THE C. BOYDEN GRAY
Center for the Study of the Administrative State
ANTONIN SCALIA LAW SCHOOL • GEORGE MASON UNIVERSITY

Rulemaking Then and Now: From Management to Lawmaking

Ronald A. Cass

CSAS Working Paper 21-01

The APA at 75 – The George Mason Law Review*'s Third Annual Symposium on Administrative Law*

This article will appear in Volume 28:3 of the George Mason Law Review
Expected publication: Spring 2021 – https://lawreviewgmu.wpengine.com/

GEORGE MASON UNIVERSITY | ANTONIN SCALIA LAW SCHOOL

Rulemaking Then and Now: From Management to Lawmaking

*Ronald A. Cass**

Introduction

Rulemaking occupies a central place in modern administrative law. It is the focus of innumerable fights—over policy, the scope of constitutionally and statutorily permissible agency policy-making (including debates over the delegation, or nondelegation, doctrine), the particular policy choices made and the substantive support needed to make them, the way policy choices must be articulated, who within the executive branch properly exercises control over these choices, and the intersection between agency and court readings of governing legal materials (notably, in arguments respecting the *Chevron* doctrine[1] and the *Auer-Seminole Rock* doctrine[2]). In other words, rulemaking figures prominently in virtually every important contest in American administrative law today.

Yet rulemaking's centrality is a relatively unforeseen part of the story of the Administrative Procedure Act's (APA's) importance and the development of administrative law in the three-quarters of a century following the APA's enactment. It also is a perfect illustration of the relationship between substance and process, as well as the law of unintended

* Dean Emeritus, Boston University School of Law; Distinguished Senior Fellow, C. Boyden Gray Center for the Study of the Administrative State; Senior Fellow, International Centre for Economic Research; President, Cass & Associates, PC. This Article has been helped by thoughtful comments from and discussions with colleagues, including Jack M. Beermann, Christopher C. DeMuth, Sr., Douglas H. Ginsburg, Jeffrey Lubbers, Nicholas Parrillo, A. Raymond Randolph, Glen O. Robinson, Matthew Wiener, and Adam White, and by able research assistance from Benjamin Janacek (Antonin Scalia Law School, Class of 2021) and Daniella Cass (University of Pennsylvania Carey School of Law, Class of 2022).

[1] Although the most famous case in administrative law needs no introduction, especially to readers interested enough in the subject to be perusing a volume on the Administrative Procedure Act's 75th anniversary, the citation is here for good form: *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837 (1984).

[2] The *Auer* doctrine (or *Auer-Seminole Rock* doctrine) derives from *Auer v. Robbins*, 519 U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The connection between the doctrine stated in those cases, and invoked in their names, and the actual decisions in those cases is debatable. *See, e.g.*, Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 FORDHAM L. REV. 531, 546–51 (2018); Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47, 47–53 (2015). *See also* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 922–27 (2017) (more broadly, early cases of deference to contemporaneous interpretation mistaken by courts for broader practice of deference to executive interpretations).

consequences. Although some government officials were authorized to make rules going back to the earliest years of the republic,[3] the nature of the authority changed over time, transforming the rulemaking process from a tool of management and ratemaking to a process aimed at lawmaking.[4] Although the seeds of the delegation doctrine's effective demise had been sown before adoption of the APA, it was reasonable for those who were contemplating a charter of administrative procedure to expect that the doctrine still would have bite.[5] The modest demands the APA put on rulemaking were intended for a less widespread and expansive commitment of lawmaking power to agencies than eventuated over the ensuing decades.[6] Without a serious constraint on delegation, rulemaking's procedural requirements took on special importance, as they—together with the rules for reviewing the substance of agency actions—constituted the only substantial legal impediments to freewheeling administrative lawmaking.

Not surprisingly, given the rise in rulemaking's importance, arguments over, and changes in, procedural requirements are part-and-parcel of the

---

[3] *See, e.g.*, Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 719–20 (1969); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1268 (2006); Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 738–39 (1994) (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993)); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 1); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 131 YALE L.J. (forthcoming 2021) (manuscript at 2); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. (forthcoming 2020) (manuscript at 11).

[4] *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1042–43 (2007); Ronald A. Cass, *Staying Agency Rules: Constitutional Structure and Rule of Law in the Administrative State*, 69 ADMIN. L. REV. 225, 237–43 (2017); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248 (1994). *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (describing the background and history of American and continental laws' limitations on unchecked administrative power).

[5] The Supreme Court's decision in *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928), had altered the test for permissible delegations of authority from the long-used test that restricted delegation to decisions of matters that had limited importance, substituting a test requiring only that the Congress provide an "intelligible principle" to guide administrators. Yet, following that alteration, the Court struck down two parts of the National Industrial Recovery Act as unconstitutional delegations. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935); Panama Refin. Co. v. Ryan, 293 U.S. 388, 430, 433 (1935). While some questionable delegations were upheld during the era in which the Administrative Procedure Act was being written, *see, e.g.*, Yakus v. United States, 321 U.S. 414, 423, 426 (1944); Nat'l Broad. Co., Inc. v. United States, 319 U.S. 190, 216, 224 (1943), only later did it become clear that the intelligible principle test was an open door to delegations of all sorts. *See, e.g.*, Alexander & Prakash, *supra* note 4, at 1043; Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 151–61 (2017) [hereinafter Cass, *Delegation Reconsidered*]; Ronald A. Cass, *Motive and Opportunity: Courts' Intrusions into Discretionary Decisions of Other Branches—A Comment on* Department of Commerce v. New York, 27 GEO. MASON L. REV. 401, 415–18 (2020) [hereinafter Cass, *Motive*]; Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 478–92 (2016); Lawson, *supra* note 4, at 1238–40; Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2165–81 (2004); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224–26, 1229–34 (1985).

[6] *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992).

rulemaking landscape. Following decades of relative quiescence after enactment of the APA, procedural requirements on rulemaking were increased, then increased further, and then assailed as leading to ossification of the (now) most obvious method for agency policymaking.[7] Subsequent generations in rulemaking's evolution saw rulemaking procedures modified again (or, more accurately, most judicial modifications halted).[8] Rulemaking requirements then were altered through the addition of explicit mechanisms for more direct executive oversight and debated as vehicles for law-free governance by the executive branch or for last-minute entrenchment of the political priorities of an outgoing administration.[9] Paralleling the evolution of procedural requirements, administrative law scholarship in the past several decades has focused almost obsessively on rulemaking and its intersection with oversight mechanisms used by the three branches of national government, the judiciary most of all.[10]

This Article explains the evolution of rulemaking from a relatively infrequent method of guiding executive action to the motive engine for a massive regulatory system that both complements and substitutes for congressional lawmaking. It sketches the way in which the APA's few,

---

[7] *See, e.g.*, *id.* at 1387; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60 (1995); Paul R. Verkuil, *Comment: Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453, 457 (1995).

[8] *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 525 (1978); Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 858 (2007); Clark Byse, Vermont Yankee *and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1823-24 (1978); Richard B. Stewart, Vermont Yankee *and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1805 (1978).

[9] *See, e.g.*, Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENV'T. & ADMIN. L. 285, 287 (2013); Christopher DeMuth, *OIRA at Thirty*, 63 ADMIN L. REV. 15, 16 (2011); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1082 (1986); Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1506 (2002); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2249 (2001); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 29 (1995); Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1853 (2013).

[10] *See, e.g.*, Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 779–84 (2010); Ronald A. Cass, *Vive la Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1295–301 (2015); Steven P. Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 821–824 (2003); William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1090-91 (2008); Michael P. Healy, *The Past, Present, and Future of* Auer *Deference:* Mead*, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. KAN. L. REV. 633, 635, 644 (2014); Knudsen & Wildermuth, *supra* note 2, at 50–54; Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 2–6 (2013); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1128–31 (2010); Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 NW. U. L. REV. 551, 552–54 (2012); Aaron L. Nielson, *Beyond* Seminole Rock, 105 GEO. L.J. 943, 953–55 (2017); Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1485–86 (2011); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1143 (2012).

simple procedural requirements helped pave the way for a shift from adjudication to rulemaking as the major force in administrative action. And it explains the increasing emphasis in academic commentary on the intersection between rulemaking and democracy—and the increasing use of analogies of rulemaking to legislating. This emphasis is understandable in light of the transformation of rulemaking in practice, but analogies to legislating are deeply flawed, for both constitutional and pragmatic reasons. The Constitution clearly and pointedly restricts lawmaking to a specific process that requires consensus among officials selected at different times in different ways by different constituencies, and efforts to shift lawmaking to administrative officials cannot be reconciled with that system. That observation is at once the reason for the increasing debate over legal constraints on dispersion of lawmaking authority and also the nub of the objection to the rulemaking-as-legislating analogy. After discussing the problematic aspects of that analogy, this Article suggests a return to a different understanding of the rulemaking authority that can be reposed in administrators' hands. The Article explains that this change is necessary to make rulemaking more akin to the tool the APA's creators imagined and defends that goal as both true to the proper implementation of the statute and better aligned with the constitutional structure that frames American administrative law.

I. Rulemaking in a World of Limited Delegation

Understanding the limited nature of the APA's procedural requisites for rulemaking begins with appreciation of the role rulemaking played prior to the blossoming—or, for those less enamored of it, the metastasizing—of the modern administrative state. The most basic and most important lesson about rulemaking for most of the nation's history leading up to the New Deal era is that there was little of it—and even less of note—primarily because the administrative agencies that might have engaged in rulemaking had little clear authority to regulate and even less authority to regulate by rule.

A. *Regulatory Authority at the Founding*

Academic commentary over the past decade has focused increasingly on the extent and terms of congressional delegations of authority to administrators, especially on the authority to make rules binding on private conduct.[11] Much of this commentary has addressed the nature of such

[11] *See*, *e.g.*, Alexander & Prakash, *supra* note 4, at 1040; Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1328 (2003) [hereinafter Alexander & Saikrishna, *Reports Exaggerated*]; Cass, *Delegation Reconsidered*, *supra* note 5, at 155; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 353–55 (2002) [hereinafter Lawson, *Delegation*]; Lawson, *supra* note 4, at 1235; Mashaw, *supra* note 3, at 1262; Mortenson & Bagley, *supra* note 3 (manuscript at 1, 8, 109); Parrillo, *supra* note 3, at 2; David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213, 222 (2020); Wurman, *supra* note 3 (manuscript at 1–7).

delegations in the founding era. Practices of that era presumably reflect the founding generation's understanding of what delegations were permissible and appropriate.[12] In other words, a relative paucity of significant delegations of discretionary authority would suggest that the contemporaneous understanding of the Constitution was that it prohibited such delegations, while discovery of extensive delegations of discretionary authority would suggest the opposite.

The long-held assumption—which might be termed the "delegation-light" assumption—has been that the men who wrote and ratified the American Constitution passed very few, if any, laws granting substantial discretionary authority for non-elected officials of the national government to impose obligations on the private conduct of ordinary citizens.[13] The distinction between such laws and other legislation was important to the Constitution's framers, who, in the words of Alexander Hamilton, identified the legislative enterprise as quintessentially "prescrib[ing] rules for the regulation of society."[14] That description generally has been recognized as describing rules controlling behavior of private citizens.[15]

Until recently, reviews of early laws by both opponents and proponents of such delegations have been consistent with the delegation-light assumption.[16] The point is not that delegations of authority were rare (they were not) but that the authority delegated to executive officials generally was limited—usually quite tightly—except in cases dealing with management of government functions, such as customs collections.[17] Even then, the delegation typically was only to exercise authority in case of emergency when Congress was not in session or only to exercise authority over matters that were sufficiently far from major public concerns to survive the test for delegation announced by Chief Justice John Marshall in 1825, distinguishing more important matters on which Congress alone could exercise authority

---

[12] *See, e.g.*, sources cited *supra* note 3; *see also* Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 2 (2014); Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1123–26 (2020); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–10 (1994).

[13] *See, e.g.*, HAMBURGER, *supra* note 4, at 83–85; Cass, *Delegation Reconsidered*, *supra* note 5, at 155–58; Davis, *supra* note 3, at 719–20; Krent, *supra* note 3, at 738–39; Lawson, *Delegation*, *supra* note 11, at 340–43; Schoenbrod, *supra* note 11, at 266–71.

[14] THE FEDERALIST NO. 75, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[15] *See, e.g.*, HAMBURGER, *supra* note 4, at 84–85; Cass, *Delegation Reconsidered*, *supra* note 5, at 186–88; Lawson, *Delegation*, *supra* note 11, at 379–81; Schoenbrod, *supra* note 11, at 220–21.

[16] *See, e.g.*, HAMBURGER, *supra* note 4, at 109–10; Cass, *Delegation Reconsidered*, *supra* note 5, at 155–58; Davis, *supra* note 3, at 719–20; Krent, *supra* note 3, at 738–39; Lawson, *Delegation*, *supra* note 11, at 340–44, 401–04; Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1735–36 (2002); Schoenbrod, *supra* note 11, at 266–71.

[17] *See, e.g.*, Cass, *Delegation Reconsidered*, *supra* note 5, at 155–58, 181–82, 188–90; Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388, 1399 (2019); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 496 (2002); Wurman, *supra* note 3 (manuscript at 11).

and less important matters which could (within bounds) be delegated to other officers.[18]

This account of early lawmaking has been challenged by recent writings that have received considerable attention in the academic community.[19] Prominent writings in the revisionist camp have asserted that Congress, from the very beginning, handed out substantial regulatory authority without reservation about constitutional limits on delegation.[20] These claims, especially in their broader forms, are inconsistent with other careful reviews of the authority exercised, the nature of that authority, and the restrictions placed on its exercise.[21] Most notably, the revisionist accounts blend delegations of authority over *administrative* functioning under legal command—of discretion over the details of management of how government officials perform various tasks, such as the mechanisms to be used in distributing benefit payments—with delegations of authority over *regulatory* functioning (coercive control over private conduct). Delegations of discretionary authority over private conduct are especially problematic, as this is the category of authority that repeatedly has been singled out as the special domain of legislative power,[22] but revisionist assertions of broad discretionary authority of that sort are, at best, far less consistent with actual practice in the founding era.

An as-yet (as of this writing) unpublished article by Professor Nicholas Parrillo, which advances arguments associated with the revisionist writings, focuses primarily on one episode that supports a more limited claim.[23] Parrillo describes in considerable detail a regime for tax assessment during the founding era that has largely escaped notice, the direct property tax of 1798. This regime, which was set up to assess and collect proceeds from a national tax on property, dispersed authority among different officials in the

---

[18] *See, e.g.*, Cass, *Delegation Reconsidered*, *supra* note 5, at 155–58, 186–89; Lawson, *Delegation*, *supra* note 11, at 342; Schoenbrod, *supra* note 11, at 266–71. Chief Justice Marshall articulated this test in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825), rejecting a contention that the Judiciary Act of 1789 (and its revision), in authorizing the federal courts to adopt rules respecting procedure for certain matters, had impermissibly delegated authority that was legislative in nature.

[19] *See, e.g.*, Mashaw, *supra* note 3, at 1270–74; Mortenson & Bagley, *supra* note 3 (manuscript at 4–6).

[20] *See, e.g.*, Mashaw, *supra* note 3, at 1276–77; Mortenson & Bagley, *supra* note 3 (manuscript at 6).

[21] *See, e.g.*, HAMBURGER, *supra* note 4, at 83-85; JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 78–93 (2017); Schoenbrod, *supra* note 11, at 266–71; Wurman, *supra* note 3 (manuscript at 1).

[22] *See, e.g.*, HAMBURGER, *supra* note 4, at 84; Alexander & Prakash, *supra* note 4, at 1040–41; Cass, *Delegation Reconsidered*, *supra* note 5, at 176; Ginsburg & Menashi, *supra* note 5, at 491–92; Lawson, *Delegation*, *supra* note 11, at 339; Lawson, *supra* note 4, at 1236; Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1506–25 (2015); David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 359 (1987). Without contradicting the importance of limiting exercises of coercive power over private conduct to the lawmaking mechanisms specified in the Constitution, Professors Alexander and Prakash also make the case that other exercises of power assigned to Congress would violate constitutional strictures. *See* Alexander & Prakash, *supra* note 4, at 1054–58.

[23] Parrillo, *supra* note 3 (manuscript at 10).

various states and apparently gave significant authority to some officials to determine methods for calculating and adjusting the value of properties for assessment purposes (and of making the assessments more uniform, at least in theory).[24] Parrillo makes the point that the discretion exercised by various boards making adjustments to other officials' tax calculations was both substantial and doubtless affected private citizens, as those were the parties who bore the tax's incidence.[25] Yet discretion over formulae for property taxes is not equivalent to regulatory discretion: it does not comprehend the choice whether to tax or what to tax or whether to proscribe particular conduct. [26] Moreover, whatever characterization one gives to this particular episode, it certainly is not emblematic of a large group of founding-era regulatory delegations.[27]

Ultimately, the revisionist approach may be credited as making the case that life is complicated, that government authority is not easily pigeonholed in simple categories, and that even a relatively modest amount of government activity comprehends a considerable degree of discretionary authority. The revisionist accounts, however, do not succeed in significantly undermining the delegation-light account of the founding era. In short, there was little significant regulation or rulemaking in the decades following adoption of the Constitution.

B. *Progressivism's Expansion of Regulatory Authority*

The pattern set in the founding era carried through for at least the first seventy-five years of the nation's history. Administrative officers were authorized to adopt rules, for example, governing the collection of taxes and assessment of imported goods' value as an incident to customs duty collections.[28] Another example of the sort of rules that were authorized well after the founding era are those concerning postal rates. The Postmaster General, with the President's approval, was empowered "to reduce or enlarge, from time to time, the rates of postage upon all letters and other mailable matter conveyed between the United States and any foreign country, for the purpose of making better postal arrangements with other

---

[24] *Id*. (manuscript at 10-11).

[25] *Id*. (manuscript at 30-36).

[26] Professor Parrillo does assert that the discretion conferred by the 1798 tax regime should be seen in the same light as more obviously regulatory empowerment and also joins issue with the separation of authority into different categories for purposes of assessing its consistency with the assignment of functions as "legislative" or "executive." *Id.* (manuscript at 9-11, 16-18). His arguments on this score merit treatment more extensive than the scope of this article permits.

[27] While Professor Parrillo does not make this claim, he does offer the episode as qualifying or contradicting broad assertions of the absence of any delegation of broad regulatory authority early in the founding era. *Id.* (manuscript at 10). His work also suggests that the paucity of legislation regulating private rights provides the best explanation for the paucity of delegations of authority to take actions directly affecting such rights. *Id.* (manuscript at 10 n. 46).

[28] *See, e.g.*, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, at 97 (1st Sess. 1941) [hereinafter ATTORNEY GENERAL'S COMMITTEE]; Mascott, *supra* note 17 at 1399.

governments, or counteracting any adverse measures affecting our postal intercourse with foreign countries."[29] This authority, designed to facilitate international postal accords, sounds substantial, but actually covered a fairly narrow set of possible arrangements and, critically, controlled only government functions rather than private conduct.

During the latter part of the Nineteenth Century and early part of the Twentieth Century, rulemaking that differed from this pattern began to emerge. Administrative officials were given authority to adopt rules designed to control private conduct that threatened health, safety, or certain economic functions. For example, in 1890, after repeated outbreaks of smallpox, cholera, and yellow fever in different parts of the nation—and following reports of further disease outbreaks in Hong Kong, sparking fears of new infections on the West Coast—Congress authorized the Secretary of the Treasury (working with the Surgeon General of the Marine Hospital Service) to adopt rules and regulations he deemed necessary to halt the spread of infectious diseases from one state to another.[30]

At the federal level, the Progressive Era saw the creation of the Interstate Commerce Commission (ICC) (1887), the Food and Drug Administration (FDA) (originally the Bureau of Chemistry in the Department of Agriculture) (1906), the Federal Trade Commission (FTC) (1914), and the Tariff Commission (1916). The expanded regulatory authority reposed in these bodies frequently was defended as calling on experts to make technical determinations—setting reasonable rates for rail carriage and assuring that those rates were uniform across shippers, identifying misbranded or adulterated foods, restraining fraudulent advertising and unfair methods of competition, and using "science" to calculate tariff rates.[31]

Much of the work of these entities was done through reports and recommendations or through adjudication, rather than through adoption of rules. Most of the early regulatory commissions, in fact, exercised authority that either had been lodged in the courts—such as policing fraudulent advertising or unfair competition or requiring common carriers for hire to charge reasonable rates—or was similar to it.[32] This fit the historic

---

[29] Act of Mar. 3, 1851, ch. 20, § 2, 9 Stat. 589.

[30] *See* Act of Mar. 27, 1890, ch. 51, § 1, 26 Stat. 31; ATTORNEY GENERAL'S COMMITTEE, *supra* note 28, at 97–98; Katherine L. Vanderhook, *A History of Federal Control of Communicable Diseases: Section 361 of the Public Health Service Act*, 20–21 (April 30, 2002) (unpublished manuscript) (on file with Harvard Law School), http://nrs.harvard.edu/urn-3:HUL.Inst.Repos:8852098.

[31] *See, e.g.*, William S. Culbertson, *The Tariff Commission and Its Work*, 207 N. AM. REV. 57, 58 (1918); John H. Garvey, *Judicial Consideration of the Delegation of Legislative Power to Regulatory Agencies in the Progressive Era*, 54 IND. L.J. 45, 47 (1978); I. L. Sharfman, *The Interstate Commerce Commission: An Appraisal*, 46 YALE L.J. 915, 919 (1937); Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 197-198 (1887).

[32] *See, e.g.*, Norman F. Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411, 413–18 (1927); Oliver Wendell Holmes, Jr., *Common Carriers and the Common Law*, 13 AM. L. REV. 609, 618, 625, 630 (1879); William L. Letwin, *The English Common Law Concerning Monopolies*,

acceptance of judicial authority to make determinations respecting subjects that had immediate application to a specific factual setting, while also following (and elaborating) principles that would guide future actions.[33] It also explains the contemporary consensus that agencies could exercise substantial authority in regulating matters that typically were regarded as adjudicatory. After all, if courts, rather than the legislature, could exercise this authority, that eliminated objection to the delegation of similar power to an agency premised on the assertion that Congress, itself, had to make these determinations.[34]

That acceptance of agency authority that substituted for certain types of adjudication—especially adjudications respecting categories of activity that were assimilable to management of public resources, of public benefits, or of activities that had special status (both protections and obligations) as providing public services—did not, however, eliminate all objections to regulatory delegations, particularly not to exercises of authority that strayed from the judicial model. From relatively early in its existence, the ICC asserted authority to set rates for broad classes of shipments and circumstances.[35] Predictably, courts found this assertion of broad, forward-looking ratemaking authority problematic, invoking doctrines that limited the agency's authority to impose rates without judicial scrutiny.[36] Concerns about provoking similar restraints on regulatory actions may have prompted agencies such as the FTC and FDA to forswear broad legislative-type rules until much more recently.[37]

C. *The New Deal, Newer Deal, and the Modern-Day Regulatory Colossus*

Traditional resistance to broad delegations of authority for agencies to engage in legislative-like rulemaking—prospectively imposing restrictions on or requirements for private conduct—largely evaporated in the New Deal era. New delegations of authority were adopted for regulation of "securities markets (1934), wholesale electric power (1935), labor relations (1935), trucking (1935), airlines (1938), [and] natural gas (1938)."[38] These

---

21 U. CHI. L. REV. 355, 381–85 (1954). *See also* Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 74–75 (2019).

[33] *See, e.g.*, Chicago & Alton R.R. Co. v. Kirby, 225 U.S. 155, 162–166 (1912); Wight v. United States, 167 U.S. 512, 515–17 (1897). For other, early applications of similar approaches to supervision of administrative controls over common carriage regulation, see, for example, New Orleans G. N. R. Co. v. R.R. Comm'n of La., 53 So. 322, 323–24 (La. 1910).

[34] *See, e.g.*, Adam J. White, *Executive Orders as Lawful Limits on Agency Policymaking Discretion*, 93 NOTRE DAME L. REV. 1569, 1596 n.162 (2018).

[35] *See, e.g.*, Garvey, *supra* note 31, at 50.

[36] *See, e.g.*, *id.* at 56–58.

[37] *See, e.g.*, Nat'l Petroleum Refiners Ass'n. v. Fed. Trade Comm'n, 482 F.2d 672, 678–79 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

[38] RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN & JODY FREEMAN, ADMINISTRATIVE LAW: CASES AND MATERIALS 3–4 (8th ed. 2020).

delegations, along with some at the end of the Progressive Era, such as for regulation of the radio spectrum,[39] either were framed in sweeping terms that comprehended discretionary authority to control private conduct or were not articulated sufficiently clearly to preclude later interpretation as authorizing capacious exercises of administrative control.[40] Further delegations—what collectively might be termed the Newer Deal (springing from Lyndon Johnson's Great Society programs but moving well beyond them)—occurred in succeeding decades, focused largely on regulation of suspect forms of discrimination, environmental harm, risks to health and safety, or questionable dealings with consumers.[41]

Prior to the end of the Twentieth Century, the rulemaking authority that was included in these laws was seldom expressly framed in the governing statutes as a sweeping power to make legislative-like decisions. Instead, most—though certainly not all—rulemaking either concerned issues better characterized as procedural or managerial (instructing agency staff rather than binding others) and, so far as rules had direct effect on others, generally addressed factual determinations (such as identifying the prevailing wage in a given area) or technical questions (such as how to define different grades of grain).[42] Yet the legislation and judicial interpretations of the New Deal era did, at the very least, contain the seeds of a defanged nondelegation doctrine.

To be sure, even in the absence of a well-defined and consistently enforced nondelegation doctrine, there are both practical and legal constraints on the exercise of discretionary administrative actions that purport to impose binding legal controls on private conduct.[43] Still, an

---

[39] Radio Act of 1927, Pub. L. No. 69-632, §§ 1–41, 44 Stat. 1162.

[40] *See, e.g.*, HAMBURGER, *supra* note 4, at 11; Alexander & Prakash, *supra* note 4; Cass, *Delegation Reconsidered*, *supra* note 5, at 168–70; Ginsburg & Menashi, *supra* note 5, at 482; Lawson, *Delegation*, *supra* note 11, at 328–29; Lawson, *supra* note 4, at 1249; Rao, *supra* note 22, at 1473; Schoenbrod, *supra* note 11, at 273.

[41] *See, e.g.*, Richard N.L. Andrews, *Long–Range Planning in Environmental and Health Regulatory Agencies*, 20 ECOLOGY L.Q. 515, 522 (1993); Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 125 (2016). Notably, this was the era that saw the creation of the EEOC (1965), EPA (1970), and OSHA (1971),

[42] *See, e.g.*, ATTORNEY GENERAL'S COMMITTEE, *supra* note 28, at 98–102; *see also* HAMBURGER, *supra* note 4, at 109. Even if the degree to which rulemaking was used for broader regulatory purposes is contested, it is noteworthy that the people who reviewed the issue for those who would recommend and vote on the APA reached the conclusion that this was not the typical use of rulemaking prior to the APA. *See* ATTORNEY GENERAL'S COMMITTEE, *supra* note 28, at 98–102.

[43] *See, e.g.*, Dep't of Transp. v. Ass'n. of Am. R.R., 575 U.S. 43, 57–66 (2015) (Alito, J., concurring); *id.* at 66–91 (Thomas, J., concurring in the judgment); Whitman v. Am. Trucking Ass'ns., Inc., 531 U.S. 457, 472–76 (2001) (rejecting a nondelegation challenge but also constraining the agency's exercise of discretion through statutory interpretation); *id*. at 487 (Thomas, J., concurring); Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 131–56 (2000) (rejecting the agency's assertion of jurisdiction to regulate tobacco use as inconsistent with the meaning of the governing law); Alexander & Prakash, *Reports Exaggerated*, *supra* note 11, at 1328; Cass, *Delegation Reconsidered*, *supra* note 5, at 172, 195–96; Lawson, *Delegation*, *supra* note 11, at 375–77; John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 711–12 (1997); Cass R. Sunstein, *Nondelegation*

expansive range of discretionary administrative and regulatory powers has been approved as consistent with the law, to a very large extent exercised through agency rulemaking.[44] Moreover, the delegations from the Newer Deal regulatory wave that took hold starting in the late 1960s and 1970s—aimed at combatting discrimination, environmental harm, health and safety risks, and harm to consumers—frequently were couched in terms that invited agencies to complete the task of assessing what behavior was appropriate and writing rules to control private conduct.[45] Starting around 1970, agencies took those invitations seriously, very seriously.[46]

The result has been a proliferation of administratively generated rules that impose specific obligations or prohibitions on private conduct. While there are roughly two hundred to four hundred laws passed by Congress each year, the federal administrative agencies adopt something on the order of three thousand to five thousand final rules.[47] These rules, covering an

---

Canons, 67 U. CHI. L. REV. 315, 327 (2000); Ilan Wurman, *As–Applied Nondelegation*, 96 TEX. L. REV. 975, at 996–98, 1002–03 (2018).

[44] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2128–30 (2019) (plurality opinion) (approving broad discretionary administrative power respecting treatment of individuals released after prison terms for specific classes of crime, specifically to determine whether and how to apply restrictions to certain individuals); Whitman, 531 U.S. at 472–76 (2001) (affirming exercise of regulatory authority over environmental risks against nondelegation challenge); Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 540-41 (1981) (upholding expansive discretionary authority to regulate workplace health and safety risks); Yakus v. United States, 321 U.S. 414, 424–26 (1944) (approving congressional delegation of broad regulatory powers to an administrative agency to regulate prices); Nat'l Broad. Co., Inc. v. United States, 319 U.S. 190, 224 (1943) (upholding the constitutionality of expansive administrative regulations of commerce despite the vagueness of the delegation of authority and the absence of clear textual authorization for the powers asserted by the agency).

[45] *See, e.g.*, DeMuth, *supra* note 41, at 125.

[46] *See, e.g.*, CLYDE WAYNE CREWS, JR., TEN THOUSAND COMMANDMENTS, 2020: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 1–6 (2020), https://cei.org/sites/default/files/10KC2019.pdf; DeMuth, *supra* note 41, at 125-127; Christopher DeMuth, Sr., *Our Voracious Executive Branch: On the Nature and Causes of Executive Government*, WEEKLY STANDARD, Jun. 27, 2016, at 18–21, https://ccdemuth.com/wp-content/uploads/2016/07/Our-Voracious-Executive-Branch.pdf.

[47] For information respecting federal rulemaking, see, for example, MAEVE P. CAREY, CONG. RSCH. SERV., R43056, *COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF RULEMAKING, AND PAGES IN THE FEDERAL REGISTER*, 7, 19–20, 22–23 (2019). The annual number of rules promulgated has been in the three to five thousand range since the mid-1980s. The pages devoted to rulemakings in the Federal Register account for something on the order of forty to fifty percent of Federal Register pages. *See id.*, at 19–20 (although in some years the percentage is as low as twenty-five percent). And the number of Federal Register pages has grown on a relatively steady trajectory from under three thousand pages in 1936 and an average of less than four thousand pages per year from 1936 to 1940 (the year before the Attorney General's Committee Report (see ATTORNEY GENERAL'S COMMITTEE, *supra* note 28) to over thirteen thousand per year for 1941 to 1946 (the years leading up to adoption of the APA) and more than eighty-three thousand per year for 2012 to 2016. *See* CAREY, *supra*, at 26–28. For information respecting federal legislation, see, for example, Susan Davis, *This Congress Could be Least Productive Since 1947*, USA TODAY (Aug. 14, 2012), http://usatoday30.usatoday.com/news/washington/story/2012-08-14/unproductive-congress-not-passing-bills/57060096/1; Michael Teitelbaum, *Congress Saw More Bills Introduced in 2019, But Few Passed*, ROLL CALL (Jan. 22, 2020), https://www.rollcall.com/2020/01/22/congress-saw-more-bills-introduced-in-2019-than-it-has-in-40-years-but-few-passed/; Matt Viser, *This Congress Going Down as Least Productive*, BOSTON GLOBE (Dec. 4, 2013), http://www.bostonglobe.com/news/politics/2013/12/04/congress-course-make-history-

astounding range of different regulations, restrictions, and commands, occupy more than one hundred eighty thousand pages in the Code of Federal Regulations.[48] Their impact on the American economy is variously estimated as benefitting or costing the economy trillions of dollars per year.[49] Whatever the best calculation of rules' effects, it is obvious that rulemaking today has major consequences for the citizenry, the economy, and the nation—which is why the functioning of the rulemaking process has become a matter of far greater importance now than it was at the birth of the APA.

II. Rulemaking Process: The APA and Beyond

The procedural requirements for rulemaking contained in the APA, and the limitations on the set of rules to which they apply, reflect reactions to the sort of rules adopted over the generation leading up to the APA and the rulemaking authority in place at the time. Mandating notice-and-comment procedures for most significant rulemaking appeared significant primarily as a means for preventing application of substantive regulations to unwary individuals and entities. Yet its modest constraint on rulemaking more importantly facilitated the dramatic expansion of rulemaking, in turn fueling demands for further constraints.

A. *Rulemaking New Process*

Professor George Shepherd characterized the events that shaped drafting and adoption of the APA as "a pitched political battle for the life of the New Deal."[50] That battle focused mainly on the terms of judicial review, which for New Deal opponents presented the best hope for stemming the growing tide of government control over private enterprise.[51] Rulemaking was not a major concern of the American Bar Association committees that were working on proposed legislation to regulate administrative procedure or for the Attorney General's Committee that was set up to study administrative

---

least-productive/kGAVEBskUeqCB0htOUG9GI/story.html; Shawn Zeller, *Divided Government Will Pose an Obstacle to Lawmaking in 2019, But Few Passed*, ROLL CALL (Jan. 3, 2019), https://www.rollcall.com/2019/01/03/divided-government-will-pose-an-obstacle-to-lawmaking-in-2019/.

[48] *See, e.g.*, George Washington Regulatory Studies Center, *Reg Stats: Total Pages in the Code of Federal Regulations and the Federal Register* (July 9, 2020), https://regulatorystudies.columbian.gwu.edu/reg-stats. For a review of the evolution and current state of federal regulation, see generally CREWS, *supra* note 46.

[49] *See* Robert W. Hahn & John A. Hird, *The Costs and Benefits of Regulation: Review and Synthesis*, 8 YALE J. REG. 233, 244–45 (1990); Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost–Benefit Analysis*, 103 VA. L. REV. 1809, 1819–22 (2017); Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 950–54 (1999). *See generally* CREWS, *supra* note 46, at 30–33 (2020); CASS R. SUNSTEIN, VALUING LIFE: HUMANIZING THE REGULATORY STATE (2014).

[50] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996).

[51] *See, e.g.*, McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 181, 199–206 (1999); Shepherd, *supra* note 50, at 1560–61, 1569–73, 1583–1623, 1655–68.

procedure and to come up with recommendations for improvement, including potential legislation.[52]

Even so, the requirement of notice and comment for rulemaking that emerged from the process has been heralded as "the APA's most important reform"[53] and the APA's "most important idea."[54] In its original iteration, the idea was that every rulemaking required advance notice to the public and a public hearing to permit introduction of evidence relevant to the topic and argument about the proposed rule.[55] That was the idea incorporated in the Walter-Logan Act, the precursor of the APA that was vetoed by President Franklin Roosevelt as interfering too much with administrative discretion.[56]

In the form adopted in the APA, the idea became less restrictive in several important ways. First, the requirement of an actual hearing that resembled adjudicative production and evaluation of evidence was limited to "formal rule making," a category that has been confined to instances in which laws expressly require rulemaking to be done "on the record" after opportunity for a hearing.[57] Second, the ambit of the rules subject to notice-and-comment requirements was limited: the provision adopted and codified as 5 U.S.C. § 553 (notice-and-comment rulemaking) only applied to rules that are not "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice"[58] and does not apply to rules or portions of rules that involve "a military or foreign affairs function of the United States or a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."[59] Third, even for the category of rules for which § 553's notice-and-comment requirements apply, agencies are, by the terms of that section, subject to relatively thin obligations. These are: (1) to provide notice of the "time, place, and nature of public rule making proceedings;"[60] (2) to include a "reference to the legal authority" for the contemplated rule;[61] (3) to state "either the terms or substance of the proposed rule or a description of the subjects and issues involved;"[62] (4) to provide for public participation "through the submission of written data, views, or arguments with or without opportunity for oral presentation;"[63] and (5) to "incorporate in the rules adopted a concise general

---

[52] *See, e.g.*, Shepherd, *supra* note 50, at 1573, 1575, 1583, 1610, 1634, 1644.

[53] *Id.* at 1583.

[54] Kenneth Culp Davis & Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 507, 520 (1986). (cited in Shepherd, *supra* note 50, at 1651).

[55] *See* Shepherd, *supra* note 50, at 1650.

[56] *See* 86 Cong. Rec. H13942-43 (daily ed. December 18, 1940) (reading of Walter-Logan Bill–Veto Message from President Franklin Delano Roosevelt).

[57] 5 U.S.C. §§ 553(c), 556, 557.

[58] 5 U.S.C. § 553(b)(3)(A).

[59] 5 U.S.C. §§ 553(a)(1)–(2).

[60] 5 U.S.C. § 553(b)(1).

[61] 5 U.S.C. § 553(b)(2).

[62] 5 U.S.C. § 553(b)(3).

[63] 5 U.S.C. § 553(c).

statement of their basis and purpose."[64] Fourth and finally, just to give one last dollop of discretion to the agencies, even these requirements—modest almost to the point of being merely precatory—could be elided if the agency decided that the use of notice-and-comment procedures in the particular instance was "impracticable, unnecessary, or contrary to the public interest."[65]

With so little bite to the APA's rulemaking requirements, why would commentators laud them as an important reform? What made the notice-and-comment process adopted in the APA noteworthy was not the stringency of the procedural requirements in the law but the mere fact that the law imposed *some* process requirements on agencies for adopting rules. The reason for stressing notice-and-comment rulemaking as an important *idea* is that the notice-and-comment requirement reinforced the notion of administration as subject to process constraints redolent of those embedded in the concept of due process. That is, it embraces the principle that those who are affected by government actions have legitimate claims to ensure those actions are taken only through processes commensurate with the level of imposition on specified individuals, the directness of the imposition, and the nature of the reasons behind the imposition.[66]

B. *Notice-and-Comment Rulemaking Gets Noticed—Eventually*

The new procedural requirements did not have much impact on the pace at which agencies adopted rules. Although precise numbers are not available, the number of rules adopted appears to have risen sharply in the 1930s, declined at the end of World War II, and then remained relatively stable over the next twenty years.[67] The evidence is consistent with a conclusion that the APA's adoption neither sparked an increase in rulemaking nor caused a decline. Some agencies used rulemaking as a primary tool for policy formation.[68] Others did not, most likely because the agency officials did not

---

[64] *Id*.

[65] 5 U.S.C. § 553(b)(3)(B) (2018).

[66] *See, e.g.*, Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 438-39 (2009); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 972 (2007).

[67] *See* CAREY, *supra* note 47, at 19, 26. Early years' figures are based primarily on pages in the Federal Register. This is an imperfect proxy for rulemaking activity but remains the best available method for assessing the relative magnitude of that activity. *See id.* at 17–18. While there were peaks and valleys in Federal Register pages, the annual numbers in 1944–1946, 1951, and 1960–63 were all in the same range, with most of the intervening years falling close to the total for 1942. *See id.* at 26. The figure recorded in the peak year of 1943 was not reached again until 1964 and was approximately equaled again in 1965 and 1966. *See id*.

[68] *See, e.g.*, Fed. Power Comm'n v. Texaco, Inc., 377 U.S. 33, 39 (1964) (affirming the Federal Power Commission's ability to use rulemaking to regulate permissible pricing provisions in natural gas producers' contracts); United States v. Storer Broad. Co., 351 U.S. 192, 202 (1956) (rejecting a challenge to the FCC's use of rulemaking to regulate concentration of ownership for broadcasting stations); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225 (1943) (rejecting a challenge to the FCC rules on "chain broadcasting" (network contracts with affiliated local stations)); Glen O. Robinson, *The Making of*

think that they were authorized to use rulemaking to regulate private conduct without more certain, direct authorization.[69]

The 1960s, however, saw a blossoming of academic commentary touting, or at least acknowledging in some degree, the benefits of legislative-like rulemaking by agencies.[70] Contemporaneous with and following these writings—no doubt propelled, as well, by changes in administration and, for some agencies, in their governing laws—in the mid-to-late 1960s and 1970s, agencies increasingly turned to rulemaking to make policies on a wide array of issues.[71] While some new agencies with more readily established authority to use rulemaking for purposes other than internal management and housekeeping embraced this form of policymaking, a few older agencies, such as the FTC, which had previously abjured using rulemaking for substantive regulatory purposes, also decided to use rulemaking to announce prospective policy determinations.[72] Like the FTC, the Food and Drug Administration belatedly discovered long-denied authority for it to use rulemaking to adopt broad, legislative-type regulations.[73] And the Civil Aeronautics Board deployed rulemaking as a means of not only prescribing policy for the future but also modifying licenses it had previously granted.[74]

The courts' acceptance of expanded use of rulemaking to lay down policies binding on others doubtless encouraged wider employment of this process. From the mid-1960s to 1980, the annual number of Federal Register pages grew dramatically: from roughly seventeen thousand in 1965 to seventy-seven thousand in 1979 and eighty-seven thousand in 1980, a more than five-fold increase in that fifteen-year span.[75] As a proxy for rulemaking, these figures suggest an extraordinary explosion of regulatory activity. A similar story emerges if one looks at the number of pages in the Code of

---

Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform, 118 U. PA. L. REV. 485, 486–89 (1970) .

[69] *See, e.g.*, Merrill & Watts, *supra* note 17, at 512.

[70] *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 65–66 (1969); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 49 (1965); JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 18 (1960); Carl McFarland, *Landis' Report: The Voice of One Crying in the Wilderness*, 47 VA. L. REV. 373, 434–36 (1961); Merrill & Watts, *supra* note 17, at 546–48 (reviewing developments in the literature); Robinson, *supra* note 68, at 513–528 (explaining different advantages of rulemaking and adjudication—as well as their limits—and discussing the expanded opportunity for using rulemaking in light of judicial decisions).

[71] *Cf.* CASS, ET AL., *supra* note 38, at 423–66 (presenting materials respecting the degree to which agencies are able to choose between adjudication and rulemaking in the announcement of policies applicable to past and future actions); Robinson, *supra* note 68, at 513–28 (discussing the relative advantages, and also the similarities, of rulemaking and adjudication).

[72] *See, e.g.*, Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n, 482 F.2d 672, 678–79 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); Merrill & Watts, *supra* note 17, at 472, 492–93, 552–57.

[73] *See, e.g.*, Nat'l Ass'n of Pharm. Mfrs. v. Food & Drug Admin., 637 F.2d 877, 888–89 (2d Cir. 1981); Nat'l Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 695–97 (2d Cir. 1975); Merrill & Watts, *supra* note 17, at 557–65.

[74] *See, e.g.*, Am. Airlines, Inc. v. Civ. Aeronautics Bd., 359 F.2d 624, 628–29 (D.C. Cir. 1965) (en banc), *cert. denied*, 385 U.S. 843 (1966); Robinson, *supra* note 68, at 496–500. The D.C. Circuit upheld the CAB's decision, but only after an *en banc* decision reversed an earlier panel determination. *Id.* at 497.

[75] *See* CAREY, *supra* note 47, at 26–27.

Federal Regulations, which more than quadrupled from 1960 to 1980, from fewer than twenty-three thousand pages to more than one hundred two thousand.[76] The numbers may to some degree reflect a shift from adjudication to rulemaking as a mechanism for announcing agency policy decisions,[77] but they almost certainly also represent a marked expansion in the amount of regulatory activity among federal agencies.

C. *Re-Modeling Process: Procedural Pile-On (and Off)*

Whatever explains the striking growth in rulemaking between 1965 and 1980, that growth certainly is testament to the relatively minor process constraints imposed on it by the APA. As noted above, the APA's notice-and-comment process in its original formulation (unchanged in the *text* of the law today) required only a spare form of notification as to the subject of a contemplated rule, virtually any form of opportunity for public input, and a bare-bones explanation of why the ultimately adopted rule was chosen.[78] Nothing in the APA as written required specific steps to assure that comments were received from an extensive group of interested parties, that they were carefully considered by the agency, or that the agency addressed major comments in laying out the reasons behind the final rule. The law did not go as far as the majority of the Attorney General's Committee would have in providing freedom for agencies to decide rulemaking procedures on their own,[79] but the APA's notice-and-comment mandate did not tightly constrict rulemaking processes.

As the scope and number of rules increased and the expectation that courts would seriously constrain congressional delegations of rulemaking authority declined, however, courts were urged to find that the notice-and-comment provisions were more confining—and in significant measure, the courts did impose more, and more onerous, obligations on agencies—than a "plain language" reading of the law's text would indicate.[80] In this vein, courts have required agencies to hold hearings or employ specific methods for testing evidence to develop better records for judicial review,[81] to more fully articulate the details of proposed rules or to reissue notices of proposed

---

[76] *See* CREWS, *supra* note 48, at 48, 97.

[77] *See, e.g.*, CASS, ET AL., *supra* note 38, at 429–66; Merrill & Watts, *supra* note 17, at 526; Richard J. Pierce, Jr., *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 HASTINGS L.J. 1, 47–48 (1979); Robinson, *supra* note 68, at 505.

[78] *See supra* text accompanying notes 57–65.

[79] *See, e.g.*, ATTORNEY GENERAL'S COMMITTEE, *supra* note 28, at 104–05, 107–08, 110; Shepherd, *supra* note 50, at 1559.

[80] *See, e.g.*, Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 5–8 (2011).

[81] *See, e.g.*, Mobil Oil Corp. v. Fed. Power Comm'n, 483 F.2d 1238, 1259, 1264 (D.C. Cir. 1973); Int'l Harvester Corp. v. Ruckelshaus, 478 F.2d 615, 649 (D.C. Cir. 1973); Appalachian Power Co. v. EPA, 477 F.2d 495, 507 (4th Cir. 1973); Stephen F. Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 402, 417-18, 444-45 (1975) (explaining the impetus for and impact of such procedural add-ons, which "created a procedural category that might be termed 'hybrid rulemaking' or 'notice-and-comment-plus.'").

rulemaking to more fully account for the content of final rules,[82] to more clearly explain the reasons for rejecting particular arguments,[83] and to more fully and persuasively explain the reasons behind choosing one regulatory option over another.[84]

For its part, the Supreme Court largely rejected these additions to the rulemaking procedures set out in the APA. Its *Allegheny-Ludlum* and *Florida East Coast Railway* decisions in the early 1970s rejected assertions that the words "after hearing" required full trial-type proceedings.[85] Its *Vermont Yankee* decision famously chastised lower courts for freelancing additional process requirements:

> The court below uncritically assumed that additional procedures will automatically result in a more adequate record because it will give interested parties more of an opportunity to participate in and contribute to the proceedings. But . . . the adequacy of the "record" in this type of proceeding is not correlated directly to the type of procedural devices employed, but rather turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes. . . . [U]nwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress.[86]

Despite *Vermont Yankee*'s stance against adding procedural requirements to what the APA and other governing statutes command, it hardly foreclosed courts getting to essentially the same place through the back door. In fact, the Court plainly left open a path for judges deciding that a rulemaking needed better reasoning or fuller explanation of the agency's position, saying, "[t]here remains, of course, the question of whether the challenged rule finds sufficient justification in the administrative proceedings that it should be upheld by the reviewing court."[87]

Unsurprisingly, this characterization of the courts' role proved a runway for reintroducing effective changes in the requisites of rulemaking—not through mandating specific procedures directly, but through rejecting rules that rested on less complete explanations or less full engagement with comments. Judicial review can be minimal or searching. In the extreme, searching review can demand explanations so carefully aimed at sealing off each potential avenue of challenge that the agency would need a comprehensive recapitulation of issues, evidence, and analysis to insulate

---

[82] *See, e.g.*, Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1103-04, 1107 (4th Cir. 1985); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 386 (D.C. Cir. 1973).

[83] *See, e.g.*, United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 253 (2d Cir. 1977).

[84] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46–57 (1983); Indus. Union Dep't., AFL-CIO v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974).

[85] United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 238–41 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 756-58 (1972).

[86] Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 547–48 (1978).

[87] *Id*. at 549.

itself against judicial reversal.[88] Looking at the way judicial review evolved in the decade following *Vermont Yankee*, Professor Richard Pierce opined that this is exactly what occurred: the courts effectively "replaced the statutory adjectives 'concise' and 'general' with the judicial adjectives 'encyclopedic' and 'detailed.'"[89] Some judges more recently have taken pains to underscore the limited role of judicial review and the narrow requirements of APA § 553 for rulemaking.[90] But these cautions do not represent the state of judicial review across the board. Judges still intrude aggressively into discretionary administrative decisions, at least on a selective basis, often citing defects in reasoning or inadequate explanation of choices made in light of evidence in the administrative record.[91] More on that anon.

D. *Legislative and Executive Add-Ons*

As rulemaking became a more important mechanism for announcing agency policies designed to govern private conduct, judges were not the only officials who tried to control the rulemaking process. Both the executive and legislative branches have endeavored to influence the process through additional demands on what agency rule-makers must consider and through review of the rulemaking results.

One source of constraint on the rulemaking process comes from laws targeting particular concerns respecting regulation.[92] These include: the National Environmental Policy Act, requiring agencies to minimize certain adverse effects on the environment, to consult with relevant officials about potential environmental effects, and to study and prepare environmental impact statements when it anticipates significant effects on the environment as a result of a proposed rule or other action;[93] the Paperwork Reduction Act, mandating limitation of, explanation for, and agency coordination respecting

---

[88] *See* Robert L. Glicksman, *A Retreat from Judicial Activism: The Seventh Circuit and the Environment*, 63 CHI.-KENT L. REV. 209, 223 (1987); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61 (1985).

[89] Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Parity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 309 (1988).

[90] *See, e.g.*, Nat'l Mining Ass'n v. Mine Safety & Health Admin., 512 F.3d 696, 700 (D.C. Cir. 2008); Schiller v. Tower Semiconductor Ltd., 449 F.3d 286, 297–98 (2d Cir. 2006); City of Waukesha v. EPA, 320 F.3d 228, 258 (D.C. Cir. 2003); CASS ET AL., *supra* note 38, at 493–94 (cases cited).

[91] *See, e.g.*, New York v. U.S. Dept. of Commerce, 351 F.Supp.3d 502, 647–60 (S.D.N.Y. 2019); NAACP v. Trump, 298 F.Supp.3d 209, 238-43 (D.D.C. 2018). *See also* Cass, *Motive*, *supra* note 5, at 409–12, 425–27 (criticizing unreasonable judicial intervention in the name of promoting reasoned analysis, and recognizing advantages of more cabined judicial tests); Pierce, *supra* note 7, at 67–69 (same).

[92] For excellent overviews of the legal requirements for federal rulemaking see generally MAEVE P. CAREY, CONG. RSCH. SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW (2013); Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO N.U. L. REV. 469, 473–78 (2003); Curtis W. Copeland, *Regulatory Analysis Requirements: A Review and Recommendations for Reform* 13-32 (March 13, 2012) (report to the Administrative Conference of the United States), https://www.acus.gov/sites/default/files/documents/COR-Copeland-Report-CIRCULATED.pdf.

[93] *See* 42 U.S.C. §§ 4331–4332.

requirements for collection of information;[94] the Regulatory Flexibility Act, restricting interference with small businesses, small governmental units, and small non-profit entities and mandating analysis of alternatives that reduce interference with small entities;[95] the Unfunded Mandates Reform Act, instructing executive branch and some independent agencies to look at the expenditures required, the costs and benefits of the contemplated rule, and alternatives that might reduce expenditures;[96] and numerous other laws that direct agencies using rulemaking to account for particular considerations in tailoring rules, to engage in certain specific types of outreach or inter-agency consultation, or to avoid given outcomes.[97]

Another constraint comes from Executive Orders regularizing review of rulemaking by officials in the Executive Office of the President and setting forth considerations that should be part of the rulemaking process. The process at the heart of this review is administered by the Office of Information and Regulatory Affairs (OIRA), a part of the Office of Management and the Budget.[98] OIRA is charged with reviewing economically significant rules or "major rules"—those with an economic impact of $100 million or more—to assure that the adopting agency has performed a serious benefit-cost analysis.[99] Commentators have debated the specific considerations that are comprehended in particular benefit-cost analyses, as well as whether benefit-cost analysis inherently predisposes evaluators to make assessments more or less favorable to regulation.[100]

The most important aspect of executive-driven review, however, is its perspective rather than its particulars. The substantive laws administered by single-focus agencies generally represent preferences of especially interested groups, preferences that also tend to be reflected in those agencies' actions.[101] Many of the laws that add requirements to agency rulemaking similarly

---

[94] *See* 44 U.S.C. §§ 3501–3506

[95] *See* 5 U.S.C. §§ 601–604.

[96] *See* 2 U.S.C. §§ 1511, 1532, 1535.

[97] *See, e.g.*, CAREY, *supra* note 92, at 13–25; CASS ET AL., *supra* note 38, at 5–6.

[98] For an overview of the creation, operation, and issues respecting OIRA review, see generally *OIRA Thirtieth Anniversary Conference*, 63 ADMIN. L. REV. 1, (2011).

[99] This has been true under the Executive Orders issued from President Ronald Reagan on. *E.g*, Exec. Order No. 12,291, 3 C.F.R. 127 (1981) (President Ronald W. Reagan); *see* Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (January 21, 2011) (President Barack Obama); Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738, 51,740-41 (October 4, 1993) (President William J. Clinton).

[100] *See, e.g.*, DeMuth & Ginsburg, *supra* note 9, at 1081–85; Robert W. Hahn & Patrick M. Dudley, *How Well Does the U.S. Government Do Benefit-Cost Analysis?*, 1 REV. ENV'T. ECON. & POL'Y 192, 199–203 (2007); Hahn & Sunstein, *supra* note 9, at 1524–29; Posner & Sunstein, *supra* note 49, at 1811–12; Revesz, *supra* note 49, at 947–48.

[101] *See, e.g.*, Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQUETTE L. REV. 449, 471–79 (1988); Susan E. Dudley, *Observations on OIRA's Thirtieth Anniversary*, 63 ADMIN. L. REV. 113, 115 (2011); Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1334–35, 1341–45 (1994); Ginsburg & Menashi, *supra* note 5, at 481-84; Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 192, 212–13 (1978); Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary Administrate State*, 96 MICH. L. REV. 1746, 1755–72 (1998).

respond to the preferences of groups especially interested in one set of issues or values.[102] Requiring attention to these issues or values could duplicate or counteract biases already present in particular rulemakings. The goal for OIRA review—as with antecedent forms of presidential review— is to place more global concerns (those consistent with broader national welfare) over the focus of any given agency or bureau.[103] Even if these efforts are subject to criticism as merely representing different administrations' peculiar, partisan visions of public interest,[104] the goal of imposing a broader vision, more responsive to the views of an officer accountable to the nation as a whole, should be credited.[105]

Similarly, while congressional add-ons can be criticized as promoting parochial (and personal) interests, the Congressional Review Act (CRA)[106] can be seen as providing Congress an analogue to OIRA review. The CRA requires agencies to submit major rules to Congress, along with accompanying benefit-cost analyses, prior to the rules going into effect. Following a report to Congress from the Comptroller General, the House and Senate have a limited time to pass a joint resolution of disapproval of a rule.[107] If the President does not veto the resolution, the agency rule does not go into effect, or if it went into effect under one of the exceptions for tolling

---

[102] *See, e.g.*, Pierce, *supra* note 7, at 64-65; Allan F. Wichelman, *Administrative Agency Interpretation of the National Environmental Policy Act of 1969: A Conceptual Framework for Explaining Differential Response*, 16 NAT. RESOURCES J. 263, 271–74 (1976).

[103] *See, e.g.*, DeMuth, *supra* note 9, at 20–21; DeMuth & Ginsburg, *supra* note 9, at 1080-82; Dudley, *supra* note 101, at 114–16; Wendy L. Gramm, *Regulatory Review Issues, October 1985–Feburary 1988*, 63 ADMIN. L. REV. 27, 33 (2011); Stuart Shapiro, *OIRA Inside and Out*, 63 ADMIN. L. REV. 135, 144–146 (2011); Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 66 (2011).

[104] *See, e.g.*, RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 151–56 (2008) (criticizing OIRA, while generally defending the use of cost-benefit analysis as a tool for better, more public-interested regulatory decisions); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1062–63 (1986).

[105] *See, e.g.*, DeMuth, *supra* note 9, at 15–18, 20–21; Dudley, *supra* note 101, at 116–21; Gramm, *supra* note 103, at 33–36; Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 109–12 (2011); James C. Miller III, *The Early Days of Reagan Regulatory Relief and Suggestions for OIRA's Future*, 63 ADMIN. L. REV. 93, 95–96 (2011); Tozzi, *supra* note 103, at 63–66; *see also* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 11 (1993); Steven P. Croley, *Public-Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 49–51 (2000); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 34–35, 66–68 (1991); Jonathan R. Macey, *Promoting Public–Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 223-27 (1986). Of course, this does not require belief that there is a single, objective, overarching metric by which public welfare may be judged or that public officials, including the President, uniformly are incentivized to pursue the advancement of public welfare. It only requires that officers see their mandate in those terms and that responsiveness to presidential concerns as an overlay on rulemaking by agencies moves decisions closer to whatever metric one chooses to measure advancement of broader public considerations. *See, e.g.*, Elizabeth Garrett, *Interest Groups and Public Interested Regulation*, 28 FLA. ST. U.L. REV. 137, 142–45 (2000).

[106] 5 U.S.C. §§ 801–808.

[107] *See* 5 U.S.C. §§801–802.

effectiveness, the rule is repealed.[108] Congress does have a limited set of considerations that effectively constrain its decisions under CRA, but the process does at least give some prospect of bringing a broader set of considerations to bear. As with all legislation, it subjects a significant public policy decision to the processes constitutionally prescribed: decision by both Houses of Congress and presentment to the President—requirements that provide better prospects than agency rulemaking for assuring that the ultimate decision conforms to current majorities' preferences for law.

E. *Ossification and Response*

As each level of government adds its own requirements for rulemaking to the basic set adopted in the APA, rulemaking gets more costly, more difficult, and more uncertain. This development led to academic writing about the "ossification" of rulemaking, observing that the cumulation of added burdens clogged the arteries of the rulemaking process.[109] Despite argument about whether ossification exists, the numbers show an almost monotonic decline in rule adoptions since 1980. In the five-year period 1976 to 1980, federal agencies adopted an average of roughly 7,360 final rules per year.[110] In the next five years, that figure dropped to below 5,770.[111] For the five-year period following that, rules per year dropped below 4,600.[112] This trend continued through the next thirty years, with agencies logging an average of only 3,375 during the most recent five-year period.[113] That is less than half the average of the late 1970s. Different political inclinations may explain some of the change, but it is hard to credit that explanation alone for a trend covering four decades.

While the increasing burdens put on rulemaking logically would—and evidently did—decrease the amount of rulemaking in the federal government, the incentives that led to increasing regulatory burdens over the better part of a century did not disappear overnight.[114] In fact, observations about the demand for regulation should mean that incentives to seek additional regulations would have been rising, not declining, throughout the period that rulemaking has been decreasing. Opportunities to shift costs and benefits in ways that are economically advantageous to well-positioned

---

[108] *See* 5 U.S.C. §801.

[109] *See, e.g.*, Beermann & Lawson, *supra* note 8, at 892–900; Lubbers, *supra* note 92, at 473–78; McGarity, *supra* note 7, at 1387–89; Pierce, *supra* note 7, at 62–66; Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1495 (2012); Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emissions Standards*, 63 ADMIN. L. REV. 99, 144 (2011). *But see* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1421 (2012).

[110] *See* CREWS, *supra* note 48, at 96.

[111] *See id.*

[112] *See id.* (figures for 1986–1990).

[113] *See id.* (figures for 2015–2019).

[114] *See* Cass, *supra* note 101, at 472.

groups and ideological commitments to government taking over roles formerly understood to be the realm of other decision-making and support loci—personal choice, families, or religious, ethnic, and fraternal organizations—generally rise with increased population, greater wealth, expanded leisure, and expanded competition for business.[115] For all those reasons, federal regulatory activity, even if dipping on occasion (as occurred to some degree during the Reagan and Trump presidencies), generally has risen almost constantly for more than one hundred years.[116]

The solution to the apparent paradox of decreased rulemaking and increased incentives for regulation is that regulatory activity has not disappeared but instead has merely changed form. Over the past several decades, regulation has been occurring less through formal rules and more through guidance documents (such as policy statements, interpretive rules, or instructions in manuals), enforcement decisions, and other instruments that do not bear the same burdens as notice-and-comment rulemaking. Scholarly commentaries have observed this shift, and entities committed to increasing the fit between law and administrative functioning have addressed this change as well.[117] For example, the Administrative Conference of the United States (ACUS) has adopted six recommendations in the past seven years respecting the way agencies should handle guidance not adopted through notice-and-comment rulemaking.[118] The number of times ACUS has taken up this subject suggests the wide scope of options for using processes other than notice-and-comment rulemaking to achieve similar regulatory

---

[115] For complementary explanations of the sources and operation demand for regulation, see, for example, TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 266 (James M. Buchanan, Robert D. Tollison & Gordon Tullock, eds., 1980); Cass, *supra* note 101, at 471–80; DeMuth, *supra* note 41, at 157–59; George J. Stigler, *Economic Competition and Political Competition*, 13 PUB. CHOICE 91. 98–100 (1972); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON & MGMT. SCI. 3, 3 (1971); Bruce Yandle, *On Bootleggers and Baptists—The Education of a Regulatory Economist*, REGULATION: AEI J. ON GOV. & SOC., May–Jun. 1983, at 12, 13–16.

[116] *See, e.g.*, CREWS, *supra* note 48, at 45–47; DeMuth, *supra* note 41, at 176–77.

[117] *See, e.g.*, U.S. GOVT. ACCOUNTABILITY OFF., GAO–15–368, REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES (2015); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1321–27 (1992); Emily S. Bremer, *The Agency Declaratory Judgment*, 78 OHIO ST. L.J. 1169, 1171–72 (2017); Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. REG. 165, 169, (2019); Cary Coliagnese & Conor Raso, *Making Guidance Available to the Public*, REG. REV. (Oct. 28, 2019), https://www.theregreview.org/2019/10/28/coglianese-raso-making-guidance-available-public/; Blake Emerson & Ronald M. Levin, *Interpretive Rules in Practice*, REG. REV. (Oct. 30, 2019), https://www.theregreview.org/2019/10/30/emerson-levin-interpretive-rules-practice/; sources cited *infra* note 118.

[118] *See* ADMIN. CONF. OF THE U.S., RECOMMENDATION 2019-3, PUBLIC AVAILABILITY OF AGENCY GUIDANCE DOCUMENTS (2019); ADMIN. CONF. OF THE U.S., RECOMMENDATION 2019-1, AGENCY GUIDANCE THROUGH INTERPRETIVE RULES (2019); ADMIN. CONF. OF THE U.S., RECOMMENDATION 2018-5, PUBLIC AVAILABILITY OF ADJUDICATION RULES (2018); ADMIN. CONF. OF THE U.S., RECOMMENDATION 2017-5, AGENCY GUIDANCE THROUGH POLICY STATEMENTS (2017); ADMIN. CONF. OF THE U.S., RECOMMENDATION 2015-3, DECLARATORY ORDERS (2015); ADMIN. CONF. OF U.S., RECOMMENDATION 2014-3, GUIDANCE IN THE RULEMAKING PROCESS (2014).

outcomes—and the difficulty of controlling administrative impulses to use them.[119]

III. Constitutional Rules and Administrative Process from the APA to Today

Understanding what procedures are best requires understanding what administrative rulemaking can and cannot do. Scholars have praised notice-and-comment rulemaking and decried departures from it largely on the ground that, even in bare-bones form, those procedures help maintain democratic legitimacy of regulation, as well as enhancing the mechanics of regulation (the ability of rules to accomplish their assigned regulatory tasks).[120] Certainly, procedures such as notice-and-comment can improve administrative decision-making and even increase its congruence with notions like democratic legitimacy.

However, there are limits to what can be done to advance democratic legitimacy that are not usually acknowledged in discussions of rulemaking procedures. The analogy of rulemaking to lawmaking is helpful in seeing why some procedural requirements are less sensibly applied to administrative rulemaking than to administrative adjudications, but at its core, the analogy gets wrong what agencies do. That lesson was understood by those who wrote the APA. The problem at the heart of demands for constraints on agency rulemaking is the need for law to set properly the parameters of what an agency is permitted to decide. If Congress and courts fail to contain delegations of authority appropriately, rulemaking procedures become more critical as means of mitigating—but not eliminating—the damage. In short, procedures cannot fully substitute for control over the parameters of delegated authority.

---

[119] Similar observations have been made apart from the ACUS agenda. *See, e.g.*, Anthony, *supra* note 117, at 1321–27; Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 524–30 (1977); DeMuth, *supra* note 41, at 146; Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 239–40; Conor N. Raso, Note: *Strategic or Sincere: Analyzing Agency Use of Guidance Documents*, 118 YALE L.J. 782, 785–87 (2010). For an argument that agency structure, especially its insulation from congressional control, influences the degree to which decisions are made by guidance documents rather than notice-and-comment rulemaking, see Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance*, 36 YALE J. REG. 273, 274–76 (2019).

[120] *See, e.g.*, JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 163–78 (2018) (relating rulemaking, participation, reason-giving, and legitimacy); Cynthia R. Farina, Mary J. Newhart, Claire Cardie & Dan Cosley, *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 402 (2011); Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343–52 (2011); Susan Rose–Ackerman, *Executive Rulemaking and Democratic Legitimacy: "Reform" in the United States and the United Kingdom's Route to Brexit*, 94 CHI.-KENT L. REV. 267, 269–70 (2019) (praising "the blend of public participation and technocratic expertise that underlies American rulemaking" and has provided "democratic legitimacy" lacking in many other processes, but also criticizing the system for failing to live up to its potential for efficient administration); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992); *see also* Mariano–Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 425 (2005).

A. *Agencies' Place in Our Constitutional Construct*[121]

The American Constitution sets the framework for understanding what agencies can, and cannot, do. Those who wrote and ratified the Constitution sought to make a national government that could act as needed to protect national interests and protect the nation against threats beyond the ability of states effectively to address—but to do this without empowering national officeholders to exercise the sort of unchecked discretionary authority that colonial Americans had objected to under British rule.[122] The Constitution assigned tasks peculiarly suited to national governance to the national government, retained other powers in the states, divided national authority among various government entities and offices, and asserted the continued primacy of individual (natural) rights against government at all levels.[123]

The most noted and most significant aspects of the constitutional framework were the division of the three large powers of government among the three branches and self-conscious creation of mechanisms for each branch to check the others. As every civics student knows—even though many brilliant scholars, politicians, and judges seem to have forgotten—under this tripartite construct, Congress makes laws (and makes the critical policy choices necessary for governance),[124] the president and those who work for him implement the laws (and make the less important policy choices assigned to that function),[125] and the courts decide disputes about law (and interpret the laws as necessary to resolve those disputes).[126]

As with so many things, these divisions are both important and, in some respects, imprecise.[127] Of particular significance for this Article, there has been growing debate over the shape and vitality of the nondelegation doctrine, which asserts the general proposition that only Congress can make decisions that constitute "law" even if both courts and administrators can make decisions within some parameters that have "the force of law."[128]

---

[121] This section draws on the section on Constitutional Design in Cass, *Motive*, *supra* note 5, at 415–20.

[122] *See, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 524, 536–47 (1969). The concern to avoid excessive discretionary governmental authority was a central consideration in the Constitution's design, with deep roots in English and American history. *See, e.g.*, HAMBURGER, *supra* note 4, at 4–8.

[123] *See* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 118 (2010).

[124] U.S. CONST. art. I, § 1; *see* THE FEDERALIST NOS. 45–48 (James Madison).

[125] U.S. CONST. art. II, § 1; *see* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825); THE FEDERALIST NOS. 67–77 (Alexander Hamilton).

[126] U.S. CONST. art. III, § 1; *see* THE FEDERALIST NOS. 78–80 (Alexander Hamilton).

[127] *See* THE FEDERALIST NO. 37 (James Madison).

[128] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality opinion); *id.* at 2130–31 (Alito, J., concurring in the judgment); *id.* at 2138–40 (Gorsuch, J., dissenting); Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 57–66 (2015) (Alito, J., concurring); *id.* at 66–91 (Thomas, J., concurring in the judgment); Alexander & Prakash, *supra* note 4, at 1038; Alexander & Prakash, *Reports Exaggerated*, *supra* note 11, at 1323–27; Cass, *Delegation Reconsidered*, *supra* note 5, at 153–55; Cynthia R. Farina,

While some elements of a restraint on what Congress can authorize an agency to do are contestable, the underlying principle of nondelegation should not be a matter of doubt. Restricting lawmaking to Congress—and insisting that laws be made by a specific process that requires agreement among two houses of Congress that are differently constituted (selected by different means, at different times, and representing differently composed constituencies) and the President (or among super-majorities to override a presidential veto)—was undeniably central to the Constitution's design.[129] Look at the space given to that in the document itself, at the energy devoted to it in the Constitutional Convention, at contemporaneous explanation of the Constitution, as well as the plain text of the vesting clause in Article I—the text and context demand a rule against delegation of lawmaking power.[130]

The serious question is the shape of the nondelegation rule. In other words, what constitutes an exercise of "the legislative powers granted" in the Constitution?[131] What is the essence of the lawmaking power reposed in Congress?

While some theorists propose rules that essentially deny the possibility of a meaningful restriction on congressional delegations of authority,[132] the Supreme Court has stopped short of that position—but not by much.[133] The rule articulated in *J. W. Hampton, Jr., & Co. v. United States* (*Hampton*),[134]

Deconstructing Nondelegation, 33 HARV. J.L. & PUB. POL'Y 87, 96 (2010); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 467–70 (2013); Lawson, *Delegation*, *supra* note 11, at 353–55; Merrill & Watts, *supra* note 17, at 467, 476–77; Posner & Vermeule, *supra* note 16, at 1730–31; Rao, *supra* note 22, at 1492–95; Schoenbrod, *supra* note 5, at 1224; Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 13 (2009).

[129] *See, e.g.*, THE FEDERALIST NOS. 45–51, 62 (James Madison), NOS. 73–75 (Alexander Hamilton); DAVID BRIAN ROBERTSON, THE ORIGINAL COMPROMISE: WHAT THE CONSTITUTION'S FRAMERS WERE REALLY THINKING 33–34, 81–109, 112–19, 169–76, 192– 203 (2013); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 554–57 (1833); WOOD, *supra* note 122, at 559–61, 608–09; Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT'L REV. L. & ECON. 145, 147–49 (1992); Manning, *supra* note 43, at 707–10, 709 n.149 (explaining bicameralism and presentment and citing, inter alia, comments of James Wilson—one of the most thoughtful and influential members of the framing generation—on the role and importance of these aspects of constitutional lawmaking process); *see also* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528–33 (1992) (explaining both a formal model of decision-making under bicameralism and presentment requirements and the common sense of the requirements for the framing generation).

[130] *See, e.g.*, THE FEDERALIST NOS. 45–51, 62 (James Madison); STORY, *supra* note 129, §§ 554–57; WOOD, *supra* note 122, at 559–61, 608–09; Alexander & Prakash, *supra* note 4, at 1050–54; Alexander & Prakash, *Reports Exaggerated*, *supra* note 11, at 1323–27; Cass, *Delegation Reconsidered*, *supra* note 5, at 153–55; Lawson, *Delegation*, *supra* note 11, at 353–55; Manning, *supra* note 43, at 707–10; Rao, *supra* note 22, at 1465; Schoenbrod, *supra* note 22, at 382; Sunstein, *supra* note 43, at 327; Wurman, *supra* note 43, at 996–98, 1002–03. More than half the Constitution is devoted to stating the terms for selection of members of Congress (and the differences between the two Houses of Congress) and the bases, limitations, and means for making law. *See* U.S. CONST. art. I.

[131] *See* U.S. CONST. art. I, § 1.

[132] *See, e.g.*, Farina, *supra* note 128, at 95–96; Posner & Vermeule, *supra* note 16, at 1729.

[133] *See* Lawson, *Delegation*, *supra* note 11, at 330 (giving the score of Supreme Court justices' votes on delegation issues between 1989 and 2001 as fifty-three to zero, all rejecting pleas to overturn laws on nondelegation grounds).

[134] 276 U.S. 394 (1928).

which has been the accepted test for the past 93 years,[135] requires merely that Congress provide an "intelligible principle" to guide the exercise of authority delegated to another official.[136] Only two enactments in the last ninety-plus years have failed to satisfy that test,[137] which in part explains why it has drawn increasing criticism from the justices.[138]

A more thoughtful test would be rooted in two opinions written over a century and a half apart. The first, written by Chief Justice Marshall for the Court in *Wayman v. Southard*,[139] makes the test turn not on the intelligibility of the *standard* for exercising a power but on the *nature* of the power itself.[140] Marshall's *Wayman* opinion for the Court declared that some decisions are essentially legislative because of their importance—matters that Alexander Hamilton had described in *Federalist 75* as "rules for the regulation of society" [141]—and that these must be made exclusively by Congress.[142] Other decisions, on matters of lesser importance to society, may be assigned to administrators.[143] The second decision, Justice Scalia's dissenting opinion in *Mistretta v. United States*,[144] emphasizes that the power assigned to administrators must be connected to (and in service of) the exercise of an *executive* function.[145] Congress cannot give any other body authority to engage in freestanding rulemaking, separate from activity that implements the rules. A body that makes rules regulating the conduct of others, independent of actions to implement those rules, would, in Scalia's pithy characterization, be "a sort of junior-varsity Congress."[146]

Despite the Supreme Court's continued adherence to some form of *Hampton*'s intelligible principle test,[147] the Marshall–Scalia "importance-

---

[135] *See* Gundy v. United States, 139 S. Ct. 2116, 2123–24, 2129 (2019) (plurality opinion); *id.* at 2130–31 (Alito, J., concurring in the judgment); *id.* at 2138–40 (Gorsuch, J., dissenting); Dep't of Transp. v. Ass'n of Am. R.Rs, 575 U.S. 43, 76–87 (2015) (Thomas, J., concurring in the judgment); Cass, *Delegation Reconsidered*, *supra* note 5, at 164–71; Lawson, *Delegation*, *supra* note 11, at 368–69; Schoenbrod, *supra* note 11, at 227–28; Schoenbrod, *supra* note 5, at 1224–26, 1229–34.

[136] *Hampton*, 276 U.S. at 409; *see also* Fahey v. Mallonee, 332 U.S. 245, 248–50, 253–54 (1947); Yakus v. United States, 321 U.S. 414, 427 (1944); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943).

[137] *See* Cass, *Delegation Reconsidered*, *supra* note 5, at 168.

[138] *See, e.g.*, *Gundy*, 139 S. Ct. at 2130–31 (2019) (Alito, J., concurring in the judgment); *id.* at 2138–40 (Gorsuch, J., dissenting); *American Railroads*, 575 U.S. at 57–66 (2015) (Alito, J., concurring); *id.* at 66–91 (Thomas, J., concurring in the judgment).

[139] 23 U.S. (10 Wheat.) 1 (1825).

[140] *Id.* at 43–47; *see* Cass, *Delegation Reconsidered*, *supra* note 5, at 160.

[141] THE FEDERALIST NO. 75, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[142] *See Wayman*, 23 U.S. at 42–43.

[143] *See id.* at 43.

[144] 488 U.S. 361 (1989).

[145] *Id.* at 417–22 (Scalia, J., dissenting).

[146] *Id.* at 427; *see also* Alexander & Prakash, *supra* note 4, at 1040, 1043–44; Cass, *Delegation Reconsidered*, *supra* note 5, at 178–81; Lawson, *Delegation*, *supra* note 11, at 343.

[147] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2123, 1229–30 (2019) (plurality opinion).

plus-function" test has garnered increased support in recent years.[148] Indeed, opinions on the underlying issue in recent cases, including the Court's latest decision on the delegation issue, *Gundy v. United States*,[149] raise serious questions respecting the *Hampton* test's future.[150] The particular line-up of justices in *Gundy* also suggests a prospect of the test changing in the future to one more constraining on delegations of rulemaking authority.[151] For now, however, the combination of a centuries-old commitment to the notion that the Constitution forbids delegation of lawmaking authority from Congress to other branches and the almost-century-old use of a test that stops almost no delegations must frame the inquiry into what standards should be used to judge the propriety of rulemaking procedures.

B. *The APA, Process, and Rulemaking's Limits*

There is a growing literature extolling the virtues of administrative decision-making as good for democracy.[152] Professor Nina Mendelson, a

---

[148] *See id*. at 2138–40 (Gorsuch, J., dissenting); Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 57–66 (2015) (Alito, J., concurring); *id.* at 66–91 (Thomas, J., concurring in the judgment); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 487 (2001) (Thomas, J., concurring)*; see also* Alexander & Prakash, *Reports Exaggerated*, *supra* note 11, at 1305–07, 1329; Cass, *Delegation Reconsidered*, *supra* note 5, at 172, 195–96; Lawson, *Delegation*, *supra* note 11, at 375–77; Sunstein, *supra* note 43, at 327; Wurman, *supra* note 43, at 996–98, 1002–03. While Justice Scalia's insight respecting the importance of tying adjudicatory or rulemaking authority to specific tasks within the ambit of the assignee's constitutional authority is critical to a proper understanding of nondelegation, he doubted that it was possible to frame a suitably definite nondelegation doctrine to prevent judicial adventurism. *See Mistretta*, 488 U.S. at 415–16 (Scalia, J., dissenting). Even if that is true, it is not a show-stopper. The questions it leaves are these: does the Constitution nonetheless require even an imperfect delegation doctrine as a necessary means of preserving separated powers? Do the governance costs of judicial adventurism from a less-than-crystalline nondelegation doctrine exceed the costs of allowing unrestrained delegations? And, finally, can principles that should inform the reading of the Constitution as mandating restraints on delegation of lawmaking authority be served by other doctrines? For partial answers to the last of these questions, see, for example, Manning, *supra* note 43, at 698; Aaron Nielson, Erie *as Nondelegation*, 72 OHIO ST. L.J. 239, 263 (2011) (arguing that the federal judiciary's deference to state judicial decisions is best understood as reflecting nondelegation principles).

[149] 139 S. Ct. 2116 (2019).

[150] *See, e.g.*, *id.* at 2130–31 (Alito, J., concurring in the judgment); *id.* at 2138–42 (Gorsuch, J., dissenting); *American Railroads*, 575 U.S. at 57–66 (Alito, J., concurring); *id.* at 66–91 (Thomas, J., concurring in the judgment).

[151] Justice Alito, who previously had suggested support for a more vigorous nondelegation doctrine concurred in the judgment in *Gundy*, believing that this was not the appropriate case (and probably not the appropriate factual and statutory setting) to reexamine the "intelligible principle" test. *Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring in the judgment); *see American Railroads*, 575 U.S. at 57–66 (Alito, J., concurring). Justice Kavanaugh, who did not participate in the *Gundy* decision, has been a strong proponent of adhering to structural limitations on discretionary executive power in other contexts. *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020); PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 165–66 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting); PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 5, 8 (D.C. Cir. 2016). If Justices Alito and Kavanaugh joined the three dissenting justices in *Gundy*—Chief Justice Roberts, Justice Thomas, and Justice Gorsuch—in a future case, that alignment could replace the Hampton test with a test closer to the Marshall-Scalia "importance-plus-function" test.

[152] *See, e.g.*, Farina et al., *supra* note 120, at 402; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 99 (1985); Gillian E. Metzger, *The Supreme Court 2016 Term — Foreword: The 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 74 (2017); Seidenfeld, *supra* note 120, at 1513–14.

proponent of expanded public participation in rulemaking as enhancing its democratic legitimacy, has collected an impressive set of statements trumpeting the fit between administrative rulemaking and democratic ideals.[153] Yet, Mendelson also recognizes that, in general, when engaged in rulemaking, "an agency must make value-laden decisions without significant guidance from the statute that authorizes the decisions . . . ."[154] That point was made even more explicitly by then-Professor Elena Kagan, who noted that rulemaking officials have no "democratic warrant . . . to make the value judgments—the essentially political choices—that underlie most administrative policymaking."[155] As Professor Peter Strauss has observed, an obvious explanation for the continued refrain that rulemaking is democratically grounded and serves as a legitimate vehicle for making these "essentially political choices" is because so many people *need* the current administrative lawmaking process to be valid.[156] It is an example of what might be termed "the imperative of the extant"—the vast amount of *political* rules generated through *agency* rulemaking must be found to come from proper exercise of administrative power because the alternative would knock the props from under so much activity that the great bulk of administrative law scholars, practitioners, and jurists accept as right.

Professors Mendelson, Kagan, and Strauss were not trying to undermine agency rulemaking, even rulemaking having the force of law. Instead, they were endeavoring to explain ways to conceive of agency actions, or ways to test the propriety of agency actions, without having to treat lawmaking outside of the legislative process—the process of bicameralism and presentment set forth in the Constitution—as illegitimate.

Yet, at the same time, they recognized that the constant comparison of agency rulemaking to legislative activity is fundamentally flawed. Others have even more directly asserted that agency decision-making is often preferred by interested parties and chosen by legislators precisely because it is not the same as legislating by constitutionally prescribed means.[157] If legislating involves "log-rolling"—compromises fueled by one lawmaker agreeing to back one initiative in exchange for another lawmaker backing a different legislative action—agency decision-making inevitably functions in

---

[153] Mendelson, *supra* note 120, at 1343–46.

[154] *Id.* at 1349.

[155] Kagan, *supra* note 9, at 2353 (quoted in Mendelson, *supra* note 120, at 1349).

[156] *See* Peter L. Strauss, *Legislation that Isn't—Attending to Rulemaking's "Democracy Deficit,"* 98 CALIF. L. REV. 1351, 1351–54 (2010).

[157] *See, e.g.*, Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, 392–93 (1986) ; Cass, *supra* note 101, at 473–79; DeMuth, *supra* note 41, at 159–60; Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 271–72 (2010); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, 36 AM. U. L. REV. 295, 297–98 (1987); David Schoenbrod, *Politics and the Principle That Elected Legislators Should Make the Laws*, 26 HARV. J.L. & PUB. POL'Y 239, 266 (2003).

a less complicated worldwhere there are fewer logs to roll.[158] For agency officials, the costs of backing a given regulation are different than the legislator's costs because the agency official is responsive to a smaller set of interests and influences than the legislator and thinks about public interests differently, as well.[159]

These differences were not discussed in great detail in the reports prepared as background for the drafting of the APA, but the drafters made clear their understanding of the distinction between legislating and rulemaking.[160] Despite treating rules that purport to bind individuals "with the force of law" as if they were the equivalent of laws,[161] the APA was not designed to produce procedures for lawmaking. Subsequent efforts to graft additional procedures onto the rulemaking process may respond to concerns that rulemaking has effectively *become* equivalent to lawmaking,[162] but it cannot transform rulemaking into lawmaking. It cannot, in short, make the administrative process the same as the process that requires majorities of two houses of Congress and presentment to the President—procedural requirements that form the touchstone for permitting coercive regulation of society.[163]

Rulemaking can help flesh out administrative programs, provide guidance on their administration, and give direction to government personnel. But rulemaking, especially of the sort that imposes obligations or constraints on private conduct, if it is to be consistent with a sensible notion of what the Constitution commands, cannot be made a substitute option for making the sort of important decisions on matters of critical, political judgment that *Wayman* recognized have been committed to legislative solution through a process that includes bicameralism and presentment. Hammering out the details of a workable judicial rule for nondelegation may remain difficult, but that has not been enough of an argument to sideline other constitutional constraints.[164]

---

[158] *See, e.g.*, JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 132 (1962); DENNIS C. MUELLER, PUBLIC CHOICE II 82–83 (1989); Cass, *supra* note 101, at 474; Robinson, *supra* note 101, at 189-90; James Q. Wilson, *The Dead Hand of Regulation*, 25 PUB. INT. 39, 46 (1971).

[159] *See, e.g.*, Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 22 (1982); Cass, *Privatization*, *supra* note 101, at 486; Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 93–94 (1992).

[160] *See* ATTORNEY GENERAL'S COMMITTEE, *supra* note 28, at 101–02.

[161] *See, e.g.*, *id.* at 98, 100.

[162] *See supra* text accompanying notes 78–97. *See also* Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 772–73 (1996).

[163] *See, e.g.*, HAMBURGER, *supra* note 4, at 3; Alexander & Prakash, *supra* note 4, at 1050–51, 1054; Cass, *Delegation Reconsidered*, *supra* note 5, at 153–55; Ginsburg & Menashi, *supra* note 5, at 493–95; Lawson, *Delegation*, *supra* note 11, at 353–55; Rao, *supra* note 22, at 1490; Schoenbrod, *supra* note 22, at 382; Wurman, *supra* note 43, at 996–98, 1002–03; Wurman, *supra* note 3 (manuscript at 39–40).

[164] *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 482–83 (2011); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57–59 (1982).

Further, as is implicit in the observation about the APA's drafting, limiting delegation of rulemaking authority to the scope understood at the time of the APA's passage will better align rulemaking with the statutory framework for notice-and-comment proceedings. This will reduce the force of arguments in favor of expanded processes and additional considerations. Given that these are the forces behind much of the ossification in rulemaking observed over the past two decades and much that is problematic in the efforts to eliminate the adverse effects of the solutions, as well,[165] the move back to a Marshall-Scalia delegation test would have pragmatic pay-offs to go along with the increased congruence to statutory and constitutional instructions. It would reduce the benefits politicians derive from being able to delegate difficult problems to administrators rather than having to resolve them.[166] And it would reduce some of the benefits administrators derive from having additional discretion over the particulars of their own regulatory power.[167] But it would provide a basis for improving the fit between regulatory discretion in theory, its exercise in practice, and the legal frameworks that should govern it.

Conclusion

Rulemaking, in one form or another, is as old as government, and American administrative officials have exercised rulemaking authority from the nation's constitutional beginnings. The nature of the rules made, however, changed from mainly managerial to regulatory, from housekeeping matters and internal guidance to means for controlling private conduct, and from matters of modest political significance to subjects that are vigorously contested in the political arena. The change in the nature of federal administrative rules overwhelmingly post-dates enactment of the APA, with its minimal requirements for notice and comment. Efforts to expand controls over rulemaking have increased its subjection to constraints more congruent with the exercise of power by those to whom lawmaking and execution responsibilities are entrusted. But at the same time, those efforts have so increased the costs of rulemaking as to incentivize shifts from rulemaking to other forms of regulation. In essence, some parts of the cure may have had

---

[165] *See supra* text accompanying notes 109–119.

[166] *See, e.g.*, Aranson et al., *supra* note 159, at 43; David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 954–55 (1999); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434 (1989); Kenneth A. Shepsle, *The Strategy of Ambiguity: Uncertainty and Electoral Competition*, 66 AM. POL. SCI. REV. 555, 556 (1972).

[167] On the sources and potential uses of official power, see, for example, WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 24–38 (1971); GLEN O. ROBINSON, AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW 4–5 (1991); KENNETH A. SHEPSLE & MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 358–77 (1997); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 107–08 (1987).

effects worse than the disease of less democratically accountable rulemaking. In the end, the necessary steps going forward—and the government's ability to keep rulemaking as a tool of administration rather than an end run around constitutional restraints on lawmaking—depend first on judicial enforcement of the Constitution's limits on delegation. Only after that has occurred can meaningful improvements in rulemaking process take hold.