Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s

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RULEMAKING'S PROMISE:
ADMINISTRATIVE LAW AND LEGAL CULTURE
IN THE 1960S AND 1970S

REUEL E. SCHILLER

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INTRODUCTION

In this era of deregulation and bureaucratic ossification, it is difficult for
contemporary students of the administrative state to conceive of the enthu-
siasm with which the administrative law cognoscenti embraced informal
rulemaking a mere thirty years ago.¹ Could Kenneth Culp Davis really

¹. For a sampling of the literature on the problems associated with informal rulemak-
ing, including its "ossification," see generally, JERRY L. MASHAW & DAVID L. HARFST, THE
STRUGGLE FOR AUTO SAFETY 10-14 (1990); Thomas O. McGarity, Some Thoughts on
"Deossifying" the Rulemaking Process, 41 DUKE L.J. 1385, 1387-437 (1992); Richard J.
Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 ADMIN. L. REV. 59 (1995). For
the dissenting views of those who think that informal rulemaking is working as well as
could be expected in a system that requires judicial review, see William S. Jordan, III, Ossi-
have written that "administrative rulemaking is 'one of the greatest inventions of modern government'"?\(^2\) This enthusiasm, it turned out, stemmed from novelty. Although rulemaking had been around for decades, it was only at the end of the 1960s that agencies turned to it as the primary staple of administrative action. Thus, hopes and expectations for what was essentially a bureaucratic innovation ran high.

Indeed, when looked at with an eye unjaundiced by hindsight, it is easy to see the promise of rulemaking. Administrative law specialists had grown accustomed to agencies that used trial-like adjudications to define vague statutory terms and develop policy. Like common law courts, agencies developed law incrementally on a case-by-case basis. To critics of the administrative state, this retrospective method of policy development created uncertainty and promoted arbitrariness. How was a person to know whether a particular act was allowed or not? What was to prevent agencies from treating similarly situated people differently?

Additionally, adjudicatory methods of developing public policy seemed glacially slow. First, the adjudications themselves came with a whole host of procedural requirements—cross-examinations, trial transcripts, and evidentiary rulings. Second, to develop a whole list of standards (what constituted an unfair trade practice, for example) could take years since the agency had to find a specific case that allowed it to define a particular standard. Indeed, the facts of any particular case might not even provide the agency with the information it needed to create the best standard.

Rulemaking, by way of contrast, seemed sleek, efficient, and fair. Issuing rules was like legislating. A vague statutory term could be given content in one fell swoop, rather than through piecemeal adjudications. Because rules had a prospective effect, nobody would be caught off guard. The agency itself would be bound by them, so it could not act arbitrarily in a particular case. Even more important was the ease with which the rules could be created. Rather than engaging in complicated, trial-like proceedings, the Administrative Procedure Act (APA) allowed for "notice-and-comment" or "informal" rulemaking.

According to section 553 of the APA, rulemaking was a simple, three-step process.\(^3\) First, an agency announced its intention to issue a rule in the Federal Register.\(^4\) The public was then allowed to submit written comments.\(^5\) Finally, the agency would issue the rule with a "concise general

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*References*

1. See id. § 553(c).
2. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 448 (2d ed. 1978).
4. See id. § 553(b).
5. See id. § 553(c).
What was most remarkable was what section 553 did not require: oral hearings, records, and rules of evidence. An agency could seek out the information it needed, apply its own expertise, and quickly issue regulations that might have taken years to develop in case-by-case adjudications. Viewed this way, it is not surprising that, by the late 1960s, administrative law theorists and agency personnel had warmly embraced informal rulemaking.

As with any innovation, however, there was bound to be a reaction. The judiciary, in its capacity as overseer of the administrative state, would have to provide its imprimatur for informal rulemaking, and its requirements for approval would be demanding. The same years that saw the rise of rulemaking also saw an increase in the intensity with which courts oversaw the administrative process. Thus, in the early 1970s, rulemaking collided with vigorous judicial review. This Article chronicles that collision. In particular, I will examine how the U.S. Supreme Court and the U.S. Court of Appeals for the District of Columbia (also known as the D.C. Circuit, the federal court that reviews a disproportionately large number of agency actions) reacted to this shift to informal rulemaking. I will also explore how Congress and the agencies themselves responded to both the rise of rulemaking and the judiciary’s reaction to it.

By relating this narrative I will demonstrate two things. First, I will show that the same desire to reform the administrative state generated both the increase in informal rulemaking and the calls for a more demanding judicial review. Both the agencies and the judiciary reacted in the way that reformers desired: agencies issued more rules and courts supervised agencies more closely. Yet, the two responses were often contradictory. Vigorous judicial review limited the speed and efficiency of informal rulemaking. Consequently, the reform impulse was frustrated.

Second, I will explain the causes of the contentious debate that arose among and within the different branches of the federal government about what the appropriate response to the rise of informal rulemaking should be. A fascinating combination of politics, institutional self-interest, and legal culture influenced members of Congress, agency officials, and, particularly, the judges of the D.C. Circuit as they developed strategies for coping with this novel form of administrative action. The D.C. Circuit’s reaction to the rise of rulemaking illustrates the way in which judges transform the abstract principles that make up legal culture (assumptions, for example, about what a judge’s role in a democratic government should be) into actual legal doctrines.

Section I of this Article describes the rise of rulemaking in the 1960s and

6. Id.
1970s. It links this rise to a potent critique of the administrative state that emerged at the beginning of the 1960s. Critics described agencies as arbitrary, inefficient, and inevitably captured by the interests they were supposed to regulate. Quick, efficient, informal rulemaking, which resulted in comprehensive and comprehensible rules, was proffered as a way to solve these problems. Many critics of the administrative state also suggested that increased judicial scrutiny of administrative action was another solution. This section concludes with a discussion of several Supreme Court cases, from the late 1960s and early 1970s, in which the Court endorsed both remedies.

Section II continues the narrative. It examines how three institutions—the D.C. Circuit, Congress, and the agencies themselves—reacted to these remedies. Section II.A. describes the D.C. Circuit’s reaction. In particular, it chronicles a heated debate among the judges over the manner in which courts should review rulemaking. One faction supported intense substantive review of agency rules. The other thought that only procedural supervision of agencies was appropriate. Courts, these judges argued, should ensure that agencies used procedures sufficient to guarantee that they had engaged in reasoned decision making, but should avoid judging the substantive outcome of the rulemaking process. This was a debate that, in the short run, both sides won.

Thus, between 1970 and 1978, the D.C. Circuit engaged in intense judicial review of the substance of agency rules and placed significant procedural requirements on agencies that were above and beyond anything mandated by the APA. Section II.B. demonstrates how, at the same time, Congress responded to the rise of rulemaking in a manner similar to that of the D.C. Circuit. The legislation that created new administrative regimes during the 1970s mandated both increased judicial scrutiny of agency actions and additional procedural requirements for rulemaking.

Section II.C. shows how the agencies attempted to retain their own autonomy by resisting the proceduralization of the rulemaking process. In particular, this Section chronicles the attempts of the Administrative Conference of the United States (ACUS) to persuade Congress and the courts to stop second-guessing agency decisions about what were the best procedures for rulemaking. Section II.D. concludes my narrative. It recounts how the Supreme Court put an end to this debate by forbidding courts from adding to the procedural requirements of the APA. It also argues that despite this gesture in the direction of agency autonomy, by the end of the 1970s, the intensity of the federal judiciary’s substantive review had impeded the efficiency and informality of notice-and-comment rulemaking. The reform impulse to control the administrative state through judicial review had trumped the reform impulse to free administration from the
shackles of adjudicative policy-making.

Having laid out this narrative, I turn to the issue of causation in Section III. Why did Congress, the judiciary, and the agencies themselves react to the rise of rulemaking the way they did? Politics, to be sure, played some role. A Democratic Congress and a federal judiciary dominated by Democratic appointees sought to weaken Republican presidents by asserting judicial and legislative control over executive agencies. However, I will argue that partisan impulses cannot explain the complexity of the debate. In particular, they do not explain the division on the D.C. Circuit, where politically like-minded judges differed dramatically in their approaches to judicial supervision of the administrative process. Instead, I argue that the debate over the proper response to the rise of rulemaking is best understood by examining the institutional interests of Congress, the courts, and the agencies; interests in strengthening their institutions that were autonomous of any particular policy preference.

Additionally, I will suggest that a split in the legal culture of the time largely drove the debate on the D.C. Circuit. The judges had different images of the proper role for the judiciary in a democratic society. Some members of the D.C. Circuit embraced a vision of judging that encouraged judicial activism in the service of social justice. For others, such activism was anti-democratic. Instead, they argued that courts should limit themselves to institutionally appropriate, procedurally oriented solutions to the social problems that they encountered. The judges, I believe, reified these images of the judicial role, turning them into legal doctrines that shaped the development of administrative law in the 1970s and continue to today.

I. THE RISE OF RULEMAKING

The idea of the agency life-cycle is a common one among scholars who study the administrative state.\(^7\) Agencies begin their lives full of youthful vigor, anxious to set right the wrong that they were created to address. They battle with the interest groups that opposed their creation, develop creative solutions to the public policy problems within their portfolio, and actively attempt to expand their power and jurisdiction.\(^8\) As agencies reach maturity, they settle into a routine. Conflict with the regulated is replaced with a more cooperative approach. Creative solutions to particular prob-

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8. *See Bernstein, supra* note 7, at 79-86.
lems are replaced with an increasing emphasis on precedent. Agencies are more likely to view their responsibilities narrowly, avoiding creative solutions to particular problems and instead following precedent and encouraging stability. Finally, agencies pass into old age. Routine adherence to precedent becomes debilitating apathy. The agency's original objectives are forgotten, as is its ability to adapt to new economic, technological, or social environments. Instead, these senile agencies fall under the control of the entities they were originally created to regulate.

The agency life-cycle is a historical as well as a theoretical phenomenon. It is possible to identify specific periods of youthful vigor, adult quiescence, and aged decrepitude for a particular regulatory regime. For many federal agencies created during the New Deal, the late 1950s were an era of increasing senescence. Accusations of inefficiency, corruption, and capture became commonplace. Indeed, Princeton University political scientist Marver Bernstein introduced the idea of the agency life-cycle in this period. Even some of the most stalwart defenders of the administrative state, such as James Landis, began to note that the problems of agency obsolescence had tarnished the luster with which expertise-based administration had gleamed during the halcyon days of the New Deal. Landis himself conducted an exhaustive examination of the federal regulatory agencies for president-elect John F. Kennedy, and his recommendations became the basis for a rejuvenation of the administrative state in the 1960s.

There were many causes of this rebirth. From within the Kennedy administration came an interest in the workings of the administrative state that had been missing during the Truman and Eisenhower administrations. Kennedy also began appointing higher quality personnel than had populated the agencies during the 1950s. From Congress came larger appropriations and a considerable increase in responsibility as the federal government expanded its regulatory activities. Additionally, in the 1960s,

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9. See id. at 86-91.
10. See id. at 91-95.
14. See McCraw, supra note 11, at 220.
15. See id.
Congress passed the Freedom of Information Act (FOIA)\(^1\) and, at the end of the decade, the National Environmental Protection Act of 1969 (NEPA)\(^2\), both of which sought to improve the quality of administrative action by exposing it to public scrutiny.\(^3\) Pressures from outside of the political branches also contributed to the reinvigorated administrative state of the 1960s and early 1970s. Public interest lawyers increasingly policed agency actions and sympathetic federal courts changed various administrative law doctrines in ways that forced agencies to become more responsive to the public at large.\(^4\)

One of the key innovations that grew out of these efforts to reinvigorate the federal administrative apparatus was an increase in the use of rulemaking by federal agencies. Before the 1960s agencies acted mainly through case-by-case adjudications. Most traditional administrative actions—ratemaking, for example—were based on judicial models.\(^5\) Administrative proceedings looked like mini-trials, where the rights of individual actors were adjudicated. Indeed, in the initial conflicts between courts and the emerging administrative state at the beginning of the century, the judiciary reprimanded agencies for behaving too much like courts, for trespassing on judicial prerogatives, or usurping judicial functions.\(^6\)

The dramatic expansion of the administrative state brought about by the New Deal did not alter this preference for adjudication. Rulemaking by agencies played only a minor role in New Deal administration. To be sure, certain agencies, particularly the Federal Reserve and the Wage and Hour Division of the Department of Labor, spent a substantial amount of their time issuing rules.\(^7\) Nevertheless, the vast majority of agencies acted primarily through adjudication. The National Labor Relations Board (NLRB), the Federal Trade Commission (FTC), the Federal Power Commission (FPC), and the Social Security Administration (SSA), for example, only is-

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\(^{19}\) See Schiller, supra note 11, at 1444-46.

\(^{20}\) See id. at 1410-43.


\(^{22}\) For the Supreme Court's classic articulation of this principle, see Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920). For other examples, see Crowell v. Benson, 285 U.S. 22 (1932), and Chicago, Milwaukee and St. Paul Railway Co. v. Minn., 134 U.S. 418 (1890).

sued rules of practice, related to how adjudicatory cases were to be brought before the agency. Other agencies, such as the Federal Communications Commission (FCC), the Securities and Exchange Commission (SEC), the Civil Aeronautics Administration, and the Interstate Commerce Commission (ICC), issued substantive rules, but devoted only a small percentage of agency resources to that activity. For example, a Roosevelt administration study of the federal administrative apparatus devoted a mere twenty-five pages of a 350-page monograph on the SEC to the Commission's rulemaking activities.

Rulemaking's lack of importance was also evidenced by the nature of the complaints people had about the post-war administrative state. Those critics of the Roosevelt administration, who aggressively pushed for the passage of the APA, focused their energies on making agency adjudications more like common law trials. Agency rulemaking was essentially ignored. Indeed, the minimalist requirements of section 553 were suggested by the American Bar Association's (ABA's) Special Committee on Administrative Law, one of the most vocal critics of New Deal-era administrative procedure. Rulemaking was simply not important enough to stir the ire of the proponents of administrative reform in the way that ad hoc adjudicatory development of policy did. Similarly, the blue ribbon panels assembled by presidents Eisenhower and Kennedy, to examine federal administrative procedure in 1953 and 1961, focused their attention and recommendations exclusively on agency adjudications not rulemaking.


26. See MONOGRAPH 26, supra note 25, at 279-304.


29. See PRESIDENT'S CONFERENCE ON ADMIN. PROCEDURE, REPORT (1954) [hereinafter REPORT]; ADMIN. CONFERENCE OF THE UNITED STATES, FINAL REPORT (1962) [hereinafter FINAL REPORT]. The only references to rulemaking in both these reports are suggestions that agencies issue procedural rules to guide litigants before agency adjudicative tribunals.
ABA's Committee on Administrative Law—perhaps the most consistent and toughest critic of the federal administrative apparatus—did not even have a subcommittee on rulemaking until 1958.30

Beginning in the 1960s federal agencies' neglect of rulemaking began to decline, gradually at first and then with such speed that by the early 1970s commentators declared that the administrative state had entered the "age of rulemaking."31 Statistics bear out this assertion. In 1960, the Federal Register recorded 498 notices of proposed rulemaking, or about 41 per month.32 Between September 1966 and April 1967—the first period in which the ABA's Administrative Law Section tracked notices—that number had jumped to 86 per month.33 The following twelve-month period saw the number increase to 115 per month.34 After a small dip in 1968 and 1969, it rose to 136 per month by the end of 1970, to 142 per month by 1972, and then to over 190 per month in 1974, where it remained for the rest of the decade.35

Anecdotal evidence corroborates these raw numbers. In the 1960s the FTC, the FPC, and the Food and Drug Administration (FDA) each undertook the first substantive rulemakings in their history. Previously each agency had operated solely through adjudications, approving drugs, setting natural gas prices, and defining unfair trade practices on a case-by-case basis. In 1960, the FPC began to set rates by region.36 Two years later the FTC established a Division of Trade Regulations and Rules and began pro-

also supra REPORT at 14-35; supra FINAL REPORT at 41.

32. I generated this number by counting the number of notices of proposed rulemaking in the 1960 Federal Register Annual Codification Guide and dividing by twelve.
33. See 4 ABA SEC. ADMIN. L. ANNUAL REPORTS OF COMMS. 18-21 (1967).
34. See 5 ABA SEC. ADMIN. L. ANNUAL REPORTS OF COMMS. 26-29 (1968).
35. This figures come from examining ABA Section on Administrative Law Annual Reports from 1968 through 1979. For some reason, the Committee did not collect statistics for the 1973-1974 Report or for the 1976-1977 Report. See 6 ABA ANNUAL REPORT 10-12 (1969); 7 ABA ANNUAL REPORT 19-21 (1970), 8 ABA ANNUAL REPORT 14-16 (1971); 9 ABA ANNUAL REPORT 17-19 (1972); 10 ABA ANNUAL REPORT 58-61 (1973); 12 ABA ANNUAL REPORT 27-31 (1975); 13 ABA ANNUAL REPORT 31-36 (1976); 15 ABA ANNUAL REPORT 48-51 (1978); 16 ABA ANNUAL REPORT 21-25 (1979).
spectively defining deceptive trade practices. In 1966 the FDA began the process of establishing standards for drug efficacy.

Even as these venerable agencies began rulemaking, the new administrative regimes created by Congress in the late 1960s and early 1970s required agencies to use rulemaking from the very beginning of their existence. Congress obligated newly created agencies such as the National Highway Traffic Safety Administration (1966), the Environmental Protection Agency (EPA) (1970), or the Consumer Products Safety Commission (1972) to issue regulations defining the standards relevant to their operations—vehicle safety standards, clear air and water standards, and product safety standards, respectively. Similarly, when traditional agencies were given new functions, such as the Department of Labor's powers under the Occupational Safety and Health Act (1970) or the FTC's powers under the Magnuson-Moss Warranty Act (1975), they were expected to exercise them using rulemakings.

There are a number of reasons for this dramatic increase in rulemaking. In part it was simply a response to ever increasing caseloads. When the Supreme Court held that thousands of independent natural gas producers were subject to FPC regulation, the Commission responded by engaging in its first rulemaking. Similarly, the FDA's initial rulemakings were triggered by Congress's decision to dramatically expand the agency's jurisdiction in the early 1960s. The 1962 Amendments to the Food, Drug, and Cosmetic Act required the FDA to engage in pre-marketing review of drug efficacy in addition to its traditional task of ensuring drug safety. This

41. See FPC Final Annual Report, supra note 36.
42. See Food, Drug, and Cosmetics Act Amendments of 1962, Pub. L. No. 87-781, §
involved examining at least one hundred new drugs per year as well as going back to test the 2,800 drugs that it had approved in the years since World War II. Rulemaking also increased because Congress began extending the reach of the administrative state into new areas—particularly consumer and environmental protection. Case-by-case adjudications were simply too inefficient for implementing these new, massive regulatory regimes. Thus, agency caseloads increased not only as old agencies responded to a rapidly growing economy but as Congress created new agencies with enormous mandates.

Ironically, these increasing demands on agencies began at the same time as criticisms of the administrative state escalated. Beginning in the early 1960s, federal administrative agencies were under attack from a wide variety of critics. Increasingly, critics on the left and the right portrayed agencies as inefficient, incompetent, and often captured by the interests they were supposed to regulate. Some of the best known scholars in the area, such as Louis Jaffe, Kenneth Culp Davis, and Bernard Schwartz, fretted about the vitality of the federal administrative apparatus, as did judges and, most significantly, administrators themselves. Marver Bernstein’s era of administrative senility had been reached and this environment generated an impulse to make rules.

This impulse was best articulated by Henry Friendly, a Judge on the Second Circuit Court of Appeals, in the 1962 Oliver Wendell Holmes Lectures at Harvard Law School. Entitled “The Federal Administrative Agencies: The Need for a Better Definition of Standards,” the lectures had a simple thesis: “A prime source of justified dissatisfaction with . . . federal administrative action . . . is the failure to develop standards sufficiently definite to permit decisions to be fairly predictable and the reasons for them to be understood . . . .” The failure, Judge Friendly believed, had resulted in a host of problems that had become endemic to the administrative state. In the absence of particular standards, agencies behaved in an arbitrary

43. See Note, supra note 38, at 207, 210 n.160.
44. See Schiller, supra note 11, at 1410-16.
46. See generally FRIENDLY, supra note 45.
47. Id. at 5-6.
fashion, treating similarly situated people differently.\textsuperscript{48} Aside from simply being unfair, this unpredictable, unconstrained agency behavior had a number of other negative consequences. It stifled economic transactions by limiting the extent to which actors could rely on agencies to behave consistently.\textsuperscript{49} It also limited the ability of the political branches to hold agencies accountable for their actions because it was so difficult to figure out what a particular agency's policies were, let alone object to them.\textsuperscript{50} Finally, the lack of clearly defined standards encouraged agency capture: "Lack of definite standards creates a void into which attempts to influence are bound to rush . . . ."\textsuperscript{51} When agency choices were "under no legal control," nothing could limit administrative actors from simply following the self-serving dictates of the regulated.\textsuperscript{52}

Judge Friendly concluded his lectures with a host of prescriptions for reform—methods of ensuring that agencies' actions were based on extant standards. These included stronger presidential leadership and more specific delegations of power from Congress, though he doubted that either institution would be able to set the type of standards that were necessary.\textsuperscript{53} Most of the reform, Judge Friendly believed, would have to come from within the agencies themselves. Like Landis, Judge Friendly hoped that the Kennedy administration would appoint a higher caliber of administrative officials than President Eisenhower had.\textsuperscript{54} The most important reform that the agencies could undertake, however, was to de-emphasize policy-making through case-by-case adjudications and instead shift to the definition of standards through policy statements and rulemakings.\textsuperscript{55} Indeed, this was one of the most common recommendation of all the critics who examined the administrative state at the end of the 1950s and beginning of the 1960s.\textsuperscript{56} If the apparati of government had fallen into a malaise, rulemak-

\textsuperscript{48} See id. at 19-20.
\textsuperscript{49} See id. at 20.
\textsuperscript{50} See id. at 21-22.
\textsuperscript{51} Id. at 22.
\textsuperscript{52} See FRIENDLY, supra note 45, at 22-23.
\textsuperscript{53} See id. at 147-73.
\textsuperscript{54} See id. at 142.
\textsuperscript{55} See id. at 143-47.
ing was a solution.

Thus, by the middle of the 1960s, the conditions for the rulemaking explosion had fallen into place. Economic growth and legislative ambition had created a demand for rulemaking. At the same time, the contemporary critique of agencies had provided a theoretical justification for its increased use. What remained to be seen was how the administrative state's traditional antagonist, the judiciary, would react.

Federal courts, as it turned out, were not in the least bit hostile to rulemaking. They consistently upheld agency rulemaking powers, even in instances when it was unclear that Congress intended to grant an agency such powers.57 A number of times in the 1960s and 1970s, federal courts actually required agencies to engage in rulemakings when they had proceeded solely through adjudications.58 In two cases from the early 1970s, the Supreme Court enthusiastically endorsed a presumption that when agencies engaged in policy-making activities, they do so through informal rulemaking.

Both cases, United States v. Allegheny-Ludlum Steel Corp.59 and United States v. Florida East Coast Railway Co.,60 involved challenges to rules issued by the Interstate Commerce Commission (ICC). In each case, the railroads argued that promulgation of the rules violated the Interstate Commerce Act, the APA, and the Due Process Clause of the Constitution because they were issued using the informal procedures of section 553. These regulations, the railroads argued, had a deleterious impact on specific parties. Accordingly, full, formal adjudicatory procedures were required so those injured parties could defend their own interests. The court rejected these arguments. Taking a page from Judge Friendly's lectures, the Court held that trial-like adjudications were simply not the best way to generate the broad public policy:

While the line dividing [rulemakings and adjudications] may not always be a bright one, [our] decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.

Here, the incentive payments . . . were applicable across the board to all of the common carriers by railroad subject to the Interstate Commerce Act . . . . The factual inferences were used in the formulation of a basically legislative-type judgment, for prospective application only, rather than in adjudicating a particular set of disputed facts.\textsuperscript{61}

Thus, absent specific instructions from Congress, when agencies formed broad policies, informal rulemaking was all that the APA or the Constitution required. "Because the proceedings under review were an exercise of legislative rulemaking power rather than adjudicatory hearings . . . the provisions of [the APA requiring adjudicatory procedures] were inapplicable."\textsuperscript{62}

The Supreme Court's embrace of informal rulemaking should not be confused with a decision to remove the judiciary from the administrative process. While the Court reacted to the growth of rulemaking by encouraging it, it also sought to ensure that the judiciary controlled it. The first step the Supreme Court took in guaranteeing judicial control over rulemaking was to accelerate the process by which agency rulemakings got to court to be reviewed. Traditionally, courts reviewed the substance of rulemakings during an enforcement action.\textsuperscript{63} Since many regulatory statutes only permitted judicial review of final orders—that is, the results of a particular adjudication—courts frequently held that pre-enforcement review of rules was forbidden.\textsuperscript{64} Even in instances where the substantive statute did not preclude pre-enforcement review of rules, courts often declined to do so because of ripeness concerns.\textsuperscript{65} Absent the application of a rule to a particular party "an appellate court has no intelligible basis for decision," wrote the D.C. Circuit, denying a petition to review a FPC rule.\textsuperscript{66} "[W]e are asked . . . to make an important decision concerning the scope of the Commission's regulatory authority . . . . It is clear to us that decisions of this kind cannot be made in vacuo . . . ."\textsuperscript{67}

In 1967, the Supreme Court dismissed these fears and ordered the Courts of Appeal to engage in pre-enforcement review of most rules. In \textit{Abbott Laboratories v. Gardner},\textsuperscript{68} the Court permitted pre-enforcement review of

\textsuperscript{61} Id. at 245-46.
\textsuperscript{62} \textit{Allegheny-Ludlum}, 406 U.S. at 757.
\textsuperscript{64} See \textit{id.} at 196-97.
\textsuperscript{65} See \textit{id.} at 202 n.78.
\textsuperscript{67} United Gas Pipe Line Co., 181 F.2d at 799.
several FDA rules regarding drug labeling and cosmetic additives. Ripeness doctrine, the Court reasoned, was designed to prevent courts "from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Since the rules had been issued, there was no doubt that the agency's policy was settled and not abstract. Furthermore, the effects of the rulemaking would be felt by the regulated well before the government started an enforcement action against a particular party. Either they must pay the costs of complying with a regulation they believed to be unlawful or they must risk prosecution. Thus, federal courts were not to wait until a rule was enforced to examine its validity. Since the rule was concrete and the potential damage impending, they should step in right away.

By endorsing pre-enforcement review, the Supreme Court not only accelerated the judiciary's involvement in the administrative process, it increased the intensity of that involvement as well. When a court's review of a rule was merely ancillary to a particular enforcement action, its attention was focused less on the process by which the rule was created and more on the application of the rule to the particular facts of the case before it. As one commentator put it, "review of the circumstances surrounding the rule's enactment [is] secondary and somewhat obscured by time." Pre-enforcement review, on the other hand, focused the court's attention on the rulemaking itself, devoid of the distractions that a particular application of the rule might create.

If the effect of Abbott Labs., unintended or not, was to increase the scrutiny with which courts reviewed informal rulemakings, the Supreme Court soon made explicit its desire for vigorous review of informal agency action. In 1971, the Court decided Citizens to Preserve Overton Park, Inc. v. Volpe. Overton Park involved the Secretary of Transportation's decision to authorize federal funds for the construction of a highway through a park in Memphis, Tennessee. A citizens group argued that the Highway Act of 1968 prohibited the use of Department of Transportation funds to build

69. Id. at 148-49.
70. See id. at 152.
71. See id. at 152-53.
72. See Verkuil, supra note 63, at 205; Pierce, supra note 1, at 89; MASHAW & HARFST, supra note 1, at 246-47.
73. Verkuil, supra note 63, at 205.
highways through parks unless no other route was "feasible and prudent" and that the Secretary had failed to make such a finding. The Highway Act, however, did not require the Secretary to make formal findings. Nonetheless, the Court overturned the Secretary's decision. It then remanded the case to the district court, which was to generate a record of the Secretary's decision making process, even if doing so meant requiring agency officials to testify as to their thinking at the time they made the decision. This record, the Court stated, should then be reviewed in a "thorough, probing, [and] in-depth" manner. Indeed, the district court was to engage in "plenary review of the Secretary's decision." Though Overton Park involved an adjudication, its holding, along with Florida East Coast Railway, Allegheny-Ludlum, and Abbott Labs., sent a coherent message about the Court's reaction to the rise of informal rule-making: it was to be encouraged, but intensely reviewed. Indeed, each set of cases represents a different approach to solving the problems associated with the critique of the administrative state that emerged during the 1960s. By encouraging rulemaking, Florida East Coast Railway and Allegheny-Ludlum endorsed the idea that increased rulemaking was an effective method for limiting agency abuses of power and increasing agency efficiency. Abbott Labs. and Overton Park, on the other hand, represented a different solution to the much-publicized problems of the administrative state. If administrative agencies were running amuck, courts should be used to reign them in.

This line of thinking emerged from the same circumstances that generated calls for increased rulemaking. The idea that the judiciary, through intense judicial review, should control the abuses of the administrative state was not a new one. Since the founding of the first state-level administrative agencies, the most vociferous critics of regulation demanded that agency actions be judged by courts. Many conservative attacks on the New Deal took this form, denouncing "administrative absolutism," attacking agencies' odd place within the three branches, and demanding their subordination to the judiciary. When, in the late 1950s and early 1960s,

75. Overton Park, 401 U.S. at 405.
76. Id. at 415.
77. Id. at 420.
78. Although the Court stated this explicitly, the prospective effects of agency action certainly make it plausible to argue that this was a rulemaking. See id. at 414.
80. See Horwitz, supra note 79, at 219-22, 225-30; see also Shepherd, supra note 27,
the administrative state was struck with another round of attacks, similar demands emerged, this time from the other end of the political spectrum. Close judicial supervision of the administrative process could prevent arbitrary administrative action and agency capture. Thus, a panoply of liberal academics and legal activists, such as Charles Reich, Joseph Sax, John Denvir, Robert Fellmeth, and Simon Lazarus, claimed that only increased judicial involvement in the administrative process could ensure that agencies actually represented the public interest. Nor did this demand emerge solely from younger, more radical thinkers. Louis Jaffe, Kenneth Culp Davis, Bernard Schwartz, and Henry Friendly—hardly members of the New Left—each advocated for an expansion of the courts’ role in the administrative process.

Thus, by the beginning of the 1970s two potent medicines to cure the maladies of the administrative state were in place. The Supreme Court had endorsed both a dramatic increase in rulemaking and stricter, more vigorous judicial review of administrative action. This placed the lower federal judiciary in a peculiar position. For the first time since the 1930s, the Supreme Court was calling on it to exercise strict control over the administrative process. At the same time, courts were faced with the widespread use of rulemaking, a mode of administrative action with which they were unfamiliar. As the 1970s wore on, it would become clear that these two impulses—for more rulemaking and for intense judicial review—were in conflict.

II. REACTIONS TO THE RISE OF RULEMAKING

A. Rulemaking and the D.C. Circuit

The judiciary’s initial reaction to this new situation was simply to ignore the fact that rulemaking was different from adjudication and scrutinize the substance of rules more carefully than they had before. Appellate courts, and particularly the D.C. Circuit, which reviewed the lion’s share of agency decisions, were familiar with the idea of deploying more or less strict scrutiny of administrative adjudications—de novo review versus substantial evidence review versus arbitrary and capricious review. Thus, it was not
difficult, at least as a matter of theory, to increase the intensity with which they reviewed rulemaking. Consequently, "hard look review" was born.

The phrase "hard look review" originated the year before Overton Park, in a 1970 D.C. Circuit opinion authored by Judge Harold Leventhal, Greater Boston Television Corp. v. FCC. Judge Leventhal suggested that in reviewing administrative actions, courts had a duty to do more than simply check that agencies had followed the procedural requirements of the APA and ensure that they were acting within the powers that Congress had delegated to them. "[The judiciary's] supervisory function calls on the court to intervene... if the court becomes aware... that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." Judge Leventhal argued that the judiciary had the responsibility to scrutinize the substance of agency decision making—the nuts and bolts of an agency's action—to protect the public's interest in rational agency behavior. While the language of his opinion indicated that courts were only to determine whether agencies had themselves taken a "hard look" at the data relevant to a particular decision, it was not a long road from Judge Leventhal's declaration that courts ensure agencies take a hard look to the courts taking that hard look themselves.

Though Greater Boston involved a formal adjudication, the judges of the D.C Circuit quickly applied the principles of hard look review to informal actions. Two cases from 1973, International Harvester Co. v. Ruckelshaus and Portland Cement Ass'n v. Ruckelshaus, best illustrate this phenomenon. Both cases involved industry challenges to environmental regulations promulgated by the EPA. In International Harvester, the court overturned the EPA's decision not to issue a one-year suspension of the Clean Air Act's emissions requirements. Judge Leventhal, the opinion's author, repeatedly acknowledged that courts did not possess the technical expertise to analyze the two factual issues in the case: the EPA's determinations that, first, the environmental harms caused by automobile emissions outweighed the economic harm of not delaying implementation; and, sec-

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86. Greater Boston, 444 F.2d at 851.
87. 478 F.2d 615 (D.C. Cir. 1973).
88. 486 F.2d 375 (D.C. Cir. 1973).
89. See 478 F.2d at 647-50.
ond, that existing technology would allow automobile manufacturers to meet the Act’s emission standards.90 Nevertheless, citing Greater Boston, he asserted that it was the court’s duty to examine the record, “even as to the evidence on technical and specialized matters,” so as to ensure that the agency had engaged in reasoned decision making.91 And examine he did, for over fifteen pages.92 Similarly, in Portland Cement, the D.C. Circuit overturned an EPA rulemaking limiting stationary source emissions by cement plants with another fifteen-page study of the chemistry and engineering of the industry.93 “While we remain diffident in approaching problems of this technical complexity,” Judge Leventhal wrote for the court, “the necessity to review agency decisions, if it is to be more than a meaningless exercise, requires enough steeping in technical matters to determine whether the agency ‘has exercised a reasoned discretion.’”94

Even as the intense substantive scrutiny of hard look review gravitated from the formal, adjudicatory context of its birth to the increasingly popular realm of informal rulemaking, judges and academic commentators began to doubt its efficacy. Rulemakings differed dramatically from adjudications in the scope of the issues they tackled, in the breadth of their effect, and in their predictive, rather than responsive nature. Consequently, hard look review, which might be appropriate for the easily cabined facts of a single adjudication, might not work as well when applied to rulemakings. The Chief Judge of the D.C. Circuit, David Bazelon, articulated this view in his concurrence in the International Harvester case:

Socrates said that wisdom is the recognition of how much one does not know. I may be wise if that is wisdom, because I recognize that I do not know enough about dynamometer extrapolations, deterioration factor adjustments, and the like to decide whether or not the government’s approach to these matters was statistically valid.95

Like Judge Leventhal, Chief Judge Bazelon recognized that the increasing use of rulemaking and the increasingly controversial subject matter of rules called for a change in the way courts and agencies interacted.96 However, Chief Judge Bazelon believed that Congress did not wish courts to “delve into the substance of the mechanical, statistical, and technological disputes in this case.”97 Courts had to be aware of “the limits of our own compe-

90. See id. at 633, 641, 647.
91. Id. at 648 (quoting Greater Boston, 444 F.2d at 850).
92. See id. at 633-48.
93. See 486 F.2d at 387-401.
94. Id. at 402 (quoting Greater Boston, 444 F.2d at 850).
95. 478 F.2d at 650-51.
96. See id. at 651.
97. Id.
The problem with hard look review was that regardless of how much energy judges put into the task, they would never have the expertise to understand the issues presented in a case like *International Harvester*.

Chief Judge Bazelon did not, however, throw up his hands. Instead, he offered a procedural solution. While courts should avoid "dig[ging] deeper into the technical intricacies of an agency's decision," they should instead require agencies to follow procedures that result in a more thorough airing of the contested issues. Methodological decisions and technical evaluations should not be challenged on judicial review. Rather, courts should force agencies to use procedures that will result in them being challenged before judicial review. These procedures would ensure that "complex questions [were] resolved in the crucible of debate through the clash of informed but opposing scientific and technological viewpoints." Chief Judge Bazelon analogized the administrative process to Justice Holmes' famous marketplace of ideas:

> [T]he best way for courts to guard against unreasonable or erroneous administrative decisions . . . is to establish a decision making process which assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market." If we were to require procedures in this case that opened the Administrator's decision to challenge and forced him to respond, we could rely on an informed "market" rather than our own groping in the dark to test the validity of that decision.

Thus, Chief Judge Bazelon made an argument based on comparative expertise. Courts did not know much about deterioration factor adjustments, but they certainly understood the value of procedures such as cross-examination. They might not know what a correct administrative decision would look like, but they knew the procedures that would yield it. Accordingly, Chief Judge Bazelon called for a rejection of the clear-cut distinction between adjudication and rulemaking that stood at the center of the APA. Rulemakings on complex, technical matters should become more adjudicatory in nature. Indeed, this belief underlies the basis of his concurrence in *International Harvester*. The EPA's decision should be reversed, but not because the substance of it was incorrect. Instead, the decision should be overturned because the EPA failed to follow certain

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98. *Id.* at 652.
99. *Id.* at 651.
100. *Id.* at 652.
102. *See id.* at 651.
procedures—cross-examination and the obligation of the agency to respond to particular criticisms, for example—that would have resulted in "a framework for principled decision-making."\textsuperscript{103}

So, by the early 1970s, two answers to the question about how to reconcile the rise of rulemaking with calls for increased judicial supervision of the administrative state had emerged. Courts could engage in intense substantive review of rulemaking, or they could eschew such review and instead demand that agencies use procedures beyond what section 553 required when they made rules. Indeed, even before the rise of hard look review, the D.C. Circuit suggested that, in certain instances, agencies engaged in rulemaking had to provide procedures not required by the APA. As early as 1966, the court suggested that oral hearings might be necessary for certain rulemakings.\textsuperscript{104} In 1971, it made this requirement explicit.\textsuperscript{105} The following year, the court dictated that the "concise general statement" required by APA had to respond to comments submitted to the agency.\textsuperscript{106} By 1976, the court mandated that agencies give a "reasoned response" to material critiques of its proposed rules.\textsuperscript{107} After 1973, it repeatedly indicated, as in \textit{International Harvester} itself, that agencies should give parties affected by rules the right to cross-examine witnesses that gave information to the agency.\textsuperscript{108} In 1977, it mandated limitations on ex parte contacts in rulemakings, and established specific procedures for circumstances under which such contacts could occur outside of the notice-and-comment process.\textsuperscript{109} Not one of these procedural innovations was required by the APA. More importantly, the net result of them—namely, that agencies create a rulemaking record—was rejected by the drafters of the APA.\textsuperscript{110} Thus, by the middle of the 1970s, Chief Judge Bazelon's wish had come true. Rulemakings had increasingly taken on the tone of adjudications, with the public airing of conflicting testimony, formalized rebuttal requirements, a

\textsuperscript{103} Id. (quoting Envtl. Def. Fund, Inc. v. Ruckelshaus, 439 F.2d. 584, 598 (D.C. Cir. 1971)).


\textsuperscript{105} See Appalachian Power v. EPA, 477 F.2d 495, 503-04 (4th Cir. 1973); Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1016 (D.C. Cir. 1971).

\textsuperscript{106} Kenncott Copper Corp. v. EPA, 462 F.2d 846, 850 (D.C. Cir. 1972); see also United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977).


\textsuperscript{110} See ATT'Y GEN.'S MANUAL, supra note 21, at 31 (citing Administrative Procedure: Hearings on S. 674, S. 675 and S. 918 Before a Subcomm. of the Comm. on the Judiciary, 77th Cong. 444 (1941)).
discrete record, and, occasionally, full blown, trial-type techniques for resolving factual disputes.\textsuperscript{111}

Throughout the time that these procedural innovations occurred, hard look review continued unabated.\textsuperscript{112} Indeed, occasionally the court justified procedural requirements beyond the mandate of the APA by declaring them necessary to generate a record that the court could examine with sufficient rigor. Judge Leventhal noted in 1972’s \textit{Kennecott Copper} case\textsuperscript{113} that requiring an agency to respond to certain comments that it received might be necessary to “enlighten the court as to the basis on which” the agency promulgated the rule.\textsuperscript{114} Similarly, the previous year he wrote that “the reality of an opportunity to submit an effective presentation”—in this case the procedural requirement of an oral hearing—“[could] assure that the Secretary and his assistants will take a hard look at the problems in the light of those submissions.”\textsuperscript{115} Nevertheless, as the 1970s wore on, the judges of the D.C. Circuit began to divide into camps. One group favored procedural restrictions on agency actions and dismissed hard look review as inexpert meddling in the substance of administrative actions. The other embraced rigorous substantive review and condemned the proceduralists, accusing them of transforming the rulemaking processes into an inefficient, judicialized mess. This division was nicely illustrated by the court’s fractured opinion in \textit{Ethyl Corp. v. EPA},\textsuperscript{116} decided in 1976.

\textit{Ethyl Corp.} involved the EPA regulations requiring the dramatic reduction of lead additives in gasoline.\textsuperscript{117} The Ethyl Corporation, as well as several other additive manufacturers and gasoline refiners, challenged the validity of the regulations. After a detailed review of the agency’s factual findings, a panel of the D.C. Circuit overturned the regulations finding, among other things, that “in assessing the scientific and medical data the Administrator made clear errors of judgement.”\textsuperscript{118} In a five to four deci-
sion, the court, sitting en banc, reversed the panel and upheld the regulations. All five members of the majority rejected Ethyl’s arguments that the Clean Air Act did not give the EPA the power to issue the lead regulations.119 The majority splintered regarding Ethyl’s other two arguments: that the regulations were unsupported by the facts the agency adduced, and that the EPA did not make relevant information available to parties who might object to it. A three-judge plurality, Judge Leventhal along with Judges Skelly Wright and Spotswood Robinson, upheld the EPA after a long and detailed analysis of the studies upon which the agency based the regulation.120 Writing for the plurality, Judge Wright noted that a “searching and careful” inquiry into the facts was “particularly” necessary “in highly technical cases such as this one.”121 Ethyl’s procedural objections, on the other hand, were rejected in a comparatively perfunctory manner. Ethyl’s demand for the right to cross-examine agency witnesses was summarily dismissed in a footnote.122 Judge Wright also dismissed Ethyl’s other claims—that the EPA’s decision to use new data required another round of comments, and that the EPA was obligated, before issuing the regulations, to identify which data it was going to rely on—as “unreasonable” with little fanfare.123

Chief Judge Bazelon’s brief concurrence124 attacked both the plurality’s opinion and the dissent, which met Judge Wright’s hard look approval of the regulations with a similarly technical refutation. This case, Chief Judge Bazelon argued, illustrated perfectly the problems with substantive hard look review. Judges’ lack of expertise in technical subjects meant that they were unqualified to evaluate the administrative action at issue.125 Furthermore, because judges were unable to truly understand the science at stake in these cases, they would “inevitably . . . make plausible-sounding, but simplistic, judgments of the relative weight to be afforded various pieces of technical data.”126 Chief Judge Bazelon then quoted passages from the plurality and the dissent that purported to evaluate scientific data.127 He then continued, “these overt examples of homespun scientific aphorisms indicate that on more subtle, and less visible, matters of scientific judgment we

119. See id. at 11-33.
120. See id. at 37-48.
121. Id. at 35 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-416 (1971)).
122. See Ethyl Corp., 541 F.2d at 53 n.124 (denying cross-examination).
123. See id. at 51.
124. See id. at 66-68.
125. See id. at 66 (“I doubt judges contribute much to improving the quality of the difficult decisions which must be made in highly technical areas . . . ”).
126. Id. at 66.
127. See id. at 66 n.7.
judges are well beyond our institutional competency." Nor was the problem simply one of comparative expertise. Instead, hard look review resulted in judicial usurpation of prerogatives of the democratically elected branches of government. If hard look review was not "resisted, [it would] not only impose severe strains upon the energies and resources of the court but also compound the error of the panel in making legislative policy determinations alien to its true function." The solution to this problem, of course, was to "improve administrative decision-making by . . . strengthening administrative procedures." Since the EPA had provided interested parties with sufficient opportunities to present evidence and rebut the agency's evidence, the regulations should be upheld. Chief Judge Bazelon's opinion drew a response from Judge Leventhal. Chief Judge Bazelon's thinking, Judge Leventhal worried, would result in "no substantive review at all . . . " "While giving up is the easier course," Judge Leventhal wrote, "it is not legitimately open to us at present." Congress was willing to delegate broad authority to agencies because it knew that courts would review the substance of agency actions. Congress assumed that "we can both have the important values secured by generalist judges and rely on them to acquire whatever technical background is necessary." Indeed, Judge Leventhal pointed out that trial court judges were routinely required to develop "sufficient background orientation" on a variety of complicated issues which crop up in litigation. Judicial review of administrative action must be restrained, but only after the judges had acquired enough information to figure out what was going on. Any other approach to judicial review, Judge Leventhal believed, was contrary to Congressional intent. "Restraint, yes, abdication, no." The acrimony evident on the court in Ethyl Corp. was only the latest event in a dispute among the judges that had long since spilled out of the pages of the Federal Reporter and into academic journals. Writing in the University of Pennsylvania Law Review in January 1974, Judge Leventhal laid out in great detail the argument he would make in Ethyl Corp. Though the article focused on a specific subject area—judicial review of

128. Ethyl Corp., 541 F.2d at 66 n.7.
129. Id. at 67.
130. Id.
131. See id.
132. Id. at 68.
133. Id.
134. Ethyl Corp., 541 F.2d at 69.
135. Id.
136. Id.
agency decisions affecting the environment—what emerged was a manifesto for hard look review. As in *Ethyl Corp.*, Judge Leventhal argued that hard look review was not an innovation of an activist judiciary, but was instead a legislatively mandated doctrine that was well within the traditional ambit of courts' responsibilities. Like all lawyers, judges were accustomed to acquiring knowledge of non-legal subjects during the course of litigation. In fact, by combining knowledge of general legal principles with technical information learned for the case at hand, judges were able to strike the perfect balance between acquiescence and untoward judicial activism.

Judge Leventhal then tried to demonstrate that judicial review of complex administrative decisions did not require tools that were very different from the traditional common law methods that courts were well-versed in. Predicting whether an industry could meet a particular environmental standard, for example, was similar to an inquiry into the possibility of “preventing or avoiding the invasion” that was routinely made in nuisance cases. Similarly, the use of burdens of proof, certainly a staple of the taught legal tradition, was the way in which courts had always judged the validity of issues with which they had only passing familiarity. Finally, he argued that courts have always had methods for tapping outside expertise in complicated cases—expert witnesses and special masters, for example. He suggested ways in which using these experts could be routinized, but the tools, he claimed, were all there.

While Judge Leventhal’s piece was a defense of hard look review, it did not have much to say about Chief Judge Bazelon’s procedural critique of it. That task was left to Judge Leventhal’s colleague on the D.C. Circuit, Judge J. Skelly Wright, the author of the majority opinion in *Ethyl Corp.* Writing in the *Cornell Law Review* three months after Judge Leventhal’s article appeared, Judge Wright attacked Chief Judge Bazelon’s “Procedural Inventiveness” directly. He began by celebrating what he called the “age of rulemaking.” When an agency regulated using common law, adjudicatory methods it created “perpetual uncertainty” and assumed “the dangerous power to create new law affecting parties selected at random, or in a

138. See id. at 515-17.
139. See id. at 551.
140. See id. at 518.
141. Id. at 534 (quoting RESTATEMENT (FIRST) OF TORTS § 828(c) (1939)).
142. See id. at 535-36.
143. See Leventhal, supra note 137, at 546-50.
144. See Wright, supra note 31, at 386-87.
145. Id. at 375.
discriminatory manner.’

Formal adjudication’s trial-like procedures made regulation “an advocate’s game,” in which legal technicalities trumped agency expertise. Fortunately, Judge Wright asserted, agencies were moving away from adjudicatory regulation and towards consistent, comprehensible, regulations of general applicability, promulgated through informal rulemaking.

There was a danger, however, that the problems of adjudicatory regulation would creep in through the back door if courts attempted to judicialize the rulemaking process. Judge Wright described the various procedural innovations that Chief Judge Bazelon and his allies on the D.C. Circuit had foisted on unsuspecting agencies. This, Judge Wright believed, was madness. First of all, it went against the Court’s explicit holding in *Florida East Coast Railway* that “courts are not to spin their own procedural requirements from statutory catch-phrases of uncertain meaning.” Second, Judge Wright rejected the notion that the judiciary was especially good at determining what procedures were appropriate. In fact, he asserted, the courts’ expertise in the area of administrative procedure was an illusion. How could they possibly know what procedures would help particular agencies come up with a fair regulation?

"Furthermore, deciding which procedures were best on an ad hoc basis would result in unpredictability and chaos. Agencies, to ensure that courts upheld their actions, would "clothe [their] actions in the full wardrobe of adjudicatory procedure," thereby undermining the benefits of rulemaking and converting it into "a lawyer’s game." Ironically, the price one paid for imposing all these procedures on agencies did not even guarantee fair administrative outcomes. Only substantive review by courts could accomplish that:

Finally, no form of procedure can ensure the minimal rationality of a rulemaker’s inferences. These after all occur within his head! To see whether he has kept the counsel of reason, the reviewing court must in each instance demand an orderly explanation of the rulemaker’s inferences. For such an explanation, logic suggests no procedural substitute.

Chief Judge Bazelon’s opinion in *Ethyl Corp.* was a response to both these articles but, for a more thorough rebuttal, he too turned to academic
journals, publishing two articles shortly after Ethyl Corp. was decided.\textsuperscript{153} In both articles Chief Judge Bazelon emphasized that public policy and administration were increasingly concerned with scientific and technological issues.\textsuperscript{154} This fact created a number of problems: How were policymakers to resolve conflicting scientific findings? How much weight were they to give to predictive, unprovable scientific theories, such as how nuclear waste will behave after 10,000 years of storage? How should society make the value choices that stem from scientific findings—should society prohibit the use of otherwise beneficial technology that has a remote, but real chance of harming a certain number of people?\textsuperscript{155} Chief Judge Bazelon was unsure how to answer these questions, but was emphatically sure that courts should not answer them: “Amidst this swirling uncertainty, one thing seems very clear. Courts are not the agency either to resolve the factual disputes, or to make the painful value choices.”\textsuperscript{156} Because they were not popularly elected, federal judges should not make the value judgments inherent in these decisions.\textsuperscript{157} Similarly, because they had no technical or scientific expertise, they ought not to judge the merits of the factual findings that underlay these decisions.\textsuperscript{158}

Having determined what courts should not do, Chief Judge Bazelon turned his attention to what they should do. He feared that the value-laden choices that agencies made were often hidden from public view, shrouded in scientific jargon, and buried in agency bureaucracy. This sort of agency action would only “invite public cynicism and distrust.”\textsuperscript{159} Instead, courts could use the APA to ensure that agency decisions were “ventilated in a public forum with public input and participation.”\textsuperscript{160} By doing this, courts would reinforce the legitimacy of the system, ensure that the appropriate institutions were making value choices, and “make intelligent public debate

\begin{itemize}
\item \textsuperscript{154} See Bazelon, \textit{Coping with Technology}, supra note 153, at 817-20; Bazelon, \textit{Impact of the Courts}, supra note 153, at 106.
\item \textsuperscript{155} See Bazelon, \textit{Coping with Technology}, supra note 153, at 821, 825.
\item \textsuperscript{156} Id. at 822.
\item \textsuperscript{157} See id. at 822, 829.
\item \textsuperscript{158} See id. at 821-22; see also Bazelon, \textit{Impact of the Courts}, supra note 153, at 107 (“Significant or not, decisions involving scientific or technical expertise present particular challenges for reviewing courts. The problem is not so much that judges will impose their own views on the merits. The question is whether they will even know what is happening.”).
\item \textsuperscript{159} Bazelon, \textit{Coping with Technology}, supra note 153, at 825.
\item \textsuperscript{160} Id. at 824. See also Bazelon, \textit{Impact of the Courts}, supra note 153, at 107-08.
\end{itemize}
Courts would also force agencies to generate better public policy because their science would be tested by independent experts, and their value choices judged by the public at large.

Ultimately, Chief Judge Bazelon argued, courts worked best when they facilitated public involvement in the administrative process through procedural protections rather than by second guessing agencies themselves. He concluded one article with a quote from John Stuart Mill: "'even if the received opinion be ... the whole truth; unless it is suffered to be ... vigorously and earnestly contested, it will ... be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds.'" He ended the other with a quote from Thomas Jefferson: "'I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion. . . .'" For Chief Judge Bazelon, both thinkers expressed the same sentiment. An informed citizenry, not an informed judiciary, should be the foundation of the administrative process.

B. Rulemaking and Congress

The D.C. Circuit's debate about the appropriateness of adding procedures to informal rulemaking was not simply an intramural one. Even as Chief Judge Bazelon tried to convince his colleagues about the need to increase the procedural requirements of informal rulemaking, members of Congress were adding such requirements legislatively. Many of the regulatory regimes established in the 1970s rejected the simple choice between formal adjudication and informal rulemaking. Instead, Congress required that agencies add certain procedures beyond the requirements of section 553 of the APA, a legislative equivalent of Chief Judge Bazelon's decisions. Most of these laws, such as the Occupational Safety and Health Act, the Consumer Product Safety Act, and the Federal Mine Coal Mine Safety Act mandated oral hearings. Others gave interested parties a right of

162. See Bazelon, Impact of the Courts, supra note 153, at 107-08, 110.
163. Bazelon, Coping with Technology, supra note 153, at 832 (quoting JOHN STUART MILL, ON LIBERTY 95 (1859)).
cross-examination at these hearings. Several statutes forced agencies to make a formal record during rulemaking or created specific content requirements for the record.

The legislative history for the creation of these so-called "hybrid" procedures was most completely laid out during the debates over the Federal Trade Commission Improvement Act of 1975. Representatives of the FTC and its defenders argued that additional procedures were against the public interest because they would provide industry with methods of delaying regulation. Instead, agencies should be allowed to structure procedures so that they were appropriate to the particular issues at hand. The Chairman of the FTC noted that the Commission frequently allowed oral testimony when appropriate and always gave a detailed explanation for each of its rules. Congress, the agency argued, echoing Judge Skelly Wright, needed to recognize that the agency's expertise allowed it to best strike the compromise between efficiency and fairness.

Like Chief Judge Bazelon, the bill's proponents simply did not trust agencies to make this balance in an equitable way. Repeatedly, and in the face of constant agency objections, they insisted that trial-like procedures,

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such as cross-examination, would yield the best rules. Furthermore, and again like Chief Judge Bazelon, Congress believed that adding procedures would allow the public to better understand what an agency was doing. Finally, and most tellingly, the bill's supporters emphasized that courts had a special ability—their own expertise, if you will—to determine which procedures resulted in the fairest outcomes. Consequently, making agencies behave more like courts would result in fairer, more accurate rules. One of the bill's chief sponsors, Representative Robert Eckhardt, a Texas Democrat, put it with admirable candor:

[W]hen I first entered into the field of study of administrative law, I used to feel, when I was going to law school in the New Deal days, that there was no real difference between a Commission and a court, both were called upon to decide issues, assuming an equal degree of fairness in meeting that duty, that the two are the same. But I have come to feel that there is a difference, and that difference is in tradition, that is, a court's tradition of due process, which frequently doesn't exist in the very best of Commissions.

FTC Chairman Lewis Engman's response was essentially a concession of defeat: "Congressman, obviously I agree with the concept of due process. You won't get me to say here I am opposed to due process. That would be like saying I am opposed to motherhood..." Rather than lecture the committee on the inapplicability of the Due Process Clause to rulemaking, he simply sat silently. After all, Eckhardt's point was not that the Due Process Clause applied to rulemaking, but that the judiciary's tradition of protecting rights through procedural innovations should be used to control agencies that acted arbitrarily. Chief Judge Bazelon could not have said it better.

Congress's imposition of additional procedures on the rulemaking process was not all it did to ensure judicial control of rulemaking during the 1970s. It did not limit itself to endorsing Chief Judge Bazelon's procedural limitations on agency discretion. Many of the regulatory statutes passed in the 1970s also mandated increased substantive scrutiny of rulemakings. The Occupational Safety and Health Act, the Consumer Products Safety Act, the Toxic Substances Control Act, the FTC Improvement Act, and the Clean Air Act Amendments of 1977 each required that agency rulemakings

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174. Id. at 68 (statement of Lewis Engman, Chairman of the FTC).
be reviewed under a "substantial evidence" standard, rather than the "arbitrary and capricious" standard dictated by the APA. The legislative history of these acts indicates that this change was intended to increase the intensity of judicial review of agency rulemakings. The House Committee Report on the FTC Improvement Act was most explicit. Arbitrary and capricious review was "inadequate" for the kind of fact intensive rulemaking that the FTC was to undertake. The authors of the Consumer Product Safety Act were equally clear. "[Substantial evidence] imposes a greater standard of review than would normally be accorded rules or regulations promulgated in accordance with [section] 553," commented the Senate Report. The Consumer Product Safety Commission's rulemakings would be "subjected to the stricter standard of review that is normally reserved for formal agency proceedings . . . ." Indeed, it was clear that the members of Congress (or their aides) had been reading the courts' hard look opinions. The House managers of the Clean Air Act Amendments of 1977 believed that their decision to subject EPA rulemakings to a substantial evidence standard was simply an admonition to courts to keep up the heightened review:

"[T]he "substantial evidence" test . . . [is not] meant to imply criticism of the courts in their past reviews of administrative action under the act. Those reviews have in general been thorough and searching. . . . [T]he purpose of the committee's provision in this regard is to endorse the court's practice of engaging in searching review without substituting their judgment for that of the Administrator and to assure that no retreat to a less search [sic] approach takes place."179

Though the quotation marks were left out, the references to "thorough" and "searching" mirrored language in Overton Park.180

Thus, in enacting hybrid rulemaking statutes, Congress attempted to increase both substantive and procedural review of rulemakings. Indeed,


some legislators saw the two as intimately intertwined. Why create a hefty rulemaking record by adding all sorts of procedures if you were not going to ask courts to review that record in some detail? For other members of Congress, having both may have been an easy compromise among differing views of how to control the administrative state. Additionally, to the extent that Congress’s goal was to rein in the executive, adding both substantive and procedural review was better than either one by itself.

C. Rulemaking and the Administrative Conference of the United States

As was apparent from the FTC’s objections to the procedural requirements of the FTC Improvement Act, agencies were not thrilled with Congress and the courts’ tendency to proceduralize the rulemaking process. Consequently, throughout the early 1970s, agency officials frequently attempted to stop or limit the judicialization of rulemaking. Indeed, the courts and Congress were not the only ones attempting to address the problems generated by the rise of rulemaking. Federal administrative agencies had their own voice in this debate in the form of an unusual independent agency called the Administrative Conference of the United States (ACUS or “the Conference”).

ACUS was established in 1968 to “develop improvements in the Federal administrative process.” It served as sort of a think tank, empowered to investigate how federal administrative agencies functioned and to make recommendations to improve their efficiency and promote “fundamental fairness” in the administrative process. The legislation establishing the Conference dictated that it have between seventy-five and ninety-one members. The president appointed its Chairman and a ten member Council. The Chairman then appointed up to thirty-six public mem-

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182. See infra notes 243-44 (discussing Congress’s institutional interest in controlling executive autonomy).
183. Informal discussions between the staff of the ACUS and various agency officials indicated that, as of late 1975, many agencies were unaware of this judicialization or, though aware of it, did not believe it applied to their agency. See Jeffrey Lubbers, Comments on the Past and Future Debate About Informal Rulemaking and Judicial Review Thereof 1, 6-7 (Oct. 10, 1975) (unpublished manuscript prepared for ACUS, on file with author).
185. Id. at 2.
186. See id. at 49-52 (describing Conference structure through reprinting of statute authorizing its creation).
187. See id.
RULEMAKING'S PROMISE

bers—mostly lawyers in private practice and academics. The remaining membership consisted of representatives of the various federal administrative agencies. The statute required that agency representatives always constitute a super-majority of the Conference, at least three-fifths of the membership. Over the years the Conference divided itself into a number of committees and employed academic consultants to produce reports on various problems with agency operations. It then made non-binding recommendations, monitored compliance with those recommendations, and issued annual reports.

Considering the dominant presence of agency personnel within ACUS, one would expect that its recommendations would seek to preserve administrative autonomy. In fact, the institutional loyalties of the Conference were not so simple. Although the majority of its membership consisted of agency officials, public members (many of whom were attorneys representing regulated industries) were disproportionately represented in leadership positions. Additionally, law professors, who served as both public members and consultants to the Conference, exerted a particularly powerful influence on ACUS's work. Consequently, the recommendations that emerged from the Conference represented an attempt to balance agency prerogatives with the need for judicial oversight. Nonetheless, in striking this balance, the Conference weighed the concerns of federal administrators more heavily than did Congress or the judiciary.

The nature of this balancing act was revealed in a trilogy of recommendations on rulemaking passed by the Conference in the early 1970s. As the Conference addressed the same issue confronting the Congress and the D.C. Circuit—the problem of how courts were to respond to increasing agency use of informal rulemaking—it attempted to find solutions that would ensure some degree of procedural protection for the regulated, while still preserving agency autonomy. Two of these recommendations, passed in 1972 and 1976, and imaginatively numbered 72-5 and 76-3, respectively, suggested procedures that agencies should use when engaged in informal rulemaking. The third recommendation, 74-4, passed in 1974, attempted to define what record a court should use when reviewing an informal rulemaking, and what standard of review that court should use.

188. See id. at 50.
189. See id.
190. The statute required that at least half the seats on the Council be held by public members. See 5 U.S.C. § 575(b) (1994 & Supp. V 2000). Between 1970 and 1978, public members were almost always a majority. Additionally, a majority of the Conference's committees were consistently chaired by public members.
Recommendation 72-5 sought to dissuade Congress from its tendency to add procedural requirements to informal rulemaking in substantive statutes. "The Administrative Conference believes that statutory requirements going beyond those of [section] 553 should not be imposed in the absence of special reasons for doing so, because the propriety of additional procedures is usually best determined by the agency . . . ." Accordingly, the Conference recommended that Congress only require hybrid rulemaking when it had "special reason to do so," and that even in those circumstances it limit additional procedures to requirements of oral presentation, consultation with advisory committees, or trial-type hearings on issues of specific fact. After reemphasizing its opposition to Congressional imposition of additional procedures, the Conference concluded by suggesting that it was the agencies themselves who were in the best position to determine what additional procedures might be needed in a given circumstance.

The Conference's next recommendation regarding rulemaking, Recommendation 74-4, sought to clarify the record upon which courts should review informal rules and to define an appropriate standard of review. It suggested that the record contain an uncontroversial list of documents: the notice of proposed rulemaking, the comments the agency received, its final order, and any other documents it relied on, as well as advisory committee reports, and transcripts of oral hearings if the agency chose to conduct them. With regard to the appropriate standard of review, the Conference stated that statutes authorizing "substantial evidence" review of informal rulemaking should be treated no differently from those that required review under the APA's arbitrary and capricious standard, and that the reviewing court's inquiry should be whether the rule was "rationally supported."

Like Recommendation 72-5, each component of Recommendation 74-4 sought to protect agency prerogatives. Missing from its definition of the appropriate record for review was any mention of documents generated by the supplemental procedures that the D.C. Circuit had required agencies to follow in the years before the Recommendation was issued. Indeed, ACUS explicitly rejected the use of these procedures:

The term "substantial evidence on the record as a whole," . . . should not, in and of itself, be taken by agencies or courts as implying that any particular procedures must be followed . . . and . . . should not be taken as a legislative prescription that in rule-

193. Id.
194. See id. at 33.
196. Id. at 59-60.
making agencies must follow procedures in addition to those specified in 5 U.S.C. § 553.\textsuperscript{197}

Similarly, the Conference’s conflation of a substantial evidence standard and an arbitrary and capricious standard into a single rationality inquiry, was directly contrary to Congress’s intent when it imposed the substantial evidence standard on agency rulemaking in hybrid statutes, such as OSHA and the Consumer Product Safety Act.\textsuperscript{198}

ACUS issued the final part of its trilogy of recommendations on rulemaking procedures in June of 1976.\textsuperscript{199} In this recommendation, numbered 76-3, the Conference directly addressed Chief Judge Bazelon’s habit of adding procedural requirements to the rulemaking process. Recommendation 76-3 noted that, to facilitate public participation in rulemaking, agencies might wish to use procedures beyond those required by section 553.\textsuperscript{200} It then listed a wide variety of procedures that might accomplish that end, many of which had already been required, in certain circumstances, by the D.C. Circuit.\textsuperscript{201} However, it was the agency, the Conference emphasized, that should be making the choice of what procedural additions were appropriate, “‘each agency should decide in light of the circumstances . . . whether or not to provide procedural protections going beyond’ the notice-and-comment requirements of section 553 . . . .” wrote the Conference quoting the language it used in Recommendation 72-5.\textsuperscript{202} Additionally, agencies should only add procedures with good reason:

An agency should employ [the suggested procedures] only to the extent that it believes that the anticipated costs (including those related to increasing the time involved and the deployment of additional agency resources) are offset by anticipated gains in the quality of the rule and in the extent to which the rulemaking procedure will be perceived as having been fair.\textsuperscript{203}

Each of these recommendations represented a compromise between conference members seeking to protect agency prerogatives and those who wished to limit them. For example, the report that served as the basis for Recommendation 72-5 was considerably less sanguine about informal rulemaking and considerably more tolerant of Congressional meddling than was the Conference’s final recommendation.\textsuperscript{204} On the other hand, agency

\begin{itemize}
\item \textsuperscript{197} \textit{Id.}
\item \textsuperscript{198} \textit{See supra} notes 177-80.
\item \textsuperscript{199} \textit{See} 1976 ACUS ANN. REP. 43 (1977).
\item \textsuperscript{200} \textit{See id.} at 43-44.
\item \textsuperscript{201} \textit{See id.} at 44-45.
\item \textsuperscript{202} \textit{Id.} at 43.
\item \textsuperscript{203} \textit{Id.} at 45-47.
\item \textsuperscript{204} \textit{Contrast} Robert W. Hamilton, \textit{Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking}, 60 CAL.
representatives and some academics argued, during the debate over 72-5, that ACUS should categorically condemn any attempt at hybrid rulemaking. The final language of the recommendation, suggested by Kenneth Culp Davis, sought to split the difference between these two positions.

Recommendation 74-4 was also transformed during the Conference’s plenary session. It began its life as a report endorsing several of the D.C. Circuit’s innovations that required agencies to create a specific record for judicial review beyond what section 553 mandated. By the time it got to the floor, these requirements had disappeared and been replaced by the uncontroversial list that appeared in the final recommendation. Indeed, during the debate several members of the Conference—most of them agency representatives—attempted to amend the recommendation to allow the agency to exclude from the record items it believed were not pertinent to the rule. Agencies, it was argued, should not have to do the work of those who were opposed to a particular regulation by compiling every bit of information they receive. Opponents of this amendment found it to be a “monstrous” incentive for agencies to hide information they did not like. As with Recommendation 72-5, the final language was a compromise, suggested by an esteemed academic, Walter Gellhorn.

Similarly, Recommendation 76-3 was the result of a series of compromises on the floor of the plenary session. Several members of the Conference believed that the version of the recommendation that emerged from committee seemed to require an agency to use additional procedures rather than simply suggest that such procedures could be used at the agency’s discretion. Additionally, many members were vehemently opposed to the committee's original version, which would have established circumstances in which allowing cross-examination was appropriate. Consequently, the

L. REV. 1276, 1313-36 (1972), with the Conference’s assertion that informal rulemaking was “simple, flexible and efficient” and that “on the whole [it] has worked well.” 1972-1973 ACUS ANN. REP. 32.


207. See Verkuil, supra note 63, at 234, 238-42.

208. See ACUS, Transcript of the Eleventh Plenary Session (May 31, 1974), at 175, 179-83, 186-87.

209. See id. at 176-77.

210. See id. at 181, 183.

211. See id. at 191-93. The final language purported to relieve agencies of the burden of tracking down every piece of information, but required them to turn over information considered by top agency officials.

212. See 2 ACUS, Transcript of the Fourteenth Plenary Session (June 4, 1976), at 65-68.

213. See id. at 46, 54, 82-102.
language in regard to cross-examination was toned down considerably, and several of the other procedural suggestions listed were altered to accommodate the complaints of certain Conference members.214

Thus, all three of these recommendations were the result of a compromise among members of the Conference who had different visions of how much autonomy agencies should have from courts and Congress. However, the bottom line, after the compromises were hammered out, tilted strongly towards preserving agency control over their own procedures. Each of the trio of recommendations strongly urged Congress and the courts to defer to agency expertise on procedural matters. Indeed, on other occasions as well, ACUS responded swiftly and strongly to specific judicial and legislative attempts to reduce agency power. It declared the D.C. Circuit’s attempt to place limitations on ex parte contacts during the rulemaking process “neither practicable nor desirable.”215 Similarly, it strenuously objected to Congressional attempts to curb agency rulemaking discretion through the use of the legislative veto.216 Thus, ACUS staked out a position hostile to Chief Judge Bazelon’s and Congress’s desire to control procedures in informal rulemaking. The agencies, speaking through ACUS, felt that control over the procedural mechanisms by which they made their rules lay at the core of their expertise and defined the boundary of their institutional sovereignty.

D. The End of the Controversy

In early 1976, the Supreme Court hinted that it might share ACUS’s reservations about Chief Judge Bazelon’s proceduralization of the rulemaking process. In January of that year, the Court decided Federal Power Commission v. Transcontinental Gas Pipe Line Corp.217 Transcontinental involved the judicial review of a FPC order rejecting a pipeline company’s curtailment plan.218 The D.C. Circuit, Chief Judge Bazelon writing, required that the Commission produce a report on the pipeline company’s reserves within thirty days and that it would then decide about the order. The FPC objected, arguing that such a demand “unwarrantedly interfered with the internal functional autonomy” of the agency.219 In a per curiam opinion, the Supreme Court agreed, demonstrating some frustration with the D.C. Circuit’s tendency to saddle agencies with specific procedural man-

214. See id. at 59-63, 72-76, 82-102.
216. See id. at 27-28.
218. See id. at 327-30 (discussing factual context).
219. Id. at 330.
dates:

[A] reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry . . . . Such a procedure clearly runs the risk of "propell[ing] the court into the domain which Congress has set aside exclusively for the administrative agency." 220

Perhaps because Transcontinental involved an adjudication rather than a rulemaking or because of the extreme specificity of the D.C. Circuit's requirement, Chief Judge Bazelon did not take the Court's opinion as a hint that it disliked procedural innovations in other instances. 221 Consequently, the Court was forced to be more specific. The next year, in Vermont Yankee Nuclear Power Co. v. National Resources Defense Council, 222 it was. Vermont Yankee concerned a rulemaking by the Nuclear Regulatory Commission (NRC) designed to help the agency determine the environmental impact of nuclear power plants. Environmental groups challenged the rulemaking, and the D.C. Circuit voided it. 223 Chief Judge Bazelon's opinion for the court held, typically, that the NRC needed to provide opponents of the rule with some opportunity to challenge the testimony of the agency's experts. 224 With one eye to the Transcontinental opinion, the court declined to dictate any specific procedural requirements, but concluded that the agency "must in one way or another generate a record in which the factual issues are fully developed." 225

Chief Judge Bazelon's opinion drew a concurrence from Judge Tamm. Citing Transcontinental, he suggested that the court simply send the rule back to the agency because it failed, substantively, to support it. 226 Then quoting Judge Wright and the study of hybrid rulemaking that served as the basis for ACUS's Recommendation 76-3, he bemoaned the "distressing trend toward over-formalization of the administrative decision making pro-

220. Id. at 333 (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).
221. When the Vermont Yankee case reached the Supreme Court, none of the parties tried to distinguish Transcontinental in this way. The National Resources Defense Council (NRDC) simply did not mention the case. NRDC's amici distinguished Transcontinental by arguing that the D.C. Circuit had not added any procedural requirements, but had simply remanded the case to the agency to come up with something more than conclusory statements upon which to base its decision. See Brief for 24 Named States as Amici Curiae in Support of Respondents at 16-19, Vermont Yankee Nuclear Power Co. v. Nat'l Res. Def. Council, 435 U.S. 519 (1978) (No. 76-419).
224. See id. at 653.
225. Id. at 654.
226. See id. at 661.
cess which will ultimately impair its utility.” Chief Judge Bazelon, of course, would have none of this. In a “separate statement,” he vigorously reasserted the need to require procedures beyond notice and comment in complex, fact intensive rulemakings. In such cases, courts were “institutionally incompetent to weigh evidence for themselves.” Once again (and, as it turned out, for the last time), he noted that the solution to this institutional incompetence was for courts to judge the procedures the agency used.

The Supreme Court was furious. In a sharply worded opinion, it reversed the D.C. Circuit. Writing for a unanimous Court, Chief Justice Rehnquist consigned Chief Judge Bazelon’s jurisprudence to the waste bin. “[T]hat agencies should be free to fashion their own rules of procedure,” he held, was “the very basic tenet of administrative law . . . .” The Court had always held so; the legislative history of the APA explicitly said so; and wise public policy dictated so. The D.C. Circuit’s proceduralization of the rulemaking process would have a profoundly detrimental effect on the ability of the administrative state to carry out the mandates it received from Congress. Citing Judge Wright (talk about strange bedfellows), Chief Justice Rehnquist noted that adding procedures effectively eliminated the speed and efficiency that were the hallmarks of informal rulemaking. What was worse, agencies, unable to guess what a court might require of them, would inevitably use “the full panoply of procedural devices normally associated only with adjudicatory hearings,” rather than risk being overturned. Judicial review, Chief Justice Rehnquist concluded, was to be substantive. The agency’s rule would “stand or fall” on the adequacy of its “contemporaneous explanation” of its action.

*Vermont Yankee* ended the debate in the D.C. Circuit over the propriety

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227. *Id.* at 660.
228. *See id.* at 657.
230. *See id.* at 656-57.
232. *Id.* at 544.
233. *See id.* at 543-45.
234. *See id.* at 545-46.
235. *See id.* at 547.
236. *Id.*
238. *See id.* at 549.

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of second guessing agency procedural choices. The Supreme Court’s vi-
sion of the administrative state, as manifest in Abbott Labs. and Overton
Park, dictated that courts would play a significant role in the rulemaking
process. In Vermont Yankee, the Court announced that their role would be
to engage in substantive review. For better or worse, intense, hard look re-
view won the day. The specifics of the judiciary’s role in the rulemaking
process had been defined.

This outcome seems to have been the one that the agencies preferred.
Throughout the first decade of its existence, ACUS raised only the mildest,
most oblique objections to hard look review. The administrative actors
who testified before Congress regarding hybrid rulemaking statutes, such
as the FTC Improvement Act, did not even do that. Legal scholars who
had traditionally defended agency autonomy applauded Vermont Yankee.
Substantive judicial review was something that agencies were used to,
while procedural innovations seemed to be novel intrusions into adminis-
trative operations. Indeed, that was the thrust of Chief Justice Rehnquist’s
opinion. Chief Judge Bazelon was incorrect in stating that understanding
procedural protections was the judiciary’s area of expertise. Instead, sub-
stantive review was. This was the courts’ traditional role and they would
retain it, even in the face of increasingly technical, complex regulatory re-
gimes.

The final irony of this narrative is that it illustrates a profound inconsis-
tency in the premises of those who sought to reform the administrative state
in the 1960s. Calls for both increased rulemaking and increased judicial
oversight of the administrative process made sense before both were im-
plemented. Each reform sought to limit arbitrary agency action. However,
as the two phenomena grew simultaneously, it became obvious that in-
creased judicial oversight of the administrative process, whether through
substantive or procedural review, could not help but constrain rulemaking.
By empowering two different institutions to solve the problem of adminis-
trative malaise, these reforms unknowingly created a battle for supremacy
over the rulemaking process. It was a battle that the judiciary won. If the
American people needed protection from the administrative state, courts
would be their white knights, even if judicial involvement in the rulemak-
ing process made the promulgation of rules more difficult.

239. See supra note 196 and accompanying text.
240. See, e.g., Stephen G. Breyer, Vermont Yankee and the Court’s Role in the Nuclear
Energy Controversy, 91 Harv. L. Rev. 1833 (1978); Antonin Scalia, Vermont Yankee: The
241. See supra text accompanying note 1. There is a vociferous debate about the extent
to which hard look review is the cause of the ossification of the rulemaking process or, in-
deed, whether the rulemaking process is ossified at all. Rather than be sucked into this de-
III. CAUSATION

The simple fact that courts were unwilling to cede power to administrative agencies did not, however, dictate the method by which they would assert that power. It was this issue that created such a controversy on the D.C. Circuit. At first glance, the contentiousness of the debate on the D.C. Circuit is surprising. The standard political explanations are not in the least satisfactory. The three most vocal participants were liberal democrats of the New Deal variety. Indeed, the two main antagonists, Judges Wright and Bazelon, were both famous for engaging in aggressive judicial protection of the rights of minority groups: Judge Wright for the desegregation of Louisiana public schools and Chief Judge Bazelon for the deinstitutionalization of the mentally ill. An examination of the subject matter of the cases they fought about reveals no pattern. Nor do their opinions seem to be driven by overt political concerns—a like or dislike of a particular administrative program.

This causation puzzle can be solved if we first step back and ask why the judiciary was so intent on exerting control over the administrative state in the 1960s and 1970s. This broader view reveals a number of factors affecting judicial decision making in this area that transcended personal policy preferences. At the heart of the debate over the proper judicial reaction to the rise of rulemaking stood differing views of what the judiciary’s institutional self-interests were. A closer examination of these institutional self-interests reveals fissures among the various actors in this drama; fissures that explain their dramatic differences of opinion despite the common goal of ensuring judicial control over the administrative process.

There are a number of reasons for the reassertion of judicial power over the administrative state in the 1960s and 1970s. One reason is purely political. The statutory regimes that included hybrid rulemaking requirements and mandates for increasingly stringent judicial review were the acts of a Democratic Congress intent on limiting the power of the Nixon admin-

For these legislators, the courts were to act as a surrogate in their struggle with the Republican president. Similarly, conservative political opponents of regulatory regimes were happy to impede their effectiveness through the addition of procedural requirements or stringent substantive judicial review. Additionally, a history of inter-branch rivalry may have reinforced these partisan considerations. The increasing restrictions placed on executive action by Congress and the courts reflect institutional reactions to a series of presidents—Kennedy, Johnson, and Nixon—all of whom attempted to concentrate political authority in the hands of the executive.

Similarly, the dramatic increase in judicial oversight of the administrative state fit perfectly with the political culture of the time. The 1960s were marked by an increasing suspicion of the political branches of government and an increasing faith in the judiciary. As such, those critics who wished to solve the problems of the administrative state through more potent judicial review were reflecting a widespread belief that courts were the best institution to guarantee the rights of individuals and ensure their genuine participation in the political process. In a complex, bureaucratized society, where agencies and the political branches were easily manipulated by powerful interests, many lawyers, scholars, and other opinion-makers viewed the courts as the most representative institution of government. According to these thinkers—Anthony Lewis, Ralph Nader, Charles Reich, and Joseph Sax were among the more famous of them—only the federal judiciary, because of its insulation from the corrupting influences of partisan politics, could counterbalance the power of the organized interests that dominated the legislature and the administrative state. The most famous manifestation of this sentiment was, of course, the Warren Court, but the increasingly heavy hand with which the D.C. Circuit treated the federal administrative apparatus bears its mark as well.

Though convincing, these explanations for increasing judicial assertiveness only tell half the story. They do not explain why there was such conflict over the method by which the courts would police the administrative


244. See Milkis, supra note 243, at 55-56.

245. I have addressed this in greater deal in Schiller, supra note 11.

246. See id. at 1421-28, 1433-35, 1440-42.
state. Politics and political culture might explain why the judiciary came to intervene so dramatically in the administrative process in the 1970s, but they do not explain how. To find the answer to this question we must turn our attention to factors that are autonomous of politics and the broader political culture. We must examine the institutional interests of the various actors in this struggle over administrative power brought about by the rise of informal rulemaking.

Social scientists who study the administrative state have recognized that political and administrative institutions have interests independent of the particular policy preferences of their constituencies. The President, for example, may want a streamlined administrative apparatus so that he can quickly implement a broad agenda that will both appeal to the national constituencies he is beholden to and produce dramatic results that will ensure his legacy.\textsuperscript{247} Legislators, on the other hand, may prefer proceduralized, balkanized administrative structures that create many opportunities for intervention on behalf of their smaller, localized constituents.\textsuperscript{248} Administrators themselves may have a completely different set of interests. They may wish to preserve their autonomy to serve the public interest, further their professional status by promoting their expertise, protect the specific interests of the groups they repeatedly encounter, or even create new interest groups to provide them with political muscle outside of their agency.\textsuperscript{249}

The clearest example of the pursuit of these institutional interests in the context of the rise of rulemaking was ACUS's attempts to limit the judicial proceduralization of informal rulemaking. The Conference's objections to hybrid rulemaking were not "political" in the sense that they stemmed from some partisan impulse. Instead, they represented the administrative state's institutional interest in being left alone to pursue whatever policies it might be required to undertake. Administrators during a Republican presidency might have a different set of policy preferences than those during a Democratic one, but each wished to be left alone by Congress and the courts.

Identifying the interests of judicial actors in a particular structure of ad-


\textsuperscript{248} See id. at 277-79. A clear and shameful example of this phenomenon was the way in which Southern legislators used federalism to promote the interest of their white constituents in maintaining the political, social, and economic subordination of African-Americans. See Jill Quadagno, From Old-Age Assistance to Supplemental Security Income: The Political Economy of Relief in the South, 1935-1972, in THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 235-63 (Margaret Weir et al. eds., 1988).

ministrative procedure is much more difficult than finding out what political and bureaucratic actors want. Federal judges do not run for election, so they have no incentive to create administrative law rules that might help them intercede on behalf of particular constituencies. Nor do they have an interest in appeasing (or antagonizing) repeat players—interest groups clustered around a particular issue—since judges generally do not deal with the same actors again and again, the way agencies must. Presumably, there is an inherent judicial interest in not losing power to administrative actors, though it is rather dilute compared to an agency's interest in seizing that power. After all, judicial oversight of an agency may impact on a great deal of what an agency does. On the other hand, a court that loses some of its power overseeing agency actions still has plenty of authority over other parts of its docket. Additionally, none of the players in the D.C. Circuit's debate doubted the judiciary's interest in overseeing the administrative process. They simply disagreed about what the best way to do so was.

Of course, judges have other institutional interests defined by their relationship to the administrative state. As Nicholas Zeppos has demonstrated, judges have an interest in promoting the forms of reasoning that they use. Indeed, years of education and experience may convince them that legal reasoning is the best possible method for arriving at just policy outcomes. Consequently, they may wish to defend their own domain against the less "legal" attributes of administrative governance—agencies' scant concern for precedent or rules of evidence, for example. Additionally, like all lawyers, judges have some interest in maintaining the status of the profession, of ensuring that disputes are resolved through the use of lawyerly expertise. Clearly, these institutional interests dictate substantial judicial control of the administrative process. Indeed, they also seem to drive Chief Judge Bazelon's vision of judicial oversight—the imposition of procedures that made rulemaking more legalistic. Congressman Eckhardt's lecture to FTC Chairman Engman had a similar tone. Agencies might be good at making public policy, but courts were experts at creating proce-

250. During the 1960s and 1970s, administrative appeals made up around 10% of the workload of the U.S. Courts of Appeal. The D.C. Circuit was an exception, of course. During the 1960s, such appeals made up about 20% of its work, rising to over 30% by the end of the 1970s. See Christopher P. Banks, Judicial Politics in the D.C. Circuit Court 13, 36 (1999).


252. See id.


254. See id. at 131-32.

255. See supra note 173 and accompanying text.
dural protections of people's liberty. This was a tradition possessed by judges, not administrators. On the other hand, Judge Wright seemed to disdain this legalistic tradition. Consider, for example, his fear of turning informal rulemaking into a "lawyer's game." This contrast indicates that the judges' differing commitments to traditional modes of legal reasoning, in and of itself, helps to explain the split on the court.

Unfortunately, the judges' beliefs in the excellence of traditional legal mechanisms do not provide a completely satisfactory explanation for the split on the D.C. Circuit. After all, substantive oversight of the administrative process was a traditional and very powerful weapon in the judiciary's fight to protect lawyerly prerogatives against the onslaught of administrative government. Judge Wright argued that this substantive oversight was the traditional role and that Chief Judge Bazelon was the innovator. Similarly, as Judge Leventhal's University of Pennsylvania Law Review article demonstrated, reference to traditional legal forms could be used to defend invasive substantive review. Indeed, the point of Judge Leventhal's argument was to justify hard look review by invoking traditional legal mechanisms. Thus, we need to look for additional interests that influenced the judges' decisions in these rulemaking cases in order to come up with a more complete picture of what drove Judges Wright, Bazelon, and Leventhal. The key to this inquiry, I believe, is to examine these judges' self-image—how they believed judges should behave.

Judges have an interest in defining and advancing their particular conception of the judiciary's institutional role in a democratic society. This is an autonomous interest, in that it is not related to the outcome of a particular case. However, it is not, strictly speaking, an institutional interest. It does not necessarily direct judges to protect the prerogatives of the courts or of the legal profession. It is, however, institutionally driven. That is, judges seek to propagate a particular vision of the judicial role when they don their robes and view themselves not as individuals, but as members of the judiciary. The judges of the D.C. Circuit had a self-image of what a judge is supposed to do, how he or she is supposed to behave. Thus, each individual judge had an interest in furthering his or her own vision of the proper judicial role. By understanding this interest we can discover one of the basic causes of the dispute on the D.C. Circuit over judicial review of rulemaking.

By the beginning of the 1970s, the way in which judges defined their own role was an issue of considerable controversy. On the one hand ex-

256. See supra note 151 and accompanying text.
257. See Wright, supra note 31, at 394.
258. See Leventhal, supra note 137, at 534-36.
isted the model of the Warren Court: judges as activist proponents of social justice and participatory democracy. Laura Kalman has dubbed this vision of the judicial role "legal liberalism" and defined it as "trust in the potential of courts, particularly the Supreme Court, to bring about those specific social reforms that affect large groups of people such as blacks, or workers, or women, or partisans of a particular persuasion; in other words, policy change with nationwide impact." Legal liberalism took many aspects of New Deal and Post-War political liberalism—mildly redistributive economics, civil rights for women and minorities, and cultural and political pluralism, for example—and created a judicial analogue. It empowered courts to achieve similar ends through aggressive, substantive review of legislation and active, affirmative remedies to perceived social needs.

For a judge who defined his or her role in this fashion, "policy change with nationwide impact" would certainly include strict oversight of an administrative state perceived by many to be incompetent, captured by unrepresentative interests groups, or both.

Legal liberalism's rival for the hearts and minds of America's judges was also a product of New Deal political liberalism. Many New Deal liberals associated judicial activism with judicial hostility to progressive reform. The judiciary had nearly crippled the Roosevelt administration, the argument went, with constitutional objections to regulatory legislation and heavy-handed review of administrative agencies. Consequently, after World War II, liberal academics and judges, many of whom had cut their legal teeth in the Roosevelt and Truman administrations, developed a jurisprudence, often known as "process theory," that sought to restrain the judiciary.

Process theory first addressed this issue of judicial restraint in the context of constitutional law. At its center was the idea of institutional com-

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260. Id.


petence. The democratically elected branches should make policy choices. Because they were unaffected by partisan political struggles, courts were better suited for identifying the "enduring values" and "neutral principles" upon which legislation could be judged. But judging legislation, process theorists warned, was a dangerous business. It slid quickly and easily into judicial legislation—the usurpation of legislative power by unelected judges. Consequently, courts were to use a variety of procedural devices—standing, mootness, ripeness, and the political question doctrine, for example—to avoid striking down a law, while at the same time informing the legislature that the law was problematic. The legislature could then address the policy issue, knowing what the constitutional stakes were.

The use of these procedural devices, however, was not simply a convenient tool to allow courts to lecture legislatures on constitutional issues without actually striking down laws. Instead, these devices were central to the judiciary's identity. Procedure, after all, was a lawyer's special area of expertise. By respecting procedure and engaging in principled decision making—that is, decision making based on legal, rather than personal, principles—courts made democracy work. By adhering to their institutional competencies and engaging in reasoned elaboration, judges would be "competent professionals and good democrats at the same time." Indeed, according to the principles of reasoned elaboration, being a competent professional—adhering to the norms of the legal profession—meant being a good democrat: not sticking your nose where it did not belong.

This contentious debate over the proper judicial role swirled around the judges on the D.C. Circuit. Judges Bazelon, Wright, and Leventhal were all products of Post-War liberalism. Each graduated from law school during the New Deal, served in the Roosevelt or Truman administration, and was placed on the federal bench by a Democratic president. Thus, the

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266. See DUXBURY, supra note 263, at 257-62.

267. WHITE, supra note 263, at 150.

268. Chief Judge Bazelon was appointed to the D.C. Circuit by President Truman in 1949, the same year the President made Judge Wright a district court judge in Louisiana. President Kennedy appointed Judge Wright to the D.C. Circuit in 1962. President Johnson placed Judge Leventhal there in 1965. For biographical information on these judges see the following remembrances, published upon their deaths. See generally William J. Brennan,
Post-War struggle between process theory and legal liberalism was the background to their entire judicial careers. Their adherence to one side or the other in this debate marked the main autonomous factor in the court’s administrative law decision making. How each man defined his own role as a judge shaped how he believed courts should police the administrative state.

Legal process theory left a deep imprint on Chief Judge Bazelon’s approach to judicial review of administrative action. At the very center of his thinking were three propositions: first, that courts did not possess the ability to judge the substance of most administrative actions; second, that when courts did so, they inevitably made value judgments best left to politically responsive entities, like agencies and legislatures; and third, that by turning to their own area of expertise—procedure—courts could ensure that agencies made reasoned decisions that could be judged by the scientific community and the public—those best suited to evaluating agency performance. These postulates are nearly identical to the central tenets of process theory. “Institutional competence,” “reasoned elaboration,” and “neutral principles” were its signal phrases. By following procedural norms—or in this instance by imposing them—courts could ensure that the proper institutions engaged in rational decision making without overstepping the judiciary’s own institutional competencies. The only values that courts would impose were procedural ones; ones in which they were expert in and which other institutions, particularly agencies, were thought to be lacking.

On the other hand, Judge Leventhal and particularly Judge Wright, rejected the insights of process theory and endorsed a more legal liberal vision of the judicial role. Not only could courts review technical data,
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they were obligated to. Judicial review, Judge Leventhal scolded Chief Judge Bazelon in *Ethyl Corp.*, was designed to guarantee substantive values. Judge Wright concurred. Procedural requirements could not ultimately ensure just agency action. Only substantive review could. What was worse, the proceduralization of rulemaking would undermine its populist, participatory potential. According to legal liberalism, the judiciary should be a direct guardian of democratic values. Surely it would fail in that role if it could do no more than impose procedures on agencies acting in an undemocratic, arbitrary fashion.

CONCLUSION

It is not my intent to argue that there are perfect causal links between process theory, Chief Judge David Bazelon, and the proceduralization of informal rulemaking on the one hand and legal liberalism, Judge Skelly Wright, Judge Harold Leventhal, and hard look review on the other. Life is, of course, much more complicated than that. Instead, my point is that these judges could not help but be affected by the intellectual environment in which they lived. When we ask what “caused” the debate on the D.C. Circuit over the judicialization of the rulemaking process, we answer by throwing a great number of ingredients into the hopper: disillusionment with the administrative state, the rise of informal rulemaking itself, the institutional struggles among the executive, the legislature, and the judiciary, and a vigorous debate over the proper scope of the judicial role. Each of these things combine to yield “the cause” of the D.C. Circuit’s behavior.

My point in highlighting the importance of judicial self-images to this story is to emphasize that intellectual conceptions of judging are a significant factor in this mix. These judges were not simply ciphers for particular

*Professor Bickel, the Scholarly Tradition, and the Supreme Court, 84 HARV. L. REV. 769 (1971).*

273. *See Ethyl Corp.*, 541 F.2d at 68-69 (Leventhal, J., concurring).

274. *See generally Wright, supra note 31.*

275. *See id. at 387-88.*

276. For example, actors on the same side of this debate had a variety of motivations. Judge Leventhal’s justification for hard look review stemmed from legislative intent, while Judge Wright’s seems to have been based on a belief in the general equitable function of the judiciary. *Compare Ethyl Corp.*, 541 F.2d at 68-69 (Leventhal, J., concurring) (“In the case of legislative enactments, the sole responsibility of the courts is constitutional due process review. In the case of agency decision-making the courts have an additional responsibility set by Congress.”), *with Wright, supra note 31, at 394.* Similarly, it would be absurd to call Chief Justice Rehnquist a legal liberal simply because he endorsed hard look review in *Vermont Yankee*. Far more likely is that, as a member of the Nixon Administration, he bristled at Democratic attempts to limit executive power during the late 1960s and early 1970s, and *Vermont Yankee* was his chance to strike back. *See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519 (1978).*
political opinions any more than they were automatons, mechanistically discerning and implementing the institutional interests of the judiciary. Instead they sat at a time when the definition of the judicial role was a hotly contested one. The rise of informal rulemaking and the necessity for a judicial response to it crystallized the issues in this debate. The judges on the D.C. Circuit, thus, put the intellectual debate into action. It provided them with vocabulary and guidance for addressing a novel legal problem and, accordingly, allowed them to fulfill their own self-image of what it meant to be a judge.