1983

Regulatory Reform: Assessing the California Plan

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Author: Marsha N. Cohen

Source: Duke Law Journal

Citation: 1983 Duke L.J. 231 (1983).

Title: *Regulatory Reform: Assessing the California Plan*

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REGULATORY REFORM: ASSESSING THE CALIFORNIA PLAN

MARSHA N. COHEN*

California enacted an extensive regulatory review plan in 1979 which established the criteria of necessity, authority, clarity, consistency, and reference for all existing and future regulations. It created the office of Administrative Law (OAL) in the executive branch to enforce compliance with the new standards, and adopted procedural modifications to the state's rulemaking scheme. In this article, Professor Cohen analyzes the California plan and its application during the first two years of the OAL's existence. She concludes that the procedural reforms are generally sound, although in some aspects impose excessive controls on agencies. In contrast, she finds troubling the plan's controls on the substantive aspects of regulatory adoptions. The ill-defined necessity criterion encourages OAL to substitute its judgment for that of the agencies' in direct contravention of legislative mandate, and inadequately recognizes the contribution of agency expertise to sound regulatory policymaking.

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The author gratefully acknowledges the research assistance of Elise M. Balgley of the Hastings Class of 1984; the cooperation of the staff of the Office of Administrative Law; and the helpful comments on an early draft by Professor Peter H. Schuck of Yale Law School and Professor Robert W. Hamilton of the University of Texas School of Law.

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I. INTRODUCTION

Both major political parties have endorsed regulatory reform¹ on the federal² as well as state³ levels. California recently implemented an

1. This Article uses the word "reform" to mean a change in the status quo. Promoters of a reform usually intend to improve the status quo; use of the word does not, however, mean that the author endorses each change.

2. Both the Democrats and the Republicans endorsed regulatory reform in their 1976 and 1980 party platforms. See N.Y. Times, Aug. 14, 1980, at B4, col. 1 (Democratic Platform of 1980); N.Y. Times, July 13, 1980, at 14, col. 1 (Republican Platform of 1980); N.Y. Times, Aug. 16, 1976, at 17, col. 1 (Republican Platform of 1976); N.Y. Times, June 18, 1976, at A12, col. 1 (Democratic Platform of 1976).

The Regulatory Reform Act, S. 1080, 97th Cong., 2d Sess. (1982), (S. 1080), which was passed unanimously by the Senate, 128 CONG. REC. S2713 (daily ed. Mar. 24, 1982) [hereinafter cited as S. 1080], proposed reforms similar to those enacted in California. See, e.g., *infra* notes 26 & 27. S. 1080 died, but an identical bill—also called S. 1080—has been introduced in the 98th Congress, see S. 1080, 98th Cong., 1st Sess. (1983), 129 CONG. REC. S4908, S4909 (daily ed. Apr. 19, 1983). General descriptions of other federal initiatives include Alviani, *Federal Regulation: The New Regimen*, 9 BRIT. COLUM. ENVTL. AFF. 285 (1980); Bliss, *Regulatory Reform: Toward More Balanced and Flexible Federal Agency Regulation*, 8 PEPPERDINE L. REV. 619 (1981); Pierce and Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175 (1981); Rosenberg, *Beyond The Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193 (1981).

executive branch mechanism to satisfy the widely perceived need for regulatory reform.⁴ Several states and foreign countries have proposed

3. See M. HERNANDEZ, REVIEW OF ADMINISTRATIVE REGULATIONS: THE EXPERIENCE OF OTHER STATES, THE FEDERAL GOVERNMENT, AND OPTIONS FOR CALIFORNIA 13, and app. 2-5, 6 (Assembly Office of Research [California], June 1979); Babbitt, *The "State" of Regulatory Reform*, REG., Sept.-Oct. 1980, at 38; Larsen, *Legislative Delegation and Oversight: A Promising Approach From Oregon*, 14 WILLAMETTE L.J. 1 (1977). As of 1978, 34 state legislatures, two governors, and several attorneys general had authority to review regulations, M. HERNANDEZ, *supra*, at 7.

The revised Model State Administrative Procedure Act, published in 1981 by the National Conference of Commissioners on Uniform State Laws, incorporates many features of regulatory reforms adopted in various states. See generally Bonfield, *An Introduction to the 1981 Model State Administrative Procedure Act, Part I: General Provisions, Access to Agency Law and Policy, Rulemaking, and Review of Rules*, 34 AD. L. REV. 1 (1982).

4. "Regulatory reform" has several different meanings and may be achieved in many different ways. See Bliss, *supra* note 2, at 621-22; DeMuth, *The White House Review Programs*, REG., Jan.-Feb. 1980, at 13; Karmel, *Appendix B, Regulatory Reform Efforts of the SEC, Panel I: A Fresh Look at Federal Regulatory Strategies*, 32 AD. L. REV. 165, 206 (1980) [hereinafter cited as *Panel I*]; Note, *Delegation and Regulatory Reform: Letting the President Change the Rules*, 89 YALE L.J. 561, 561 (1980).

In one sense regulatory reform responds to the costs of direct government spending programs and business regulation. Proponents of regulatory reform of this type favor limiting government intervention in the marketplace. See, e.g., Paul, *Is a Regulatory Revolt Next?* NATION'S BUS., Oct. 1978, at 28; *The Regulation Mess*, NEWSWEEK, June 12, 1978, at 86; Weidenbaum, *Regulation or Over-Regulation?*, Wall St. J., Apr. 6, 1976, at 22, col. 3. To the automobile industry such reform means relief from many safety and pollution regulations. United States Automobile Industry Statement by the President, 17 WEEKLY COMP. PRES. DOC. 403 (Apr. 6, 1981).

To the consumer movement, which generally favors the types of safety and pollution regulation from which the automobile industry has sought relief, reform means eliminating government intervention that prevents competition. See, e.g., Airline Deregulation Act of 1978, 49 U.S.C. § 1305(a) (Supp. IV 1980); Heinenway, *Railroading Antitrust at the ICC*, THE MONOPOLY MAKERS: RALPH NADER'S STUDY GROUP REPORT ON REGULATION AND COMPETITION 139 (M. Green ed. 1973) (trucking); and Pillai, *The CAB as Travel Regulator*, *id.* at 159 (airlines).

Only substantive programmatic reforms can meet the foregoing types of concern. Demands for procedural reform, which seek changes in the way the government accomplishes its programmatic goals, also fall under the regulatory reform umbrella. Cooper, *Regulatory Reform?*, 35 FOOD DRUG COSM. L.J. 193, 194 (1980).

The ability of agencies to create binding regulations that carry the force and effect of law raises the hackles of many, notwithstanding the legitimacy of the agencies' delegated powers. See, e.g., Butcher, *The Stifling Costs of Regulation*, BUS. WK., Nov. 6, 1978, at 22, 24; Ford, *The High Cost of Regulation*, NEWSWEEK, Mar. 20, 1978, at 15.

The notice and comment method of rulemaking, hailed by some as a brilliant procedural innovation in administrative law, 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, §6:1 (2d ed. 1978), has been the subject of increasing criticism. Participant-critics have sought to increase their role in informal rulemaking by the addition of oral hearings and cross-examination. They at one time received considerable support from judges, particularly the members of the District of Columbia Court of Appeals, who required agencies to supplement normal notice and comment procedures with additional procedures. See, e.g., Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651-52 (D.C. Cir. 1973); see also California Optometric Ass'n v. Lackner, 60 Cal. App. 3d 500, 509-11, 131 Cal. Rptr. 744, 750-52 (1976). The United States Supreme Court ended this practice, however, holding that courts may not require agencies to employ more involved procedures than those mandated for informal rulemaking by § 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1976). Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

or are studying legislation paralleling California's innovations.⁵

California's regulatory reform plan includes both substantive and procedural innovations. The procedural reforms increase the formality of notice-and-comment rulemaking. Agencies must now provide more information and explanation in the mandated notice of rulemaking, hold oral hearings when demanded by interested individuals, respond to public comment on proposed rules, and incorporate the entire rulemaking proceeding into a rulemaking file.⁶ Similar requirements have already been imposed on federal rulemaking by executive order,⁷ and pending federal legislation is also likely to incorporate such reforms.⁸

In contrast to the procedural reforms of the California plan, which roughly parallel those imposed on or proposed for the federal agencies, the substantive reforms diverge from their federal counterparts. Under the California plan, all regulations must pass two major substantive tests: before promulgation, agencies must prove both that they have authority to issue a particular regulation and that the regulation is necessary.⁹ Federal reformers have focused instead on whether the benefits of a regulation outweigh its costs.¹⁰ The California plan empowers the new Office of Administrative Law (OAL) to oversee the regulatory process and to enforce the procedural and substantive standards embodied in the plan.¹¹ This development radically departs from prior

Demand for "open" government resulted in the passage of such laws as the Freedom of Information Act, 5 U.S.C. § 552 (1976 & Supp. IV 1980) (release of government-held information); the Government in the Sunshine Act, 5 U.S.C. § 552b (1976) (public meetings required for multi-member government agencies); and the Federal Advisory Committee Act, 5 U.S.C. App. I (1976 & Supp. IV 1980) (public meetings required for advisory committees). A number of states have passed parallel legislation. See, e.g., Public Records Act, CAL. GOV'T CODE §§ 6250-6265 (West 1980); Ralph M. Brown Act, CAL. GOV'T CODE § 54950 (West 1980) (open meetings required for local government agencies); State Agency Act, CAL. GOV'T CODE § 11120 (West 1980) (open meetings required for state agencies).

5. Four states (Arizona, New Jersey, Pennsylvania, and Texas) have introduced legislation modeled after the California law. Four additional states (Georgia, Indiana, New York, and Wisconsin), Australia, and the Canadian province of Quebec have studied the California law to consider its application. 1981-82 OAL ANNUAL REP. 2 (Office of Administrative Law) (Director's Message). The Arizona proposal—H.B. 2217, introduced Jan. 19, 1982, 35th Leg., 2d Sess.—virtually copies A.B. 1111, the cornerstone of California's reforms; see *infra* notes 13-26.

6. See *infra* text accompanying notes 27-41.

7. See *infra* text accompanying note 28.

8. See *infra* text accompanying notes 39-40, 43, 50, 143. Because several of the provisions of pending federal regulatory reform legislation are similar to provisions of the California plan, an examination of the California plan may shed light on the wisdom of the proposed federal reforms. Accordingly, this article notes similarities to proposed federal legislation in the California plan.

9. See *infra* text accompanying notes 45-62.

10. See *infra* note 89.

11. See *infra* text accompanying notes 64-84.

law; previously, only the courts reviewed the validity of regulations. Federal reforms have vested similar authority in the Office of Management and Budget (OMB).¹²

This article describes California's regulatory reform plan,¹³ and reviews and analyzes the results of its first two years of operation. The description reveals a sweeping plan for review of all existing and future regulatory enactments. The procedural and substantive innovations that the plan imposed were intended to reduce the number of regulations and to improve their quality. Analysis of the procedural changes reveals some flaws and excesses but also discloses process modifications that are well designed to focus agency and public attention on the critical issues underlying regulatory choice. The substantive provisions, however, present considerable problems. Most significantly, the ill-defined requirement that the OAL review each regulation for necessity inevitably shifts policymaking power from the agencies to their reviewer. This shift has potentially negative ramifications for those decisions in which agency perspective, philosophy, and judgment properly play a significant role. Accordingly, the article proposes modifications that would maintain the advantages of centralized regulatory review while minimizing interference with agency judgment.

II. THE CALIFORNIA PLAN¹⁴

A. *Background, Purpose, and Scope of the California Plan.*

California's legislators responded to demands for regulatory reform by proposing a number of bills,¹⁵ most of which relied on the legislative veto¹⁶ and the sunset clause¹⁷ to control regulatory discre-

12. Successive presidents have empowered the Office of Management and Budget (OMB), an arm of the Executive Office of the President, to exert control over federal regulatory processes. Federal regulatory reform legislation is likely to incorporate presidential oversight of at least some aspects of the regulatory process. See *infra* note 63. See generally *Symposium: Presidential Intervention in Administrative Rulemaking*, 56 TUL. L. REV. 811 (1982).

13. The California legislature initially enacted the regulatory reform mechanism as A.B. 1111, 1979 Cal. Stat. 567, which became effective for the most part on July 1, 1980.

14. Two descriptions of the California reforms published early in the life of the program are PRICE, EXECUTIVE CONTROL OF RULEMAKING: THE OFFICE OF ADMINISTRATIVE LAW IN CALIFORNIA, REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (Washington, D.C. Apr. 1981) and Starr, *California's New Office of Administrative Law and Other Amendments to the California APA: A Bureau to Curb Bureaucracy and Judicial Review, Too*, 32 AD. L. REV. 713 (1980).

15. M. HERNANDEZ, *supra* note 3, at app. 5 (listing regulatory reform bills pending in legislature).

16. A legislative veto provision vests authority in a committee, one house, or both houses of a legislature to review and disapprove administrative regulations. The process is designed to be less burdensome than the passage of legislation to overturn agency actions, and does not require executive (presidential or gubernatorial) approval. The United States Supreme Court has just

tion. Assembly Bill (A.B.) 1111, which instituted the California plan, was offered as a less radical approach to the problem of regulatory reform.¹⁸ The bill became law in 1979 and was amended in 1981¹⁹ and 1982.²⁰ It provides for increased executive control of the regulatory process through changed procedures and substantive standards, with enforcement by a semi-autonomous agency of the executive branch, the OAL.²¹

In establishing the OAL and charging it with oversight of all new and existing regulations, the California Legislature declared its intent "that the purpose of such review shall be to reduce the number of administrative regulations and to improve the quality of those regulations which are adopted."²² The desire to reduce the number of regulations is understandable considering the sheer volume of regulations promulgated by California agencies: 28,000 pages — 14½ feet²³ — of regula-

declared the legislative veto unconstitutional, see *Immigration and Naturalization Serv. v. Chadha*, 51 U.S.L.W. 4907 (U.S. June 21, 1983). For a general discussion of the legislative veto, see Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1371 (1977).

17. Sunset laws terminate agency programs or agencies themselves unless the legislature specifically reauthorizes the program or agency. Adams, *Sunset: A Proposal for Accountable Government*, 28 AD. L. REV. 511, 520 (1976). Although 35 states have enacted sunset laws, observers suggest that their impact on deregulation has been limited. One state has repealed its sunset law, and repeal legislation has been introduced in six other states. Carlson, *Success of Sunset Laws Varies as Fights Turn to Big Targets*, Wall St. J., May 4, 1982, at 29, col.1; see also Erbin, *Has The Sun Set on Sunset?: A Postmortem in California*, CAL. REG. L. REP., Summer 1981, at 2.

18. California's former Governor Edmund G. Brown, Jr., a number of his powerful Democratic allies in the legislature, and a coalition of liberals, environmentalists, and labor unions opposed a legislative veto amendment to the California Constitution. This coalition offered A.B. 1111 as a substitute regulatory-reform package. Former Assembly Speaker Leo T. McCarthy authored the bill, which was introduced on March 22, 1979. The bill was enacted rapidly and was passed by an almost unanimous vote. The backers of A.B. 1111 successfully blocked the legislative veto amendment.

The political background of A.B. 1111 is examined in Walters, *Regulating the Regulations*, CAL. LAW., Jan. 1982, at 34. The article misstates the year of the critical events, erroneously citing 1980 as the date of passage of A.B. 1111. A.B. 1111 was introduced in 1979, approved by the Governor, and filed on September 11, 1979. See also Price, *supra* note 14, at 1, 23, 24 n.22.

19. Chapters 592, 604, 814, 865, 983, and 1091 of the 1981 California Statutes significantly modified the regulatory reform parts of the California Administrative Procedure Act. See *Administrative Law, Review of Selected 1981 California Legislation*, 13 PAC. L.J. 513, 537-38 (1982).

20. Chapters 61, 1083, 1211, 1236, 1544, and 1573 of the 1982 California Statutes significantly modified portions of the California Administrative Procedure Act affecting regulatory reform.

21. Some of the procedural reforms incorporated into A.B. 1111 had previously been proposed to apply to rulemaking by the California Occupational Safety and Health Standards Board. See Preprint A.B. 7 (Assembly Subcomm. on Industrial Safety, 1977), §§ 1 (improved information in notice), 3 (expanded "basis and purpose" statement), & 4 (rulemaking file).

22. 1979 Cal. Stat. 567, §1 (codified as CAL. GOV'T CODE § 11340.1 (West 1980)). Unless otherwise noted, all statutory citations are to sections of the California Government Code.

23. Smith, *The State's Shrinking Pains in Cutting Government Red Tape*, XIII CAL. J. 218 (June 1982).

tions were in force at the time A.B. 1111 was passed.²⁴

The boldness of the California reform is most evident in its all-encompassing scope. A.B. 1111 requires the agencies and the OAL to review all existing and all new regulations. The task²⁵ — recall the 28,000 pages — is enormous. Federal reformers have never been willing to tackle the parallel task of reviewing the entire Code of Federal Regulations.²⁶

24. The California Administrative Code grew from 13,500 pages in 1974 to 28,000 pages in 1979; both Democratic and Republican legislators referred to these numbers in statements about A.B. 1111, Starr, *supra* note 14, at 713. Similarly, between 1970 and 1974 the Code of Federal Regulations grew from 54,105 to 69,270 pages. Miller, *Lessons of the Economic Impact Statement Program*, REG., July-Aug. 1977, at 15.

25. A.B. 1111 includes strict deadlines for review of each title of the California Administrative Code: it requires completion of regulatory review by June 30, 1986. § 11349.8 (West 1980). Governor Brown, at the request of the OAL, accelerated the review of existing regulations so that it would be completed by December 31, 1982. See Smith, *supra* note 23 at 219; Exec. Order No. B72-80 (Oct. 9, 1980), 1980 OFFICE OF THE GOVERNOR RELEASES 392 (2,3); Erbin and Fellmeth, *The Office of Administrative Law: Regulatory Reform or an Ayatollah for California?*, CAL. REG. L. REP., Spring 1981, at 2. This completion date coincided with the end of Governor Brown's term of office.

26. The Code of Federal Regulations took up almost 22 linear feet of library shelf space in October 1982.

President Carter's Executive Order (Improving Government Regulations), Exec. Order No. 12,044, 3 C.F.R. 152 (1979), extended by Exec. Order No. 12,221, 3 C.F.R. 266 (1981) [hereinafter cited as Carter Order], mandated that agencies "periodically review their existing regulations to determine whether they are achieving the policy goals of this Order," *id.* § 4, but the analytic procedures required by the Order for rulemaking were limited to "significant" regulations, *id.* § (2)(e), or significant regulations with "major economic consequences," *id.* § 3.

President Reagan's Executive Order (Federal Regulation), Exec. Order No. 12,291, 3 C.F.R. 127 (1982) [hereinafter cited as Reagan Order], imposed Regulatory Impact and Analysis Review on "major" rules only, *id.* § 3. A "major" rule is defined in the Reagan Order as one that is likely to result in:

- (1) An annual effect on the economy of \$100 million or more;
- (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Id. § 1(b).

The rate of rejection of rules reviewed under the Reagan Order was slightly less than eight percent during its first 100 days in effect. EXCERPTS FROM: THE FIRST 100 DAYS OF E.O. 12291, "FEDERAL REGULATION": A REPORT TO THE PRESIDENTIAL TASK FORCE ON REGULATORY RELIEF, Staff of the Office of Management and Budget, June 6, 1981, at 3. The OAL, on the other hand, had an overall rejection rate of 31 percent in 1981-82. 1981-82 OAL ANNUAL REP., 6-7. S. 1080, *supra* note 2, would have mandated review within ten years of all existing major rules. The definition of a "major rule" in this legislation was similar to that in the Reagan Order. 128 CONG. REC. S2715 (daily ed. March 24, 1982).

Both Presidents Carter and Reagan conceded that their Orders did not apply to the independent regulatory agencies. Reagan Order, *supra* § 1(d); Carter Order, *supra* § 6(b)(5). In contrast, OAL has authority over all 124 California agencies except the Public Utilities Commission and the Division of Industrial Accidents. § 11351; Price, *supra* note 16, at 26, 29; 1981-82 OAL ANNUAL REP., 11.

B. *Innovations Increasing Public Information.*

A number of the procedural innovations of A.B. 1111 and its progeny facilitate public participation in the rulemaking process. The bill extends the time for allowing comment on any proposed rule from 30 to 45 days.²⁷ Also, in addition to the "informative digest" required previously, the agency must now include in the notice of rulemaking "reference to the fact that the agency has prepared a statement of the reasons for the proposed action [and] has available all the information upon which its proposal is based."²⁸ The thrust of federal reforms is in the same direction.²⁹

C. *Changes in Rulemaking Procedures.*

The hallmark of informal rulemaking has been the use of the notice and comment procedure.³⁰ In the past, this procedure normally did not involve hearings,³¹ and interested parties had no right to be heard:³² an agency usually would invite only written comments in response to the notice of a proposed rule. Now, however, A.B. 1111 and its progeny forbid agencies using notice and comment rulemaking from

27. Compare § 11423 (West 1966 & Supp. 1980) with § 11346.4 (West 1980 & Supp. 1982). Mandatory publication of the notice in a newspaper of general circulation, trade or industry publication (§ 11423(a)) was repealed, leaving the better targeted and less costly methods of notice, such as mailing the notice to everyone who has filed a request for notice with the agency and publication in the California Administrative Notice Register. Compare § 11423(b) (West 1966 & Supp. 1980) with § 11346.4(a) (West 1980 & Supp. 1982).

28. Compare § 11424(a)(3) (West 1966 & Supp. 1980) with § 11346.5(a)(8) (West 1980 & Supp. 1982).

The initial statement of reasons must include at least:

(1) A description of the public problem, administrative requirement, or other condition or circumstance the regulation is intended to address.

(2) A statement of the specific purpose of the regulation and the factual basis for the determination by the agency that the regulation is reasonably necessary to carry out the purpose for which it is proposed.

(3) An identification of each technical, theoretical, and empirical study, report, or similar document, if any, on which the agency is relying in proposing the adoption or amendment of a regulation.

(4) A description of any alternatives the agency has identified that would lessen any adverse impact on small businesses.

§ 11346.7 (a) (West 1980 & Supp. 1982), as amended by 1982 Cal. Stat. 1573, § 3.5.

29. S. 1080, *supra* note 2, § 3, at 128 CONG. REC. S2713 (daily ed. March 24, 1982).

30. K. DAVIS, ADMINISTRATIVE LAW TEXT, §§ 6.01, 6.03 (3d ed. 1972); *United States v. Florida East Coast Ry.*, 410 U.S. 224, 234-35 (1973).

31. Courts have at times, however, referred to the procedure as a hearing. *See, e.g.*, *United States v. Florida East Coast Ry.*, 410 U.S. 224, 235 1973; *American Mining Congress v. Marshall*, 671 F.2d 1251, 1261 (10th Cir. 1982); *American Trucking Ass'n v. ICC*, 659 F.2d 452, 461 (5th Cir. 1981), *cert. denied*, 51 U.S.L.W. 3647 (U.S. Mar. 7, 1983).

32. § 11425 (West 1966 & Supp. 1980); 5 U.S.C. § 553(c) (1976).

refusing a timely demand for a public hearing — a legislative-type oral proceeding.³³

The California reforms also guarantee agency responsiveness to public input in the hearing process. The adopting agency must submit to the OAL a final statement of reasons including "a summary of each objection or comment made regarding the regulation, together with an explanation of how the proposed regulation has been amended to accommodate each objection or comment, or the reasons for rejecting each objection or comment."³⁴

The change with perhaps the greatest potential impact on the rulemaking process requires that "[e]very agency shall maintain a file of each rulemaking which shall be deemed to be the record for that rulemaking proceeding."³⁵ The California APA, like the federal APA, had contained no such provision, and traditionally the record of a rulemaking proceeding has not been a clearly defined body of information.³⁶ Instead, it has been a hodge-podge of materials, only assembled into something called a "record" when required for purposes of judicial review.³⁷ At the late date of judicial review such a disjointed record makes it difficult for litigants and courts to distinguish what the agency relied on at the time of rulemaking from information added later in justification of the rule.³⁸ A.B. 1111 addresses this issue directly by specifically defining the rulemaking file.³⁹ For judicial review of the

33. § 11346.8 (West 1980 & Supp. 1982).

Although federal reforms encourage increased use of oral hearings, no proposal would require such hearings except for major rules. Carter Order, *supra* note 26, § 2(c); S. 1080, *supra* note 31, § 3, at S2713. When oral hearings are required by federal law, however, the proposed federal reform would require an opportunity for cross-examination. *Id.* § 3 at S2714.

34. § 11346.7(b) (West 1980 & Supp. 1982). This provision, adopted in 1981, superseded a less stringent command in A.B. 1111 that the final statement "include a summary of the primary considerations raised by persons outside the agency in opposition to the regulation as adopted, together with a brief explanation of the reasons for rejecting these considerations." § 11346.7(c). Federal reformers would adopt the approach of the original A.B. 1111 requirement in expanding the scope of the mandated statement of basis and purpose. *See* S. 1080, *supra* note 2, § 3, at S2714.

35. § 11347.3(a) (West 1980 & Supp. 1982).

36. 1 K. DAVIS, *supra* note 4, §§ 6:5, 6:10; Auerbach, *Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review*, 72 NW. U.L. REV. 15, 23-24 (1977). *See generally* DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 271-72 (hybrid rulemaking requirements).

37. *See, e.g.,* Camp v. Pitts, 411 U.S. 138, 142-43 (1973); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419-20 (1971); Texas v. EPA, 499 F.2d 289, 297 (5th Cir. 1974), *cert. denied*, 427 U.S. 905 (1975); Appalachian Power Co. v. EPA, 477 F.2d 495, 507 (4th Cir. 1973); California Ass'n of Nursing Homes v. Williams, 4 Cal. App. 3d 800, 813, 84 Cal. Rptr. 590, 599 (1970); McGowan, *Reflections on Rulemaking Review*, 53 TUL. L. REV. 681, 687 (1979).

38. A.B. 1111 permits *post hoc* justifications to support regulations resubmitted to OAL after initial disapproval. *See infra* note 107.

39. A.B. 1111 defines the rulemaking file as:

(1) Petitions concerning the regulation,

agency's determination that the regulation is reasonably necessary,⁴⁰ the record will consist of the rulemaking file; the OAL's necessity review is restricted to that file.⁴¹

D. *Clarity Requirement.*

The California Legislature gave the California Administrative Code very bad reviews for its literary merit.⁴² Its solution was to require that the OAL review all regulations for clarity.⁴³ By statute, "clarity" means "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."⁴⁴

E. *Requirement of Rulemaking Authority.*

An agency may make rules only if authorized to do so.⁴⁵ Accordingly, whether a particular rule is in fact authorized by statute is a frequent issue in litigation over the validity of adopted rules.⁴⁶ In a

(2) Published notices,

"(3) All data and other factual information, any studies or reports, and written comments submitted to the agency in connection with the adoption, amendment, or repeal of the regulation.

(4) All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying . . ."

(5) Transcripts, recordings, or minutes of public hearings,

(6) Mandated statements of reasons,

(7) Any other information that the agency is required by law to consider.

§ 11347.3(a) (West Supp. 1983).

40. See *infra* notes 53-62 and accompanying text.

41. §§ 11350(b) (West 1980); 11349.1 (West 1980). Proposed federal reform legislation is remarkably parallel to California law on the rulemaking record issue. California's rulemaking procedures after A.B. 1111 contrast sharply with the long-applicable requirements of the federal Administrative Procedure Act. The provisions of 5 U.S.C. section 553 are currently a spare framework. Passage of the Regulatory Reform Act would make federal requirements more like those of California. See S. 1080, *supra* note 2, at S2713.

42. "The language of many regulations is frequently unclear and unnecessarily complex, even when the complicated and technical nature of the subject matter is taken into account. The language is often confusing to the persons who must comply with the regulations." § 11340(b) (West 1980).

43. § 11349.1 (West 1980).

44. § 11349 (West 1980). President Carter's executive order included a similar "plain English" requirement. Carter Order, *supra* note 26, § 2(d)(5).

45. See K. DAVIS, *supra* note 30, §§ 2.01, 2.04; *American Trucking Ass'n v. ICC*, 659 F.2d 452, 469-70 (5th Cir. 1981), *cert. denied*, 51 U.S.L.W. 3647 (U.S. Mar. 7, 1983); *In re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 523 (D.C. Cir.) (en banc), *cert. denied*, 454 U.S. 822 (1981); *Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1141, 1147-48 (D.C. Cir. 1980); *Trans-Pacific Freight Conference v. Federal Maritime Comm'n*, 650 F.2d 1235, 1244, 1248 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 984 (1981); *National Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 701-04 (3d Cir. 1979); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1024, 1040-41 (D.C. Cir. 1978).

46. See, e.g., *Board of Governors of the Fed. Reserve Sys. v. First Lincolnwood Corp.*, 439 U.S. 234, 236-37 (1978); *SEC v. Sloan*, 436 U.S. 103, 106 (1978); *Gardner v. Toilet Goods Ass'n*,

reform with potentially great impact, the legislature made OAL approval contingent on the OAL finding that the regulation is authorized.⁴⁷ The statute defines authority as "the provision of law which permits or obligates the agency" to make the regulation.⁴⁸ Two additional standards by which the OAL must judge a proposed regulation, consistency⁴⁹ and reference,⁵⁰ also relate to the agency's authority to adopt the rule. The consistency standard requires that the regulation not conflict with any existing law;⁵¹ the reference standard requires the agency to articulate which statute, court opinion, or other legal provision the regulation implements.⁵² The authority standard similarly requires that the agency cite the provision giving it rulemaking power.

Both the authority and consistency standards require the OAL to make legal judgments about the basic legitimacy of the agency's action. Reference, although related, is almost entirely procedural in its nature. It requires only that the agency cite those provisions of law that it believes it is implementing.

F. *Requirement of Necessity for Rule.*

The most controversial⁵³ and important standard of review implemented by A.B. 1111 is "necessity." Since early in the history of the California Administrative Procedure Act, regulations have had to be "reasonably necessary" to survive judicial review.⁵⁴ A.B. 1111 left untouched the "reasonably necessary" requirement in the section concerning the validity of regulations,⁵⁵ and added language requiring regulations to be "reasonably necessary" to the section on declaratory relief.⁵⁶ At the same time, it included "necessity" as one of the stan-

387 U.S. 167, 169-70 (1967); *Industrial Welfare Comm'n v. Superior Court*, 27 Cal. 3d 690, 719, 613 P. 2d 579, 594-95, 166 Cal. Rptr. 331, 346-47, *cert. denied*, 449 U.S. 1034 (1980); *Credit Ins. Gen. Agents Ass'n v. Payne*, 16 Cal. 3d 651, 657, 547 P.2d 993, 996-97, 128 Cal. Rptr. 881, 884-85 (1976).

47. § 11349.1 (West 1980).

48. § 11349(b) (West 1980).

49. § 11349.1 (West 1980).

50. *Id.*

51. § 11349(d) (West 1980). The definition was broadened in 1982 to require that a regulation not conflict with "existing statutes, court decisions, or other provisions of law." 1982 Cal. Stat. 1573, § 4.

52. § 11349(e) (West 1980).

53. See Erbin and Fellmeth, *supra* note 25, at 5-6; ADMINISTRATIVE RULEMAKING (Assembly Office of Research [California] Mar. 1982), at 29 [hereinafter cited as ADMINISTRATIVE RULEMAKING].

54. 1951 Cal. Stat. 479, § 1.

55. § 11342.2 (West 1980).

56. § 11350(b) (West 1980).

dards against which OAL must evaluate a regulation before its filing.⁵⁷

As originally adopted in 1979, the necessity standard was defined as "the need for a regulation as demonstrated in the record of the rulemaking proceeding."⁵⁸ In 1982, the legislature amended the standard, adopting in essence the definition of necessity that the OAL had proposed to govern its own operations,⁵⁹ and rejected alternatives.⁶⁰ The OAL defined necessity as follows:

(a) A regulatory interpretation, requirement or prohibition is necessary when the record of the rulemaking proceeding, taken as a whole, contains substantial evidence supporting the agency's determination that the regulatory provision is necessary.

(b) Necessity is not demonstrated by speculative assertions or opinions which are unsupported by facts.⁶¹

However defined, the necessity review standard requires the OAL to make a substantive judgment based on the contents of the rulemak-

57. §§ 11349, 11349.1 (West 1980).

58. § 11349 (West 1980). A 1981 amendment to A.B. 1111 added that a regulation would not satisfy the necessity standard if it "serve[s] the same purpose as another regulation. This standard requires that an agency proposing to adopt any new regulation must identify any other state regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication." § 11349 (West 1980 & Supp. 1982). In 1982, the legislature separated the duplication issue from necessity, creating a sixth review standard. 1982 Cal. Stat. 1544, § 1; 1573, § 4. This change was one of format rather than substance, as nonduplication already existed as part of the necessity standard. The legislature made the change to enable the addition of the substantial evidence standard to the necessity definition, *see infra* text accompanying notes 223-26; Memorandum prepared by the office of Hon. Leo T. McCarthy, Speaker Pro Tempore of the Assembly (Apr. 7, 1982) (explaining A.B. 2820, following a hearing of the Select Committee on Regulatory Oversight) [California Assembly] (on file with the author).

59. 1982 Cal. Stat. 1573, § 4.

60. The legislature rejected the following language:

An agency has complied with this standard when there are sufficient facts, credible testimony, informed assessments, and other information of a persuasive nature in the record of the rulemaking proceeding taken as a whole to demonstrate that the agency's decision to adopt or amend the regulation is supported by fair and substantial reasons and that the content of the regulation is related directly to the purposes of the statute which authorizes the rulemaking.

A.B. 3322, introduced Mar. 11, 1982. This bill was amended to eliminate this language and passed as amended. 1982 Cal. Stat. 1544.

61. Art. 6, § 160, PROPOSED REGULATIONS, OFFICE OF ADMINISTRATIVE LAW, 82 Cal. Admin. Reg., No. 22-Z (May 29, 1982), at A-5 to A-6 [hereinafter cited as PROPOSED REGULATIONS].

In its original instructions to the agencies in 1980, OAL had suggested a two-part analysis of necessity, as follows:

First, the general question of whether regulations in the particular area are needed at all should be asked. What public interest is served by governmental regulation in this area? Why must government be involved? What is lacking in the private enterprise, free market system that requires governmental intervention?

Secondly, is this particular regulation necessary? Is there another, less burdensome approach? Does the benefit of this regulation outweigh its costs? Has the regulation outgrown its usefulness? Has the regulation had any adverse unintended consequences?

Instructions for the A.B. 1111 Review of Existing Regulations (Oct. 24, 1980), *reprinted in* Price, *supra* note 14, at B-5, B-6.

ing file. A.B. 1111 strictly limits this substantive review: "It is the intent of the Legislature that neither the Office of Administrative Law nor the court should substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations."⁶²

G. OAL's Authority and Procedures.

A.B. 1111 grants the OAL broad authority to oversee the adoption of new regulations and agency review of existing regulations.⁶³ The OAL assures compliance with the various rulemaking requirements by refusing to publish noncomplying rules in the California Administrative Notice Register,⁶⁴ which is prepared and published by the OAL.⁶⁵

All agencies must transmit a copy of each rulemaking file to the OAL for its review to determine whether the agency met the six standards of necessity, authority, clarity, consistency, reference and nonduplication.⁶⁶ The only exception is for repeal of any regulation,

62. § 11340.1 (West 1980). This limitation was a late amendment to the bill. It first appeared in Senate amendments of July 1979, responding to concerns of the Senate Judiciary Committee that the necessity standard was ambiguous and may have allowed OAL to rule on the efficacy of regulations. HISTORY, A.B. 1111, *as amended*, July 4, 1979, at 4, in *Government Regulations-Office of Administrative Law*, Senate Committee on Judiciary; Starr *supra* note 14, at 716 & n.31, 717.

In 1982, the legislature reaffirmed its intent that the OAL not substitute its judgment for that of the agencies. An amendment that mandates the OAL to adopt regulations governing its own operations requires that those regulations ensure that OAL not substitute its judgment for that of the adopting agency. 1982 Cal. Stat. 1573, § 4.

63. The OAL's enforcement power contrasts with the lesser authority of the OMB or any other presidential delegate under federal executive orders or proposed legislation. The Carter Order, *supra* note 26, required agencies to report compliance to the OMB, which was "to assure the effective implementation" of the Order and report to the President semiannually on its effectiveness. *Id.* § 5. The Order mentions no methods to assure implementation. See DeMuth, *supra* note 4, at 20-22. The Director of OMB has greater power under the Reagan Order. For example, the Director may order that a rule be treated as a major rule, thus mandating regulatory impact analysis and review. See *supra* note 26, § 3(b). The Director must review rules subject to the Order, and agencies are forbidden to publish rules until such review is concluded. *Id.* § 3(f). But the OMB's role is not to "be construed as displacing the agencies' responsibilities delegated by law." *Id.* § 3(f)(3). An agency may be delayed in publishing final rules and is required to incorporate OMB's views and the agency's response in the rulemaking file. *Id.* § 3(f)(2). The Order, however, does not prevent a determined agency from adopting a rule opposed by the OMB.

Although S. 1080 provides that "the President shall have the authority to establish procedures for agency compliance . . . [and] to monitor, review, and ensure agency implementation of such procedures," S. 1080, *supra* note 2, at S2716, the actual scope of the President's enforcement power was left unclear. If the Senate intended the President to ensure compliance by preventing issuance of final agency rules, that authority should be more clearly delineated.

64. § 11346.4 (West 1980). Hernandez found the power to disapprove rules to be a characteristic of effective regulatory review programs. M. HERNANDEZ, *supra* note 3, at 2.

65. § 11344 (West 1980).

66. §§ 11347.3; 11349.1 (West 1980), *as amended by* 1982 Cal. Stat. 1544, § 1.

over which the OAL has only limited reviewing authority.⁶⁷ The OAL has thirty days either to approve a regulation or to return it to the agency with written reasons why it was disapproved.⁶⁸

On disapproval the agency has several choices. It may rewrite the regulation or provide further supporting information and resubmit it to the OAL. If the regulation has been significantly changed, the agency must repeat the notice and comment procedure and, if there is a timely demand, hold a public hearing.⁶⁹ Alternatively, the agency may appeal the disapproval to the Governor, who may overrule the OAL's decision.⁷⁰ If the Governor overrules the OAL, the regulation is immediately filed.⁷¹ The agency's third choice is to negotiate with the OAL to reach a mutually acceptable accommodation. Such negotiation usually involves modifying the language of the regulation somewhat.⁷² If the OAL ultimately withholds its approval, and the Governor does not overrule the decision, the regulation cannot be filed.⁷³

The review process differs for existing regulations. A.B. 1111 required each agency with existing regulations to submit a plan for review of those regulations.⁷⁴ The plan was required to include

67. Until 1983, the OAL had no review authority over repeals. A 1982 amendment gave the OAL the power to disapprove repealers that were not adopted in compliance with mandated rulemaking procedures. § 11349.2 (West 1980), *as amended by* 1982 Cal. Stat. 1573, § 6.

68. § 11349.3 (West 1980). The OAL disapproves regulations by sending a letter to the submitting agency, stating its reasons for disapproval. From July 1980 until July 1981 the OAL's disapproval letters were not published. The author reviewed the disapproval letters by reviewing the general correspondence files kept by James M. Mattesich, Deputy Director and General Counsel of the OAL. This review focused almost exclusively on letters expressing failure to meet the necessity requirement; many of the "necessity" disapprovals also reflected failure to meet other review standards. Beginning with the July 25, 1981 edition of the California Administrative Notice Register (Register 81, No. 30-Z), the OAL has published virtually all of its disapproval letters, its correspondence with the Governor concerning appeals of its decisions, and the Governor's decisions on those appeals. The data in this article reflect the selective review of the Mattesich files and complete review of all the published materials through 82 Cal. Admin. Reg. No. 25-Z, published June 23, 1982. The source base for this article consists of approximately 230 sets of disapproved regulations (including what should constitute all of the disapprovals from July 1981 to June 1982) and 24 appeals to the Governor (the total number of appeals to the Governor from the OAL's inception to mid-June 1982).

The sources are cited by reference to the date of each letter and its addressee and, if published, to the California Administrative Notice Register. *See, e.g., infra* note 97.

69. § 11349.4 (West 1980).

70. § 11349.5 (West 1980). The statute does not require the Governor to base the decision on the rulemaking file or any other standard. Starr, *supra* note 14, at 723.

71. § 11349.5 (West 1980).

72. The OAL negotiates some clarity or reference changes in about 10 percent of all submissions. Telephone interview with Gene Livingston, first Director of the OAL (resigned effective October 31, 1982) (August 10, 1982) (tape recording on file with author) [hereinafter cited as Livingston Interview]; *see also* Erbin and Fellmeth, *supra* note 25, at 6; Price, *supra* note 14, at 15.

73. § 11349.3. (West 1980).

74. § 11349.7 (West 1980).

mechanisms for public participation.⁷⁵ The initial review resulted in a "Statement of Review Completion," indicating to the OAL whether each reviewed regulation would be retained, repealed, or amended.⁷⁶ Agencies have six months after this report to complete and submit to the OAL any amendments or repeals.⁷⁷ The OAL then has jurisdiction for six months after the final agency action to review that action for compliance with the review standards.⁷⁸ If a regulation fails to meet any of the standards, the OAL can order the adopting agency to show cause why the regulation should not be repealed.⁷⁹ The order to show cause procedure appears designed to create a record to substitute for the rulemaking file in those cases in which an agency has decided to retain a regulation unchanged.⁸⁰ If, after the agency responds to the order to show cause, the OAL still believes the regulation in question to be nonconforming, it may order the regulation repealed.⁸¹ Agency appeal to the Governor from this decision is available.⁸²

An agency may dispense with most of the procedures necessary for rulemaking by adopting a regulation as an emergency measure. Normal rulemaking procedures must follow adoption of an "emergency" rule; however, or it will expire after 120 days.⁸³ The OAL has the power to oversee the required agency declaration that the emergency adoption or repeal of a regulation is "necessary for the immediate preservation of the public peace, health and safety or general welfare."⁸⁴

III. THE CALIFORNIA PLAN: ANALYSIS AND EVALUATION

In the statement of goals, the legislators who adopted the California plan gave equal weight to reduction of the number of regulations and improvement in their quality.⁸⁵ Like all legislation, A.B. 1111 and

75. This requirement emanates from Governor Brown's Executive Order, which provided, "State agencies shall insure that representatives of persons who are affected by their regulations are effectively involved in the review of all existing regulations." Exec. Order No. B72-80, *supra* note 25.

76. § 11349.7 (West 1980). After two years, 86 agencies had reviewed 23,942 regulations and slated 5,690 of them for repeal and 7,907 for amendment. 1981-82 OAL ANNUAL REP. 3, 10-11.

77. § 11349.7 (West 1980).

78. *Id.*

79. § 11349.7(h) (West 1980).

80. See § 11349.7(i),(j) (West 1980), as amended by 1982 Cal. Stat. 1236, § 4.

81. § 11349.7(j) (West 1980). By June 30, 1982, OAL was challenging 3,556 regulations via the issuance of 90 Orders to Show Cause. 1981-82 OAL ANNUAL REP. 3, 11.

82. § 11349.7(k) (West 1980).

83. § 11346.1(h),(e) (West 1980), as amended by 1982 Cal. Stat. 1573, § 2.

84. § 11349.6 (West 1980).

85. § 11340.1 (West 1980 & Supp. 1983); see *supra* text accompanying note 22.

its progeny are the result of compromise among legislators with conflicting goals and motivations.⁸⁶

A.B. 1111 melds two conflicting views of regulatory reform. One view disfavors government regulation and would limit it severely, leaving regulation to the pressures of the marketplace rather than to government.⁸⁷ Under this view, only regulation that improves on conditions created by market forces should be adopted.⁸⁸ Regulatory reformers at the federal level who hold this view have introduced cost-benefit analysis into the rulemaking process.⁸⁹ In California the requirement of proof of "necessity"⁹⁰ most succinctly accomplishes the same goal. However, the difficulty of assigning meaning to the necessity standard⁹¹ suggests that legislators of varying ideologies may have had different purposes in agreeing to this terminology. The denial of jurisdiction to the OAL to review repeals of regulations except for procedural regularity far better reflects the perspective that the best regulation is no regulation at all.⁹²

A.B. 1111 also reflects the view that what is needed to cure the excesses of regulation are process improvements, particularly those that would generate informed public participation in rulemaking.⁹³ The California plan's modifications of the traditional notice and comment

86. See *supra* text accompanying notes 15-21.

87. Friedman, *Regulatory Schizophrenia*, NEWSWEEK, June 29, 1981, at 65; Noll, *Breaking Out of the Regulatory Dilemma: Alternatives to the Sterile Choice*, 51 IND. L.J. 686, 686 (1976); Schmults, *Government Regulation - Is Regulatory Reform a Challenge or a Myth?*, 33 BUS. LAW. 441, 441-43 (1977). Price claims that OAL's perception is that its mission is to reduce regulation. Price, *supra* note 14, at 14.

88. See Reich, *Warring Critiques of Regulation*, REG., Jan.-Feb. 1979, at 37, 38.

89. See Reagan Order, *supra* note 26, § 2(b) ("Regulatory actions shall not be undertaken unless the potential benefits to society for [sic] the regulation outweigh the potential costs to society"); S. 1080, *supra* note 2, at S2715.

The use of a cost-benefit analysis technique in rulemaking elicits anguished concern, especially from persons who are ideologically disposed in favor of regulation. See, e.g., *Federal Regulation and Regulatory Reform: Excerpts from the Moss Committee Report*, 29 AD. L. REV. 399, 405-17 (1977) [hereinafter cited as *Excerpts from the Moss Committee Report*]; Rosenberg, *supra* note 2, at 195, 214-15 n.94, 219 n.109; *Ralph Nader on Regulation* (Letter to the Editor), Wash. Post, Feb. 14, 1979, at A22, col. 3; Green, *The Faked Case Against Regulation*, Wash. Post, Jan. 21, 1979, at C1, col. 1. See Remarks of Michael S. Baram, *Panel I*, *supra* note 4, at 179-82. But see Schuck, *On the Chicken Little School of Regulation*, Wash. Post, Jan. 28, 1979, at C1, col. 1.

90. § 11349.1 (West 1980).

91. See *infra* text accompanying notes 197-220.

92. § 11349.2 (West 1980); Starr, *supra* note 14, at 716; see *supra* note 67. Unlike the courts, the OAL has no jurisdiction to determine whether a repealer is substantively appropriate. Cf. *State Farm Ins. Co. v. DOT*, 680 F.2d 206 (D.C. Cir.) (holding rescission of automobile crash protection safety standard arbitrary and illogical), *vacated*, 51 U.S.L.W. 4953 (U.S. June 21, 1983).

93. Reich, *supra* note 88, at 37, refers to this ideology as the "political responsiveness critique" of regulation, in contrast to the "economic impact critique," which demands cost-benefit analysis, see *supra* text accompanying notes 87-89. Reich claims that the two critiques are at war. See Reich, *supra* note 88, at 42.

pattern for rulemaking are of this sort, designed to enable the public both to understand agency proposals better and to have more impact on the final outcome of agency deliberations.⁹⁴

Both views — the regulatory reform programs of which, reduced to their most basic elements, can be denominated as procedural reform and substantive reform — are blended in California's regulatory reform plan. The compromise that became A.B. 1111 was politically acceptable because it enabled legislators to vote against regulatory excess and for diminished government intrusion, both universally favored goals. Concurrently, politicians whose constituents favor retention of regulatory programs were able to argue that the plan would retain all necessary regulations; those politicians whose constituents oppose most regulation were able to point to the stringency of the adopted test of necessity. The question to be explored is whether the outcome of this politically acceptable compromise is theoretically sound.

To be theoretically sound, procedural reforms should enable collection and analysis of important factual information and also direct public and agency attention to the critical policy decisions that must be resolved in making regulatory choices. Procedural reforms should achieve these purposes without burdening agencies with papershuffling tasks that add to neither the soundness of regulatory choices nor the accessibility of the regulatory process to the public.

Whether one views substantive reforms as theoretically sound depends on the value one places on regulation. Because the California system reflects a balance of competing ideologies, it should be tested against the criterion of maintaining balance. The substantive reforms should provide a review system that imposes on agencies a fair test of demonstrable authority and necessity for regulations, while neither placing an impossible obstacle in the path of regulation nor ignoring the mandate for independent review outside the adopting agency.

Whether the enforcement mechanism selected for the California reform program, the OAL, is theoretically sound may be determined by examining the impact of the OAL's functioning on public accessibility, rulemaking delay, and general power dispersion within the governmental structure. The viability of alternative enforcement mechanisms also must be considered in this regard.

A. Implications and Evaluation of Procedural Reforms.

1. *Initial Statement of Reasons.* Many of the A.B. 1111 procedural reforms lessen the agencies' ability to issue regulations in profu-

94. See *supra* text accompanying notes 27-28.

sion, simply because the rulemaking process has become more complex and time-consuming.⁹⁵ The statement of reasons and underlying information requires far more time and thought to prepare than the simpler informative digest that was previously required.⁹⁶

The OAL has rejected regulations because a statement of reasons was nonexistent,⁹⁷ conclusive,⁹⁸ too general,⁹⁹ or misleading.¹⁰⁰ With regard to the notice requirements of A.B. 1111, regulations have been rejected because an agency provided inadequate time for public notice¹⁰¹ or failed to provide a substantively adequate notice. For example, when an agency attempted to avoid the notice strictures by enacting "nonsubstantive" changes in its regulations, the OAL found the proposed changes to be substantive.¹⁰²

A.B. 1111's statement of reasons requirement could improve the quality of regulations. Internally, the requirement to state in some detail and in a coherent manner the factual and policy predicates for agency action should force agency decisionmakers to focus on logical flaws and policy drawbacks in their proposals and final regulations prior to publication.¹⁰³ Externally, the increased information made available with proposed rules should make agency action more accessible by making it simpler for interested persons to take positions on

95. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1331 (1972); cf. Alvi-ani, *supra* note 2, at 295 (additional procedures may curtail number of regulations proposed or issued by federal agencies).

96. Compare §§ 11346.5 and 11346.7 (West 1980 & Supp. 1982) with § 11424 (West 1966 & Supp. 1980).

97. Letter of Dec. 2, 1981, to California State University and Colleges, 81 Cal. Admin. Reg. No. 49-Z (Dec. 5, 1981), at 41, 42.

98. Letter of Sept. 11, 1981, to State Department of Education, 81 Cal. Admin. Reg. No. 37-Z (Sept. 12, 1981), at 24, 25.

99. Letter of Jan. 7, 1982, to Department of Food and Agriculture, 82 Cal. Admin. Reg. No. 2-Z (Jan. 9, 1982), at 39, 40.

100. Letter of Jan. 22, 1982, to State Department of Education, 82 Cal. Admin. Reg. No. 5-Z (Jan. 30, 1982), at 67, 69.

101. Letter of Jan. 13, 1982, to Department of General Services (California State Police), 82 Cal. Admin. Reg. No. 3-Z (Jan. 16, 1982), at 42 (second rejection of same regulations for notice problems).

102. Letter to the California State University and Colleges, *supra* note 97, at 41.

Similarly, the OAL disapproved Air Resources Board regulations delaying an emission standard for one year because the Board had given notice proposing a two-year delay. Letter of Jan. 29, 1982, to Air Resources Board, 82 Cal. Admin. Reg. No. 5-Z (Jan. 30, 1982), at 80, 81-82. An appeal to the Governor was withdrawn after the regulations were resubmitted to the OAL and approved on Feb. 19, 1982. 82 Cal. Admin. Reg. No. 8-Z (Feb. 20, 1982), at 44. See generally *Is This Really Necessary?* CAL. REG. L. REP., Summer 1982, at 14.

103. Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 73 (1975); cf. Cooper, *supra* note 4, at 213 (impact statements focus policymakers' attention but are costly in time and money).

proposals and to focus their comments on relevant issues.¹⁰⁴ To the extent that information enables relatively unsophisticated persons to express their views to the agencies more competently, the statement of reasons requirement may diminish the imbalance of influence between well-funded interests represented by counsel or lobbyists, who could participate effectively without the additional information, and affected members of the general public.¹⁰⁵

2. *Final Statement of Reasons and the Response to Comments.*

The requirement that the agency's final statement of reasons include the agency's response to each objection or comment received¹⁰⁶ should increase the perception of agency responsiveness to the public, and meeting this requirement may increase actual agency responsiveness as well.¹⁰⁷ But the requirement's stringency seems designed to drown

104. Wright, *Court of Appeals Review of Federal Regulatory Agency Rulemaking*, 26 AD. L. REV. 199, 210-11 (1974).

105. Cf. Scalia, *Two Wrongs Make a Right*, REG., July-Aug. 1977, at 38, 40 (approving as part of democratic process giving greater weight to positions of interest groups than to positions of private citizens). But see *infra* text accompanying notes 266-68.

106. See *supra* text accompanying note 34.

107. When the OAL disapproves a rule, however, the procedure may negate this increased agency accountability and responsiveness to the public. The agency may provide the OAL with additional evidence in support of its resubmitted regulations, notwithstanding the restriction of OAL review to the record of the rulemaking proceeding. § 11349.1 (West 1980). This material will be beyond public scrutiny.

For example, after the OAL disapproved regulations of the State Board of Pharmacy increasing licensure fees, the Board's staff prepared new budgetary documents to prove to the OAL why certain of its licensure fees, rather than others, had to be raised and to demonstrate the need to maintain a budgetary surplus. These documents were not available to the Board or the public at the time of the adoption decision. Telephone interview with Claudia Foutz, Executive Secretary, State Board of Pharmacy (Sept. 8, 1982) (notes on file with author); Letter of Jan. 28, 1981, from the OAL to the State Board of Pharmacy, at 2.

The procedure followed by the Pharmacy Board to obtain approval of its regulation was legitimate. "[U]nless the substantive provisions of the regulation have been significantly changed" the rewritten regulation may be resubmitted without complying with notice and public hearing requirements. § 11349.4 (West 1980). A new text of a regulation has to be made available to the public for 15 days prior to its adoption. § 11346.8(c) (West 1980 & Supp. 1981). But often it is not the regulation that is faulty, but the proof supporting it. The statute allows the OAL to approve a resubmitted regulation on the basis of information and rationale that were never before the public for review.

Gene Livingston, former OAL Director, states that nothing can be added to the record without notice and comment, but that the final statement of reasons is not technically evidence and can be amended and resubmitted after disapproval. Livingston Interview, *supra* note 72. The OAL's current policy as stated by Livingston does not appear to be based on any clear statutory command.

The impact of section 11349.4 is significant. About twenty percent of disapproved regulations are resubmitted. Livingston Interview, *supra* note 72. The OAL disapproved 407 sets of regulations during 1980-82. 1981-82 OAL ANNUAL REP. 6.

A solution is problematical, because requiring a new round of notice and hearing is expensive and time-consuming. But the current procedure would allow an agency purposefully to omit ex-

agencies in paperwork — and thus to reduce the number of regulations — rather than to improve the quality of decisionmaking. It is unnecessary to treat all objections and comments alike to improve the regulatory process.¹⁰⁸ Abuse of this requirement may snarl agency processes. Agencies may be required to respond to massive sets of suggestions, even if the suggestions are absurd.¹⁰⁹ The original requirement of A.B. 1111 that agencies must respond to “primary considerations” suits the needs of rational decisionmaking far better than the existing requirement.¹¹⁰

The OAL has vigilantly enforced the response to comments requirement. In approximately one-sixth of the sets of regulations rejected by the office between January 1, 1982, the date the more stringent requirement went into effect, and June 9, 1982, the OAL cited the agency's failure to comply with this requirement as one reason for rejection.¹¹¹ The OAL insists that “an agency must respond, in the Final Statement of Reasons, to *each* objection.”¹¹²

The OAL's rejection of regulations promulgated by the California Health Facilities Commission illustrates the specificity of response which the OAL requires. Several hospitals objected that the regulations would increase their costs; one hospital stated that the requirement would cost \$.015 per patient. The Commission's response that “added costs to hospitals will be minimal and that, ‘No Commission

posure of some important justification documents or rationale to public scrutiny, suffer OAL rejection, and provide those documents or rationale (or create them) to support resubmission. Some exposure of significant new justification or data should be mandated. A brief description of the material and its availability published in the California Administrative Register, with a 15-day period for receipt of written comment directed only to the ramifications of the new material, would satisfy the need for public scrutiny without excessive delay and would preclude agency circumvention of that scrutiny.

108. One proponent of a similar requirement for federal agency rulemaking would require comments to “meet a standard of detail equal to that required of the agency in promulgating its rule” before they would be significant enough to trigger an answer by the agency. Pedersen, *supra* note 103, at 75-76.

109. The OAL sponsored the amendment to A.B. 1111 that made the final statement requirement more stringent. It sought the change to eliminate arguments with agencies about which considerations were “primary” and needed response. The OAL believes the current language best serves the dual purposes of assuring good faith consideration of all comments and allowing the public to understand why its views were not accepted. In the OAL's experience, the same facts supporting a rule's necessity counter the comments; for the agencies the main difficulty is in dealing with comments that are entirely irrelevant or absurd. Livingston Interview, *supra* note 72.

110. Even compliance with the requirement of response only to “primary considerations” entails considerable work by the agencies. Letter of Feb. 9, 1981, to Commission for Teacher Preparation and Licensing, at 1-2. Federal reformers, aiming for the same goal of increased agency responsiveness to comments, would require no more. See *supra* note 34.

111. Author's calculation from collected data.

112. Letter of Apr. 7, 1982, to Department of Food and Agriculture, 82 Cal. Admin. Reg. No. 15-Z (Apr. 10, 1982), at 25, 27 (emphasis added).

action is necessary on this comment,' " was deemed inadequate by the OAL because it failed to explain the Commission's reason for rejecting the comment.¹¹³

The hospital regulations example illustrates the shortcomings of requiring utmost specificity in responses to public comment. It would have been a near-impossible task for the Commission to prove that \$.015 is minimal. If agencies are forced to utilize cost-benefit analysis to justify disagreements with commentors, the response requirement, which was intended to increase agency responsiveness, will become a substantive, outcome-determinative requirement.¹¹⁴ The necessity criterion, not the response to comments requirement, should test the underlying validity of the regulation. In its response to comments the agency should only have to express its reasons for its choices, not prove their cogency.

This criticism is directed solely at the all-encompassing nature of the response requirement and the stringency of its enforcement. Other OAL rejections based in part on violation of the response to comments rule are entirely justified.¹¹⁵ At a certain point, however, process reforms produce paperwork and little else of actual or perceived value.¹¹⁶ Requiring and enforcing agency responsiveness is an excellent goal, but the California statute requires too much and should be redrafted. The redrafted statute should instruct the OAL to require only a good faith response by agencies to the most important criticisms of their proposals.¹¹⁷

113. Letter of Apr. 9, 1982, to California Health Facilities Commission, 82 Cal. Admin. Reg. No. 16-Z (Apr. 17, 1982), at 34, 36; *see also* letter of Dec. 10, 1981, to Department of Corporations, 81 Cal. Admin. Reg. No. 50-Z (Dec. 12, 1981), at 20, 21.

114. *See also* letter of Aug. 6, 1981, to CAL/OSHA Standards Board, 81 Cal. Admin. Reg. No. 32-Z (Aug. 12, 1981), at 29.

115. Letter of Jan. 15, 1982, to Department of Food and Agriculture, 82 Cal. Admin. Reg. No. 4-Z (Jan. 23, 1982), at 54, 56; Letter of Feb. 23, 1981, to State Lands Commission, at 1.

116. *Cf. Cooper, supra* note 4, at 212-13 (impact statements divert agency resources from other goals).

117. A model for redrafting might be the federal Administrative Procedure Act, which requires publication of a "concise general statement of [a rule's] basis and purpose," 5 U.S.C. § 553(c) (1976). The Court of Appeals for the District of Columbia Circuit interpreted this provision as follows:

We do not expect the agency to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking. We do expect that [the required statement] will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.

Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968). *See generally* Pedersen, *supra* note 103, at 73 (degree of detail required in supporting documents much greater than APA suggests); Wright, *supra* note 104, at 209 & n.35 (concise general statements should serve as serious substantive support for rules); Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871, 1885 & nn.77-80 (1981).

3. *The Right to a Hearing.* From a practical perspective, the newly created right to an oral hearing¹¹⁸ could measurably affect agency efficiency in rulemaking. From a theoretical point of view, this requirement represents a major break from the tradition of informal rulemaking by notice-and-comment.¹¹⁹

Some state agencies, especially the boards responsible for occupational licensure, have customarily held public hearings prior to the adoption of rules.¹²⁰ These hearings satisfied rulemaking requirements while simultaneously providing a forum for communication with the regulated. Licensing boards, however, have narrow responsibilities and well-defined constituencies. The efficiency of major state agencies with diffuse responsibilities and lengthy and complex rules¹²¹ could be considerably impaired if a single petitioner can force a public hearing every time the agency makes a minor regulatory adjustment. Under the new law a single person or group can disrupt agency functioning by burdening it with unnecessary public hearings. On the positive side a group that needs a public hearing to present its views effectively can require a hearing. Under prior law it would not have been able to demand one.¹²²

Statutory modification could retain the advantages of the provision while preventing its abuse. The right to an oral hearing could be limited to those regulatory actions that would have a significant impact on the public, the state, or the regulated group. Significance could be defined, for example, in terms of the number of affected parties, or the financial, competitive and public welfare implications of the action. Federal precedents in defining "major" or "significant" rules would offer a useful starting point.¹²³

118. The relevant language, in Government Code sections 11346.5 (a)(9) and 11346.8 (West 1980 & Supp. 1982), was added to the law by 1981 Cal. Stat. 865 § 251, effective January 1, 1982; its impact is thus not yet obvious.

119. K. DAVIS, *supra* note 30, at § 6.01; Scalia, *supra* note 105, at 39-40.

120. Telephone Interview with Richard B. Spohn, Director, Department of Consumer Affairs [California], Sept. 7, 1982 (notes on file with author); *cf.* Scalia, *supra* note 105, at 39 ("most agencies frequently hold public hearings on rules of major impact").

121. An example is the California Department of Health Services, which administers a wide variety of programs and had 2,000 pages of rules in 1982.

122. *Cf.* Hamilton, *supra* note 95, at 1330 (oral presentations enable more forceful and persuasive advocacy than written comments). Hamilton criticizes the formal rulemaking process, finding it workable only when narrowly defined factual issues are involved. *Id.* at 1312-13. He nonetheless favors the incorporation into notice-and-comment rulemaking of many of the process modifications mandated by A.B. 1111, such as oral hearings, explanations of rejection of comments, and formalization of the record. *Id.* at 1332-36.

123. *See supra* note 26. Federal reform efforts encourage oral hearings, but mandate them only for major regulations. The Senate legislation has taken a giant step beyond the bare oral hearings requirement, however, in requiring, where necessary to resolve "significant issues of

4. *The Rulemaking File.* Of all the procedural modifications of the A.B. 1111 reform package, the sections that define the rulemaking file¹²⁴ and denominate it as the record for OAL and court review¹²⁵ most reflect the "progressive judicialization of the rulemaking process"¹²⁶ that has been evident throughout the last decade of regulatory reform. Courts, uncomfortable with having to review the typically untidy rulemaking record, have pressed for formalization of the rulemaking process.¹²⁷

The rulemaking file requirement gives no direct instruction to the agencies. Agencies must, however, have their regulations approved by the OAL and, if challenged, by the courts. Because the statute requires that agencies prove necessity to the OAL's satisfaction on the basis of the rulemaking file alone,¹²⁸ the rulemaking file is essentially an exclusive record. Whether the statute requires that the rulemaking file be the exclusive record for judicial review of the agency's conclusion that a regulation is necessary¹²⁹ is, however, unclear.

By making the rulemaking file the exclusive record for review, at least by the OAL, the rulemaking file requirement should promote agency accountability and accessibility.¹³⁰ Interested persons and re-

fact," the "opportunity for direct and cross-examination of the principal agency employees . . . who prepared . . . data on which the agency substantially relied" as well as of other persons who present testimony at the hearings. S. 1080, *supra* note 2, at S2714. The implications of this requirement, in terms of delay and formalization, are significant. This one provision could essentially erase for affected rules the distinction between formal and informal rulemaking procedures.

124. §§ 11347.3, 11350(b) (West 1980 & Supp. 1982).

125. *Id.* § 11350(b).

126. Scalia, *supra* note 105, at 38.

127. See e.g. *Industrial Union Dep't v. Hodgson*, 499 F.2d 467, 475-76 (D.C. Cir. 1974); *Texas v. EPA*, 499 F.2d 289, 308 n.31; (5th Cir. 1974) *California Optometric Ass'n v. Lackner*, 60 Cal. App. 3d 500, 510-11, 131 Cal. Rptr. 744, 751-52 (1976); see also Wright, *New Judicial Requisites for Informal Rulemaking: Implications for the Environmental Impact Statement Process*, 29 AD. L. REV. 59, 61-62 (1977) (author is Circuit Judge J. Skelly Wright). Pedersen's thoughtful analysis concludes that informal rulemaking procedures, especially the unstructured record, "provide neither a satisfactory framework for agency decisionmaking nor a structure to those decisions that would ease judicial review. . . . If rules . . . were based on clearly defined records, the efficiency of both rulemaking and judicial review would be increased." Pedersen, *supra* note 103, at 39. Pedersen argues for a clearly defined, exclusive record for rulemaking. *Id.* at 78-82 & *passim*. He agrees, however, with other commentators who fear excessive formalization of rulemaking procedures. *Id.* at 44; see Hamilton, *supra* note 95, at 1312-13; Scalia, *supra* note 105, at 40-41.

128. § 11349.1 (West 1980 & Supp. 1982).

129. Cf. § 11350(b) (West 1980 & Supp. 1982) ("[a] regulation may be declared invalid if the court cannot find that the record of the rulemaking proceeding supports the agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute . . .").

130. Due process may also mandate that reviewers of agency processes have access to all information available to the decisionmakers. Auerbach, *supra* note 36, at 40; Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 757-58 (1975).

viewers will be better able to comment on, and perhaps to contradict, the bases of agency decisions.

Outweighing these advantages, however, are the troublesome ramifications of "closed record" rulemaking. First, the closed record requirement will be costly. Agencies will have to expend considerable time and energy defining the record.¹³¹ Second, and more importantly, the requirement places unprecedented discretion in the OAL and, to a lesser extent, in the judiciary.¹³² Although good government may require that reviewers of agency processes have access to all the information available to agency decisionmakers, it is not necessarily true that good government demands that regulatory decisionmakers issue rules solely on the basis of that information.¹³³ The creation of good public policy as embodied in generally applicable rules requires more than a technocratic sifting of data.¹³⁴ Administrative agencies were created in part to allow delineation of policy by specially qualified individuals — that is, experts.¹³⁵ But the closed record typical of a trial court or an administrative adjudication leaves no room for applying expertise or making policy judgments: a decision not wholly supported by evidence in the record will be reversed on review. Thus, particularly in scientific and technical areas in which the agency is operating on the frontiers of available knowledge, the closed record requirement may stifle agency expertise and judgment because decisionmakers may not be able to

131. These bureaucratic costs include preparing papers reflecting agency expertise for inclusion in the rulemaking file and the delay that will result when decisionmakers do not know in advance what influences not in the record will inform their judgment, and are forced to repeat notice and comment cycles.

132. The "closed" record requirement may have a disproportionate negative impact on the ability of the least sophisticated to participate effectively in rulemaking proceedings. Pedersen, *supra* note 103, at 79-80 n.150; *see infra* text accompanying notes 266-68.

133. Other reformers have recognized this point. The Regulatory Reform Act would establish a rulemaking file requirement, and that file would constitute the record for judicial review. A rule would be arbitrary if its *factual basis* were without *substantial support* in that file. S. 1080, *supra* note 2, at S2713, 2714, 2717. The 1981 Model State Administrative Procedure Act (MSAPA) provides that the "rule-making record need not constitute the exclusive basis for agency action on that rule," as long as "only those particular *reasons* on which the agency relied in its concise explanatory statement [are] used as justifications for adoption of that rule." Bonfield, *supra* note 3, at 10, (discussing 1981 MSAPA §§ 3-112(c) and 3-110(b)) (emphasis in original).

134. Scalia, *supra* note 105, at 40; *cf.* Cooper, *supra* note 4, at 200 (not all governmental decisions are suitable for review on a record). Elsewhere Scalia argues that "[f]or the agencies to produce politically sound rules . . . [t]he rulemaking process itself must permit the play of political forces that enables an intelligent political judgment to be formed" and "the standard of review [must] leave . . . room for political judgment." *Rulemaking as Politics* (Chairman's Message), 34 AD. L. REV. v, ix (1982).

135. *Angel v. Butz*, 487 F.2d 260, 262-63 (10th Cir. 1973), *cert. denied*, 417 U.S. 967 (1974); *General Tel. Co. v. United States*, 449 F.2d 846, 862 (5th Cir. 1971); Wright, *supra* note 104, at 211.

supply facts in the file to support the necessity of their decisions.¹³⁶ This is unfortunate. Since agencies often must set standards in the absence of sound data,¹³⁷ they must be accorded some latitude for making reasoned judgments under such circumstances.¹³⁸

A modification of the current statute that maintains the closed record but requires limited recognition of agency judgment and expertise in appropriate circumstances could increase agency accessibility without eliminating all deference to agency expertise.¹³⁹ Such a modification should provide that expertise shall not take the place of facts that were reasonably obtainable but are not in the record.¹⁴⁰ The modification should also provide that deference shall not be given to agency experience that could have been explained in the record, but was not. Expertise should be recognized as legitimate when it involves the as-

136. Agencies of course have the option of introducing materials into the record that ostensibly reflect their expertise or justify appropriate results. See Letter of Apr. 2, 1981, to California Highway Patrol, at 2 ("Specific facts derived from the CHP's own experience and expertise . . . would satisfy this requirement"); Letter of May 18, 1981, to Department of Real Estate, at 2 ("we would assume that a factual basis for its development of these new regulations . . . is to be found in its experience . . . and that the Department may explain the need . . ."); Letter of Jan. 15, 1981, to Governor Brown, at 2 ("agency members should see to it that information which is available to them as individuals and which is relevant to a specific item before them is placed in the rulemaking file in a form which is accessible to the public.").

137. See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 37-38 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976); *Reserve Mining v. EPA*, 514 F.2d 492, 519 (8th Cir. 1975).

138. A parallel critique may apply to federal reform proposals. The Senate has adopted the rulemaking file language of the California statute, see *supra* note 133, and denominated that file as the record for judicial review. Whether it would be the exclusive record is unclear; if so, it suffers from the same problem as the California provision. S. 1080, *supra* note 2 at S2714. The report accompanying S. 1080 fails to resolve the ambiguity. See S. REP. NO. 284, 97th Cong., 1st Sess. (Star Print) 132-33, 165. The Senate bill may, however, include the benefits of the rulemaking file without its disadvantages. The judicial review section of the bill refers to the rulemaking file, in contrast to the record, just once, in the context of the court's determination whether the factual basis of a rule has substantial support in that file. 128 CONG. REC. S2716 (daily ed. March 24, 1982). The rulemaking file may be intended to be exclusive only with respect to finding support for a rule's factual basis, which is far more limited than in the California reform package.

139. The increased accessibility of decisionmaking may be illusory. Access to participation in governmental processes, even in informal rulemaking, is not universal. A certain level of sophistication is required to make one's views known to agencies contemplating rule changes. If the rulemaking file, which is disproportionately influenced by sophisticated interests, is exclusive, and it requires effort by the agency in the absence of other input to add conflicting views to that file, the agency is less likely to reach a sustainable policy choice favorable to the unrepresented. Cf. Greenberger, *A Consumer Advocate's View of the FDA's Procedures and Practices*, 32 FOOD DRUG COSM. L.J. 293, 295-96 (1977) (consumer representatives may lack information necessary to recognize issues they should address); Livingston, *Organizations and Administrative Practice—A Balance to the Corporate State?* 26 HASTINGS L.J. 89, 107 (1974); Noll, *supra* note 87, at 687-88; Comment, *The Agency for Consumer Advocacy*, 26 AM. U.L. REV. 1062, 1062 & nn. 3-5; Note, *supra* note 117, at 1879 & n. 46.

140. "[P]retensions of expertise unsupported by the record" should not alone support a rule. Wrigni, *supra* note 127, at 62.

assessment and interpretation of facts (or lack of facts), or the reasoned and explained choice¹⁴¹ among facts supported by the record, or the rejection of those facts.¹⁴² To the extent that judgment will determine the agency's view of a particular rule's necessity, the OAL should defer to that judgment and accordingly demand support in the rulemaking file only for the facts informing that judgment.¹⁴³ The rulemaking file requirement — which appears to be only a procedural change — is an inappropriate vehicle to eliminate deference to agency policy choices.¹⁴⁴

5. *Emergency Adoption of Regulations.* The grant of oversight powers to OAL over emergency adoption of regulations has already had a dramatic and salutary effect on a chronic problem. Some agencies have habitually abused emergency rulemaking procedures. One agency adopted a regulation as an emergency provision several times in a row.¹⁴⁵ Such abuse had to be remedied because emergency adoptions are inaccessible to the general public; only those who closely follow an agency's activities may be aware of its intentions, and even they have no formal mechanism to influence "emergency" regulations.¹⁴⁶ During

141. Reasoning and explanation must occur prior to or simultaneous with adoption of the rule, and not simply as a *post hoc* rationalization. Cf. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962) (citing *SEC v. Chenery Corp.*, 32 U.S. 184, 196 (1947)) (court must judge propriety of agency action "solely on the grounds invoked by the agency").

142. But see Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 519-20 (1970) ("we have not suffered from too little faith in and reliance on expert wisdom. . . . Expertise all too often means narrowmindedness").

143. S. 1080's judicial review provisions recognize just such a distinction between the factual basis for a rule and its policy basis; the bill requires substantial support in the rulemaking file only for the former. See *supra* notes 133, 138; see S. 1080 *supra* note 2, at S2718. See DeLong, *supra* note 36, at 290-93.

144. Drastic change in the level of deference to be accorded agency judgment was urged in the United States Congress in the form of the Bumpers Amendment. That amendment would have modified the judicial review sections of the federal APA. Its critical language, as passed by the Senate in 1979, provided in pertinent part as follows:

There shall be no presumption that any rule or regulation of any agency is valid, and whenever the validity of any such rule or regulation is drawn in question in any court of the United States or of any State, the court shall not uphold the validity of such challenged rule or regulation unless such validity is established by a preponderance of the evidence shown.

125 CONG. REC. S12145 (daily ed. Sept. 7, 1979). See Bliss, *supra* note 2, at 640-43; Keunedy, *The Bumpers Amendment: Regulating the Regulators*, 67 A.B.A. J. 1639 (1981). This language was significantly amended in the Regulatory Reform Act. S. 1080, *supra* note 2, at S2713. 1982 Amendments to the California APA provisions on standards for review of agency action somewhat limit deference to agency judgment. See *infra* text accompanying notes 223-28.

145. See *California Ass'n of Nursing Homes v. Williams*, 4 Cal. App. 3d 800, 812, 84 Cal. Rptr. 590, 597-98 (1970).

146. Informal channels may be open; agencies also may allow selective participation.

the OAL's first two years of operation, agencies requested approval of 120 and 105 sets of emergency regulations, respectively.¹⁴⁷ This compares favorably to the 232 filed the previous year. The OAL disapproved 67 of those filings during its first two years¹⁴⁸ as not "necessary for the immediate preservation of the public peace, health and safety or general welfare."¹⁴⁹

The OAL's demials of agency requests for "emergency" rule approvals are, on the whole, laudable. For example, the OAL has denied emergency status to regulations changing the "coupling" of horses as a single wagering interest;¹⁵⁰ expanding the authorized size of cauliflower containers;¹⁵¹ and increasing the assessments for the California Beef Council.¹⁵² In contrast, the OAL has approved emergency status for such purposes as expanding quarantine areas to prevent the spread of infestations, to suspend pesticide application permits and to deal with harvest situations in which delay "immediately threatened harvests, markets and employment."¹⁵³ The OAL has also appropriately refused to allow agencies to use emergency procedures when the emergency is of their own creation — when the agency had adequate time to follow normal rulemaking procedures but failed to plan so that it could meet deadlines.¹⁵⁴ The OAL has also consistently refused to recognize

147. 1981-82 OAL ANNUAL REP. 9.

148. *Id.*

149. § 11346.1(b) (West 1980). The Governor was apparently powerless to review these disapprovals until a statutory change allowed him to overrule "a decision refusing to allow the readoption of an emergency regulation." § 11349.5 (West 1980), *as amended by* 1980 Cal. Stat. 1238 § 5; *cf. Internal Government Review of Agencies*, CAL. REG. L. REP., Winter 1982, at 14, 15-16; *Cluchette v. Brown*, L.A. Sup. Ct., No. C384208, Oct. 16, 1981, cited in CAL. REG. L. REP., Winter 1982, at 16.

150. Letter of Aug. 12, 1981, to California Horse Racing Board, 81 Cal. Admin. Reg. No. 33-Z (Aug. 15, 1981), at 27-28.

151. Letter of Mar. 30, 1982, to Department of Food and Agriculture, 82 Cal. Admin. Reg. No. 14-Z (Apr. 3, 1982), at 42. The Department of Food and Agriculture readopted the same regulations as an emergency measure in May 1982, and once again OAL ordered their repeal. This time OAL explained that "while the increase in container size has been shown to be generally necessary, this amendment cannot be justified as an emergency While the facts presented support a non-emergency amendment, they do not present the type of crisis situation which necessitates regulatory action without notice or public hearing." OAL also noted that during the time the Department delayed its resubmission of the regulation as an emergency, it could have adopted the amendments by regular adoption procedures. Letter of May 14, 1982, to Department of Food and Agriculture, 82 Cal. Admin. Reg. No. 21-Z (May 22, 1982), at B-7, B-8, B-9.

152. Letter of Apr. 16, 1982, to Department of Food and Agriculture, 82 Cal. Admin. Reg. No. 16-Z (Apr. 17, 1982), at 41.

153. *Id.*

154. Letter of Apr. 29, 1982, to Department of Health Services, 82 Cal. Admin. Reg. No. 18-Z (May 1, 1982), at 30; Letter of Nov. 30, 1981, to Assistant State Treasurer (California Industrial Development Financing Advisory Commission), 81 Cal. Admin. Reg. No. 49-Z (Dec. 5, 1981), at

agency budgetary woes as a rationale for emergency rulemaking.¹⁵⁵ This interpretation of its statutory mandate is quite sound, and has received implicit approval from the legislature.¹⁵⁶

The legislature has confirmed the OAL's view that agencies cannot justify using emergency rulemaking procedures solely on the ground that the legislation being implemented contains an urgency clause.¹⁵⁷ The legislature inserts urgency clauses not only to afford certain statutes an earlier effective date than January 1 of the succeeding year, but also to circumvent various internal legislative deadlines.¹⁵⁸ Thus, the urgency clause does not always reflect legislative concern for immediacy. Nor does the need to adopt a statute quickly always imply that implementing regulations are needed quickly as well.

The OAL's tough stance is effectively and appropriately eliminating agency abuse of the emergency adoption procedure. Eliminating this abuse has led to major gains in agency accountability and public responsiveness.

6. *Clarity.* The requirement that OAL review submissions for clarity is uncontroversial.¹⁵⁹ Although agencies and commentators may complain that the OAL does not have the expertise necessary to make some of the judgments entrusted to it,¹⁶⁰ that very lack of special expertise makes it an appropriate reviewer for clarity. If the OAL's

39; Letter of Oct. 2, 1981, to Department of Justice, 81 Cal. Admin. Reg. No. 41-Z (Oct. 10, 1981), at 44, 45.

155. Letter of Oct. 16, 1981, to Commission for Teacher Preparation and Licensing, 81 Cal. Admin. Reg. No. 42-Z (Oct. 17, 1981), at 36; Letter of Sept. 14, 1981, to Department of Water Resources, 81 Cal. Admin. Reg. No. 37-Z (Sept. 12, 1981), at 30.

156. In October and December 1980, the OAL rejected regulations of the Department of Social Services (DSS) that would have eliminated welfare fair hearings when grants were adjusted in accordance with statutory changes because welfare recipients could not prevail at such hearings. DSS based its emergency filing on the costs to the state of providing hearings and of paying welfare benefits at existing levels until the hearings were completed. The OAL said that DSS's view of the expected number of hearings was "speculative" and that the agency's problem was self-created because DSS knew of the legislative change requiring the grant adjustments since July 1980. In response to the OAL's disapproval, a bill was introduced in the legislature on December 1, 1980, to eliminate the right to fair hearings when automatic adjustments to welfare grants are authorized by law. The bill passed both houses and was signed and chaptered by the Governor on December 4, 1980. Price, *supra* note 14, at 17-19. The legislature was undoubtedly motivated to quick action by the expense to the State of providing meaningless hearings. It directed its action solely toward DSS's problem, however, and expressed no displeasure with the OAL's general stance in regard to emergency regulations.

157. In 1981, the legislature amended section 11346.1 to add, "The enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action." 1981 Cal. Stat. 865 § 22.

158. Cf. CAL. CONST. art. IV, § 8(c); Senate Concurrent Resolution No. 13 (amended in Assembly Mar. 23, 1983) (Temporary Joint Rules 61(g)).

159. See, e.g., *Is This Really Necessary?*, *supra* note 102, at 14.

160. See, e.g., *OAL, A Red Tape Hydra?* CAL. REG. L. REP., Fall 1981, at 5.

staff considers a regulation unclear, persons directly affected by the regulation are also likely to find it difficult to understand. The OAL and the promulgating agency then may negotiate what the agency must do to satisfy the clarity requirement. A change in wording often satisfies the OAL that the meaning of a regulation will be clear to the public.¹⁶¹

The clarity requirement encompasses a variety of other problems in regulations in addition to inappropriate word choice. These include unclear references in tables;¹⁶² general references to standards, policies, or requirements not spelled out in the regulation;¹⁶³ and incorporation by reference of material that can be changed by someone other than the adopting agency.¹⁶⁴ Similarly, the OAL has used the clarity criterion to require adoption within rules of material that would otherwise be found only in staff manuals and other documents not subject to the rulemaking process.¹⁶⁵

The OAL's expansive use of the clarity criterion exceeds the original legislative intention to substitute plain English for legalese.¹⁶⁶ The OAL's position, however, reflects a legitimate concern that true understanding of agency policies requires that those policies be exposed in

161. Livingston Interview, *supra* note 72.

The most publicized OAL disapproval for lack of clarity was the rejection of the following language concerning the operation of fork lifts when workers are standing on the lifting platform: "Before elevating personnel, make sure that the mast is vertical in a sideways direction as well as forward and rearward." Letter of Dec. 26, 1981, to Occupational Safety and Health Standards Board, at 1. The OAL suggested the following rewording of the section: "Before elevating personnel, make sure that the mast is vertical and/or the platform is level." *Id.* at 2. See also Letter of Aug. 18, 1980, to State Athletic Commission, objecting to the following language in regulations concerning pension and disability funds for boxers: "If the covered boxer is alive on the date of his retirement, actuarially reduced monthly payments will be made to him as long as he lives." Price, *supra* note 14, at 7 n.7. See also Letter of May 3, 1982, to Department of Health Services, 82 Cal. Admin. Reg. No. 20-Z (May 15, 1982), at B-5, B-7.

162. Letter of Nov. 25, 1981, to Bureau of Automotive Repair, 81 Cal. Admin. Reg. No. 49-Z (Dec. 5, 1981), at 36, 37.

163. Letter of Sept. 11, 1981, to California State University and Colleges, 81 Cal. Admin. Reg. No. 37-Z (Sept. 12, 1981), at 29. This disapproval was appealed to the Governor, who upheld the OAL's determination for a different reason. OAL Appeal Docket No. 81 OAL 7 (on file with author).

164. Letter of Sept. 11, 1981, to California Highway Patrol, 81 Cal. Admin. Reg. No. 37-Z (Sept. 12, 1981), at 27, 28.

165. The OAL's position is in accordance with the California Supreme Court's decision in *Armistead v. State Personnel Bd.*, 22 Cal. 3d 198, 583 P.2d 744, 149 Cal. Rptr. 1 (1978).

166. The early drafts of A.B. 1111 defined clarity as "written or displayed so that the meaning of regulations will be easily understood by an interested person of average intelligence who is somewhat familiar with the subject." A.B. 1111, 1979 Regular Sess., as amended May 16, 1979, § 11349(c) (West 1980). The bill was amended for fear that it would preclude appropriate use of language familiar to specialists in a regulated field. Starr, *supra* note 14, at 721 & n.68.

their entirety to public scrutiny. The OAL's expanded use of clarity is commendable and should be supported.¹⁶⁷

7. *General Reflections on Procedural Changes.* The procedural changes that A.B. 1111 made in California's informal rulemaking process reflect the evolution in the relationship between the citizen and government. When the federal and state Administrative Procedure Acts were initially adopted in the 1940s,¹⁶⁸ the government influenced citizens' daily lives considerably less than it does now.¹⁶⁹ To check this increasing influence, citizens have sought and obtained increased public access to government operations.¹⁷⁰ California's procedural reforms apply this trend toward increased review to the rulemaking process.

These reforms have in some particulars exceeded reasonable boundaries. The most notable excesses are the response to comments and oral hearing requirements. Ironically, the response to comments requirement reflects a "command and control"¹⁷¹ mentality that is much despised in regulators. The original requirement in A.B. 1111 struck a better balance between external control and self-control and is preferable to the present requirement. Although the superseded requirement contained a troublesome point — the meaning of "primary considerations"¹⁷² — the OAL could easily remedy that problem by educating the agencies with disapproval letters. The economist's objection is appropriate here: added procedures may make the system so complex and bureaucratic that their marginal benefits exceed their marginal costs. The legislature should review California's reforms with an eye to such considerations.

167. Legislation sponsored by the OAL in 1982, to be effective January 1, 1983, deals directly with this problem area by forbidding agencies from enforcing guidelines, bulletins, manuals, or instructions that are regulations as defined in the APA without use of rulemaking procedures. 1982 Cal. Stat. 61. This new statute is merely declaratory of existing court decisions.

168. The federal Administrative Procedure Act was adopted in 1946; the California Administrative Procedure Act was adopted in 1947.

169. Starr, *supra* note 14, at 713-14.

170. See *supra* note 4.

Agency responsiveness to the demands—real or perceived—of public pressure may not always be beneficial. Legislators often delegate tasks to administrative agencies to avoid making politically unpopular but necessary decisions. The politics of single-issue pressure groups may well exacerbate the need for such delegation. An agency that must adopt politically sensitive regulations would probably prefer to do so by using traditional notice and comment procedures, which afford no opportunity for direct confrontation. The increased public scrutiny and opportunity for confrontation provided in California's new rulemaking procedures may encourage agencies to respond in a political fashion, as do legislators. Such a result would be unfortunate. It is important that administrative agencies remain somewhat sheltered from the extent, if not the type, of direct pressures that operate on a legislature.

171. Cf. DeMuth, *supra* note 4, at 23 (federal regulatory review programs establish engineering standard of cost-analysis preparation rather than performance standard).

172. § 11346.7 (West 1980). See *supra* note 109.

Although control of the rulemaking record has its benefits, a closed record is too narrow to be the exclusive basis for review of policymaking. It is appropriate to demand that the factual foundations for agency policy choices be reflected in that record.¹⁷³ The present statute, however, fails to distinguish factual premises from policy choices. The closed record requirement should be amended or interpreted to limit its applicability to the factual premises of agency rules.

In addition, the increased formality in process that the procedural changes have effected may actually disadvantage unsophisticated and unrepresented interested groups, and ultimately increase the imbalance in access to government.¹⁷⁴ Public policy choices could be skewed as a result.

A useful side effect of the new processes may well be a diminution in judicial review.¹⁷⁵ The OAL's oversight of agency compliance with rulemaking procedures prevents the filing of regulations with serious procedural defects, reducing procedural challenges in the courts.

Whether the procedural changes have improved the overall quality of regulations may be undeterminable.¹⁷⁶ Undoubtedly, however, the rulemaking process itself has been measurably improved. The need to face squarely the issues raised in one's proposals, to frame rationales, and to respond to public criticisms all improve the quality of the agency thinking that shapes the regulations. The trap into which the California reformers are falling in their pursuit of improved procedures is excessive formalizing of the policymaking task.¹⁷⁷ If the reformers seek ultimately to control agency discretion — to control agency policy choices — procedural changes are an inappropriate and inefficient means to that end. Procedures may shape the exercise of discretion, but procedural solutions should solve procedural problems rather than substitute for frank controls on the substance of agency policy choices. Nor should substance control be disguised in procedural clothing.¹⁷⁸

173. See *supra* text accompanying notes 139-42.

174. See *supra* note 132; *infra* text accompanying notes 266-68.

175. Statistics concerning judicial challenges to final federal regulations after the adoption of the Reagan Order, *supra* note 26, suggest that this result is likely. The White House claims that a percentage decline in court cases that is much greater than the percentage decline in final regulations issued reflects the improvements in regulations promulgated: "under the Executive Order, new regulations have generally been better reasoned [and] more empirically solid." EXECUTIVE OFFICE OF THE PRESIDENT, OMB, EXECUTIVE ORDER 12291 ON FEDERAL REGULATION: PROGRESS DURING 1981 6-7 (Apr. 23, 1982).

176. Many other factors could intervene to improve regulations other than the reforms of A.B. 1111. Miller, *supra* note 24, at 17.

177. Hamilton, *supra* note 95, at 1311-13.

178. Pierce and Shapiro, *supra* note 2, at 1179.

Narrower grants of discretionary power and straightforward substance review are far more effective avenues to control policy choices.¹⁷⁹

B. *Substance Control and its Implications.*

1. *Authority, Consistency, and Reference: Legal Review.* When the OAL determines whether regulations meet the statutory criteria of authority,¹⁸⁰ consistency,¹⁸¹ and reference,¹⁸² it engages in an essen-

179. See *infra* text accompanying notes 280-83.

180. Authority may be express or implied. § 161, PROPOSED REGULATIONS, *supra* note 61, at A-6.

181. The consistency standard is broad. A regulation may be inconsistent with the authorizing statute. Letter of Dec. 18, 1980, to Contractors State License Board, at 2; see also Letter of Mar. 26, 1981, to Board of Forestry, at 2. A regulation also may be inconsistent with procedural statutes. Letter of Feb. 1, 1982, to Department of Health Services, 82 Cal. Admin. Reg. No. 5-Z (Jan. 30, 1982), at 86-87; substantive statutes, Letter of June 7, 1982, to California Department of Justice, 82 Cal. Admin. Reg. No. 24-Z (June 12, 1982), at B-10 to B-11; or judicial interpretations of statutes, Letter of Feb. 1, 1982, to Department of Health Services, *supra*.

The OAL also interprets the consistency standard to include consistency with the federal and state constitutions. PROPOSED REGULATIONS, *supra* note 61, § 163, at A-6. The OAL has disapproved regulations for inconsistency with decisions of the United States Supreme Court on procedural due process, Letter of July 24, 1981, to California Horse Racing Board, 81 Cal. Admin. Reg. No. 31-Z (Aug. 1, 1981), at 31; and on freedom of speech, Letter of June 5, 1981, to Department of General Services, at 2; cf. Letter of July 30, 1981, to State Athletic Commission, 81 Cal. Admin. Reg. No. 31-Z (Aug. 1, 1981), at 35 (disapproval based on "chilling effect on speech and expression").

The OAL's declarations of inconsistency with the United States Constitution raise the issue of the following prohibition in the California Constitution:

An administrative agency . . . has no power: (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; (b) To declare a statute unconstitutional; (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

CAL. CONST. art. III, § 3.5. The OAL's authority, of course, is over regulations and not statutes. In adopting regulations, however, agencies are enforcing their organic statutes. As an administrative agency itself, the OAL should, in the absence of a court determination, refrain from taking action on the basis of the unconstitutionality of a statute or on the basis that a regulation enforcing a statute conflicts with federal law.

This limitation on the OAL's power is unfortunate; the problem lies in the constitutional provision itself. Although denying administrative agencies the power to declare statutes unconstitutional is appropriate public policy and a proper reflection of separation of powers, section 3.5 goes beyond forbidding such declarations. It also forbids agency refusals to act on the grounds of unconstitutionality or preemption. Thus an agency that decides that it should not adopt or modify proposed regulations solely because of a constitutional or preemption problem emanating from the underlying statute faces a Hobson's choice: the agency can either state that reason for not adopting or modifying the regulations and disregard the constitutional provision, or provide a false justification in its final statement of reasons and disregard its obligations to the public and the OAL.

No case has discussed the applicability of section 3.5 to agency rulemaking. The OAL should, however, take cognizance of this provision when testing agency actions for consistency.

182. The reference requirement is actually procedural in nature. It is included in this section, however, because it is very similar to authority and consistency. All three standards represent the

tially legal task. Although the requirement of a statement of the authority for adopting regulations is procedural,¹⁸³ a lack of such authority, or a conflict between the regulation and superior legal authority, is a substantive flaw that renders the regulation invalid.

Unauthorized regulations have always been invalid.¹⁸⁴ Previously, however, a declaration of invalidity has always required a court challenge, either by pre-enforcement judicial review or by assertion of the regulation's invalidity in an enforcement proceeding. As a result, individuals and businesses often conformed their behavior to invalid regulations because they could not afford the costs of such a challenge. Now, however, the OAL's review for authority and consistency provides a test of a regulation's fundamental validity prior to its adoption, at no direct cost to the regulated. Because agencies may well overstep their authority in the zealous pursuit of their statutory missions, the authority standard is beneficial.¹⁸⁵

However, the OAL's objections can also preclude agencies from adopting regulations that are in fact authorized.¹⁸⁶ And, because agen-

legislature's attempt to assure the legality of the agency's regulatory action. The OAL considers the reference requirement to be essentially bibliographic. Letter of Jan. 28, 1981, to California Coastal Commission, at 4.

183. The OAL sometimes finds that an agency's claimed authority is inaccurate, but that the agency does have adequate authority that it has failed to cite. See Letter of Feb. 11, 1982, to Department of Education, 82 Cal. Admin. Reg. No. 8-Z (Feb. 20, 1982), at 40; Letter of Sept. 4, 1981, to Division of Industrial Accidents, 81 Cal. Admin. Reg. No. 36-Z (Sept. 5, 1981), at 52-53 (miscited authority and reference).

184. See *supra* note 45 and accompanying text.

185. For example, the Fish and Game Commission, which is authorized to protect "rare or endangered birds, mammals, fish, amphibia or reptiles," CAL. FISH & GAME CODE §§ 2052-53 (West 1958 & Supp. 1981), adopted a regulation to protect some species of butterflies. Price, *supra* note 14, at 12. The OAL objected to this extension of the Commission's authority. Letter of July 29, 1980, to Fish and Game Commission, at 1. See generally Price, *supra* note 14, at 13. The predominant theme underlying the OAL's disapprovals for overstepping authority appears to be strict constructionism. Former OAL Director Gene Livingston admits to being a strict constructionist. See Livingston Interview, *supra* note 72.

Many of the authority issues facing the OAL pose difficult and interesting questions of interpretation. For example, what is the scope of the Coastal Commission's powers, both substantively—what types of development projects are covered—and procedurally—what kinds of procedures may be utilized by the Commission? Letter of May 28, 1982, to California Coastal Commission, 82 Cal. Admin. Reg. No. 23-Z (June 5, 1982), at B-14 to B-15; see also Letter of May 1, 1981, to Department of Health Services, at 1.

186. For example, the OAL disapproved a provision of the Board of Accountancy's Rules of Professional Conduct that would have forbidden licensees from engaging in any discriminatory practice or conduct. The OAL argued that the Board could establish standards of "integrity and dignity" for accountants, but could not forbid all conduct that the Board deems inappropriate. Letter of Apr. 30, 1981 to Board of Accountancy, at 2. The Board appealed the OAL's decision to the Governor, and the Governor reached a conclusion contrary to the OAL's analysis. Memo of June 5, 1981, to OAL from Governor's Office, 81 OAL 1, at 6 (on file with author). See generally *Regulatory Agency Action: Board of Accountancy*, CAL. REG. L. REP., Spring 1982, at 33.

cies appeal few disapprovals to the Governor,¹⁸⁷ the OAL's legal opinions about authority and consistency will in most cases be final, whether right or wrong. Agencies have had no means of securing judicial review of OAL disapprovals. However, since January 1, 1983, interested persons have been able to obtain court review of OAL disapprovals; whether the promulgating agency may seek review is unclear.¹⁸⁸

Courts traditionally have deferred to agency interpretations of their own governing statutes,¹⁸⁹ although they have always been free to substitute their judgment on questions of law for that of the agencies.¹⁹⁰ The rationale behind this judicial deference to agency legal opinions — that the agency is more familiar than the reviewer with its governing statutes — applies to OAL review of agency opinions as well.¹⁹¹ It is therefore arguable that the OAL should not substitute its interpretation of statutes for that of the agencies. Yet, the OAL's organic statute clearly authorizes such substitution.

An assessment of the wisdom of the OAL's power in this regard requires an analysis of whether it is appropriate to err on the side of preventing some otherwise valid regulations. If it is, it must then be determined whether it is appropriate to vest such power in the OAL. Erring on the side of non-adoption certainly comports with the views of those regulatory reformers concerned primarily with reducing the number of regulations. The major harm from an excessive tendency toward non-adoption is delay. If the legislature disagrees with an OAL disapproval on this ground, it can redraft the relevant statute to clarify

This appeal may exemplify the Governor's use of the reversal power to effectuate political policy choices. Former OAL Director Livingston believes most gubernatorial reversals of the OAL are for reasons of philosophy or political expediency, and he considers the Governor's ability to reverse OAL decisions on policy grounds to be one of the strengths of A.B. 1111. In contrast, he sees the OAL's role as restricted to making objective decisions based on compliance with the statutory standards, without regard to policy implications. Livingston Interview, *supra* note 72.

187. *See supra* note 68.

188. 1982 Cal. Stat. 1544, 1573; *see infra* text accompanying notes 258-59.

189. *White v. Winchester Club*, 315 U.S. 32, 41 (1942); *Fawcus Mach. Co. v. United States*, 282 U.S. 375, 378 (1931); *Ralph's Grocery Co. v. Reimel*, 69 Cal. 2d 172, 175, 176, 444 P.2d 79, 83, 70 Cal. Rptr. 407, 411 (1968); *Morris v. Williams*, 67 Cal. 2d 733, 748, 433 P.2d 697, 707, 63 Cal. Rptr. 689, 699 (1967); *Whitcomb Hotel v. Cal. Employment Comm'n*, 24 Cal. 2d 753, 756-57, 151 P.2d 233, 235 (1944).

190. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978); *Sanchez v. Unemployment Ins. Appeals Bd.*, 20 Cal. 3d 55, 67, 569 P.2d 740, 748, 141 Cal. Rptr. 146, 154 (1977); *Carmona v. Division of Indus. Safety*, 13 Cal. 3d 303, 310, 530 P.2d 161, 165-66, 118 Cal. Rptr. 473, 477-78 (1975); *Whitcomb Hotel v. Cal. Employment Comm'n*, 24 Cal. 2d 753, 757, 151 P.2d 233, 235 (1944).

191. *Pitts v. Perluss*, 58 Cal. 2d 824, 832, 377 P.2d 83, 88, 27 Cal. Rptr. 19, 24 (1962).

the agency's rulemaking authority.¹⁹² The agency could thereafter re-adopt the regulation. The new statute authorizing the public to judicially challenge OAL disapprovals further protects against OAL abuse of its power.

It seems appropriate that the power to review the basic legality of regulations reside in the OAL. The OAL is a quasi-independent executive branch agency;¹⁹³ its judgments are subject to gubernatorial reversal.¹⁹⁴ This creates some conflict because in California's executive branch the Attorney General, who is elected by the people and not appointed by the Governor,¹⁹⁵ is the primary source of agency legal advice and opinions. The OAL may, however, contradict legal advice that the Attorney General gives agencies concerning their rulemaking authority,¹⁹⁶ and unless someone seeks judicial review the OAL's legal opinion will prevail.

This conflict between the Attorney General and the OAL is on balance acceptable. It makes sense to vest all regulatory review power in one body. It would be duplicative, confusing, and burdensome to vest legal review in the Attorney General, and all other review — which inevitably also has legal aspects — in the OAL. The alternative, placing all regulatory review under the Attorney General, would be a very poor policy choice in California. The Governor, as chief executive officer, is responsible for the executive branch agencies. If the Attorney General were subordinate to the Governor rather than independent, a role for that officer in the legal aspects of the review process would be appropriate. Under California's governmental structure, however, giving the Attorney General a role in regulatory review would inevitably politicize the review process. The Governor and Attorney General can be from different political parties and may even be political rivals. If the Attorney General made legal judgments in the review process that were subject to gubernatorial reversal, some of those judgments and reversals undoubtedly would reflect direct political rivalry. Thus, California agencies will have to be tolerant of conflict between the Attorney General and the OAL.

192. This result of course assumes that the agency has sufficient legislative support and attention to succeed in having a bill passed. Frequently this will not be the case, and the OAL's judgment would prevail.

193. § 11340.2 (West 1980). The OAL Director does not serve at the pleasure of the Governor, Price, *supra* note 14, at 23, but undoubtedly can be fired for cause. Cf. *Humphrey's Executor v. United States*, 295 U.S. 602, 623-24 (1935) (President could fire Federal Trade Commissioner only for cause).

194. § 11349.5 (West 1980).

195. CAL. CONST. art. V, § 11.

196. A third opinion could be produced on appeal to the Governor. § 11349.5 (West 1980).

2. *Necessity: Substance Review.* Of all the powers vested in the OAL, the power to determine whether an agency's regulations meet the test of "necessity" is at once the most far-reaching¹⁹⁷ and the most controversial.¹⁹⁸ The necessity criterion is ambiguous.¹⁹⁹ Deliberate ambiguity may have been critical to legislative acceptability, but it causes serious administrative difficulty.

a. *Theory and Intent.* Some regulations are necessary because the legislature has mandated their adoption;²⁰⁰ such regulations easily pass the necessity test. All other regulations are adopted at the option of the agencies. Agencies can, and often do, accomplish their statutory purposes with little or no use of their rulemaking power.²⁰¹ Through case-by-case adjudication agencies can develop standards which, after sufficient usage, function almost as effectively as rules to influence later cases.²⁰² Regulations are, of course, an extremely useful tool that an agency may use to make its operations more efficient, effective, and fair.²⁰³ But even if all the regulations in the California Administrative Code were to vanish overnight, California's administrative agencies would continue to function and regulation would continue.²⁰⁴ Pub-

197. The necessity standard "carries the seeds of enormous power." Price, *supra* note 14, at 6. "OAL may well be King of the Mountain. Think what President Carter's Regulatory Analysis Review Group would have given for the power to review and veto regulations on the basis of 'necessity'!" See *More Governmental Innovation from the Golden State*, REG., Jan.-Feb. 1981, at 9.

198. See Erbin and Fellmeth, *supra* note 25; see also Spohn, *Rules for the Regulators' Regulator* CAL. REG. L. REP., Winter 1982, at 3.

199. The regulatory reform plans of the Reagan Administration and the United States Senate require rules to pass a straightforward cost-benefit test. Reagan Order, *supra* note 26, § 2; S. 1080, *supra* note 2, at S2715 (limited to major rules).

200. Pedersen, *supra* note 103, at 38; Starr, *supra* note 14, at 720. In the 1981 California Legislative Session, more than 500 bills that were introduced mandated rulemaking. *Id.* at 5.

201. The National Labor Relations Board, for example, has almost never issued substantive rules. B. SCHWARTZ, ADMINISTRATIVE LAW 188 n.220 (1976). Under some circumstances due process may require adoption of regulations to precede enforcement actions. Fuchs, *Development and Diversification in Administrative Rule Making*, 72 NW. U.L. REV. 83, 97-102 & n.50 (1977) (discussing, *inter alia*, Morton v. Ruiz, 415 U.S. 199 (1974)). Generally the choice between issuing rules or proceeding by case-by-case adjudication is within the informed discretion of the administrative agency. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (Black, J., concurring); SEC v. Chenery Corp., 332 U.S. 194, 201-02 (1947).

202. A standard developed in adjudication becomes a precedent for subsequent adjudications. After sufficient development of the standard, official notice can be taken of it, and it will function in rule-like fashion in subsequent enforcement proceedings. See, e.g., *In re Manco Watch Strap Co.*, 60 F.T.C. 495 (1962); B. SCHWARTZ, *supra* note 201, at 364-74.

203. Cooper, *supra* note 4, at 197. Regulated firms quite commonly "prefer that an agency proceed by rulemaking and regulation rather than by adjudication." *Id.*; see also Spohn, *supra* note 198, at 3; Wright, *supra* note 104, at 201-02.

204. Realistically, of course, the inefficiency of case-by-case adjudication would make it very difficult for some agencies to "discharge their sweeping mandates." Pedersen, *supra* note 103, at 38.

lished regulations are thus not "necessary" in an absolute sense. Therefore, to interpret the language of the necessity standard literally seems absurd.

Consequently, it may be accurate to conclude that by "necessity" the legislature means reasonable necessity. Such an interpretation seems sensible,²⁰⁵ and legislative developments appear to support it. In 1951, a test of reasonable necessity was written into the California Administrative Procedure Act.²⁰⁶ A.B. 1111 and its immediate progeny did not alter this test.²⁰⁷ In fact A.B. 1111 appears to have added "reasonably necessary" language to the APA's judicial review standard;²⁰⁸ however, A.B. 1111 omitted the long-used modifier "reasonable" from the "necessity" test that the OAL enforces.²⁰⁹

The complaint in regulatory reform rhetoric that many regulations are "unnecessary" may explain this apparently absolutist stance. Political rhetoric deals in absolutes. It condemns regulations for being unnecessary, *not* for being not reasonably necessary. It pays no heed to the theoretical non-necessity of virtually all regulations. As the statutory embodiment of a rhetorical flourish, the bare "necessity" standard may express only a general antipathy to regulation and a desire for improved factual support for each specific regulation.

During the 1982 legislative session, OAL-supported legislation was introduced that would have deleted the qualification "reasonably" from the phrase "reasonably necessary" in the two places it appears in the APA.²¹⁰ Such a legislative change would have evidenced legislative favor for the absolutist view of necessity, and the change could have been used to argue that virtually any regulation failed to meet the necessity standard. Shortly before passage, however, the bill was amended to retain the reasonableness language. As so amended the bill passed.²¹¹ This episode supports the conclusion that the legislature

205. Starr believes "necessity" and "reasonably necessary" to be abstract equivalents, but claims the statutory context requires the OAL to show less deference to the agencies than have the courts. See Starr, *supra* note 14, at 718. He feels comfortable with this diminished deference for two reasons. First, the OAL will have the rulemaking file. This reason does not hold up because the courts also will have the file. Second, the OAL "may employ staff with requisite expertise to review highly technical regulations." *Id.* (footnote omitted). This reason also does not hold up; the OAL has not chosen to employ such people. See Livingston Interview, *supra* note 72.

206. 1951 Cal. Stat. 479.

207. See § 11342.2 (West 1980).

208. 1979 Cal. Stat. 567, art. 7; see § 11350(b) (West 1980).

209. §§ 11349 and 11349.1 (West 1980).

210. A.B. 2820, §§ 11342.2, 11346.7, as amended June 28, 1982.

211. 1982 Cal. Stat. 1573; telephone interview with Gene Livingston, first Director of the OAL (resigned effective October 31, 1982), Nov. 23, 1982 (notes on file with author) [hereinafter cited as Livingston Interview].

never really meant for necessity to be interpreted as an absolute, but rather that the OAL and the courts are to test each regulation for reasonable necessity.

The legislature probably did not intend A.B. 1111 to change any substantive standard — regulations have had to be “reasonably necessary” for many years — but merely to create an enforcement mechanism in the executive branch.²¹²

To date, the OAL’s interpretation of the necessity standard supports this view. Although failure to meet the necessity standard is the most frequent reason for OAL disapproval of regulations,²¹³ the OAL has not applied an absolutist reading of “necessity.”²¹⁴ In fact, a number of its disapproval letters use the phrase “reasonably necessary” interchangeably with “necessity” as the relevant standard.²¹⁵

b. *Necessity for What?* The elimination of absolute necessity as a possible meaning for the necessity standard does not end the inquiry into the content of the standard. When regulations were subject only to judicial review, the courts never determined the content of the “reasonably necessary” standard that has long been part of California’s APA.²¹⁶ In the midst of this void the OAL reviews each regulation for necessity, and finds many lacking.

The definition of necessity that the OAL proposes is tautological.²¹⁷ It fails to answer the question: “Necessity for what?” The stat-

212. The necessity provision parallels the emergency standard in that respect. *See supra* text accompanying notes 83-84.

213. The OAL cited lack of necessity in 127 (51%) of the 248 disapprovals during 1981-82. Procedural deficiencies of all types were a basis for 122 disapprovals; clarity was a basis in 71; authority was a basis in 43; and consistency was a basis in 39. Many disapprovals are for multiple reasons. 1981-82 OAL ANNUAL REP. 7-8.

214. This observation is of particular interest because the OAL’s former director believes the agency is intended to be a strict constructionist. *See* Livingston Interview, *supra* note 72. The OAL has strictly construed other elements of its statutory mandate, *see supra* text accompanying notes 111-15, and it strictly construes agency authority as well, *see supra* text accompanying notes 185-91.

215. *See* Letter of Dec. 31, 1980, to State Athletic Commission, at 2; Letter of Jan. 7, 1981, to California Horse Racing Board, at 1; Letter of May 18, 1981, to Department of Real Estate, at 2.

The Governor’s Office has consistently referred to a reasonable necessity standard in its appeal determinations. *See, e.g.*, Letter of Dec. 14, 1981, to New Motor Vehicle Board, 81 Cal. Admin. Reg. No. 52-Z (Dec. 26, 1981), at 35; Letter of Nov. 30, 1981, to Gene Livingston (re: Department of Corrections), 81 Cal. Admin. Reg. No. 52-Z (Dec. 26, 1981), at 63-64.

216. *See, e.g.*, *ALRB v. Superior Ct.*, 16 Cal. 3d 392, 411, 546 P.2d 687, 699-700, 128 Cal. Rptr. 183, 195-96 (1976); *Morris v. Williams*, 67 Cal. 2d 733, 749, 433 P.2d 697, 707, 63 Cal. Rptr. 689, 699 (1967); *Pitts v. Perluss*, 58 Cal. 2d 824, 834-35, 377 P.2d 83, 89-90, 27 Cal. Rptr. 19, 25-26 (1962).

217. *See supra* text accompanying note 61.

utes also provide no answer, despite the 1982 amendment that essentially adopted the OAL's necessity definition.

A comparison with the standard of necessity required to support emergency rulemaking procedures illustrates this ambiguity. To qualify for emergency adoption, a regulation must be "necessary for the immediate preservation of the public peace, health and safety, or general welfare."²¹⁸ This standard has specific content against which a reviewer can judge the agency's use of emergency procedures.²¹⁹ To assure that the OAL properly exercises its discretion within the framework of legislative intent, the legislature should state in what sense a regulation must be considered necessary. For example, the legislature might consider legislation providing that "'necessity' means that the agency has demonstrated in the rulemaking file that the proposed regulation is needed for the fair, efficient, fiscally sound or effective implementation of its organic statute." Language of this type would direct the agencies to the types of factual support they need to demonstrate the necessity of proposed regulations. It would also focus the OAL's attention on the acceptable varieties of support for a regulation.

Even if the legislature does not provide such a definition, the OAL should consider a procedural regulation detailing what an agency must establish to meet the necessity standard. The staff of the OAL has been making necessity decisions for several years. The agency therefore must have some shared notion of necessity that could be memorialized. If it has not had such a sense, the need is manifest for the OAL to curb its discretion by clarifying its position on the definition of necessity.²²⁰

c. *Scope of Review — How Well Proven a Necessity?* Even though neither the legislature nor the OAL has adequately defined necessity, both have exhibited concern about what standard of review the OAL should employ in reviewing regulations for necessity. The only relevant statutory language prior to 1982 prohibited both the OAL and the courts from substituting their judgment on the content of regulations for that of the adopting agency.²²¹

The California courts have traditionally applied the deferential "arbitrary and capricious" test when reviewing the substantive content

218. § 11346.1 (b) (West 1980).

219. See *supra* notes 150-55 and accompanying text.

220. The OAL was in existence for almost two years before it proposed regulations governing its own procedures. Livingston Interview, *supra* note 72. The OAL's critics were particularly incensed that OAL had not earlier regularized its own procedures by adopting regulations. Spohn, *supra* note 198, at 2. The legislature has now mandated that the OAL adopt such regulations. 1982 Cal. Stat. 1544, § 1; 1573, § 5.

221. § 11340.1 (West 1980).

of adopted regulations.²²² Following the lead of the OAL, which has proposed regulations to the same effect,²²³ the legislature has replaced the arbitrary and capricious standard with the "substantial evidence" test.²²⁴ The substantial evidence test, which has traditionally been applied in reviewing agency adjudicatory decisions,²²⁵ is usually less deferential than the arbitrary and capricious test.²²⁶ Courts and scholars have expressed doubt, however, that there is much difference between the two standards, particularly when there is a record available for review.²²⁷ Accordingly, A.B. 1111's requirement of a "closed" rulemaking record may alone substantially eliminate the distinction between the two standards.²²⁸

222. See *Estate of Fasken*, 19 Cal. 3d 412, 439-40, 563 P.2d 832, 848-49, 138 Cal. Rptr. 276, 292-93 (1976) (Mosk, J., dissenting); *Ralph's Grocery Co. v. Reimel*, 69 Cal. 2d 172, 179, 444 P.2d 79, 85, 70 Cal. Rptr. 407, 413 (1968); *Pitts v. Perluss*, 58 Cal. 2d 824, 832, 377 P.2d 83, 88, 27 Cal. Rptr. 19, 24 (1962).

223. PROPOSED REGULATIONS, *supra* note 61, § 160.

224. 1982 Cal. Stat. 1573, § 4, amending § 11349(a).

Another 1982 bill proposed a more complex review formulation that would have satisfied necessity by "fair and substantial reasons" found in facts, testimony, assessments, or "other information of a persuasive nature" in the rulemaking file. A.B. 3322, § 11349(a), as introduced Mar. 11, 1982. The bill was amended before passage to eliminate this definition. 1982 Cal. Stat. 1544.

A number of recent federal enactments include a substantial evidence test. See Scalia, *supra* note 105, at 39.

225. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971); Alviani, *supra* note 2, at 301.

226. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 705 (1980) (Marshall, J. dissenting); *Consumers Union v. CPSC*, 491 F.2d 810, 812 (2d Cir. 1974); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1258-60 (D.C. Cir. 1973).

It is generally assumed that the arbitrary and capricious test is the federal standard for review of informal rulemaking. See Pedersen, *supra* note 103, at 47-48 & n. 48; Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 212 (1974); cf. Note, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L.J. 1750, 1756-60 (1975) (discrepancy between Supreme Court and lower courts in choice of review standard). But see *Citizens to Preserve Overton Park, Inc. v. Volpe* 401 U.S. 402, 414 (1971) (dictum).

227. *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 705 (2d Cir. 1975) (Lumbard, J., concurring); *Associated Indus. v. United States Dep't of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973); *Bunny Bear, Inc. v. Peterson*, 473 F.2d 1002, 1005-06 (1st Cir. 1973); Pedersen, *supra* note 103, at 48-49 & n.49; Scalia, *supra* note 105, at 39; Note, *supra* note 226, at 1753.

228. The United States Senate's desire to impose a more stringent review standard than "arbitrary and capricious" review was translated into the standard of "substantial support" in pending regulatory reform legislation. S. 1080, *supra* note 2, at S2718. The choice of this new term instead of the term "substantial evidence" was to avoid any implication that trial-type procedures were necessary in informal rulemaking. S. REP. NO. 284, *supra* note 138, at 166. In essence, the new term offers a fresh start in case development.

Both the Governor's draft and early introduced drafts of A.B. 1111 required that the evidence supporting the necessity of a regulation be substantial in light of the whole record. Governor's Draft (undated) at 16, § 11350; A.B. 1111, as amended in Assembly April 26, 1979, § 11349; Spohn, *supra* note 198, at 3. After the expression of concern about the use of this term of art associated with adjudication, the language was removed. See § 11350 (West 1980).

Nevertheless, two problems might accompany the change to substantial evidence review. Because of the heavy baggage that the substantial evidence terminology carries as a result of having been developed almost exclusively in the context of adjudication, formalities familiar from adjudication could be imported into the rulemaking process.²²⁹ Also, the shift in standard, combined with the formalization of the rulemaking record, could diminish agency use of informed judgment below the minimum level acceptable for sound policymaking. In the final analysis, however, the impact of the new standard on the OAL's review for reasonable necessity depends a great deal on the OAL's conception of what is reasonable.

d. *Disapprovals Under the Necessity Standard.* During its first two years the OAL's disapprovals on the basis of the necessity standard have fallen into three major groups. The first and largest group comprises regulations for which the agency provided an insufficient factual basis.²³⁰

The second group includes submissions that the OAL found to be duplicative of existing statutory language or other regulations; a duplicative legal requirement, the OAL concluded, cannot be necessary.²³¹ That conclusion seems sound. The Legislature has concurred by adopting nonduplication as a sixth standard for OAL review.²³²

A third category comprises of material that the OAL found was not regulatory in nature.²³³ The OAL has taken the position that submissions not in conformance with the APA definition of a "regulation"²³⁴ need not be adopted in accordance with its procedures and, therefore, should not become part of the California Administrative Code. No real harm would be done if the OAL were to allow non-regulatory material to be adopted in regulatory fashion and included in the Administrative Code. This practice would, however, conflict with the goal of reducing the number of regulations, and would detract from the attractiveness of the statistics describing the effectiveness of regula-

229. See *supra* text accompanying notes 124-38.

230. See *infra* text accompanying notes 235-42. In the approximately 230 sets of regulations reviewed by the author for this article, this variant of failure to meet the necessity standard was encountered 136 times.

231. This variant of failure to meet the necessity standard was encountered 43 times in the approximately 230 sets of regulations reviewed by the author.

232. 1982 Cal. Stat. 1544, 1573; see *supra* note 58.

233. An example is an agency's publication of the location of its office. Letter of May 20, 1981, to State Building Standards Commission, at 1. This variant of failure to meet the necessity standard was encountered 26 times in the approximately 230 sets of regulations reviewed by the author.

234. § 11342(b) (West 1980).

tory reform. In any event, because agencies are free to include in their own publications useful nonregulatory information, the OAL's position is of little consequence.

The first category of necessity disapprovals best illustrates the serious implications of "necessity" review. Disapprovals of a number of proposals involving fee increases and training standards demonstrate the OAL's approach to necessity review.

Many agencies are authorized to set fees for services and licenses that they provide. The OAL has disapproved a number of fee increases on the ground that the increase was not necessary.²³⁵ It found that the agencies' fiscal analyses were insufficient to justify the fees sought.²³⁶

For a fee increase, the agency typically has all the information needed for rational decisionmaking: the costs the fees are needed to cover, the revenue expected from the increase, the amount revenue will exceed costs, and the justification for the surplus. The disapproved regulations show a tendency by the agencies arbitrarily to round up their fees, even without demonstrable evidence of need for the additional funds.²³⁷ The OAL's disapprovals are thus appropriate. Even without further definition of necessity, it is reasonable to require substantiation of fiscal need to demonstrate that a fee increase is reasonably necessary. Although there are policy aspects to fee determinations — such as the size of necessary surpluses — the increases generally depend on fiscal analysis rather than individual perspective, philosophy, or judgment. Thus, these decisions are primarily fact-determined. Fact-determined decisions lend themselves well to centralized review by a general reviewing agency like the OAL. The OAL can readily identify the questions to be asked to assess the propriety of the agency's decision, and these questions should be answerable by reference to determinable facts. The judgments underlying the decision are minimal, and those judgments that are necessary can appropriately be made by nonexpert reviewers.

The OAL's decisions about appropriate agency fees are in stark contrast with its decisions concerning appropriate training and licens-

235. Letter of Nov. 28, 1980, to Water Resources Control Board; Letter of Sept. 24, 1981, to Department of Housing and Community Development, 81 Cal. Admin. Reg. No. 39-Z (Sept. 26, 1981), at 28; Letter of Sept. 25, 1981, to State Lands Commission, 81 Cal. Admin. Reg. No. 39-Z (Sept. 26, 1981), at 30, 32; Letter of Nov. 13, 1981, to New Motor Vehicle Board, 81 Cal. Admin. Reg. No. 46-Z (Nov. 14, 1981) at 12, 13.

236. Letter of Dec. 30, 1981, to Physical Therapy Examining Committee; Letter of Apr. 8, 1982, to Division of Occupational Safety and Health.

237. Letter of Nov. 13, 1981, to New Motor Vehicle Board, *supra* note 235.

ing standards.²³⁸ The propriety of a particular fee level can be judged in relationship to facts that can be demonstrated or predicted with some accuracy. The propriety of a training standard, however, can be judged, if at all, only in relation to intangibles. Whether a standard is effective in attaining a set goal is an elusive question. The answer requires a multifactoral analysis of data that often will be impossible to obtain as a practical matter; any collectible data would likely fail to yield definitive conclusions. Perspective, philosophy, and judgment — particularly expert judgment — will ultimately play a significant role in formulating such standards.²³⁹

This type of decision could be called judgment-determined: although informed by facts, the decision calls for an exercise of judgment.²⁴⁰ With this type of decision, there may be considerable disagreement about the questions that should be asked to check the validity of the agency's views. Moreover, there may be no hard facts to answer the questions, only hazy predictions and imprecise estimates. Reliance on views expressed in the rulemaking file would also be hazardous, as the judgment of the regulated community may reflect a

238. Letter of Apr. 20, 1981, to Board of Vocational Nurse and Psychiatric Technician Examiners; Letter of May 13, 1981, to Board of Dental Examiners; Letter of Sept. 3, 1981, to State Board of Examiners of Nursing Home Administrators, 81 Cal. Admin. Reg. No. 36-Z (Sept. 5, 1981), at 49; Letter of Nov. 2, 1981, to State Board of Examiners of Nursing Home Administrators, 81 Cal. Admin. Reg. No. 45-Z (Nov. 11, 1981), at 23.

239. One example arises from a series of three disapproval letters issued to the Board of Examiners of Nursing Home Administrators. See Letter of Sept. 3, 1981, to State Board of Examiners of Nursing Home Administrators, *supra* note 238, at 49; Letter of Nov. 2, 1981, to State Board of Examiners of Nursing Home Administrators, *supra* note 238; Letter of Jan. 28, 1982, to State Board of Examiners of Nursing Home Administrators, 82 Cal. Admin. Reg. No. 5-Z (Jan. 30, 1982), at 79. The Board, reviewing existing regulations, promulgated regulations that administrator-trainees were to receive four hours of instruction per day from their preceptors and spend 75 percent of their training time in the preceptor's facility. Despite repeated requests from the OAL, the Board was unable to provide "specific facts" to support the necessity of the regulations which the OAL disapproved.

It is unclear whether it was at all possible for the Board to prove to the OAL's satisfaction that the regulations were necessary. The Board perhaps could have added facts to the rulemaking file or offered witnesses to testify that 75 percent was the "necessary" figure. Certainly the appropriate figures for the regulations could not be demonstrated by the type of precise facts available in the fee cases.

It is demonstrable that licensing arose as a substitute for the restrictive guild system and still frequently operates to create restrictive barriers to professional entry that are unnecessary for public protection. G. ROBINSON, E. GELLHORN, H. BRUFF, *THE ADMINISTRATIVE PROCESS* 611-19 (2d ed. 1980). It is therefore arguable that the OAL serves the purposes of regulatory reform when it intensely scrutinizes regulations such as those discussed above. This argument is misguided, however. The problem of restrictive licensing must be addressed by legislatures that have mandated licensure and often placed its control in the hands of licensee decisionmakers. *Id.* at 616; cf. 1976 Cal. Stat. 1188 (adding non-licensee members to licensing boards).

240. Cf. Scalia, *supra* note 105, at 41 ("Sometimes the evidence is *not* the only applicable criterion.") (emphasis in original).

greater interest in preserving the status quo than in protecting the public welfare.

The OAL argues that it is simply demanding factual proof of necessity when it disapproves such judgment-determined decisions.²⁴¹ This argument drastically understates the OAL's role. When the facts are elusive, unavailable, or controversial, the OAL is by definition substituting its judgment for that of the agency when it disapproves such a regulation.²⁴²

This is not entirely a fault of the OAL staff, or even of its philosophy. It is a flaw inherent in the system. A centralized review process will inevitably produce such substitutions of judgment because many categories of regulation ultimately depend on someone exercising judgment. The agency with power to make its judgments prevail necessarily has decisive authority.

This problem of substitution of judgment is another manifestation of the question of how much reliance on expertise is appropriate in the rulemaking process.²⁴³ The OAL has occasionally stated in its disapproval letters that an agency could use experience as a justification for a regulation,²⁴⁴ but other disapprovals suggest little OAL deference to agency expertise.²⁴⁵

241. Livingston Interview, *supra* note 72.

242. See *More Governmental Innovation from the Golden State*, *supra* note 197, at 9 ("How one can disagree with the necessity for a proposed rule without performing such substitution is a mystery."); Erbin and Fellmeth, *supra* note 25, at 5; see also Spohn *supra* note 198, at 3; cf. Pedersen, *supra* note 103, at 49 (to the extent uncertainties surround consequences of some agency actions, courts have "instantiate[d] any requirement that regulations be supported by 'proof' in some hard and factual sense").

OAL's use of the necessity standard is not uniformly inappropriate. To the contrary, most often its objections appear reasonably well-founded. For example, rejected regulations of the Department of Education detailed rules for child care, such as minimum teacher and adult/child ratios and staff training requirements, but were supported neither with information explaining their specific purpose nor with their factual basis. Letter of May 21, 1982, to Department of Education, 82 Cal. Admin. Reg. No. 22-Z (May 29, 1982), at B-2, B-3.

Similarly, the Department of Motor Vehicles wanted to require driving schools to post signs of specific dimensions, urging the need for standardization, but failed to provide any indication why standardized signs are needed at all. Letter of June 3, 1982, to Department of Motor Vehicles, 82 Cal. Admin. Reg. No. 24-Z (June 12, 1982), at B-5, B-7. In these situations, the OAL has properly found a lack of necessity where an agency's rationale is either unstated or conclusory. In a sense the objection is procedural, directed initially to the lack of supporting documentation rather than to the substance of the agency's judgment.

243. See *supra* text accompanying notes 133-38. The OAL has a budget to hire consultants but does not do so. Price, *supra* note 14, at 27 n.25. Its staff members are generalists; many are lawyers. It would not solve any problems in regulation—and greatly increase its cost—were OAL to duplicate the expertise of agencies. However, it might assist its reviewing function, as well as greatly improve its relationships with agencies, if the OAL could call on a greater range of expertise in performing its functions.

244. Letter of May 18, 1981, to Department of Real Estate, at 2; Letter of Apr. 2, 1981, to California Highway Patrol, at 2.

245. See *supra* text accompanying notes 239-42.

The OAL violates the APA when it substitutes its judgment for that of the agency.²⁴⁶ The elimination of the prohibition on the OAL substituting its judgment for that of the agencies would be the easiest solution for this problem.²⁴⁷ The result would be frank centralized control over rulemaking, with ultimate policy judgments situated in the OAL, subject only to gubernatorial veto.²⁴⁸

The agencies would of course be outraged by such a change. Such a change is not advisable, even though it might have little real impact other than to legitimize the process that now exists. It would place tremendous judgmental power in the hands of an agency that is less accountable and less expert than the adopting agencies themselves. Moreover, granting such sweeping discretion to the OAL would place it under intense political pressures and make neutrality impossible. The present OAL can deflect political pressure by using the excuse that its review is limited by the prohibition against substitution of judgment. If that restriction were eliminated, the OAL would no longer have this shield. Elimination of this limit on the OAL's power is thus both unwise and unresponsive to the regulatory reformers' desire for increased accountability and improved decisionmaking.

Alternatively, moving the regulatory review function into the Governor's Office, in tandem with eliminating the prohibition on substitution of judgment,²⁴⁹ would preserve and perhaps enhance accountability. As chief executive the Governor is, after all, titularly responsible for the agencies' acts. Admittedly, this solution to the substitution of judgment problem also would place ultimate judgment in nonexpert hands, but the hands would be those of an accountable official. Of more concern are the political ramifications of such a proposal. The political pressures on the Governor would be more severe than those that the OAL would face because the Governor is a partisan political leader as well as an administrator. The Governor, who must

246. Cf. § 11340.1 (West 1980).

247. The Legislature could provide that the prohibition would continue to apply to judicial review.

248. Of course the courts could reverse the administrative decision as well. The courts review only a small percentage of adopted rules, however. Court review has always been limited, but under new legislation there will be broader substantial evidence review. See *supra* text accompanying notes 223-26.

249. The American Bar Association advocated giving the President the power to modify or to reverse agency decisions concerning regulations. Resolution A, *American Bar Ass'n, Summary of Action of the House of Delegates* 11-12 (Aug. 1979); see 65 A.B.A. J. 1284 (1979). Resolution A is criticized in Note, *supra* note 4, *passim*. The Note urges as an alternative a Board of Regulatory Appeals. See *id.* at 578-84.

worry about campaign contributions, would have more difficulty insulating the process from interest group and lobbyist pressures than would a director of the OAL. In the existing scheme the Governor exerts final authority only if an agency appeals, and appeals are limited in number.²⁵⁰

The injection of partisan politics into the review process would also have unfortunate repercussions on administration.²⁵¹ So far the agencies have accepted most of the OAL's decisions, with varying degrees of grace.²⁵² If partisan politics infected even the most mundane review decisions, the agencies would be less likely to accept the results. The legislature should be the location of politically charged decision-making; one of the functions of administrative agencies is to provide a decisionmaking mechanism less subject to political bias than the legislature.

A far more promising solution would involve recognition of the distinction between agency policy choices and the factual foundations for those choices.²⁵³ The solution would involve completely rewriting the necessity standard while retaining the prohibition on the substitution of judgment.

If the need for a regulation is factually demonstrable, taking into account the state of the art in any given technological field, it is appropriate to require substantial support for its factual basis in the rulemak-

250. Only 24 appeals were taken to the Governor in the first two years of OAL's existence; 407 sets of regulations were rejected during those two years. See 1981-82 OAL ANNUAL REPORT 6. Of the 24 appeals, 11 resulted in reversals of OAL's position, OAL was upheld nine times, and four appeals were withdrawn. (Data compiled by author.) Although appeal to the Governor is bureaucratically inexpensive, requiring only a letter, it may be politically costly; agencies are undoubtedly reluctant to involve the Governor unless the issue is significant to the agency. Livingston Interview, *supra* note 72. Cf. Alviani, *supra* note 2, at 299-300 (federal agencies avoid direct confrontation with OMB). Appeals thus are likely to remain limited, even when agencies recognize the frequency of OAL reversal.

251. Cf. Rosenberg, *supra* note 2, at 227-28 (opposition in 1941 to Office of Federal Administrative Procedure for fear of politicization of agency decisionmaking process).

252. About 20 percent of disapproved regulations are resubmitted. Livingston Interview, *supra* note 72. Only 24 disapprovals were appealed as of June 1982. See *supra* note 68 (data compiled by author); see also Price, *supra* note 14, at 8.

253. S. REP. NO. 284, *supra* note 138, at 166. Note, *supra* note 226, supports such a recognition, and urges a "sliding scale" test for judicial review. *Id.* at 1766. Arguing that "[c]omplex, technical decisionmaking requires an adaptable approach," *id.* at 1761, it concludes that "[t]he degree of factual support necessary [to uphold a regulation] should be recognized as varying directly with the determinability of the relevant data, and inversely with the societal risk addressed by the regulation," *id.* at 1765. DeLong considers it "wise to resist" dividing rulemaking into fact and policy components, see *supra* note 36, at 294, while recognizing the need for judgment as well as information to underlie the rulemaking process. "Application of intuition and value judgment will always be necessary, but an agency can structure decisions and obtain information so as to narrow the areas of normative choice and communicate the grounds of decision." *Id.* at 355.

ing file. Without such support, the OAL should disapprove the rule. To the extent that a regulation is based on a policy choice, the OAL should require the agency to explain its choice in the rulemaking file, and ensure that the choice is not arbitrary. An arbitrary policy choice is one that is not reasonably supported by fact, testimony, or logic. The OAL should have the power to disapprove agency policy judgments only when they are arbitrary. This view of necessity would give substance to the existing APA prohibition on substitution of judgment, while fully retaining the OAL's right to insist on both factual foundations for fact-determined decisions²⁵⁴ and explanations of judgment for judgment-determined decisions.²⁵⁵ Expertise as a foundation for judgment would be recognized in the limited areas in which it is appropriate.²⁵⁶ This solution is in harmony with the various legislative goals behind the creation of the OAL; the OAL would still be effective in reducing regulation and improving its quality, but would not be substituting its judgment for that of the adopting agencies.

There is no perfect solution to the problem of substitution of judgment. A body that has broad powers to review but is prohibited from reaching judgment inevitably will overstep the prohibition. The only escape valve originally was the agency's right to appeal to the Governor.²⁵⁷ Amendments effective in 1983, however, allow interested persons objecting to OAL disapprovals to obtain court declarations of the validity of regulations.²⁵⁸ The amendment is silent on whether the adopting agency is itself an interested person,²⁵⁹ and consequently on the relationship between gubernatorial and judicial review if the agency is an interested person. The advent of judicial review of disapprovals along with gubernatorial appeals might force the OAL to respect the substitution of judgment prohibition. Additionally, should the courts begin to define the ambiguous necessity standard, such a definition would provide boundaries for the OAL's review function.

254. See *supra* text accompanying notes 235-38.

255. See *supra* text accompanying notes 238-40.

256. See *supra* text accompanying notes 137-44.

257. § 11349.5 (West 1980).

258. 1982 Cal. Stat. 1544, § 2; 1573, § 11.

259. Under the APA, an "interested person" for purposes of seeking declaratory relief in regard to the validity of a regulation is someone who is subject to or affected by the regulation. *American Friends Serv. Comm. v. Procter*, 33 Cal. App. 3d 252, 255, 109 Cal. Rptr. 22, 23-24 (1973); *Chas L. Harney, Inc. v. Contractors' State License Bd.*, 39 Cal. 2d 561, 564, 247 P.2d 913, 917 (1952). Of course, an agency itself is not subject to the regulation but may be considered "affected" by the existence or nonexistence of the regulation. Another formulation defines an interested person as someone with a direct rather than a consequential interest in the litigation. *Associated Boat Indus. v. Marshall*, 104 Cal. App. 2d 21, 22, 230 P.2d 379, 380 (1951). On that basis an agency might qualify.

V. BUREAUCRACY AND CITIZEN ACCESS: PROBLEMS REQUIRING SPECIAL STUDY

A. *Bureaucracy.*

From a purely bureaucratic cost perspective, the OAL review process is reasonably sound. Strict time deadlines circumscribe the OAL's review of new agency regulations,²⁶⁰ so the review process does not unnecessarily delay their promulgation.

The review of existing regulations, however, involves considerably greater delay. The OAL has six months to review regulations amended in the course of the mandated review of existing regulations.²⁶¹ Whenever an agency incorporates new regulatory ideas into its scheduled review, the entire package falls into the six month review category. In 1982, the OAL's backlog was so severe that it accomplished its reviews only shortly before statutory deadlines.²⁶² Thus, many regulations were delayed six months as a result of OAL review. Such lengthy delays may cause enforcement problems, if only because of confusion. In some instances the delay could cause serious programmatic concerns.²⁶³ Once the initial review of current regulations is completed, however, the far shorter deadlines for new regulations will be exclusive.

The cost of running the OAL is reasonably modest.²⁶⁴ The OAL's budget does not, however, represent the full cost of the review program. Each agency must expend resources to generate the additional paperwork required by the more complex rulemaking process.²⁶⁵ To

260. § 11349.3 (West 1980) (30 calendar days for approval or disapproval); § 11349.6 (West 1980) (10 calendar days for approval or disapproval of emergency regulations).

The legislature in 1982 added to § 11349.4 the requirement that the OAL expedite regulations resubmitted without significant substantive change after previous disapproval. 1982 Cal. Stat. 1573, § 7.

The change in notice requirement from 30 to 45 days, also mandated by A.B. 1111, *see supra* note 27, combined with OAL review, inevitably results in some delay.

261. § 11349.7 (West 1980).

262. Livingston Interview, *supra* note 211.

263. Letter of Oct. 29, 1982, to the OAL from Claudia Foutz, Executive Secretary, California State Board of Pharmacy. Foutz sought expedited review of amendments concerning a passing grade on the pharmacist licensure examination. "The issue involved here is whether to allow pharmacists who flunk a section of the exam but receive an overall passing score, to become licensed to practice . . . [because of the review delay] another 50 to 100 persons will be permitted to be licensed . . . and not competent in all facets [sic] of the practicing profession." *Id.* The Board filed changes in this section with the OAL on August 9, 1982; its next licensure examination was scheduled for January 1983. In response to this expression of concern, the OAL approved the amendments and they were filed on November 16, 1982.

264. OAL's 1982-83 fiscal year budget is \$1.8 million, supporting 46 full time positions. Agencies must reimburse the OAL for the services the OAL renders in reviewing regulations.

265. The OAL's critics charge that the OAL "has become the most onerous layer of red tape in the government," *OAL, A Red Tape Hydra*, *supra* note 160, at 5; *see* Erbin and Fellmeth, *supra*

the extent that the hours spent improve the decisionmaking process, however, it is not fair to charge those costs against the OAL. Whether these costs will be recaptured by downstream bureaucratic savings is presently unanswerable.

B. *Citizen Access.*

Whether the new requirements have improved citizen access to the rulemaking process is a troublesome issue. Notwithstanding procedural reforms designed to improve access, the increased emphasis on the rulemaking record and the increased formality of the rulemaking process could decrease the already limited influence of average citizens. Those who can afford to construct a rulemaking file to support their views will have an increased advantage over those who cannot afford access to experts, studies, and economic analysis.²⁶⁶

The existence of a centralized review agency theoretically creates an additional conduit for input into the rulemaking process.²⁶⁷ The OAL has taken the position, however, that interest groups may direct their pressure only at the adopting agency.²⁶⁸ It supports this practice by noting the statutory requirement that the OAL base its review solely on the rulemaking file, which is made only by the adopting agency. This position is supported by both the statute and policy considerations. The OAL's function is to test agency decisions against a set of

note 25, at 5; some of their complaints are legitimate. Any review process, however, will impose some paperwork burdens.

266. See *supra* note 132. A congressional study of federal regulation found "that many agency actions reflect more than anything else a responsiveness to the interests of the regulated industry and a disregard of the underrepresented interests of the general public. . . . because of the superior resources available to most regulated interests, the process of decision-making often is unfair; the balance usually is tilted in advance against the public." *Excerpts from the Moss Committee Report, supra* note 89, at 419-20; cf. McLachlan, *Democratizing the Administrative Process: Toward Increased Responsiveness*, 13 ARIZ. L. REV. 835, 836 (1971) (public interest best served when competing interest groups present their demands).

This potential imbalance might be countered by financial assistance to underrepresented interests to enable their effective participation. Note, *Federal Agency Assistance to Impecunious Intervenors*, 88 HARV. L. REV. 1815, 1826-30 (1975); see Butzel, *Intervention and Class Actions Before the Agencies and the Courts*, 25 AD. L. REV. 135, 144 (1973); Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 543-45 (1972); *Citizens for a Safe Environment v. AEC*, 489 F.2d 1018, 1022 & n.3 (3d Cir. 1974); cf. *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 425-27 (2d Cir.), *cert denied*, 409 U.S. 849 (1972) (agencies only have power to award fees if Congress explicitly so provides in the enabling act).

267. Livingston Interview, *supra* note 72. The parallel concern is raised about industry access to the OMB, the reviewer of federal agency regulations, see Alviani, *supra* note 2, at 308; Rosenberg, *supra* note 2, at 243-46; and about state legislative or executive reviewers of rules, see M. HERNANDEZ, *supra* note 3, at 12, 19.

268. Section 132, PROPOSED REGULATIONS, *supra* note 61.

procedural and substantive criteria in a fashion seemingly designed to encourage neutrality. It is advisable, therefore, that it avoid contacts intended to influence its evaluation of agency judgment.²⁶⁹

Despite its official stance on *ex parte* contacts, however, the OAL has sought information outside the rulemaking file from at least one group other than the promulgating agencies.²⁷⁰ The OAL believes that it is appropriate to seek the views of legislators and their staffs concerning legislative intent.²⁷¹ It has done so a number of times to determine whether the authors of statutes contemplated emergency adoptions of implementing regulations.²⁷² Although this approach may save the OAL from legislative wrath, and does not conflict with the OAL's own proposed rules, it is inappropriate for two reasons. First, the APA limits the OAL solely to review of the rulemaking file to protect the OAL against extraneous influences.²⁷³ Its provisions make no exceptions either for review of emergency regulations or for contacts with legislators.

Second, accepted procedures for determining legislative intent do

269. Some critics of the OAL claim that the OAL has not rigidly enforced its putative position on *ex parte* contacts. Seeming to cite Livingston, Erbin and Fellmeth claim that "OAL will permit *ex parte* communications to the extent those communications refer to the rulemaking file." Erbin and Fellmeth, *supra* note 25, at 5. The California Regulatory Law Reporter, staffed by Erbin and Fellmeth, continues to insinuate that the OAL has "*ex parte* secret contacts [with] those with a profit stake in [the] rules." *OAL, A Red Tape Hydra?*, *supra* note 160, at 5; *Is This Really Necessary?*, *supra* note 102, at 14.

The OAL's rule does not apply to the review of emergency regulations or existing regulations, where no file exists. § 132, PROPOSED REGULATIONS, *supra* note 61. In those reviews, the OAL seeks public input. Livingston Interview, *supra* note 72.

270. Letter of Apr. 29, 1982, to Department of Health Services, 82 Cal. Admin. Reg. No. 18-Z (May 1, 1982), at 30; Letter of Apr. 16, 1982, *supra* note 152, at 41-42 (discussions with California Cattlemen's Association and legislative staff); Letter of Oct. 23, 1980, to Governor Brown (re: Certified Shorthand Reporters Board), at 1; Letter of Sept. 12, 1980, to Board of Medical Quality Assurance.

271. Livingston Interview, *supra* note 72. Livingston did not mention contacts with private "sponsors" of legislation. There can be no justification for such contacts, as reflected in Letter of Apr. 16, 1982, to Department of Food and Agriculture, *supra* note 152.

272. The legislature recently created a mechanism for assuring OAL attention to regulations of particular interest to members. At legislative request, the OAL must initiate a priority review of designated regulations, without regard to their place on the agency's review plan. 1982 Cal. Stat. 1573, § 9; 1236, § 4 (adding §§ 11349.7(m)(n)).

273. § 11349.1 (West 1980).

Under the Reagan Order the OMB views the agencies as the "primary forum for receiving factual communications regarding proposed rules," but will on occasion itself receive factual material that it believes relevant to the rulemaking. The OMB claims that *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), supports this procedure. Memorandum for Heads of Executive Departments and Agencies from David A. Stockman, Director, Executive Office of the President, OMB, M-81-9, June 13, 1981.

not include using legislators' recollections.²⁷⁴ Legislative intent is determined from legislation itself and from written materials that were available at the time of passage to influence legislators' votes. To the extent that legislators wish to guide the explication of their statutory adoptions, they may create explanatory materials and make them available to assist their colleagues at the time they vote.

Post-adoption legislative interpretation is not a task for individual legislators. It is no more appropriate for the OAL to ask a legislator about the meaning of legislation than it would be for a court to do so. This practice should be terminated. If legislators wish to state their views on matters before the OAL, they too should direct their comments to the adopting agency.

V. CONCLUSIONS

After two years of OAL review, a number of conclusions may be drawn. The OAL review process works well to control the procedural aspects of rulemaking.²⁷⁵ It is less successful as a control over the substantive aspects of regulatory adoptions because the process fosters substitution of judgment and inadequately considers agency expertise.²⁷⁶

With regard to the procedural reforms, elimination of excessive controls would improve the system. The legislature should recognize a distinction between factual premises and policy choices, and require only that the agency include all factual premises in the rulemaking file. The agencies may ultimately internalize the procedural controls enforced by the OAL. If so, there should be fewer and fewer disapprovals for procedural shortcomings. When the disapproval rate drops to a small percentage of adoptions, the legislature should consider reversion to self-control by the agencies and elimination of the procedural review process. A "sunset" clause in the laws governing the OAL might provide a valuable incentive for the agencies to police themselves.

The need for substance control is likely to continue. Agencies have promulgated fewer regulations since the OAL's birth than before,²⁷⁷ indicating that they recognize the current antipathy to regu-

274. C. NUTTING AND R. DICKERSON, *CASES AND MATERIALS ON LEGISLATION* 425-665 (1978); J. DAVIES, *LEGISLATIVE LAW AND PROCESS* 241-62 (1975); 2A C. SANDS, *STATUTES AND STATUTORY CONSTRUCTION* (4th ed. 1973).

275. See *supra* text accompanying notes 168-79.

276. See *supra* text accompanying notes 235-45.

277. OAL's reports regularly highlight statistics of the reduction in adopted regulations since its existence, the diminutions in new proposals, and the percentage of disapproved regulations. See, e.g., 1981-82 OAL ANNUAL REPORT 3, 6-7. However, the OAL's statistical analyses overstate that agency's impact. The total decline in regulatory adoptions—50% during the first two years of the OAL's existence, *id.* at 6—includes diminutions attributable to agency choice as well as to

lation. However, a long-term reduction in unnecessary regulation requires bureaucracywide commitment to this goal; such commitment will not be achieved as easily as compliance with the procedural changes. Compliance with procedures requires only the time and effort needed to jump procedural hurdles. In contrast, compliance with substantive reforms may involve limits on agency programs or policies. The latter will be far more difficult for officials to accept.

Tension between agency officials who wish to use rulemaking to accomplish delegated tasks and outsiders who see each regulatory adoption as a burden is inevitable. A centralized review agency can serve as an effective buffer between these two perspectives. Continued broad-based political acceptability requires that the OAL not reflect one ideological perspective. Rather, the OAL must strike and maintain a balance that imposes a fair test on agency rulemaking without making rulemaking virtually impossible.

It is difficult to determine whether the OAL has thus far reached such a balance. Some signs suggest that it has. Although the agencies may not like the OAL's role,²⁷⁸ they have challenged OAL disapprovals quite infrequently. Additionally, the legislature has continued to support the OAL by agreeing to modifications that the OAL has requested in its statutes. Although substitutions of judgment and overreaching substantive review have occurred, they have not been excessive, especially considering that the OAL has had to create the review system and strike a balance without any prior precedent as a guide.²⁷⁹

Centralizing review of the substance of regulatory promulgations in an executive branch agency like the OAL creates some problems. Nevertheless, it offers significant advantages over legislative branch re-

OAL oversight. Whether agencies are proposing fewer regulations because they could not pass OAL scrutiny, or because of the general unpopularity of issuing regulations, or—as is most likely—for a combination of reasons, is undeterminable.

278. The author's personal experience with OAL has been mixed. Although its rejections of her own agency's proposed regulations have generally been greeted with frustration as well as derision and occasional anger by staff and Board members, frequently there has been some significant basis for the rejection. On other occasions, however, it has been felt with considerable justification that the reviewing officials at the OAL had an inadequate understanding of the agency's functions to assess the proposal, either on substantive ("necessity") grounds or for such procedural flaws as lack of clarity. This problem relates not to the existence of an OAL in theory, but to the operation of its reviewing functions, including the nature and experience of its personnel and their level of respect for and deference to agency officials.

279. The passage of statutes that exempt particular programs and agencies from OAL review implies some erosion in support for the OAL. *See, e.g.*, 1982 Cal. Stat. 978, 1209, 1309. All the exceptions to OAL authority to date involve regulatory matters of importance to the state budget. Livingston Interview, *supra* note 211. Legislative commitment may erode on a broader scale as the OAL disapproves regulations of concern to individual legislators.

view.²⁸⁰ Legislative review requires the legislature to pay regular attention to issues of varying importance, a task it is unlikely to undertake.²⁸¹

Also, legislative review would be a far more political and therefore less neutral control device than OAL review. If the legislature desires to increase its impact on the substance of regulation it should exert greater control over statutory delegation to agencies. The exertion of control over agencies by more precise delegation of power would accomplish many of the regulatory reformers' objectives with the least bureaucratic cost.²⁸²

To review all legislation authorizing administrative agency activities would be a massive task unlikely to engage the attention of the populace or the media. Therefore, it seems unlikely that the legislature will take such action.²⁸³ If the legislature will not itself enforce regulatory controls, the executive branch is the only viable option — except, of course, a return to the formerly-accepted model in which rulemaking was subject only to judicial review.²⁸⁴ Yet the OAL's tremendous power over all California regulation gives one pause: the amount of influence exerted by one fairly independent agency is troublesome. Any steps to assure the review agency's accountability, however, will subject the review process to an increased infusion of political pressure.²⁸⁵ Such political pressure is undesirable; the OAL's long-term

280. The legislative veto is one example of such review.

281. Hamilton, *supra* note 95, at 1327; *see generally* Bruff and Gellhorn, *supra* note 16, at 1370-71. The *Chadha* decision, *see supra* note 16, strongly suggests that legislative review by means of the legislative veto could be enacted in California only by constitutional amendment. The California Constitution, however, is amended frequently, in contrast to the United States Constitution.

282. *See* ADMINISTRATIVE RULEMAKING, *supra* note 53, at 8 (California regulatory reform treats "symptoms rather than causes" because it does not affect broad delegations of legislative power); Bliss, *supra* note 2, at 623; Fuchs, *supra* note 201, at 118-19; M. HERNANDEZ, *supra* note 3, at 13; Moakley, *Foreward, Symposium on Administrative Law*, 16 NEW ENG. L. REV. 645, 655-56 (1981); Rosenberg, *supra* note 2, at 212 n.84, 216. *But see* McGowan, *supra* note 37, at 683.

283. § 11349.7(f) (West 1980). A.B. 1111 allows the OAL to recommend programmatic changes of this type. The legislature has so far ignored OAL's recommendations in this area. Livingston Interview, *supra* note 72. The *Chadha* case, *see supra* note 16, eliminating use of the legislative veto by the United States Congress, will force that body to review several hundred statutes and to set standards in future legislation that accomplish its purpose.

284. Personally, the author prefers no centralized review of the substance of regulatory adoptions. The political climate today, however, demands some nonjudicial review of agency action. If there must be such review, executive branch review is preferable to legislative branch review.

285. *See supra* text accompanying notes 247-52.

See DeMuth, *supra* note 4, at 25; Morrison, Panel III, "Managing the Regulatory Process," *Proceedings of the National Conference on Federal Regulation: Roads to Reform*, 32 AD. L. REV. 266, 269-70.

survival as an institution demands that it serve reform rather than programmatic goals.²⁸⁶

Is California's plan a good model for other states and the federal government? California has considerably slowed the growth of regulation and has forced a review of all existing regulation. Each jurisdiction's unique governmental structure must be considered in deciding whether, and where, to centralize substance control. Centralized control over the legal framework of regulatory promulgations — the authority review — may already exist; however, control over the judgmental decisions of the agencies is the most difficult issue. If a substantive review is to be reasonably neutral, rather than political, it must be placed within the governmental structure so that neutrality will be fostered. Whatever course is taken, it is important to ensure that the cure is not excessive regulation of the regulatory process. The review function should be kept efficient and the review agency lean.

If a centralized review will adversely impact the ability of any portion of the citizenry to influence the regulatory process, it should be reformulated. Alternatively, protections such as funding mechanisms should be created to moderate its impact. Any power shift of the magnitude involved in establishing a central review authority is likely to affect both actual and perceived access to decisionmaking processes. If review based on neutral principles set forth by the legislature is to be achieved, it is important to ensure that the power redistribution itself is neutral. No review plan will be theoretically sound, nor will it long survive political scrutiny, if it is perceived as a tool to impose any limited philosophy of regulation.

The Governor's existing power to reverse OAL disapprovals evokes lobbyist pressures. *See* Letter of Feb. 19, 1982, from Wm. G. Holliman, counsel for the California Forest Protective Ass'n, to Governor Brown. (Re: appeal of Department of Forestry).

286. One modification might help minimize the political commitment of OAL. The Governor's appointees to run the agency must be confirmed by a majority of the state Senate; thus, they need only be politically acceptable to a majority of one house. Requiring more widespread approval—for example by requiring confirmation by a two-thirds vote of both houses of the Legislature—would assure consensus about OAL's leaders. Because broad-based support would be needed for confirmation, persons with strong ideological views of regulation would not attain leadership positions in OAL.