

## Special Report

# Administrative Rulemaking: An Old and Emerging Literature

Rulemaking is the most important way in which bureaucracy creates policy. In some respects, it rivals the even legislative process in its significance as a form of governmental output. Although rulemaking was long overlooked in the policy sciences, students of government and public administration have begun to redress this neglect as part of a more general interest in formal institutions. In so doing, they have built on a long-standing interest in the subject among students of administrative law.

This report offers a brief overview and evaluation of research on the administrative and political issues surrounding rulemaking. Like institutional analysis generally, some of this literature is empirical and descriptive, some of it is normative and prescriptive, and much of it combines these two types of concerns. Far from being comprehensive, the following discussion seeks to identify the central issues that define the analysis rulemaking, as well as issues that deserve more attention than they have received.

The most fundamental questions about rulemaking have to do with its implications as an alternative form of policy implementation. Once a popular topic, this has received relatively little attention since the use of rulemaking expanded dramatically in the 1970s. Most recent scholarship has focused instead on *how* rules are developed. Of particular interest have been the determinants and effects of the formal institutions that constrain the rulemaking process. These constraints have become more numerous and demanding in direct relation to the growth in the popularity of rule-making itself. Some studies have focused on the political forces or doctrines that explain controls over the exercise of delegated legislative authority. Others have evaluated the effects of structural choices in terms of values such as effectiveness, efficiency, and responsiveness.

Much of the literature on rulemaking is excellent, and an extension of its trajectory promises to refine our understanding of key theoretical and applied issues in public administration. At the same time, scholars have slighted fundamental dimensions of rulemaking that are critical to an evaluation of its character. By focusing primarily on formal, institutional arrangements, existing work on rule-

making has overlooked the informal process through which the most important decisions are often made. Another limitation of the literature that cuts across many of the issues discussed in this report is its inattention to context. The fact that rules are issued for very different purposes and within different technical and political environments has profound implications for both descriptive and prescriptive analysis.

## Rules as a Form of Administration

A “substantive” or “legislative” rule is a generally applicable and legally binding standard that must be authorized by enabling legislation for the purpose of implementing a particular program. Most agencies have substantive rulemaking authority to carry out at least some of their responsibilities.<sup>1</sup>

An essential function of rulemaking is to confine bureaucratic discretion in individual cases. It can also be an alternative to the incremental development of policy through precedent, especially in regulatory settings in which enforcement can occur through formal adjudication. Agencies sometimes have the freedom under their enabling legislation to choose between rulemaking and ad hoc implementation in carrying out their mandates.<sup>2</sup> In other contexts, Congress requires them to issue rules in developing and applying policy.

## Rulemaking as an Administrative Strategy

The choice of rulemaking was of considerable interest to students of administrative law during the 1950s and 1960s. Most felt that it was usually an advantageous approach, both in terms of its fairness to individuals and in terms of democratic and effective policy development. In the first instance, rules limit arbitrariness and capriciousness in the application of policy in individual cases. They also preclude the retroactive imposition of sanctions for

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actions taken before the establishment of clear standards. In the second instance, rulemaking is arguably more transparent and more accountable than the ad hoc approach. It also permits broader participation by stakeholders and encourages comprehensive solutions to problems that go beyond the facts of individual cases. Finally, advocates of rulemaking argued that it would enable agencies to accomplish their statutory objectives more expeditiously than they could through incremental policy development (Davis 1969, 1975; Peck 1967).

These arguments were seldom presented in absolute terms. Some observed that most of the substantive differences between rulemaking and adjudication had been oversold (Shapiro 1965).<sup>3</sup> Conversely, others noted that case-by-case discretion has advantages that are the inverse of the advantages claimed for rulemaking. If general standards promoted fairness by ensuring that like cases would be treated alike, their application could also lead to a rigid disregard for differences in individual circumstances (Davis 1969, 1975; Jowell 1975). If prospective rulemaking<sup>4</sup> was conducive to more synoptic and forceful policy making, comprehensive strategies could also lead to large mistakes (Baker 1957; Peck 1967). If rulemaking permitted broader participation, it could also limit the participatory rights of those who are affected most intensely by agency decisions (Scalia 1981).

In these respects, a second and related theme in the literature was that the desirability of rulemaking is context-specific. For instance, Warren Baker (1957) observed that, although rulemaking is generally desirable, the Federal Communications Commission's case-by-case strategy during the first decades of its existence was salutary given its lack of knowledge about the problems it had been charged to confront. Adjudication allowed it to deal with concrete situations that had "ripened" without having to anticipate issues that might arise in the future. Others suggested that rulemaking might never be advisable in some areas.<sup>5</sup>

Despite such qualifications, most commentators in the 1950s and 1960s felt that agencies did not employ rulemaking extensively enough. Although this thesis was offered most frequently with regard to regulatory administration (which consumed most of law scholars' attention), Kenneth Davis made a compelling argument for the increased use of rulemaking across a broad range of policy areas in his influential book *Discretionary Justice* (1969).

### **Bureaucratic Politics and the Rulemaking Revolution**

Authorities offered competing explanations for agencies' reluctance to issue rules when considerations of sound administration seemed to dictate otherwise. James Wilson (1971) suggested that it reflected bureaucrats' perverse de-

sire to exercise power over those they regulate by preserving the discretion to behave arbitrarily. In contrast, others argued that administrators' preference for ad hoc implementation could be explained, not as a strategy that enhanced their power, but as a means that was less forceful and therefore less dangerous politically (Cary 1967; Wright 1972). Notwithstanding its fairness and the greater certainty it might provide, rulemaking also had the potential to elicit stronger opposition from powerful regulated groups because of its more precipitous, immediate, and widespread policy effects. Marver Bernstein (1956) refined this theory by noting that a case-by-case implementation strategy was appealing to quiescent regulators because it rendered their unwillingness to protect the public less visible.

If rulemaking was ever an underemployed strategy, however, its use expanded dramatically during the 1970s. To some extent, this was the result of voluntary choices made by agencies that had previously emphasized other techniques. It was also the result of enabling legislation stipulating that agencies must issue rules in carrying out their mandates (Mayton 1980). Such requirements, which were sometimes accompanied by deadlines, were especially common in areas of social regulation protecting health, safety, consumers, and the environment. Some of these statutes included provisions allowing the intended beneficiaries of programs to obtain injunctions forcing agencies to issue rules (Ackerman and Hassler 1980).

Identifying the root sources of the so-called rulemaking revolution requires more speculation. As Cornelius Kerwin (2003) suggests, it was attributable partly to the prescriptive arguments of authorities such as Davis. It was also undoubtedly a result of fundamental changes in the political environment of administrative regulation. If agencies' former preference for the case-by-case approach reflected their unwillingness to alienate influential groups, rulemaking became more attractive precisely because of its effectiveness as pressures for more aggressive regulation mounted during the late 1960s and the 1970s (Robinson, Gellhorn, and Bruff 1986).

In turn, the forcefulness of rulemaking had important systemic effects. Whether it led to too much regulation (Weidenbaum 1981) is largely a subjective judgment. There is no doubt, however, that fundamental changes in the form of bureaucratic action had much to do with the backlash against regulation and bureaucracy that occurred during the late 1970s and 1980s (Gellhorn 1980). As a more comprehensive way of developing policy that had more dramatic effects on a more diverse array of interests, the emphasis of rulemaking also contributed substantially to the increased complexity and contentiousness that came to characterize the political environment of administration (Hecl 1978).

## Rulemaking as a Given

Has greater reliance on rulemaking also promoted fairer administration and sounder and more democratic policy development in the ways that its advocates claimed it would? Scholars have given little direct attention to the effects of rules as an alternative strategy in recent decades. In his outstanding 300-page overview of rulemaking, for example, Kerwin (2003) devotes little more than a page to its advantages and disadvantages as a form of administration. The primary exception to this neglect is a small literature focusing on the use of interpretive guidelines and other alternatives to legally binding rules as a means of articulating general policy. These have become more appealing to some agencies as the institutional constraints on substantive rulemaking have become more burdensome.<sup>6</sup> Yet concern with the choice between general standards and ad hoc discretion has all but disappeared from the literature.

The neglect of rulemaking as a means of policy implementation may be attributable to its increased usage. Perhaps it has become so pervasive that analysis of its implications or determinants is no longer perceived as being relevant. Standards can be more or less confining, however, and the choice of rulemaking should continue to interest scholars, both from an applied perspective and from the standpoint of descriptive political science. In the first instance, although some of the early work focusing on the importance of administrative context in determining the desirability of rulemaking was informative, it was hardly systematic or definitive. It did little more than scratch the surface of a complex topic that should be of central concern to public administration. In the second instance, much remains to be learned about the political causes and effects of rulemaking and its relationship to fundamental concepts such as bureaucratic power.

## The Formal Structure of Rulemaking: Two Interpretations of Its Systemic Role

Most recent research on rulemaking has focused on how we have sought to channel it and to hold it accountable rather than its implications as a form of administration. This is hardly surprising in light of the expansion of procedural requirements and other controls that has accompanied its increased usage. Thus, another important effect of the rulemaking revolution—and one that is closely interrelated with those mentioned previously—has been the institutional transformation of the rulemaking process.

Scholars have applied two approaches in examining the role played by controls over agencies' legislative discretion. Given the importance of rulemaking as a way of allocating scarce resources, some have stressed the political implications of procedural requirements and oversight

mechanisms. Given the issues of legitimacy that delegated legislative authority arguably poses for representative democracy, others have focused on the values that structural constraints on rulemaking are designed to promote. In turn, each of these perspectives encompasses various and sometimes conflicting propositions concerning the determinants of institutional choice.

## Key Institutional Developments in the Rulemaking Process

Space does not permit a comprehensive discussion of the ways in which we have sought to constrain rulemaking. With this caveat, the Administrative Procedure Act (APA) of 1946 provides a logical starting point for describing the most important changes in the process. The APA requires agencies to publish a notice of proposed rulemaking in the *Federal Register* and to solicit written comments on the merits of their proposal. Its framers reasoned that because the promulgation of rules is a "quasi-legislative" function, agencies should be exposed to the views of those who might be affected by their decisions. At the same time, they were reluctant to impose undue constraints on administrative policy making. The APA's deference to bureaucratic discretion was manifested in a standard of judicial review that allowed judges to overturn only those rules that were "arbitrary or capricious." It was also reflected in total exemptions from notice and comment for broad categories of rulemaking.<sup>7</sup>

The APA's requirements remain a basic framework for the rulemaking process. As agencies' reliance on rules has expanded, however, Congress has sought to constrain their discretion through provisions in enabling statutes that supplement the act's minimal standards of due process. Especially common in the regulatory statutes of the late 1960s and 1970s, "hybrid procedures"<sup>8</sup> sometimes require agencies to extend formal adversary rights to participants in rulemaking. A common denominator is the requirement that agencies base their rules on a record (Diver 1981; Hamilton 1972).<sup>9</sup> Courts moved in the same direction during the 1970s, reinterpreting the meaning of the APA's "arbitrary or capricious" standard of review to require that rules survive a "hard look" (Diver 1981; Verkuil 1980).

The president and Congress have sought to confine rulemaking discretion and to expand their own influence over agencies' policy decisions in other ways as well. Executive orders have required agencies to justify rules on the basis of cost-benefit analysis (Blumstein 2001; Kagan 2001). Since the Reagan administration, these initiatives have empowered the Office of Management and Budget to ensure that rules are based on sound analysis and otherwise consistent with the president's policy agenda.<sup>10</sup>

Among the most important legislatively imposed constraints on rulemaking are the Paperwork Reduction Act,

which requires agencies to analyze the information-gathering burdens of their policies on small businesses; the National Environmental Policy Act, which requires agencies to prepare environmental impact statements for rules that affect the environment; and the Congressional Review Act, which requires rules to be submitted to the legislature and the Government Accountability Office before they go into effect.<sup>11</sup> In addition to their requirement of heightened due process in some cases, enabling statutes have imposed a wide variety of procedural constraints on rulemaking that are tailored to the implementation of individual programs. Some create participatory opportunities through mechanisms such as advisory committees or provisions strengthening the ability of affected interests to shape agencies' policy agendas, for example, whereas others strengthen Congress's oversight capabilities.

### The Politics of Institutional Choice

What explains institutional controls over rulemaking? One response to this question proceeds from the observation that *how* bureaucracy is required to do things helps to determine *what* it does. Because participatory rights, burdens of proof, oversight arrangements, and other rules of the game ultimately influence substantive policy, such constraints often result from political forces. This view has become especially prevalent in the work of rational-choice theorists. If their claim to have "discovered" the political role played by administrative institutions is an exaggeration, these scholars have revitalized discourse on the subject through an economic perspective that has lent itself to the development of theory. Rulemaking has naturally occupied much of their attention given its political salience and heightened efforts to constrain it in recent years.

Political explanations for institutional controls over bureaucratic policy making fall into two categories. The more straightforward approach assumes that because they have predictable policy implications, structural choices are part of the same bargain among contending interests that results in substantive policy.<sup>12</sup> Although this perspective is implicit in much of the traditional literature on bureaucratic politics (e.g., Seidman 1980; Truman 1951),<sup>13</sup> it has been developed more systematically by Terry Moe (1989). Moe frames the determinants of bureaucratic structure in terms of the competition between groups that stand to benefit and groups that stand to lose as a result of effective program implementation.

A second general perspective on the politics of structural choice focuses on the dilemma that delegated authority presents for elected officials, especially legislators. Institutional constraints on rulemaking cope with the problems of bureaucratic "shirking" and "slippage" by ensuring that agencies remain faithful to program goals and to the interests of the constituents those programs are intended

to serve. They may do this by "stacking the deck" in favor of the constituents represented by winning legislative coalitions or by establishing "fire alarms" that facilitate reactive political oversight (McCubbins, Noll, and Weingast 1987).

Whether there is a meaningful distinction between the concept of deck stacking and explanations that stress the importance of group pressures is an interesting question. In either case, although recent scholarship has made significant headway, important questions remain concerning the politics of structural choice. A good deal of the administrative process derives from judges whose behavior is difficult to model in terms of political incentives. Moreover, many of the constraints imposed on rulemaking by the two political branches cut across agencies and program boundaries. Although such generic requirements have been shaped by politics, to be sure, they are difficult to reconcile with Moe's analysis and with principal-agent models that describe institutional arrangements in terms of the coalitions surrounding the creation of individual programs. A final general criticism of the literature on the politics of structural choice is that it has produced a welter of conflicting propositions (West 1997). This may be an especially damning indictment of rational-choice theory given its pretension to analytical rigor.

None of this is to say that political explanations for institutional constraints on rulemaking lack merit in general or that rational-choice approaches in particular have not made useful contributions to our understanding. If nothing else, the latter have provoked a richer discussion by setting forth clear hypotheses. Moreover, rational-choice scholars have sought to refine their models in response to criticisms such as those outlined previously. Several recent studies have sought to extend principal-agent theory to generally applicable requirements such as those of the APA (McNollgast 1999; Rui et al. 1999) for example, and some have also sought to model institutional choices by judges.

Future research can refine our understanding of the political implications of controls over rulemaking. Especially critical is the importance of context in determining the implications of institutional choices for particular kinds of interests. Under what circumstances, for example, might those being regulated prefer the greater certainty offered by rulemaking (as opposed to ad hoc approaches), and under what circumstances might they oppose rulemaking as a more forceful means of implementation? Under what circumstances might program proponents prefer or not prefer judicialized rulemaking procedures? Do legislative oversight provisions favor those who benefit from or oppose effective program implementation? Leading authorities have offered plausible but contradictory answers to all of these questions (West 1997). In these and other respects,

much can be gained from more extensive and systematic empirical research.<sup>14</sup>

### **The Doctrinal Foundations of Institutional Choice**

The most fundamental issue raised by political explanations concerns their underlying premise. Thus, if many scholars have framed constraints on rulemaking as the product of self-interested behavior, many others have framed it as a “search for a theory of how policy should be made” (Diver 1981, 393). Like political explanations, however, analyses that stress the influence of ideas have hardly arrived at consistent conclusions.

Some constraints on rulemaking have obviously sought to promote openness and responsiveness in agency decision making. These values underlie the APA’s requirements and have provided the ostensible rationale for a variety of other developments. The extension of more rigorous due process to notice and comment was intended to ensure that agencies take relevant inputs seriously (Rosenbloom 2000), for example, and other legislative provisions such as advisory committees, offerer provisions (Schwartz 1982), and intervener funding programs (Bonfield 1969) were motivated by a desire to provide balanced and effective stakeholder access to rulemaking. Richard Harris and Sydney Milkis (1989) attribute these and other institutional developments to the New Left’s emphasis on empowerment and participatory democracy in the 1960s and 1970s.

Analyses that stress the importance of responsiveness as a basis for controls over rulemaking often begin from the premise that the traditional view of public administration as a rational, technical process has become unrealistic in light of the continued growth of delegated legislative authority (Stewart 1975).<sup>15</sup> Yet other analyses have argued that the systemic tension posed by delegated authority has encouraged efforts to institutionalize traditional values (Diver 1981). This is arguably true of cost–benefit analysis, for example, which promotes economic efficiency in rulemaking through the objective and comprehensive examination of probable policy effects. It is also true of due process in important respects. Thus, if adversarial procedures and requirements that agencies base their decisions on the record are intended to promote effective comment, the ultimate purpose of participation is to ensure that rules are based on accurate constructions of legislative intent and sound empirical evidence (Diver 1981; Fuller 1978; Shapiro 1982).<sup>16</sup>

The specific qualities that we have sought to encourage in the rulemaking process are, in fact, much more variegated than a simple distinction between administrative and political values might imply. Among them are responsiveness to affected interests, accountability to the courts, accountability and responsiveness to the president, account-

ability and responsiveness to Congress, transparency, objective rationality in the pursuit of legislative intent, and objective rationality in the pursuit of economic efficiency. The potential for most of these goals to conflict with most of the others should be obvious.

The observation that constraints on agency policy making promote conflicting objectives is consistent with accounts that stress political self-interest as the ultimate determinant of institutional choice. For example, Moe’s statement that “bureaucracy is not designed to be effective” (1989, 267) stems from his thesis that the formal structure of program implementation emerges from the same pluralistic cauldron as substantive policy. Yet an alternative explanation for competing controls over rulemaking, familiar to most students of bureaucracy, is that a clear doctrine of public administration has never emerged to replace the traditional model. If the demise of the politics–administration dichotomy as a basis for prescriptive theory has led to the endorsement of democratic political values, we have hardly given up the quest for different kinds of objectivity as a way of legitimizing the exercise of delegated legislative authority (Freedman 1978). Nor have we arrived at anything approaching a consensus about the proper relationship between rulemaking and the three constitutional branches of government.

### **Evaluating and Reforming the Rulemaking Process**

Whether ideas play an independent role in shaping administrative institutions or whether they are handmaidens to political forces is an issue that is as difficult to resolve as it is fundamental. Both perspectives undoubtedly capture important elements of reality, and to some extent they are merely different versions of the same story (Mashaw 1990). In any case, assumptions about the values that controls over rulemaking should promote obviously provide the basis for prescriptive analysis. These are typically interrelated with empirical assumptions about the character of rulemaking.

### **Institutional Constraints and the Nature of Rulemaking**

At least partly because they compete with one another, the controls imposed on administrative policy making can also undermine agencies’ efficiency and effectiveness in carrying out their mandates. Allegations that the expansion of procedural requirements and oversight arrangements has led to the “ossification” of rulemaking (McGarity 1992) have, in turn, led to a consideration of the values and controls that should inform the process. Much of this analysis examines the relationship between the goals that institutional arrangements are designed to promote and the

tasks that agencies are called on to perform. For example, some scholars argue that the expansion of participatory opportunities has hindered administrators' ability to plan and implement coherent policy agendas (Schwartz 1982). Others contend that it has rendered the environment of individual decisions more complex or polycentric, thus impeding agencies' ability to fashion acceptable policy solutions (Stewart 1975).

An especially popular theme in the evaluative literature is that, because rulemaking is often a political process of defining policy goals through the accommodation of competing interests, requirements that assume that agency decisions can be *tested* in terms of preestablished goals can lead to delay and can otherwise result in bad policy. This may lead to "paralysis by analysis." In her study of the Forest Service, for example, Julia Wondolleck (1988) observes that the agency's need to justify its decisions on the basis of objective economic and scientific analysis has prevented it from arriving at decisions that accommodate the interests of different stakeholders.

The extension of more rigorous due process to rulemaking has been singled out for special criticism. Davis (1975) notes that adversarial procedures are designed to test narrow adjudicative facts of "who did what, when, where, how, and with what motive or intent," whereas rules are apt to be based on legislative facts about probable policy effects that are often difficult to prove and are better examined through informal give-and-take among experts. An even more telling observation is that key issues in rulemaking are often not factual at all. Rather, they reflect a consideration of what is equitable or just or what people otherwise want. Lon Fuller (1978) observed that the need to make such political judgments is inconsistent with the premise of due process that actions are demonstrably correct or incorrect.<sup>17</sup>

The tension between the means-ends testing required by due process and the task environment of rulemaking has been associated with several undesirable results. Agencies operating under open-ended mandates may struggle to provide rational justifications for their actions when none are possible. Similarly, agencies may be prevented from accommodating affected interests through mechanisms of partisan mutual adjustment such as logrolling and bargaining and compromise (Boyer 1979). Phillip Harter (1982) and others have observed that adversarial procedures encourage those interests themselves to become polarized and to adopt extreme and confrontational positions for strategic purposes. A final effect of due process may be to encourage agencies to develop very specific and rigorously justified proposed rules that can withstand challenges in the courts. Such front-loading can inhibit the effects of participation in the rulemaking process because of the sunk costs it produces and because it con-

finer public participation to the consideration of particular policy alternatives (West 2004).

## Proposed Reforms

Criticisms of rulemaking procedures as they have evolved in recent decades have led to various recommendations. Perhaps the most popular is to return to the APA's original intent—that agencies should have broad discretion to craft policies that are reasonably related to their statutory mandates. The Supreme Court has at least partially embraced this prescription in its criticism of efforts by lower courts (especially the DC circuit) to impose rulemaking procedures that go beyond the APA's requirements (*Vermont Yankee Nuclear Power Corp. v. NRDC*, 1978). Its landmark *Chevron* (1984) decision stressed the legislative character of rulemaking in approving of ex parte contacts between the White House and the Environmental Protection Agency (EPA). The Court reasoned that as an elected official, the president arguably had more legitimacy in influencing the EPA's political discretion than did judges.

Negotiated rulemaking is a more radical extension of the premise that rulemaking is inherently a political process. This approach allows the principal stakeholders in a policy decision to participate in developing a proposed rule that they can all support. Although advocates of "RegNeg," such as Harter (1982), do not feel that it is appropriate for all issues, they argue that it can expedite decision making and promote greater acceptance of and compliance with regulatory policies in many areas. Unlike institutional constraints that test specific and well-developed policy alternatives, RegNeg can ensure balanced participation at an earlier and arguably more meaningful stage in the rulemaking process. Although empirical analyses have arrived at mixed conclusions concerning its effects (Coglianese 1997), some suggest that it has led to quicker and more legitimate decisions (Kerwin and Furlong 1992; Langbein and Kerwin 2000). Arguments on behalf of RegNeg have been sufficiently compelling that both Congress and the president have encouraged its use.

One should hasten to add that initiatives to reconcile the institutional structure of rulemaking with its political character have been limited in scope and effect. Notwithstanding the *Vermont Yankee* (1978) and *Chevron* (1984) decisions, lower-court judges have not reverted to anything approaching the lax standard of review that was contemplated by the APA and that existed during the first 25 years following the act's passage (Schuck and Elliott 1990). The Supreme Court has continued to insist that agencies justify their decisions primarily on the basis of a record (which the APA does not mention).<sup>18</sup> In addition, the hybrid procedures imposed by enabling statutes remain in place.

As for negotiated rulemaking, the fact that it continues to be used sparingly belies the popularity it has enjoyed as

a prescription over the past 20 years. Where it is used, moreover, it only results in a proposed rule that must be vetted through the normal notice-and-comment process. In this regard, Gary Coglianese (1997) finds that rules developed through RegNeg actually take longer to develop than other rules and are more apt to be challenged in the courts.

The institutional complexity of the rulemaking process is unlikely to be abated. In part, it reflects our ambivalence toward delegated authority. It also reflects the influence of politics in institutional choice as well as the constitutional tension built into the American political system. As rulemaking has become more important as a locus of policy-making activity, it has naturally become a key arena for interbranch conflict and struggle among contending interests. To some extent, moreover, the variety of controls imposed on rulemaking reflects the fact that, like policy making in general, it is neither purely a political nor a technical process. Rather, it combines elements of both in ways that are inextricably tied together.

## **The Effects of Notice and Comment: Public Participation and Bureaucratic Responsiveness**

If rulemaking is subject to many controls, notice and comment remains the most basic and important. Despite this fact, scholars long neglected the question of whether this device achieves its ostensible goal of promoting responsiveness to affected interests in agencies' policy decisions. This neglect was almost certainly attributable to methodological challenges.<sup>19</sup> Fortunately, several recent analyses have examined the effects of public notice and comment in an objective and systematic way. Indeed, this has motivated much of the recent interest in rulemaking by political scientists.

Three conditions must be met if rulemaking procedures are to achieve their intended goals: notice must be effective, comment must occur, and agencies must be influenced by that comment in arriving at their final decisions. Although much remains to be learned, scholars are beginning to shed light on these issues.

### **The Ability and the Will to Participate**

Several factors can limit the effectiveness of rulemaking procedures on the input side. Obviously, stakeholders must be aware that a proposed rule has been issued, and the standard means of providing notice—the *Federal Register*—is a document that most people do not read. *Effective* public comment also entails reasoned argumentation, at the very least. Depending on the issue, it may also require the collection and analysis of data or the ability to make a convincing legal case that the agency has stayed within or exceeded its statutory authority.

In light of these observations, it is not surprising that Kerwin (2003), Golden (1998), and others have found that participation in rulemaking is largely confined to organized interests. In terms of its frequency, at least, comment is also weighted heavily in favor of business groups. The volume of participation further varies tremendously from one regulation to the next: Some rules elicit tens of thousands of comments, whereas some elicit none (Kerwin 2003). Obviously, the intensity and breadth of a rule's effects are key factors in explaining such variation. Given the resources it requires, participation is also determined by the types of interests it affects. Even important rules proposed by agencies such as the Departments of Health and Human Services and Housing and Urban Development may generate few comments because stakeholders are poorly organized (West 2004).

Agencies are often aware of the factors that limit effective public comment, and sometimes they employ supplementary means of providing notice and facilitating meaningful feedback on proposed rules.<sup>20</sup> The recent popularity of e-rulemaking is especially notable in this regard. Encouraged by the E-Government Act of 2002, this initiative is intended to increase public awareness, facilitate participation, and promote transparency in the rulemaking process through digital technologies. A handful of agencies have adopted elements of e-rulemaking, such as e-comment and Web-based access to rulemaking records. Moreover, proposals for the expanded use of e-rulemaking have enjoyed the enthusiastic support of some prominent academics, who view it as a way not only to improve participation in the administrative process but also to increase their own access as scholars.<sup>21</sup>

### **The Effect of Public Comment**

Comment must be taken seriously by agencies if rulemaking procedures are to have their intended effects. Although efforts to address this issue were long confined to the conflicting impressions of leading authorities,<sup>22</sup> a number of recent studies have examined the effects of public comment through empirical analysis. Using the most straightforward approach, Golden (1998) and Balla (1998) compare proposed and final rules to determine whether agencies made changes that corresponded with the public comments they received. In a variation of this methodology, Susan Yackee (forthcoming) uses content analysis to scale public comments and changes in rules along a single dimension of regulatory intrusiveness. I have also focused on changes in a sample of proposed rules but relied on interviews with agency staff to determine whether changes were made and whether those changes resulted from public comment (West 2004). In contrast to these studies, which examine particular agency actions, Furlong and Kerwin (2005) draw broad infer-

ences about the effects of public comment from surveys of group representatives.

Each of these approaches has its advantages and disadvantages. Although surveys of participants in rulemaking permit generalizations about a diverse process that one might hesitate to draw from a few cases, these findings are limited by the fact that they are divorced from concrete observations. Although my study examined a fairly large sample of particular rules, it is open to the criticism that the data for each case are based on the recollections of a single bureaucrat whose memory could have been clouded by time or who could be biased by his or her close involvement in that proceeding. Conversely, efforts by scholars to draw their own conclusions about the effects of public comment based on content analyses of multiple cases may be preferable in terms of objectivity but suffer from a lack of contextual knowledge. This limitation is exacerbated by the technical nature of many rules. For example, how does one who is not intimately familiar with the issues determine whether a change in a proposed rule is significant? And how does one know that the change was made as a result of public comment?

An alternative methodology that addresses these limitations is for the researcher to become immersed in a particular rule or small sample of rules. Indeed, a number of excellent case studies have employed such a strategy (e.g., Cheit 1990; Fritschler 1989; Rothstein 1985). Again, however, it is difficult to generalize from one or a few cases. As Kerwin (2003) notes, most of the case literature on rulemaking focuses on policies that are exceptional in terms of their substantive impact and political salience.

### **Consensus and Unanswered Questions**

Despite the various approaches they have employed, most analyses of notice and comment agree on certain fundamental points. One is that organized groups will often submit comments on issues that affect them. Another is that agencies spend a good deal of time and effort evaluating the comments they receive. Another is that agencies change proposed rules fairly often in ways that are consistent with some of those comments. Within these general parameters, however, much remains to be learned about the inputs and outputs of the notice-and-comment process.

Although its general contours are evident enough, there has been little research addressing variation in the level and distribution of public comment in rulemaking. In what policy areas is it most and least prevalent? Where is it balanced and where is it one sided? How frequently do agencies employ supplementary techniques to encourage public comment, and what are the effects of such efforts? Under what circumstances and in what areas are agencies more and less likely to change their proposals in response to public comment? Scholars are only beginning to collect

systematic data that cut across agencies and policy areas that will address such issues.

A related but perhaps more fundamental question raised by existing studies concerns the significance of the changes that agencies make to proposed rules. Kerwin (2003), Furlong and Kerwin (2005), and Balla (1998) take a generally sanguine view of the effects of public comment, whereas Golden's (1998) finding that 10 of the 11 rules in her sample were changed is tempered by her observation that all but one of those changes involved definitions, deadlines, reporting requirements, procedures, and other relatively minor issues.<sup>23</sup>

Differing conclusions on the effects of public comment can be attributed partly to the inherent subjectivity of assessing the importance of changes that are made in proposed rules. Developing operational distinctions in this area is a daunting task that scholars have largely avoided. As discussed shortly, moreover, a consideration of the notice-and-comment phase of rulemaking in relation to the entire rule-development process provides a useful frame of reference for such determinations that is missing from most accounts.

To the extent that proposed rules are altered in meaningful ways, a final unresolved issue in evaluating the effects of notice and comment concerns the motives behind those decisions. Most scholars assume that changes which are consistent with public comment result from public comment. This assumption is reinforced by the testimony of agency officials that they take comment seriously (Kerwin 2003). It is also reinforced by the preambles to final rules, which often take great pains to explain why agencies did or did not respond to comments.

Yet some rational-choice theorists argue that the true role of public notice and comment is not to secure policy-relevant information in a direct way; rather, it serves as a fire alarm that alerts politicians to agency actions that have significant adverse effects on their constituents (who will complain about proposed values they do not like) (McCubbins and Schwartz 1984; McCubbins, Noll, and Weingast 1987). My recent study provides some empirical support for this view. It finds that although agency staff were sometimes influenced by new information provided through public comment, this represented a minority of the cases in which proposed rules were changed. Moreover, political influences were almost a common denominator in explaining significant changes in proposed rules. Legislators and White House officials had taken an active interest in most of these cases (West 2004).

### **The Informal Process**

A meaningful assessment of responsiveness in rulemaking must also consider the decision-making pro-



cess that precedes notice and comment. A key observation in this regard is that most proposed rules are very specific. They often take years to develop and are typically supported with substantial research and documentation (West 2004).<sup>24</sup> And again, although proposed rules are often modified, some studies suggest that changes are seldom of a fundamental nature (Golden 1998). This may be attributable in part to sunk organizational costs and in part to the fact that due process tends to discourage major departures (which all affected interests would not have had an opportunity to address). In any event, notice-and-comment procedures and most other constraints on rulemaking constitute what Herbert Simon (1976) refers to as the alternative-testing stage of the decision-making process. Without slighting the importance of this function, the more fundamental determinations in rulemaking are often made as problems are being defined and as alternative solutions to those problems are being identified, evaluated, and eliminated.

### Participation and Responsiveness in Agenda Setting and Proposal Development

Several dimensions of the informal rulemaking process are critical to our understanding of bureaucracy's role in government. Perhaps the most important of these is *agenda setting*. Which factors determine why agencies allocate scarce organizational resources to the development of some policies and not others?

The general contours of variation in agenda setting are easy enough to identify. Policy initiatives might come from agencies' program staff or from line officials in the field. Alternatively, they can result from a wide array of external influences, including judicial mandates and suggestions or formal petitions from affected groups, other agencies, legislators, and officials in the White House and Executive Office. Although scholars are well aware that such influences exist, they have given little attention to their relative frequency or importance. Nor have they addressed variation in agenda setting across time, agencies, and policy areas. For example, if almost all of the rules that are developed by the Agricultural Marketing Service are suggested by regulated industry (Anderson 1982), this is probably not the case for the Occupational Safety and Health Administration (OSHA) and the EPA.

An informative preliminary study by Golden (2003) is one of the few exceptions to scholars' neglect of agenda setting in the rulemaking process. Drawn from interviews with officials from five agencies, Golden's data confirm that rules come from diverse sources, the relative importance of which varies among agencies. She also finds that Congress is generally the most important among a pluralistic array of actors that influence the rulemaking agenda.

The character of outside participation in the develop-

ment of proposed rules is also important to our understanding of how bureaucracy makes policy. Here, too, substantial variation exists along several key dimensions:

- **How participation occurs:** We know that agencies often communicate with affected interests as they develop notices of proposed rulemaking, and we also know that such input can occur through a wide variety of mechanisms. These include letters, informal conversations between agency staff and affected interests, the appointment of advisory committees, hearings, and even focus groups, among many other possibilities (West 2004). If agencies gather input in many ways, however, scholars have made little systematic effort to describe or explain variation in the frequency of different forms of participation.
- **Who participates:** Outside participation in proposal development usually occurs at the agency's invitation. Thus, bureaucrats exercise broad discretion in determining whose views will be considered as they define problems and identify and evaluate alternative solutions to those problems. In light of this, perhaps the most obvious questions about the character of responsiveness in proposal development are suggested by the policy literature. For example, is outside participation normally confined to subgovernment actors, as John Chubb (1983) finds in his case study of energy policy making, or do bureaucrats sometimes go beyond the usual suspects in gathering input from stakeholders? To the extent that it is the latter, when is it likely to occur? And when and how often do agencies employ advance notices of proposed rulemaking that allow all interested parties to weigh in on issues at an early stage of policy development?
- **The timing of participation:** My interviews with agency staff indicated that the "when" of outside participation in rule development also varies a great deal (West 2004). Some officials indicated that they communicated with outside interests from the beginning of proposal development through the comment phase. In other cases, participation was terminated with the publication of notice or (most frequently) at some earlier stage of proposal development in order to avoid improper *ex parte* communications or to otherwise prevent the appearance of bias.<sup>25</sup> The most common reported cutoff point was when agency staff had finished their preliminary investigation of a problem and had begun to refine and document the bases for a specific course of action. The timing of participation in policy making is obviously an important determinant of its impact. Here, too, we know little about patterns of variation within and across agencies.

Existing perspectives from the study of bureaucracy and policy making might aid in efforts to develop generalizations about the relationship between agencies and their

environments in the informal rulemaking process. As Golden (2003) notes, for example, the literature on agenda setting might provide a useful framework for examining the origins of proposed rules (Baumgartner and Jones 1993; Kingdon 1984). Similarly, the literature on policy typologies might inform both this question and efforts to identify and explain variation in outside participation during rule development (Lowi 1972). Using James Wilson's (1980) typology, for instance, one might expect to find that interactions between agencies and affected interests are less formal or structured in areas of client politics characterized by concentrated policy benefits and dispersed costs than in areas of interest group politics, where concentrated benefits and costs produce a more conflicted decision-making environment. Research along these lines can not only borrow from existing theory in gaining a better understanding of rulemaking but also contribute to the literature on policy making, whose primary institutional focus has been the legislative process (Golden 2003).

### **Proposal Development as an Organizational Process**

The development of proposed rules frequently involves the accommodation of different viewpoints from within the agency. For example, an excellent work by McGarity (1991) examines the tension between lead office staff, who have the technical expertise most closely associated with the organization's mission (mechanical or construction engineers in OSHA's Safety Division, for example), and policy analysts, whose more comprehensive view of the effects of government actions has become an important consideration in most areas of regulatory administration. Although no two agencies bring to bear exactly the same kinds of professional and other orientations in making policy, in most cases, lawyers and political executives play important roles as well (West 1988). The perspectives of agency actors, the conflict among those perspectives, and the way that conflict is resolved have received relatively little attention in the literature.

Variables from organization theory may be useful for describing rule development. For example, some agencies have highly formalized procedures for developing proposals, whereas others do not. In a related vein, some agencies' rule-development processes are much more highly differentiated than others in terms of the number of stages and clearance points they entail and the variety of actors they involve. To the extent that agencies have elaborate procedures for proposal development, another important consideration is the relationship between those constraints and informal patterns of communication and influence among agency actors. As William Pederson's (1975) insider account of EPA rulemaking suggests, these two dimensions of the process can be quite different.

How different agency actors are brought together in rulemaking can have important implications for both the efficiency of the process as well as its ultimate result. In one of the few systematic and comparative studies to examine the organizational dynamics of rule development, McGarity (1991) finds that a team approach, in which different professions are brought together early in the process, is more efficient than a sequential approach in which the perspectives of policy analysts and other specialists are brought to bear only after lead staff have produced a fully developed proposal. One might add, however, that the higher level of cooperation and consensus engendered by a team approach may undermine the very purpose of bringing diverse viewpoints to bear in bureaucratic policy making.

The analysis of rule development as an organizational process may both contribute to and help to integrate academic literatures that have had relatively little to say to one another. Most studies of agencies' political behavior ignore internal dynamics, instead modeling administrative organizations as unitary actors that pursue their own objectives or respond to external pressures (or both). Conversely, most studies of organizations ignore politics, assuming instead that internal characteristics are or should be a reflection of hierarchically ordered goals.

By viewing rulemaking processes and structures as reflections of competing forces in agencies' political environments (instead of in narrowly functional terms), we may gain a better understanding of how bureaucracy processes or transmits external demands and supports to make policy. We may find, for example, that agencies that operate in highly complex, conflicted, and fluid environments (such as the EPA) tend to have policy-making structures that are quite different from those of agencies operating in more simple and stable environments. Perhaps the former tend to internalize the conflict in their environments. We may also find that the way agencies' organizational characteristics transmit and perhaps alter the character of external political demands into policy has important explanatory and prescriptive value.

### **Conclusion**

The study of rulemaking has been, until recently, almost exclusively the province of administrative law scholars. Much of their work was (understandably) driven by legal concerns, but it also included some excellent analyses of the policy and administrative issues associated with rulemaking and the institutions that constrain it. These analyses have been supplemented in recent years by a growing interest in rulemaking by students of government and public affairs.

The study of rulemaking has been motivated by the same eclectic concerns and theoretical perspectives that inform

the study of bureaucracy generally. This is highly appropriate, and scholars have made important headway along a variety of descriptive and prescriptive fronts. At the same time, much remains to be learned. Although any effort to tie the preceding discussion together would necessarily fall short of the mark, one can identify broad tensions in and omissions from the literature on rulemaking that suggest directions for future research.

A theme that runs throughout a good deal of the foregoing discussion is that we expect the rulemaking process to promote different qualities. This is true not only of analyses that are explicitly prescriptive; differing normative premises also frequently underlie the questions that inform empirical analysis. Efforts to assess rulemaking and the procedures that constrain it are variously informed by the assumption that administration should be politically responsive to stakeholders or political principals, timely and efficient in the use of organizational resources, accurate and effective in carrying out legislative intent, and economically efficient. Although these values are all relevant and worthy of our attention, they are often impossible to pursue simultaneously. Therefore, the study of rulemaking should be guided not only by the question of how to promote particular qualities but also by the questions of how to reconcile competing qualities and when some qualities might be more appropriate than others.

To a considerable extent, conflicting expectations about the qualities that rulemaking should promote are grounded in conflicting assumptions about its character. Thus, another important theme that emerges from the preceding discussion is simply that rulemaking is a highly diverse process. Efforts to generalize about or evaluate almost any aspect of rulemaking based on one case or even on multiple cases within one agency or policy area are usually doomed to failure. The fact that rules are issued for different purposes and within very different technical, legal, and political environments conditions the answers to virtually all of the empirical and normative questions that scholars have raised concerning the implications of rulemaking and the procedures that constrain it. In the broadest sense, therefore, a basic challenge facing students of rulemaking is to identify the most important elements of contextual variation in the process. This might borrow existing concepts from the study of public administration and public policy. It might also borrow from traditional institutional scholarship dealing with issues of delegation and with levels and types of discretion.

Finally, the study of rulemaking could benefit from much more attention to its informal dimensions. A certain irony underlies this observation, given that the recent interest in rulemaking by students of political science and public administration is part of a broader resurgence of interest in formal institutions. Although this has been a positive de-

velopment, it is important not to lose sight of the processes that precede and surround notice and comment and other constraints. This is not to suggest that we revert to an extreme form of behaviorism that ignores formal structure. Rather, it is to acknowledge that a full understanding of the rulemaking process must recognize how its formal and informal dimensions shape and delimit one another.

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## Notes

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1. Often equated with regulatory administration (the terms “rule” and “regulation” are used interchangeably), rulemaking plays an important role in most policy areas. The Department of Housing and Urban Development issues rules establishing eligibility criteria for Section 8 housing, for example, just as the Occupational Safety and Health Administration issues rules to protect workers.
2. This was obtained under much of the old economic regulation, for example, whereby agencies could (and often did) bring enforcement proceedings against companies whose practices were allegedly inconsistent with the public interest and other broad expressions of legislative intent.
3. Adjudicatory actions (such as cease-and-desist orders) often did not impose direct punishments for actions taken in the past, for example, just as rules could have indirect retroactive effects by forcing firms to abandon practices or technologies in which they had sunk costs. In addition, the policies established through rules could be trivial, just as adjudicatory precedents could be substantively broad and consider policy effects that went beyond the parties involved in the case at hand.
4. As opposed to the codification of precedent.
5. As one possible illustration, Shapiro (1965) argued that the practical definition of “good-faith bargaining” was so context specific that it had to be fleshed out on a case-by-case basis by the National Labor Relations Board.
6. Interpretive rulemaking does not have legal force, and thus it is not subject to the same institutional constraints as substantive rulemaking.
7. Although the meaning of “arbitrary or capricious” was debated from the outset, it was generally construed as applying only to rules for which there was no reasonable basis. Exceptions from the APA’s procedural requirements include interpretive rules (which do not have the force of law) and rules pertaining to internal agency management. They also encompass substantive (legally binding) rules relating to foreign and military affairs and to “public property, loans, grants, benefits, subsidies, or contracts.”
8. These procedures represented a middle ground between the APA’s legal requirements and the formal due process required for administrative adjudication.
9. The APA does not mention a record, and agencies seldom compiled one in any formal sense before the 1970s.

10. So-called regulatory review applied to all rules under the Reagan and George H. W. Bush administrations. As was the case under Presidents Ford and Carter, under the Clinton and George W. Bush administrations it was confined to “significant” regulations having an annual economic impact of at least \$100 million per year or meeting one of various other criteria (including the determination by the Office of Management and Budget that a rule merited review).
11. Major regulations (so designated by the Office of Management and Budget) do not go into effect for 60 days, during which time Congress may disapprove them through a joint resolution.
12. Program design does not bear an instrumental relationship to substantive program objectives under this view. Rather, it helps to define those goals (along with whatever explicit substantive guidance that agencies receive in their enabling legislation).
13. In one case study, for example, I describe the imposition of heightened due process on Federal Trade Commission rulemaking as a concession to those who opposed giving the agency greater authority to police “unfair or deceptive practices.” The expectation of groups such as the U.S. Chamber of Commerce and the National Association of Manufacturers (and their legislative allies) that adversary rights and substantial evidence review would impede the commission’s policy making were proved to be well founded (Boyer 1979; West 1981).
14. Although much of the recent literature has used illustrative examples, these have been confined primarily to anecdotes from social regulation.
15. In an influential article, Richard Stewart (1975) argued that as judges have come to realize that administrative policy making is a matter of balancing competing interests, they have sought to ensure that all relevant stakeholders have an opportunity to participate in and influence agency decisions through the expansion of standing.
16. For example, whether statutory requirements designed to strengthen the efforts by environmentalists to influence the EPA rules are the result of politics or whether they stem from the desire to ensure that the agency is accountable to interests other than those of regulated industry ultimately may be an ephemeral distinction.
17. The APA does not mention a record, and agencies usually did not compile one in any formal sense before the 1970s.
18. Unlike regulatory enforcement, for example, where studies have examined agency inspections or citations as a function of changing presidential administrations (Moe 1985; Wood 1988), turnover on legislative oversight committees (Weingast and Moran 1983), local political environments (Hedge, Menzel, and Williams 1988), and other political variables, responsiveness in rulemaking is difficult to model using quantitative data. Inattention to the effects of notice and comment may also have been attributable to lawyers’ lack of interest and to social scientists’ alleged view of institutional arrangements as “epiphenomena” or “throughputs” that could be ignored in favor of more fundamental forces.
19. The former include announcements in newspapers, letters to stakeholders, and informal communications from field offices. The latter range from oral hearings to the provision of funding for “impecunious interveners” (Bonfield 1969).
20. The Center for Business and Government at Harvard University’s Kennedy School has recently become active in both the promotion and evaluation of e-rulemaking.
21. Some, such as Davis (1969, 1975), have argued that notice and comment is highly effective in democratizing bureaucratic policy making. Others, such as Fritschler (1989), have expressed the view that proposed rules are *faits accomplis* and that comment have little effect other than to help legitimize what has already been decided. Still others have argued that the true role of rulemaking procedures can be understood in terms of political motives and effects that are quite different from their ostensible goals (McCubbins and Schwartz 1984; McCubbins, Noll, and Weingast 1987).
22. Golden notes that “in the majority of cases, the agency made some of the changes that were requested by commenters, but it rarely altered the heart of the proposal” (1998, 259).
23. Proposed rules are often accompanied by hundreds of pages of supporting materials. In my study, which was based on an examination of 43 rules, the average proposal took 5.1 years to develop.
24. Although the courts have been inconsistent on the subject in recent years, off-the-record influences on rulemaking are problematic to the extent that enabling statutes and judicial precedent have empowered judges to take a hard look at the supporting rationales for decisions.

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