soar to perhaps seventy or eighty percent.<sup>84</sup> The results are easy to predict: petrification of the rulemaking process.

The same proposed amendment that would create a legal environment in which rulemaking is no longer a viable option also would mandate systematic agency review of pre-existing rules. The proponents of the amendment appear to believe that agencies simply choose not to review existing rules to determine whether they should be amended or rescinded. Solid empirical work refutes that belief.<sup>85</sup> Agencies would like to devote more resources to the important task of reviewing existing rules and to the related tasks of amending or rescinding the many obsolete rules. The powerful impediments they confront are resource constraints and burdensome rulemaking procedures. As Congress piles more and more mandates on agencies' plates, and couples those mandates with increasingly burdensome procedural requirements, it is simultaneously reducing significantly the resources it provides agencies to accomplish their assigned tasks.<sup>86</sup> It is unimaginable that agencies would be able to comply with both the proposed new statutory mandate to engage in systematic review of existing rules *and* the proposed new procedures for issuing rules with fewer resources than they have today. Enactment of the proposed amendment to the APA's rulemaking provisions would represent a complete triumph of the traditional U.S. suspicion of government. We would have succeeded in creating checks on the rulemaking process so powerful that agencies would not attempt to issue, amend, or rescind rules.

#### AN OPTIMISTIC ALTERNATIVE FUTURE FOR RULEMAKING

I have painted an unduly grim picture of the future of rulemaking in the prior section, however. After all, Congress has not yet enacted the proposed amendment to the APA I criticize. It might choose to move in an entirely different direction. Congress, like the society it represents, is intensely ambivalent about potential methods of reconciling our traditional suspicion of government

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83. For a particularly good example of the inability of courts to understand scientific disputes, see *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 655 (1980). The Court attempts to illustrate the difference between a risk that is clearly significant and a risk that is clearly insignificant by describing an example of each. It is obvious, however, to anyone who understands toxicology and risk assessment, that the risk the Court considers insignificant is larger than the risk the Court considers significant.

84. See sources cited *supra* note 80. This feature of the proposed amendment is described and analyzed in Leslie Kux, *Looking Back at Existing Rules: Agency Perspectives on Analysis Requirements*, 48 ADMIN. L. REV. 375 (1996).

85. See Sidney A. Shapiro, *Agency Priority Setting and the Review of Existing Agency Rules*, 48 ADMIN. L. REV. 370 (1996); Neil R. Eisner & Judith S. Kaleta, *Federal Agency Reviews of Existing Regulations*, 48 ADMIN. L. REV. 139 (1996).

86. See Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. (forthcoming Dec. 1996).

with our traditional pursuit of a government that is efficient, fair, and accountable. In 1996, Congress enacted an amendment to the APA that could lead to a far better method of merging those often conflicting social values.<sup>87</sup>

The enacted amendment adds a new chapter to the APA entitled "Congressional Review of Agency Rulemaking."<sup>88</sup> It requires agencies to submit all major rules to Congress at least sixty days before a rule's effective date.<sup>89</sup> Congress is then obligated to review each rule.<sup>90</sup> If a rule does not conform with Congress' preferences, Congress can "veto" it by enacting a joint resolution of disapproval.<sup>91</sup> The amendment establishes expedited procedures for considering such a resolution. The expedited procedures render unavailable the tactical weapons that opponents of legislation use most frequently to block, or to stall, legislative initiatives that have majority support.

With the addition of the new congressional review chapter of the APA, we now have in place two-thirds of a new legal environment that would combine our social values in a new way so as to maximize our ability to further those values simultaneously.<sup>92</sup> We have had systematic Presidential review of major rules for over a dozen years.<sup>93</sup> Beginning in 1996, Presidential review will co-exist with systematic Congressional review. As a result, an agency can issue a major rule only if it survives review by both of the politically accountable branches of government. That process certainly should satisfy our desire for accountability of rules. We can hold the elected officials of both branches accountable for any rule that we dislike. It also responds effectively to our inherent suspicion of government and to our craving for checks on the power of government officials. A rule can be issued through this process only if it is initiated by one institution, an agency; approved by another, the President; and acquiesced in by a third, our bicameral Legislature.

At the same time, the new rulemaking process will further the social goals of enhancing efficiency and fairness in government operations. It will have this effect by creating an environment in which agencies can maximize their reliance on rules and rulemakings: the primary sources of efficiency and fairness in implementing benefit programs and regulatory programs. Our elected officials in the White House and on Capital Hill will approve the vast majority of agency rules. My prediction in this respect may seem counterintuitive given the persistent criticism of agencies' performance by the leaders of whichever party controls Congress. The two phenomena are consistent, however. Carping about the performance of agencies is a low political cost activity. Indeed, it can yield political dividends for congressional leaders when the other party controls the

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87. See Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, §§ 201-253, 1996 U.S.C.A.N. (110 Stat.) 857-74.

88. See *id.* § 251, 1996 U.S.C.A.N. (110 Stat.) at 868-74 (to be codified at 5 U.S.C. §§ 801-808).

89. See *id.* § 251, 1996 U.S.C.A.N. (110 Stat.) at 869 (to be codified at 5 U.S.C. § 801).

90. See *id.* § 251, 1996 U.S.C.A.N. (110 Stat.) at 868 (to be codified at 5 U.S.C. § 801).

91. See *id.* § 251, 1996 U.S.C.A.N. (110 Stat.) at 871 (to be codified at 5 U.S.C. § 802).

92. See Verkuil, *supra* note 42, at 458.

93. See 1 DAVIS & PIERCE, *supra* note 1, § 7.9.

White House: a situation that has become the norm in recent decades. Disapproving an agency rule carries much higher potential costs than merely criticizing an agency rule. Most rules have powerful beneficiaries, and congressional leaders can anticipate that the agency and the White House will assist those beneficiaries in orchestrating a public outcry if Congress vetoes a rule that would confer significant benefits on the public. Members of Congress will be reluctant to risk incurring the high political costs of such an outcry.

I have described the legal environment created by enactment of the new congressional review chapter of the APA as providing two-thirds of an ideal new environment conducive to use of rules and rulemaking. The missing one-third consists of a characteristic of the present legal environment that is incompatible with the new environment. Traditionally, we have asked the judiciary to play a broad role in the rulemaking process. Indeed, we have asked more of the judiciary than it is institutionally capable of providing. Judicial review of rules through application of the open-ended "hard look" version of the amorphous "arbitrary and capricious" standard is the primary source of the phenomenon of rulemaking ossification.<sup>94</sup> It greatly increases the cost and delay attendant to agency use of rulemaking, with little pay off. Generalist judges lack both the technical expertise and the time required to understand the relationship among the many complicated issues that are raised in a major rulemaking.<sup>95</sup> Agencies have a clear comparative advantage over courts in that respect. The judiciary is the least politically accountable branch of government. Presidential and Congressional review of agency rules is vastly superior to judicial review as a means of ensuring that rules reflect the preferences of the people.<sup>96</sup> As Judge Wald argued persuasively in 1981, rulemaking is, and must be, an inherently political process.<sup>97</sup> If the President approves a rule and the Congress acquiesces in the rule, we know who to hold accountable if the rule yields adverse effects, and we have access to the most effective tool ever invented to insure political accountability: the ballot box.

With the addition of the congressional review chapter to the APA, then, we need to make only one further change in law to deossify rulemaking. Courts should be limited to two narrow, but important roles, in the rulemaking process. They should retain the power to hold a rule unconstitutional, and they should retain the power to hold a rule invalid because it is inconsistent with a statute. As Justice (then-Professor) Breyer pointed out in 1986, those are the roles in which the judicial branch has comparative advantages over other branches.<sup>98</sup> By retaining the rarely exercised power to hold a rule unconstitutional, courts

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94. See sources cited *supra* note 42.

95. See Pierce, *supra* note 42, at 68-71.

96. See Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239 (1989).

97. See *Sierra Club v. Costle*, 657 F. 2d 298, 400-10 (D.C. Cir. 1981). See also Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980).

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

will remain in a position to play their crucial counter-majoritarian role.<sup>99</sup> By retaining the power to hold that a rule is invalid because it is contrary to a statute, courts will remain in a position to preserve the vital principle of Legislative Supremacy by insuring that a statute cannot be enacted or amended except through the constitutionally prescribed process of bicameral action and presentment.<sup>100</sup>

Congress could accomplish this socially beneficial change in law through an incredibly easy step. It needs only to amend the APA by making section 706(2)(A) inapplicable to rules that are subject to the new congressional review process. Section 706(2)(A) authorizes a court to set aside an agency action that a court determines to be arbitrary, capricious, or an abuse of discretion.<sup>101</sup> That section should continue to apply to agency adjudications, both because there is considerable potential for agency abuse of the adjudicatory process<sup>102</sup> and because decisions in adjudications are not appropriate candidates for congressional review.<sup>103</sup> The existence of presidential and congressional review of major rules renders redundant and counter productive, however, retention of a broad role for the judiciary in that context.<sup>104</sup>

Alternatively, the judiciary itself can create the final one-third of this vastly improved new legal environment. The "hard look" version of the arbitrary and capricious test is entirely a product of the judicial branch.<sup>105</sup> The Court could eliminate that judge-made doctrine and replace it with the highly deferential version of the arbitrary and capricious test that existed when Congress enacted the APA in 1946.<sup>106</sup> The Justices should find that course of action appealing. Such an interpretation of the APA would be far more faithful both to the language of the Act<sup>107</sup> and to the intent of the Congress that enacted the APA than the interpretation that has evolved in recent decades.<sup>108</sup>

### THE FUTURE OF RULEMAKING

Now that I have described two dramatically different future legal environments applicable to rules and rulemaking and expressed my normative views on those alternative futures, I suppose I have an obligation to predict the actual environment that will exist in the future. I can do no better than to end this essay where I began. Peter Strauss has described the political, social, and cultur-

99. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (1962).

100. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 308-09 (1989).

101. See 5 U.S.C. § 706(2)(A) (1994).

102. See 2, 3 DAVIS & PIERCE, *supra* note 1, §§ 11.5, 17.1-2.

103. See 2 *id.* §§ 8.4, 9.2, 9.8.

104. See Pierce, *supra* note 42, at 66-71.

105. See Pierce, *supra* note 86; 1 DAVIS & PIERCE, *supra* note 1, § 7.4.

106. See *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935).

107. Section 553 of the APA requires only that an agency incorporate in each rule "a concise general statement of [its] basis and purpose." 5 U.S.C. § 553(c) (1994).

108. See Martin Shapiro, *APA: Past, Present, and Future*, 72 VA. L. REV. 447 (1986).

al forces that are the roots of our intense ambivalence toward rules and rulemaking.<sup>109</sup> There is no reason to expect those forces to abate. Instead, they will continue to manifest themselves in myriad ways that will create perpetual tension between the proponents of rules and rulemakings and the skeptics whose distrust of government will induce them to create new obstacles to the issuance of rules.

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109. See Strauss, *supra* note 2.

