



ADMINISTRATIVE LAW REVIEW



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COMMON LAW AND STATUTE LAW IN ADMINISTRATIVE LAW

JACK M. BEERMANN*

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* Professor of Law and Harry Elwood Warren Scholar, Boston University School of Law. This is a revised version of the chapter *Common Law and Statute Law in US Federal Administrative Law*, originally published in *ADMINISTRATIVE LAW IN A CHANGING STATE: ESSAYS IN HONOR OF MARK ARONSON* (Linda Pearson, Carol Harlow & Michael Taggart eds., 2008). The Author thanks Hart Publishing for permission to republish this article in revised form. Thanks also to Crystal Callahan, Jeff Russell, and Sarah Kaskel for research assistance. Special thanks to the late Mike Taggart for general inspiration.

INTRODUCTION

The largely statutory appearance of U.S. administrative law should not be surprising in light of the existence of the federal Administrative Procedure Act of 1946 (APA).¹ The APA, including its additions and amendments, is a relatively comprehensive guide to much of administrative law in the United States. It contains the procedures agencies are supposed to follow in both rulemaking and adjudication and provisions on the availability and scope of judicial review of agency action. As amended, it includes open meeting and open file requirements as well as procedures for negotiated rulemaking and legislative review of agency rules. Add in the generally held view that federal courts should not make common law but should act only when and how they are statutorily authorized to act, and it is understandable that administrative law takes on a strong statutory appearance.

Thus, although common law pops up explicitly on occasion in the odd quarter of administrative law, by and large the law of judicial review appears to be statutory and it is understood that way by most lawyers. Note the word “appears.” Scratch below the surface, and the federal courts may not actually behave all that differently than court systems with an openly acknowledged common law tradition in administrative law. While the federal courts have always been statutorily authorized to employ the writs that English courts used in the common law of judicial review,² the courts have, since the enactment of the APA, been reluctant to be open about their use of common law in the administrative law arena, especially when a statute contains an answer or even the germ of an answer. Even when the federal courts rely on pre-APA case law or principles, courts usually filter this law through the lens of the APA.

The purpose of this Article is to uncover the statutory veneer of federal administrative law and reveal ways in which federal courts behave like common law courts, creating administrative law based on principles and policies that may or may not be consistent with the language, structure, and history of the APA and other relevant provisions. I will also highlight areas in which the Supreme Court has required a more statutory focus as a matter of contrast with the common law aspects of administrative law to illustrate that the Court has not provided, or even attempted to provide, a principled justification for its continued use of administrative common law. Last, this Article shows that the courts have not provided a method for

1. Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C. (2006)).

2. See Judiciary Act of 1789 § 14, 1 Stat. 73, 81–82 (current version at 28 U.S.C. § 1651 (2006)).

choosing between a statutory or common law focus in any particular doctrinal area.

A clarification of the term “common law” is in order at this point. While common law may have originally referred to a body of law thought to exist in common across jurisdictions under generally accepted standards of legal reasoning, I use the term here to distinguish statutory law made by legislators from case law made by courts. It is well understood that each state has its own common law, crafted by its courts under the supervision of the state supreme court, subject only to the supremacy of federal statutory and constitutional law.³ In many contexts, including administrative law, courts use statutes and constitutional text as jumping-off points for a degree of creativity beyond that expected of a court engaged in the construction and application of an authoritative text. These courts apply a common law methodology in two separate but related senses. The first sense is that courts often make administrative law in areas ostensibly governed by the APA with little or no regard for the actual language or intent of the statute. Second, this law is then applied using the common law method of elaboration and development, so that doctrinal systems governing important areas of administrative law become so well-developed that it becomes virtually unnecessary to refer to the text of the APA when deciding cases concerning APA provisions.

This is not the first analysis of the relationship between the APA and the common law of judicial review in the United States. Kenneth Culp Davis examined the issue in 1980 and concluded that “most administrative law [in the United States] is judge-made law” and that the law in the long run will reject efforts to transform administrative law into a statutory discipline.⁴ John Duffy concluded otherwise in 1998, arguing that administrative law was following a trend away from federal common law toward a more statutory basis.⁵ With the benefit of another decade of developments, Davis appears to have the better of the arguments, although Duffy may actually have been expressing not a conclusion but a hope—based on a particular case in which the Supreme Court took a strongly statutory perspective—that the entire body of administrative law would move in the statutory direction. It is, however, more of a spectrum than a dichotomy with courts

3. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). There are small pockets of federal common law, for example, the law governing federally issued negotiable instruments and the preclusive effects of federal court judgments, but this federal common law exists only in the tiniest fraction of subject areas.

4. Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3, 3.

5. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 115 (1998).

paying more or less attention to enacted law across the range of administrative law subjects. The most that one can confidently say today is that administrative law contains elements that appear to be highly statutorily focused alongside elements in which courts exercise the discretion of a common law court.⁶

In this Article, I analyze two of the many sets of administrative law issues that could be explored under this rubric: the law of administrative procedure and the availability and scope of judicial review of agency action. In the procedural area I look at rulemaking procedure, the timing and availability—including preclusion—of judicial review, and standing to seek judicial review. In the more substantive area of the scope of review, I look at two issues: judicial review of agency statutory interpretation and the general standard governing judicial review of agency policy decisions. In both areas, the operative question is whether courts reviewing agency action for procedural or substantive regularity are following governing statutes or applying judicially created norms.

Before turning to the analysis, it is necessary to confront a sensible challenge to this project. My thesis is that U.S. administrative law is fashioned from a combination of statutory law and common law doctrines without any strong indication of which, if either, is more appropriate than the other in any particular context. There is another view, however, that also ought to be considered. Perhaps the dichotomy identified in this Article is a false one, and even in those situations that I have placed furthest toward the common law end of the spectrum, the courts are merely engaged in traditional statutory construction and gap filling that is well within the historical practice of judges in common law countries. Most of the decisions examined construe language of governing statutes, most notably the APA. When courts have gone too far and abandoned statutory fidelity altogether, the Supreme Court has brought them back in line.

While I appreciate this view of judicial practice as applied to administrative law, in my view, for the reasons largely expressed in the body of this Article, it obscures more than it reveals. Rather, the dichotomy or spectrum concerning common law methodology and

6. The issue of common law versus statutory methodology is often relevant to administrative law analysis even if it has not often been the central focus. More recent publications have cast at least a glancing blow at the subject. See Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 508–10 (2010) (discussing how the nonstatutory nature of administrative law allows constitutional principles to become part of “ordinary administrative law”); Noga Morag-Levine, *Agency Statutory Interpretation and the Rule of Common Law*, 2009 MICH. ST. L. REV. 51, 52–60 (2009) (describing the evolution of common law principles in England that limited the lawmaking powers of agencies).

adherence to authoritative statutes reveals important features of administrative law. Not only does the dichotomy or spectrum exist, but the decisions also do not explain why in some contexts a statutory focus is appropriate while in other contexts it is not. With no indication of a trend in either direction, and no way to choose a methodology in advance in any particular context, it appears that administrative law does not satisfy basic rule of law requirements.

I. ADMINISTRATIVE PROCEDURE

The APA prescribes detailed procedures for formal⁷ and informal rulemaking,⁸ and for formal adjudication.⁹ Unless a more specific statute provides otherwise, federal agencies are required to follow the procedures specified in the APA. Given the concentrated attention Congress paid to administrative procedure in the APA,¹⁰ this area would seem to be a prime candidate for judicial modesty in the sense that a court reviewing administrative procedure would require agencies to follow the APA and other statutorily mandated procedures and nothing more. However, as we shall see, despite adherence by the Supreme Court to the principle that courts should not require agencies to employ procedures beyond those required by statute, this is not how the law regarding judicial review of administrative procedure has developed.

A. Informal Rulemaking Procedure

Let us use informal rulemaking as our main example. The APA establishes a bare bones rulemaking procedure that is used in the vast majority of agency rulemaking proceedings. This procedure, referred to as “informal” or “notice-and-comment rulemaking,” requires notice of the proposed rulemaking, opportunity for interested persons to comment on the proposed rules, and a “concise general statement of their basis and purpose” of any rules actually adopted.¹¹ In the very earliest decisions construing the APA, the federal courts applied the requirements of the APA

7. 5 U.S.C. §§ 554, 556–557 (2006).

8. *Id.* § 553.

9. *Id.* §§ 554, 556–557.

10. *See* *Fahey v. O'Melveny & Myers*, 200 F.2d 420, 480 (9th Cir. 1952) (“We take judicial notice of the prolonged campaign to secure passage of the APA and the fact that few pieces of legislation passed in recent years received more attention at the hands of Congress. During its consideration the entire field of administration procedure and judicial review of administrative orders was subjected to searching scrutiny in order to develop a more orderly pattern in this area of law . . .”).

11. 5 U.S.C. § 553(c). There is also a provision for formal rulemaking in the Administrative Procedure Act (APA), but that procedure is rarely used. *See id.* §§ 556–557.

primarily with reference to the text, perhaps because of the recognition that Congress paid a great deal of attention to the finer points of administrative procedure when it drafted the APA.

As time went on, and perhaps the memory of the concentrated political attention to the details of administrative procedure faded, close adherence to the text of the APA broke down. By the late 1960s, federal courts entertaining challenges to the results of informal rulemakings adjusted procedural requirements based on their own sense of best practices in light of the importance and complexity of the particular rulemaking proceeding. The courts treated the APA as setting a floor, but employed a common law methodology to determine the appropriate level of procedure in each particular proceeding. In other words, courts would require agencies to provide procedures over and above those specific in the APA when they found that issues were too important or complex to be determined via such a sparse procedural framework.

In 1978, the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*¹² firmly rejected this practice as inconsistent with the statutory scheme embodied in the APA. The Court held that courts may not require procedures other than those specified in the APA or another applicable statute, except in “extremely compelling circumstances” or when an agency makes “a totally unjustified departure from well-settled agency procedures of long standing.”¹³

In the *Vermont Yankee* decision itself, the Court held that agencies could not be ordered to allow cross-examination or other trial-type procedures in proceedings governed by the APA’s notice-and-comment rulemaking provisions.¹⁴ The Court later extended the *Vermont Yankee* rule to less formal decisionmaking processes,¹⁵ and the black letter rule in U.S. law is that courts generally may not require agencies to adopt procedures other than those required by statute, including the APA, unless such procedures are constitutionally deficient.¹⁶ While the Court supported its decision with policy arguments concerning uniformity and predictability, it drew those arguments, and most of the support for its decision, from the statute and its legislative history. The Court viewed the role of courts engaged in judicial review of administrative procedure as enforcing the standards imposed by Congress rather than as creating a system of agency best procedural

12. 435 U.S. 519 (1978).

13. *Id.* at 542–43. For a more complete review of the *Vermont Yankee* decision and its current application—or nonapplication—see Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856 (2007).

14. *Vermont Yankee*, 435 U.S. at 543.

15. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990).

16. See Beermann & Lawson, *supra* note 13, at 871–72.

practices.

Despite this apparently clear directive, lower federal courts have persisted in applying a common law method to procedural questions arising under the APA's rulemaking provisions. Perhaps this should not be surprising. Kenneth Culp Davis attacked *Vermont Yankee* as inconsistent with the traditional common law powers of U.S. courts and with the APA itself, which explicitly preserves "additional requirements imposed by statute or otherwise recognized by law."¹⁷ Davis predicted that "[t]he law in the long run will reject the *Vermont Yankee* opinion and is tending to do so in the short run."¹⁸ His prediction and characterization of the post-*Vermont Yankee* case law has proven half right. Although *Vermont Yankee* itself has not been repudiated, and in fact has been reaffirmed, the lower federal courts continue in many areas to shape administrative procedure in a common law process without much reference to the text and history of the APA.

B. Notice of Proposed Rulemaking

The best example of continued federal court creativity despite *Vermont Yankee* is the application of the § 553 requirement that agencies provide notice of the "terms or substance of . . . proposed rule[s] or a description of the subjects and issues involved."¹⁹ In cases arising shortly after the APA was adopted, the federal courts stuck to the statutory language and rejected challenges to the adequacy of agency notices of proposed rulemaking whenever the notice met the statutory minima by specifying the subjects and issues involved in the rulemaking, as required by the APA.²⁰ More

17. See Davis, *supra* note 4, at 10 (emphasis added) (quoting 5 U.S.C. § 559 (2006)). Davis concluded that "otherwise recognized by law" must refer to common law.

18. *Id.* at 13. John Duffy pointed out more recently that *Vermont Yankee* itself was a common law decision because it relied on pre-APA precedent for its central holding and because it allowed for exceptions to its rule—for extremely compelling circumstances and departures from long standing agency practices—that are not provided for in the APA or any other statute. See Duffy, *supra* note 5, at 182. Duffy finds a statutory basis for *Vermont Yankee* in APA § 706(2)(D)'s requirement that courts set aside "agency action reached 'without observance of procedure required by law.'" *Id.* at 186. He interprets "law" as limited to the APA and to other governing statutes. *Id.*

19. 5 U.S.C. § 553(b)(3).

20. See *Colo. Interstate Gas Co. v. Fed. Power Comm'n*, 209 F.2d 717, 723–24 (10th Cir. 1954), *rev'd on other grounds*, 348 U.S. 492 (1955); *Owensboro on the Air, Inc. v. United States*, 262 F.2d 702, 706 (D.C. Cir. 1958); *Logansport Broad. Corp. v. United States*, 210 F.2d 24, 28 (D.C. Cir. 1954). In *Logansport*, for example, the court rejected the argument that the notice was insufficient because the agency departed from the priorities announced in the notice and decided the matter based on a consideration not previously announced—a determination that very high frequency (VHF) television stations should be allocated to larger cities. It seems fairly clear that under current law in the federal courts of appeals, the

recently, however, even after *Vermont Yankee*, lower federal courts have imposed nonstatutory tests such as requirements that the final rule be a “logical outgrowth” of the notice or that the final rule not materially alter the proposal.²¹ Courts have also required that agencies provide public notice of information or studies they considered when formulating the final rule.²²

Courts support these decisions with arguments based on fairness to the parties interested in the rulemakings and on the quality of the rules likely to be produced with better notice. From one perspective, this is consistent with the traditional role of courts engaged in statutory construction, which is to apply the language and intent of the statute in a way that makes sense in light of the policies underlying the statutory scheme. However, the requirements entailed in these tests are elaborated and clarified in a case law process largely detached from the language and intent behind the APA’s rulemaking provisions, rendering the entire enterprise inconsistent with the statutory method for applying the APA’s procedural provisions apparently required by the Supreme Court in *Vermont Yankee*.

Although the notice decisions seem to be in tension with the *Vermont Yankee* rule, the Supreme Court appears to have embraced the lower courts’ general approach to notice. In a recent decision rejecting a challenge to a rule based on inadequate notice, the Court framed the issue as follows:

The Administrative Procedure Act requires an agency conducting notice-and-comment rulemaking to publish in its notice of proposed rulemaking “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” The Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be “a ‘logical outgrowth’ of the rule proposed.” . . . The object, in short, is one of fair notice.²³

agency would be required to disclose its new decision rule in a second notice so that interested parties could comment on the potential basis for the decision. *But see* Am. Med. Ass’n v. United States, 887 F.2d 760 (7th Cir. 1989) (rejecting a challenge to the notice based on significant change from proposal to final rule).

21. *Chocolate Mfrs. Ass’n v. Block*, 755 F.2d 1098, 1105 (4th Cir. 1985).

22. *See* *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 392–93 (D.C. Cir. 1973). This requirement had been rejected in the earlier and more statutorily oriented decision in *Logansport*. 210 F.2d at 28. More recently, D.C. Circuit Judge Kavanaugh has questioned whether this requirement is consistent with *Vermont Yankee*. *See* *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).

23. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (quoting 5 U.S.C. § 553(b)(3); *Nat’l Black Media Coal. v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986)); also citing *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980),

The Supreme Court did not firmly endorse the lower courts' understanding of the notice requirement, but there is no hint of discomfort with it. At least for the foreseeable future, the federal courts are likely to continue to apply the logical outgrowth test and related doctrines when evaluating the sufficiency of agency notice of proposed rules.

C. *Ex Parte Comments*

Another area in which federal courts continue to impose procedural requirements and restrictions on agencies that are not supported by any statute involves agency receipt of ex parte communications during informal rulemaking proceedings. The APA says nothing about these, and because the APA explicitly prohibits them in formal proceedings, the best statutory argument is that they are allowed in informal rulemaking.²⁴ Some lower courts, however, have banned them, perhaps for good reason—they facilitate favoritism and fuel suspicion.²⁵ However, a panel of the D.C. Circuit recently ruled against a ban on ex parte contacts outside the formal adjudication context based on the panel's reading of *Vermont Yankee*.²⁶ This is a small step in extending *Vermont Yankee* beyond what the Supreme Court has explicitly required.

D. *Availability and Timing of Judicial Review*

The APA regulates the availability and timing of judicial review. This includes a specification of what agency actions are reviewable and unreviewable, who may seek judicial review, and when review is available.²⁷ In this area, the federal courts at times follow the statutory language fairly closely and insist on a statutory method, while at other times they engage in a much freer, common-law-like methodology.

1. *Reviewable Agency Action*

As the APA specifies, "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."²⁸ The first half of this provision is

cert. denied sub nom. Lead Indus. Assn., Inc. v. Donovan, 453 U.S. 913 (1981); S. Terminal Corp. v. EPA, 504 F.2d 646, 659 (1st Cir. 1974).

24. 5 U.S.C. § 557(d).

25. *See, e.g.*, Home Box Office, Inc. v. FCC, 567 F.2d 9, 53–57 (D.C. Cir. 1977); Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959).

26. Marine Eng'rs' Beneficial Ass'n v. Mar. Admin., 215 F.3d 37, 42–43 (D.C. Cir. 2000).

27. 5 U.S.C. §§ 701–704.

28. *Id.* § 704.

redundant; the second, according to the Supreme Court, creates a presumption that all final agency action is subject to judicial review of some sort.²⁹ The vague language of the second half of this provision—“final agency action for which there is no other adequate remedy in a court”³⁰—is intended to clarify that when judicial review of a category of agency action is provided for in a statute other than the APA, that statute’s judicial review provisions take precedence over the APA’s and continue in force. This is sensible statutory reasoning: normally, a more specific statute takes precedence over a general statute. The APA basically admits that it is meant to provide review in those cases in which review is not otherwise available.

This picture of specific statutes providing review with an APA backstop for other situations is incomplete. There is another category of review, denominated “nonstatutory review,” under which courts review agency action that is covered neither by a specific review provision nor by the APA.³¹ These challenges to agency action include petitions for mandamus, general federal question equity actions, and actions for declaratory relief under the federal Declaratory Judgment Act. The term *nonstatutory review* is a misnomer, since these forms of nonstatutory review depend at least to some extent on various statutes including the APA itself, which provides that if judicial review under the APA is inadequate or unavailable, the challenger may employ “any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.”³² This goes hand in hand with the APA provision relied upon by Davis for the proposition that Congress did not intend for the APA to displace the federal courts’ traditional common law powers in administrative law.³³

In the absence of these nonexclusivity provisions in the APA, given the complex nature of the APA and the concentrated attention that was

29. See *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993) (“[W]e have read the APA as embodying a ‘basic presumption of judicial review.’”) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)).

30. 5 U.S.C. § 704.

31. Nonstatutory review has been asserted as a means of reviewing presidential actions that are not reviewable under the APA. See generally Kevin M. Stack, *The Reviewability of the President’s Statutory Powers*, 62 VAND. L. REV. 1171 (2009); Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1613–14 (1997). For a more general look at nonstatutory review, see Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1115–17 (2009), and Clark Byse, *Proposed Reforms in Federal “Nonstatutory” Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1479–83 (1962).

32. 5 U.S.C. § 703.

33. See *supra* note 17 and accompanying text (discussing 5 U.S.C. § 559).

involved in its framing, there would have been strong arguments against preservation of review outside the APA. It might have been wise to presume that the APA constituted the exclusive means to challenge agency action, and if an action under the APA is not available, no review is available. As appealing as this reasoning might be in other contexts, it is inconsistent with the language and intent of the APA.

The question then becomes what law determines the availability of these nonstatutory remedies such as mandamus, certiorari, and injunctions. The answer turns out to be federal common law. (It may seem odd to use the term “common law” since these are technically considered equitable remedies. The term is used here to denote judicial action based on the traditional powers of courts in the absence of enacted substantive law.) There are some statutory aspects; from the very beginning, in the All Writs Act, Congress granted federal courts the power to employ the traditional writs known to courts at that time.³⁴ These remedies may also be entailed in the judicial power granted to the federal courts in Article III of the Constitution, which means that they would exist even without Congress’s permission. Further, various statutes grant federal courts jurisdiction over actions for mandamus, habeas corpus, and suits in equity arising under federal law.

Even if congressional permission is necessary for federal courts to grant the traditional remedies of non-APA judicial review, no federal statute specifies the conditions under which each remedy should be granted. By specifying that writs must be “agreeable to the usages and principles of law,”³⁵ the All Writs Act in effect delegates this determination to the courts. In administrative law, federal courts fashion appropriate actions and remedies where the APA and other specific regulatory statutes do not fulfill the task, applying the same common law methodology they employed before passage of the APA.

Thus the entitlement to judicial review comprises both statutory and nonstatutory elements. Because most judicial review arises under the APA, little attention has been paid to the nonstatutory aspects of judicial review, but in light of the APA’s explicit provision for nonstatutory methods of review, it remains an important aspect of U.S. administrative law.

34. Judiciary Act of 1789 § 14, 1 Stat. 73, 81–82 (current version at 28 U.S.C. § 1651 (2006)).

35. 28 U.S.C. § 1651(a).

2. *Exceptions to the Availability of Judicial Review*

The APA creates two broad exceptions to the availability of judicial review. First, judicial review is not available when another statute precludes it. Second, judicial review is not available when “agency action is committed to agency discretion by law.”³⁶ The former exception is highly statutory, and the federal courts look to the language and intent of statutes to determine whether review is precluded. Statutes precluding review are relatively rare and are somewhat disfavored, with the Supreme Court interpreting them relatively narrowly.

The exception to review for when agency action is committed to agency discretion has statutory and common law elements. The statutory phrase “committed to agency discretion by law” is ambiguous because it cannot mean that every discretionary action by an agency is unreviewable. That would undercut a central purpose of judicial review, ensuring that agencies do not abuse the discretion they are granted, and it would be inconsistent with the APA’s specification that agency action is unlawful and should be set aside if it involves an abuse of discretion.³⁷ As the Supreme Court recognized, this exception was meant to incorporate pre-APA common law. However, in its first discussion of this provision, the Court ignored an important aspect of the pre-APA law of reviewability, stating that under this exception, agency action is unreviewable only if, in a particular matter, the standards governing agency action are so vague that there is, in effect, no law to apply.³⁸ This inquiry is highly discretionary, calling on federal courts to engage in a common-law-like analysis of whether a particular agency statute meets some standard of vagueness as understood in the case law.

More importantly, the Court completely ignored the pre-APA understanding that judicial review is not available when a statute grants discretion in terms of the personal judgment of an official, using phrases such as “in his judgment” to describe the conditions for executive action.³⁹ The APA’s language was meant to incorporate this doctrine, and this oversight was remedied later when the Court found no review of actions under a statute granting the Director of the Central Intelligence Agency (CIA) the power to terminate the employment of any agency employee when he “shall deem such termination necessary or advisable in the interests of the United States.”⁴⁰ The Court noted that the inclusion of the

36. 5 U.S.C. § 701(a)(2).

37. *Id.* § 706(2)(A).

38. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 413–14 (1971).

39. *See, e.g., United States v. George S. Bush & Co.*, 310 U.S. 371, 376–77, 379–80 (1940).

40. *Webster v. Doe*, 486 U.S. 592, 599–601 (1988) (emphasis omitted) (holding that an

word “deem” indicated that Congress meant for this authority to be a personal decision of the agency director, not questionable in court or any other forum.⁴¹ Although the Court formally stuck to the “no law to apply” interpretation of the provision, it strained to include “deeming clause” provision in its understanding of when there is no law to apply. This remedied the Court’s earlier neglect of this important aspect of the pre-APA common law of reviewability, which Congress had intended to incorporate into the APA.

Later, Justice Scalia convinced the Court that the common law should have an even greater role in its reviewability jurisprudence than had existed before the passage of the APA. In his separate opinion in *Webster*, he argued that the phrase “by law” in the APA’s judicial review exception refers generally to a common law of review under which certain categories of agency action were exempt from judicial review.⁴² He also implied that personnel decisions by the CIA Director are one such category.⁴³ Justice Scalia’s argument is interesting, and it may even be normatively persuasive, but it has absolutely no support in either the language or the history of the APA or in pre-APA common law. Even the Supreme Court decision that most strongly supports the argument that some categories are exempt from judicial review, involving agency prosecutorial discretion, carefully adhered to the “no law to apply” understanding of the statutory exemption. In line with that reasoning, the Court recognized that agency action within the category is subject to judicial review if clear statutory standards govern the exercise of the otherwise unreviewable discretion.⁴⁴

Despite the doubtful pedigree of Justice Scalia’s categorical approach to nonreviewability, in a decision just a few years following his separate opinion advocating the approach, a majority of the Court, in an opinion by Justice Souter, adopted this reasoning and announced that “[o]ver the years, we have read [APA] § 701(a)(2) to preclude judicial review of certain categories of administrative decisions that courts traditionally have regarded as ‘committed to agency discretion.’”⁴⁵ For this assertion, Justice Souter’s authority consisted of one concurring opinion and one dissenting opinion, raising the question of what he meant by “we” in the statement.

executive officer’s actions are not subject to review if the actions are necessary, appropriate, and in accordance with legislation) (quoting 50 U.S.C. § 403(c) (1988)).

41. *Id.* at 600.

42. *Id.* at 608–09 (Scalia, J., dissenting).

43. *Id.*

44. *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985); *see also Dunlop v. Bachowski*, 421 U.S. 560, 566–68 (1975) (holding that Congress did not intend to prohibit all judicial review of an agency’s decision under the Labor-Management Reporting and Disclosure Act).

45. *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993).

The next issue that arose under this development is what the Court would find sufficient to establish a tradition of nonreviewability of a category of administrative actions. The Court's first application of this doctrine allowed for such weak evidence of a tradition that it has opened up reviewability to the possibility of an unmoored common law process under which federal courts would be free to exclude categories of agency actions from judicial review based on their own view of good policy without any real precedent.⁴⁶ Our common law tradition assumes that judges act within a framework of accepted norms of judicial behavior, such as adherence to precedent and fidelity to tradition, while maintaining the appropriate deferential judicial attitude toward statutes. In this particular instance, we would expect the Court to rely on a well-established common law tradition of nonreviewability before it exercises its common law power to deny review in the face of a statute that grants an entitlement to judicial review of agency action. However, in the single case in which the Court found nonreviewability under the categorical approach, the best support it could muster for the tradition of nonreviewability (of agency allocations of funds from lump sum appropriations) was a citation to a 1975 opinion by the Comptroller General deciding a government contract protest.⁴⁷ No judicial opinion supported the Court's conclusion that the category of allocation of funds from lump sum appropriations had been traditionally unreviewable.⁴⁸

There were two more straightforward paths to the decision, both with more statutory orientations. The Court might have said that the very nature of a lump sum appropriation is that there is no law to apply to the allocation of funds among permissible agency objectives. It might have also said that the nature of a lump sum appropriation is to assign final discretion over allocation to responsible agency officials. Rather than take either of these more constrained paths, the Court chose to adopt the reasoning that maximized its common law power to determine when judicial review is not available.⁴⁹ Perhaps the intent was to let Congress and the agencies know who's boss.

46. *Id.* at 192–93.

47. *Id.* at 192 (citing LTV Aerospace Corp., 55 Comp. Gen. 307, 319 (1975)).

48. *Id.*

49. Justice Souter's opinion for the Court in *Lincoln* also left open the possibility that judicial review of the allocation of funds from lump sum appropriations might be available if an agency goes beyond statutory bounds. *See id.*, 508 U.S. at 193 (“[A]s long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives, § 701(a)(2) gives the courts no leave to intrude. ‘[T]o [that] extent,’ the decision to allocate funds ‘is committed to agency discretion by law.’”) (quoting 5 U.S.C. § 701(a)(2) (2006)).

3. *Standing to Seek Judicial Review*

Both the APA and the U.S. Constitution play a role in determining whether a party has standing to seek judicial review of agency action in a federal court. Standing involves the requirement of a case or controversy for federal court jurisdiction under Article III of the Constitution.⁵⁰ Standing also involves a set of nonconstitutional requirements, some deriving from the APA⁵¹ and some from general prudential concerns.⁵² In both areas, the Supreme Court has adopted unclear and malleable common law standards, allowing courts great freedom in making standing determinations.⁵³ Contrary to the usual hope for increased clarity in common law reasoning over time, the criteria for standing have not been refined in a way that has led to clarity or predictability in the law of standing either under the APA or the Constitution.

The APA specifies that a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”⁵⁴ Uncertainty exists over the meaning of “adversely affected or aggrieved . . . within the meaning of a relevant statute.”⁵⁵ Does this language liberalize standing, allowing anyone injured by agency action to seek judicial review, or does it require that a person seeking judicial review identify a statutory source outside the APA for the right to review?

Pre-APA law was very restrictive, rarely granting standing to third parties such as competitors.⁵⁶ The Supreme Court has interpreted the APA to liberalize standing substantially, holding that by *within the meaning of a relevant statute*, § 702 requires that the adversely affected or aggrieved “complainant [be] arguably within the zone of interests to be protected or regulated by the statute.”⁵⁷ While standing is generally not an impediment

50. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”).

51. See *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 394–96 (1987) (discussing APA standing rules).

52. See *Warth v. Seldin*, 422 U.S. 490, 499–500 (1975) (discussing prudential standing limitations).

53. See *infra* notes 62–63 and accompanying text.

54. 5 U.S.C. § 702.

55. *Id.*

56. See, e.g., *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249, 254–55 (1930) (denying shippers standing to challenge an agency decision that set rates charges for other shippers).

57. *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). It is not completely clear that the APA is the source of the zone of interests test since more recently, the Court has characterized the test as a generally applicable prudential standing

to litigation by the direct subject of regulation seeking judicial review, this liberalization is important for third parties who are affected by the regulation of others. These parties include business interests complaining about lenient regulation of competitors and environmentalists complaining about lenient environmental regulation.

What does it mean for a third party to be “arguably within the zone of interests” of a statute? The Court looks at multiple factors including the language, purpose, and history of the statute to determine whether the plaintiff is within a category of those meeting the zone of interests test. The Court has not been clear about what it actually requires, sometimes looking for affirmative indications that Congress intended to include the party seeking review within the zone of interests and other times looking mainly for evidence of whether Congress meant to exclude an affected party from the class of parties eligible to seek judicial review. In the most recent application in a statutory context, the Court held that voters were within the zone of interests of a law requiring political action committees to disclose certain information, concluding, “We have found nothing in the Act that suggests Congress intended to exclude voters from the benefits of these provisions, or otherwise to restrict standing, say, to political parties, candidates, or their committees.”⁵⁸ This holding implies that adversely affected parties are within the zone of interests unless there is affirmative evidence that Congress meant to exclude them from having standing. Although the Court did rely on the language of the statute and its purpose to conclude that Congress intended to include voters within the statute’s purview, in earlier cases the Court stated that “there need be no indication of congressional purpose to benefit the would-be plaintiff” for the plaintiff to meet the zone of interests test.⁵⁹

In another decision, however, excluding postal workers’ unions from standing to challenge the U.S. Postal Service’s decision to surrender part of its statutory monopoly to competitors, the Court denied standing because it could not find affirmative evidence in the relevant statute or legislative history that workers’ interests were meant to be considered in the decision.⁶⁰ The Court is thus unclear on whether affirmative evidence of inclusion is required for standing, or whether it is sufficient that there is no evidence that Congress intended to exclude an adversely affected or

requirement, stating that it applies even in cases that do not arise under the APA. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, 17 (2004).

58. *FEC v. Akins*, 524 U.S. 11, 20 (1998).

59. *Clarke v. Sec. Indus. Ass’n.*, 479 U.S. 388, 399–400 (1987) (citing *Inv. Co. Inst. v. Camp*, 401 U.S. 617 (1971)).

60. *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 528–30 (1991).

aggrieved party. The Court could have made this a statutory inquiry, focused on whether there is evidence in a statute or legislative history that Congress intended to benefit, or at least was concerned about, the plaintiff's class. Instead, the Court constructed a common-law-like test with multiple and sometimes conflicting factors calling for the exercise of policy judgment for its application.

In constitutional standing, the Court has constructed a common-law-like jurisprudence that is even less clear in application than the statutory and prudential standing tests. There are three basic constitutional requirements for standing: the plaintiff must have suffered an injury, the injury must have been caused by the challenged conduct, and the injury must be redressable by a favorable judgment.⁶¹ Although these criteria appear relatively clear, in practice they have been very pliable and have produced divided courts and wildly inconsistent results.

The classic examples of the pliability of the constitutional standing requirements are the roughly contemporaneous decisions in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*⁶² and *Simon v. Eastern Kentucky Welfare Rights Organization (EKWRO)*.⁶³ In each case, an interest group challenged regulation of third parties that allegedly affected members of the group indirectly. In *SCRAP*, a group of law students concerned with the environment challenged the Interstate Commerce Commission's decision to increase freight shipping rates, alleging that the increase would impede recycling by making it more expensive, which in turn would lead to more garbage in parks they used and more pollution generally.⁶⁴ Remarkably, the Supreme Court held that this chain of argument was sufficient to establish standing.⁶⁵ In *EKWRO*, welfare advocates challenged the Internal Revenue Service's interpretation of the requirement that nonprofit hospitals provide free care to patients unable to pay, alleging that lax enforcement made it difficult for members to receive free care.⁶⁶ The Court held that this set of allegations was insufficient to establish standing, largely on the ground that there was no guarantee that even with stricter enforcement the patients would be able to obtain free care.⁶⁷ This may be so, but it is difficult to see how this is more speculative than the argument that lower freight rates would lead to more recycling, less litter and less pollution. Recently appointed Chief Justice Roberts complained that the

61. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

62. 412 U.S. 669 (1973).

63. 426 U.S. 26 (1976).

64. *SCRAP*, 412 U.S. at 678–80.

65. *Id.* at 685–87.

66. *EKWRO*, 426 U.S. at 32–33.

67. *Id.* at 43–44.

Court had returned to the excesses of *SCRAP* by allowing the Commonwealth of Massachusetts standing to challenge the refusal of the Environmental Protection Agency (EPA) to regulate carbon dioxide emissions, based on the possibility that reducing carbon dioxide emissions from cars would reduce global warming and thus reduce erosion of the Massachusetts coastline.⁶⁸

One aspect of *EKWRO* helps explain both the appearance of inconsistency, and the controversial nature of standing cases at the Court. Justice Stewart, concurring in the *EKWRO* decision, commented, “I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else.”⁶⁹ Why not, and why the exception for the First Amendment? Because the injury-causation-redressability requirements for standing are proxies for broader considerations concerning the proper role of the courts in deciding matters of government policy. While normally courts have no role to play when a third party complains about the tax treatment of someone else, the First Amendment’s restrictions on the establishment of religion are important enough to justify an exception. Some decisions of the 1960s stressed that standing is concerned primarily with ensuring the adverseness necessary to make out a constitutional case or controversy.⁷⁰ However, when the Court began to pull back on the most liberal standing doctrines of that period, it explained that standing is also concerned with separation of powers, namely with keeping courts within their proper role in government.⁷¹ It should, therefore, not be surprising that standing decisions can be divisive and inconsistent, given the diversity and strength of views on the basic issue of the proper judicial role. Any attempt to confine the doctrine in a rule-bound fashion will likely fail. What we have seen and are likely to continue to see in standing is a common-law-like elaboration of the standards for injury, causation, and redressability that appears to depend less on the content of the standards than the views of the Justices on the appropriateness of standing in a particular case.

68. See *Massachusetts v. EPA*, 549 U.S. 497, 547–48 (2007) (Roberts, C.J., dissenting).

69. *EKWRO*, 426 U.S. at 46 (Stewart, J., concurring).

70. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 101 (1968) (“[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.”)

71. See, e.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 473–74 (1982) (discussing the relationship between Article III standing and separation of powers).

4. *Timing of Judicial Review*

Case law on the timing of judicial review is a study in contrasts. On the one hand, the Court has created a ripeness doctrine of dubious pedigree and highly uncertain standards while, on the other hand, the Court has taken a statutory approach to the requirement that those seeking judicial review exhaust their administrative remedies before going to court. Let us look first at exhaustion and then at ripeness.

The requirement that parties seeking judicial review of agency action exhaust their administrative remedies before going to court is one of the pillars of the common law of judicial review. The leading case on exhaustion is the pre-APA decision in *Myers v. Bethlehem Shipbuilding Corp.*⁷² In that case, the National Labor Relations Board charged Bethlehem with unfair labor practices. Rather than seek a hearing on the complaint before the Board, Bethlehem went straight to federal court to enjoin further administrative proceedings on the ground that it was not engaged in interstate commerce and thus not within the Board's jurisdiction. The Supreme Court held that Bethlehem should have sought relief first in the agency, based on a well-established common law requirement of exhaustion. In response to Bethlehem's arguments for immediate judicial intervention, the Court stated: "The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."⁷³

Courts continued to apply the common law requirement of exhaustion, with its exceptions, to a wide variety of challenges to administrative action.⁷⁴ In APA cases, however, there was a factor that was lacking in many other contexts: the APA contains a provision that governs the timing of judicial review, establishing that agency action is final when the petitioner has exhausted those administrative remedies expressly provided for by statute or agency rule.⁷⁵ Because the APA provides that aggrieved parties are entitled to review of final agency action, the Supreme Court held that in cases arising under the APA, courts are not free to impose common law exhaustion requirements, but rather must follow the APA when determining whether the time is right for judicial review.⁷⁶ In a sense,

72. 303 U.S. 41 (1938).

73. *Id.* at 50–51.

74. *See, e.g.,* *McCarthy v. Madigan*, 503 U.S. 140 (1992) (reviewing the option of administrative action through the Federal Bureau of Prisons for a case involving a federal prisoner and his right to initiate a suit).

75. 5 U.S.C. § 704 (2006).

76. *Darby v. Cisneros*, 509 U.S. 137, 146 (1993).

the APA's statutory finality provisions have displaced the common law requirement of exhaustion of administrative remedies.

The statutory turn in exhaustion is the jumping-off point for John Duffy's claim that administrative procedure generally is becoming more statutory in focus.⁷⁷ This statute-based exhaustion regime stands in marked contrast to the Court's ripeness jurisprudence. Early on in the life of the APA, the issue arose as to whether a regulated party may seek judicial review immediately upon the issuance of an unfavorable rule, or whether the party must await an enforcement action to challenge the rule. The APA's statutory provisions, in fact the same ones relevant to the exhaustion inquiry, support immediate review—the issuance of a rule is a final agency action, and normally once a rule is issued, no statute or rule requires appeal to a higher agency authority before judicial review may be sought. The issuance of a rule is the end of the administrative line.

Despite the strength of these statutory arguments, the Supreme Court has constructed a common law standard governing whether a regulated party may seek immediate review of a rule or must await enforcement before challenging it. Although the Court acknowledged that the issuance of a rule is final agency action within the meaning of the APA—and thus would be subject to immediate review under the Court's exhaustion case law⁷⁸—the Court stated that a pre-enforcement challenge to a rule is not ripe unless the issues are fit for judicial review and the complainant would suffer serious hardship if review were delayed until after enforcement.⁷⁹ The Court characterized its ripeness doctrine as a matter of judicial discretion, and it has continued to apply the doctrine even after recognizing that exhaustion is governed by statute and rule rather than discretionary legal doctrines.⁸⁰ Thus, in the related areas of ripeness and exhaustion of administrative remedies, we find radically different methods, with one area governed by statute and the other governed by common law standards.

77. See Duffy, *supra* note 5, at 160. Davis cited the law of exhaustion of remedies as an example of administrative common law, but that was before *Darby v. Cisneros* rejected the common law doctrine of exhaustion in cases governed by the APA. See Davis, *supra* note 4, at 8.

78. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967) (“[T]he regulations in issue we find to be ‘final agency action’ within the meaning of § 10 of the Administrative Procedure Act, 5 U.S.C. § 704 . . .”).

79. *Id.* at 148–49.

80. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001) (concluding that a challenge to final rules was ripe because the relevant statute explicitly provided for pre-enforcement judicial review).

II. STANDARDS AND SCOPE OF JUDICIAL REVIEW

The APA contains an apparently comprehensive set of standards of judicial review that apply across the spectrum of administrative action,⁸¹ unless they have been displaced by another statutorily applicable standard. Although these statutory provisions outline the standards that govern the scope of judicial review, the actual meaning of the standards has developed in a common law fashion, sometimes with little attention to the language of the governing statute. In the interest of space, the focus here is on three issues: the standard of review that is applied to agency decisions of statutory interpretation, the meaning of the “arbitrary and capricious” standard, and the circumstances under which de novo review is available.

A. Review of Questions of Agency Statutory Interpretation

Over the past twenty-five years, perhaps the greatest change in U.S. administrative law, at least as a formal matter, has been the creation and development of the “*Chevron* doctrine”⁸² for judicial review of questions of agency statutory interpretation. This doctrine is the quintessential common law creation, created with only a passing nod to the statutory standard that governs the matter and then developed without further reference to the statute.⁸³ The reason for the qualifier, that the change may only be formal rather than substantive, is that it is not clear how much the change in the standard has affected judicial or agency behavior. There is no question that *Chevron* has drastically affected the way cases are argued to the courts, and how the issue is discussed within the scholarly commentary, but what is unclear is whether, especially at the Supreme Court, *Chevron* has actually had much impact on how cases are ultimately decided.⁸⁴

Chevron itself involved the EPA’s interpretation, in a rule issued after notice and comment, of the term “stationary source” in a provision of the Clean Air Act. After the D.C. Circuit rejected the EPA’s interpretation, the Supreme Court heard the case and issued what appeared to be a revolutionary new standard for judicial review of agency statutory

81. 5 U.S.C. § 706.

82. Named for the Court’s decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

83. Justice Scalia, whose behavior indicates that he is not very happy with judicial deference to agency statutory interpretations, has stated that *Chevron* was not “observant of the APA’s text.” See *United States v. Mead Corp.*, 533 U.S. 218, 242 n.2 (2001) (Scalia, J., dissenting).

84. For a general look at *Chevron* and an argument that the doctrine is a failure and should be abandoned, see Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010).

construction. The Court created a two-step standard. The first step is to determine “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.”⁸⁵ If, however, “Congress has not directly addressed the precise question at issue,” the reviewing court enters the second step in which it must defer to an agency’s “permissible construction” of a statute if the statute is either “silent or ambiguous” on the issue before the court.⁸⁶ So far, the statute that governs the scope of judicial review has not made an appearance.

The Court’s opinion elaborates on the second step’s deferential standard by separating congressional silence and ambiguity into two categories: one in which Congress has “explicitly left a gap for the agency to fill” and another in which the gap is implicit.⁸⁷ In the case of explicit gaps, the Court almost mentions the governing statute when it states that regulations filling an explicit gap “are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”⁸⁸ This quoted language is a paraphrase of APA § 706(2)(A)’s “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” standard. Notice that “otherwise not in accordance with law” becomes, in the Court’s words, the much more deferential sounding “manifestly contrary to the statute.”⁸⁹ The Court did not elaborate on what it meant by “manifestly.” Perhaps it meant “facially” or “obviously,” as the term implies. In addition, the Court completely ignored the APA’s admonition that “the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions.”⁹⁰

The development of the *Chevron* standard continues the pre-APA tradition at the Court of creating conflicting common law standards regarding review of agency decisions on questions of law. The Court has long oscillated between the view that statutory interpretation is a judicial function, and highly deferential standards of review like *Chevron*, sometimes stopping temporarily at points in between the two extremes.⁹¹ This has continued even after *Chevron*. Soon after *Chevron* was decided, the Court

85. *Chevron*, 467 U.S. at 842.

86. *Id.* at 843.

87. *Id.* at 843–44.

88. *Id.*

89. *Id.* at 844.

90. 5 U.S.C. § 706 (2006).

91. Compare *United States v. Am. Trucking Ass’n*, 310 U.S. 534, 544 (1940) (stating that statutory interpretation is a judicial function), with *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 130–31 (1944) (noting that statutory interpretation is a judicial function, but that courts should give “appropriate weight” to agency decisions), and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that while agency decisions are not binding on the courts, courts may rely on these decisions for guidance).

explained that in determining whether Congress has directly spoken to the precise question at issue, the Court should employ “traditional tools of statutory construction” such as the canons and other interpretive devices.⁹² The Court no longer required that Congress actually mention the issue in question in the statute or its legislative history to find that Congress had directly spoken to that precise question at issue. This makes it much more likely that the Court will find clear congressional intent, which under *Chevron* “is the end of the matter,”⁹³ and will apply this intent regardless of the agency’s views.⁹⁴

The Court has also constructed an elaborate jurisprudence of when *Chevron* applies and when it does not.⁹⁵ While the Court’s analysis purports to be based on Congress’s intent, the level of deference is influenced by congressional intent much less today than it was in the pre-APA period when a clear convention that Congress could easily follow existed.⁹⁶ Under current law, the Court uses indirect evidence—mainly the level of procedure required by Congress—to determine whether Congress intended for courts to defer to agency statutory interpretations. This construction is based on the supposition that the more procedure Congress required, the more it intended that judicial review of statutory decisions be deferential. Even within this framework, the Court has maintained a great deal of discretion, refusing to set hard and fast standards for when *Chevron* applies and when it does not.⁹⁷

Finally, when the Court decides that *Chevron* does not apply, its analysis reverts to the pre-APA *Skidmore* doctrine, under which the reviewing court decides whether to defer to the agency’s interpretation based on all the factors that might be considered relevant to whether the court ought to defer to the agency’s interpretation.⁹⁸ As Justice Scalia points out, this is no

92. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

93. *Chevron*, 467 U.S. at 842.

94. See *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 550 (1996) and *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 233 (1994), for examples of cases in which the Court has found clear legislative intent despite the fact that Congress did not mention the precise issue in question.

95. See *United States v. Mead Corp.*, 533 U.S. 218, 230 n.12 (2001) (enumerating rulemaking and adjudication cases where *Chevron* deference has been applied).

96. See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 493, 545–46 (2002) (describing the past standard by which Congress would expressly signal when it was granting regulatory authority and how the courts now find regulatory authority in congressional ambiguity).

97. See *Mead*, 533 U.S. at 231 (holding that lack of a certain procedure alone does not determine *Chevron* applicability).

98. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that the level of a

legal test at all, but rather simply tells the courts to decide based on whatever they find relevant.⁹⁹ More to the point for present purposes, the standard has no connection to the APA or any other statute, and there is no reason to believe that a court applying the *Skidmore* standard is likely to defer when and only when Congress wants it to.

B. Review Under the Arbitrary and Capricious Test

The catchall standard that governs judicial review of agency action, which applies to most cases not involving formal agency adjudication, is the arbitrary and capricious test, spelled out in the APA as whether the agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁰⁰ In the Court’s most comprehensive pronouncement on the meaning of this standard, it stated that in addition to making sure that the agency has acted within the scope of its authority, the reviewing court

must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.¹⁰¹

While this standard is based on the statute, the Court did not parse the APA’s language and elaborate on the meaning of “arbitrary,” “capricious,” or “abuse of discretion.” Rather, it used the statute as a jumping-off point for the creation of what appears to be a sensible standard for reviewing the substance of agency decisions.

In subsequent decisions, the Court has elaborated on this standard in a common law fashion, without any claim that the developments result from the language or intent of the APA. For example, in a decision invalidating the rescission of a rule requiring airbags in new automobiles, the Court stated that the arbitrary and capricious standard requires that the agency “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”¹⁰² The “rational connection” language is quoted from a

court’s deference to agencies is determined by a totality of the circumstances test).

99. See *Mead*, 533 U.S. at 241 (Scalia, J., dissenting) (arguing that the “*Mead* Court effectively replaced the *Chevron* doctrine with the *Skidmore* . . .”).

100. 5 U.S.C. § 706(2)(A) (2006).

101. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

102. *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Supreme Court opinion applying the substantial evidence standard of review to a formal agency adjudication,¹⁰³ which is supposed to be a more stringent standard of review than the arbitrary and capricious test. In a more recent decision applying the standard, the Court reversed the EPA's decision not to take action against greenhouse gases on a similar basis—that the agency had not provided a “reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change.”¹⁰⁴ The meaning of the arbitrary and capricious test is thus derived from decisions applying an altogether different standard of review which is supposed to be less deferential to agency decisions. This illustrates how little regard the Court has for the statutory standards it is applying as it develops its common law of judicial review.

C. *De Novo Review*

The APA provision on de novo review is an example of a situation in which the APA has been construed to create a wholly new doctrine, rejecting pre-APA common law standards. The APA states simply that agency action should be set aside when the agency decision is “unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.”¹⁰⁵ The APA says nothing about when this is true—that is, when facts are subject to trial de novo. The Supreme Court, relying on a legislative report from the House of Representatives that cites no case law, has stated that trial de novo is available in two circumstances: first when agency fact-finding procedures are inadequate in an adjudicatory matter, and second when new issues are raised in a proceeding to enforce an order issued as a result of a nonadjudicatory agency proceeding.¹⁰⁶ The Attorney General, in the well-known 1947 *Attorney General's Manual on the Administrative Procedure Act*, vehemently disagreed with the House Report's description of this provision, stating that “the language of [§ 706], ‘to the extent that the facts are subject to trial de novo by the reviewing court,’

103. *Burlington Truck Lines*, 371 U.S. at 168.

104. *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007). This was under the Clean Air Act's own statutory standard of review which contains the exact same language as the APA's arbitrary and capricious standard. See 42 U.S.C. § 7607(d)(9)(A) (2006).

105. 5 U.S.C. § 706(2)(F).

106. *Citizens to Pres. Overton Park*, 401 U.S. at 415 (citing H. R. REP. NO. 79-1980, at 45 (1946)). Interestingly, while the House Report explains what the APA provision means, it cites no authority for its explanation. The *Attorney General's Manual on the Administrative Procedure Act*, however, supports its view with pre-APA case law and a careful reading of the statutory language. See U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 109–10 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL] (citing 5 U.S.C. § 706 (2)(F)).

obviously refers only to those existing situations in which judicial review has consisted of a trial de novo.”¹⁰⁷ According to the Manual, “existing situations” refers to “situations where other statutes or the courts have prescribed such review.”¹⁰⁸ The reference to previous action by courts implicates pre-APA common law. The Manual posits that the House Report is based on an unenacted previous version of the de novo provision.¹⁰⁹

This disagreement between the Executive Branch on one side and Congress and the Supreme Court on the other occurs along two axes. The first is an unsurprising disagreement over the scope of review, with the Executive Branch arguing for narrower review than contended for by Congress and the Court. The second is along a different axis of method. The House Report, as adopted by the Court, explains the language and intent of the APA without drawing any connection to the preexisting common law or any other precedent. The Manual, by contrast, urges a more common law focus, reading the de novo provision as incorporating the pre-APA understandings of when de novo review is available. In this case, the Manual is more faithful to the language of the provision, while the Court pays more attention to the House Report than to the statutory language.

D. *Dynamic Statutory Interpretation and the APA*

Given the concentrated attention in Congress and beyond that led to the enactment of the APA, this discussion should lead to the question of why the courts have strayed so far from the statutory language of the APA. As we have seen, in the early years, at least with regard to some provisions, courts were careful to stick pretty closely to the language of the statute. But as time went on, even with regard to those provisions, the courts applied more of a common law methodology with the statute providing at most a jumping-off point. The role of the statute is merely to authorize the court to rule on the issue under its own principles.

This movement away from strict application of the meaning and history of the APA should not be surprising for several related reasons. As William Eskridge explained in his landmark book *Dynamic Statutory Interpretation*, as statutes age and the political background changes, the meaning of a statute may evolve toward a more contemporary understanding of the language

107. ATTORNEY GENERAL’S MANUAL, *supra* note 106, at 109.

108. *Id.* at 110.

109. *See id.* at 109–10 (discussing how the legislative history repeatedly cites language that was omitted by the Senate Committee).

and values underlying the statute.¹¹⁰ When the enacting coalition is still present, courts are more likely to stick closely to the plain meaning and intent underlying a statute. Reasons for this include the fact that the judges share the views of the political community that enacted the statute, judges may be concerned about criticism or even being overruled by statute if they do not apply a statute as the enactors anticipate, and the fact that when a statute is relatively new, judges may have an easier time discerning the meaning of the statute and how the legislature intended it to apply to the issues that led to the statute's enactment.

As a statute ages, as we have seen with the APA, courts may move away from strict application, again for several reasons. For one, with the passage of time, judges may be less able to discern the intent of the enacting legislature, especially if the language of the statute is not crystal clear. Further, new problems may arise, inviting application of the statute in unanticipated situations. Similarly, problems that were serious or seemed important to the enacting legislature may no longer be or seem important as social conditions and political views change over time. Political views may change so that the enacting legislature's solution to a problem may no longer seem sensible years later, and if the enacting coalition is no longer present, judges may feel free to be creative because they are less likely to be statutorily overruled, or even criticized, for not following the original legislative intent.

More specifically with regard to the APA, the fact that administrative procedure received such concentrated attention in Congress when it enacted the APA in 1946 may not seem so important to the courts more than fifty years later. Courts today may be more sensitive to procedural fairness considerations in administrative law, especially as the administrative state continues to grow and touch more and more aspects of society. Further, the increased complexity and importance of administrative action may convince some judges and observers that more attention to process, and more stringent judicial review, is necessary. While judicial activism in administrative law has been criticized on several fronts, most notably for contributing to the "ossification" of rulemaking,¹¹¹ there is not really a threat of a serious backlash due to the passage of time since the APA was enacted. In sum, the federal courts are relatively free to impose their own policy views in the area of administrative law and procedure.

110. See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 13–80 (1994) (discussing the movement away from originalism and toward a more fluid concept of statutory interpretation).

111. See generally Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

Administrative law is unlikely to return to a strict statutory focus.

CONCLUSION

In 1980, Kenneth Culp Davis mustered eight separate reasons for his prediction that the *Vermont Yankee* decision requiring a statutory focus in judicial review of administrative procedure would ultimately be rejected in favor of a common law orientation. Two of them merit attention here. The first, his fifth, is that “[a]ny effort to stifle judicial creativity is profoundly incompatible with the nature of the judicial process.”¹¹² The second, his last, is that ingrained pre-APA common law and the APA itself allow courts to set aside agency action that is either procedurally or substantively arbitrary and capricious, and *Vermont Yankee* goes against the grain by cutting off review of procedural decisions except when the allegation is that the agency did not follow applicable statutes and rules.¹¹³

Davis was both right and wrong at the same time. He was wrong in the sense that the law has not explicitly rejected *Vermont Yankee* and has in fact reaffirmed it every time the issue has arisen. He was correct, however, in his identification of the predominance of common law in administrative law despite the existence of the APA (and the occasional appearance that the federal courts were enforcing it) rather than applying a common law of judicial review. Davis’s accurate characterization of the inherently creative nature of the judicial process probably explains why in the more than thirty years since the *Vermont Yankee* decision, the doctrine has been confined to a relatively narrow space within administrative procedure, with only the smallest of steps toward a more comprehensive statutory focus.

The more recent views of John Duffy on the role of common law in judicial review are similarly partially correct and partially incorrect. Duffy rightly points out that the turn toward a statutory focus concerning exhaustion of administrative remedies before judicial review throws the ripeness doctrine exemplified in *Abbott Laboratories v. Gardner* into question. If the APA’s finality requirements displace the common law of exhaustion, they ought also to displace nonstatutory ripeness doctrines. However, Duffy is incorrect insofar as he predicts that statutory law—or as he phrases it, the “supremacy of legislation”—is ascendant in administrative law.¹¹⁴ In particular, the nonstatutory fitness and hardship test from *Abbott Laboratories* continues to be applied to determine whether final agency action is ripe for review;¹¹⁵ equally, the notice cases in the courts of appeals apply standards

112. Davis, *supra* note 4, at 14.

113. *Id.* at 15.

114. Duffy, *supra* note 5, at 161.

115. See, e.g., *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 479 (2001) (concluding

that are far removed from the statutory language. More generally, *Darby v. Cisneros* did not set off a movement toward statutory administrative law any more than *Vermont Yankee* did. Rather, as before, pockets of administrative law are statutory and other pockets are common law, and courts apparently do not feel the need to justify or even acknowledge the apparent methodological contradictions.

We are left with the question this Article started with: Is the methodological dichotomy upon which my analysis is built real, or simply a reflection of different, but acceptable, traditions in judicial method?

It is plausible to argue that there is no great dichotomy, but rather disparate approaches that occur frequently in our legal system, in which judicial opinions are often more important than the text of any particular statutory or constitutional provision. In the area of rulemaking procedure, for example, while the unmoored methodology employed by the pre-*Vermont Yankee* courts may have involved too much judicial creativity, the decisions regarding the adequacy of the notice of proposed rulemaking simply construe the language of the APA in light of the statute's purposes, hardly a radical move away from fidelity to the proper judicial role. One could see the rules regarding ex parte contacts in rulemaking not as judicial usurpation but rather as an attempt to ensure that rulemaking remains a fair and open procedure as intended by the authors of the APA. Without explicit statutory approval of ex parte contacts in rulemaking, the courts are on solid ground in regulating them in light of the policies and principles underlying the APA. Similarly, with regard to the ripeness and availability of judicial review, the statutes are arguably vague and incomplete, and thus it is well within the traditions of the Anglo-American legal system for courts to construe such statutes and fill gaps as they become apparent.¹¹⁶ The same could be said for scope of review—the courts are merely construing statutes that do not have self-evident meanings, and doing so in the traditional way: with attention to the statutory language, the legislative intent, and the statute's underlying principles.

While these examples and arguments cannot be dismissed out of hand, they do not rebut the primary contentions here: that the common law versus statute law dichotomy is a useful lens for examining many areas of administrative law, that the courts in many areas apply a common law methodology while in others they apply a highly statutory focus, and that the courts have not provided guidance on when each methodology is more

that the challenge to the final rules was ripe).

116. On traditional views of statutory construction in the United States which allow for judicial creativity in filling gaps and construing vague terms, see BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 127–30 (1921).

appropriate.

In conclusion, if the past is prologue—which it usually is—administrative law scholars and practitioners are likely to need to continue to feel comfortable working from both a statutory and a common law orientation.

SUBSTANCE, PROCEDURE, AND THE DIVIDED PATENT POWER

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* Professor, Lewis & Clark Law School. Participants at the George Washington University Law School's Fall 2009 IP Workshop Series offered insightful, challenging comments that helped me improve the piece. Lydia Loren and Jan Neuman highlighted weak spots in an early version that helped me focus my efforts. Bill Funk, Tom Merrill, and Jim Speta helped with administrative law, and Ed Brunet and Juliet Stumpf helped with civil procedure. Connie Trela gave a welcome critical read.

The answer to the question, “What is procedure?” depends upon the answer to another question, “Why do you want to know?”¹

The line between “substance” and “procedure” shifts as the legal context changes.²

INTRODUCTION

In 1790, Congress split its patent power.³ Rather than grant patents itself by private bill, Congress enacted a general patent law,⁴ creating a patent board in the Executive Branch with the delegated power to grant patents according to statutorily prescribed standards.⁵ The Patent Office (the Office) we know today, created in the 1836 Patent Act,⁶ received its broadest grant of regulatory power from Congress in 1870.⁷ The terms of the grant remain the same today: “The Office . . . may establish regulations, not inconsistent with law, which . . . shall govern the conduct of proceedings in the Office . . .”⁸ Just how broad is this grant?

It is settled that Congress has given the Patent Office the power to issue procedural rules for patent examination at the Office, *not* substantive

1. Thomas Fitzgerald Green, Jr., *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A. J. 482, 483 (1940).

2. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (differentiating the substance–procedure distinction used in applying the *Erie* doctrine from the substance–procedure distinction used to test the validity of a Federal Rule of Civil Procedure under the Rules Enabling Act).

3. U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

4. Act of Apr. 10, 1790, ch. 7, 1 Stat. 109.

5. See generally P.J. Federico, *Operation of the Patent Act of 1790*, 18 J. PAT. OFF. SOC’Y 237 (1936).

6. Act of July 4, 1836, ch. 357, 5 Stat. 117; see also EDWARD C. WALTERSCHEID, *TO PROMOTE THE PROGRESS OF USEFUL ARTS: AMERICAN PATENT LAW AND ADMINISTRATION, 1798–1836*, at 1 (1998).

7. Act of July 8, 1870, ch. 230, § 19, 16 Stat. 198, 200 (“*And be it further enacted*, That the commissioner, subject to the approval of the Secretary of the Interior, may from time to time establish rules and regulations, not inconsistent with law, for the conduct of proceedings in the patent office.”).

8. 35 U.S.C. § 2(b)(2)(A) (2006). Before 1999, the provision was found at 35 U.S.C. § 6(a) (1994). The scope of the grant on the Patent and Trademark Office’s (the Office’s) trademark side is the same. See 15 U.S.C. § 1123 (2006) (“The Director shall make rules and regulations, not inconsistent with law, for the conduct of proceedings in the Patent and Trademark Office under this chapter.”). The language dates from the 1905 federal trademark registration act, Act of Feb. 20, 1905, ch. 592, § 26, 33 Stat. 724, 730, and was preserved in the Lanham Act of 1946, ch. 540, § 41, 60 Stat. 427, 440 (codified as amended in scattered sections of 15 U.S.C. (2006)).

rulemaking power of the sort federal agencies typically possess.⁹ But people differ sharply over how—or where—to draw the line the Patent Act demands between proper procedural rules and improper substantive rules. When the Office asserts that a given rule is procedural and an applicant blocked from patent rights by the rule contends that it is substantive, the need for a means to distinguish procedural from substantive rules is plain.

The scope of the Patent Office's procedural power is a pressing question, as recent events illustrate. The Office groans beneath the weight of a substantial backlog of applications, built up as the utility patent¹⁰ application filing rate doubled between 1998 and 2008.¹¹ Simply

9. *Merck & Co. v. Kessler*, 80 F.3d 1543, 1549–50 (Fed. Cir. 1996) (denying *Chevron* deference to a Patent Office construction of a patent term extension statute on the ground that “Congress has not vested the Commissioner with any general substantive rulemaking power”); *Animal Legal Def. Fund v. Quigg*, 932 F.2d 920, 930 (Fed. Cir. 1991) (“[T]he authority granted in section 6 [now § 2] is directed to the ‘conduct of proceedings’ before the Office. A substantive declaration with regard to the Commissioner’s interpretation of the patent statutes, whether it be section 101, 102, 103, 112 or other section, does not fall within the usual interpretation of such statutory language.”). One may well question whether, as an original matter, *Merck* and *Quigg* provide the sounder construction of § 2(b)(2)(A). Patent Office “proceedings” are, chiefly, examinations for patentability under the Patent Act’s substantive standards. See 35 U.S.C. § 131. The “conduct of [these] proceedings” could fairly be thought—at least as a textual matter—to entail Patent Office resolution of any ambiguities in the Patent Act’s substantive patentability standards. Congress, however, reenacted this grant of regulatory power in 1999, post-*Merck*, both moving the provision to a different part of the Patent Act and modifying some of its terms. See Patent and Trademark Office Efficiency Act, Pub. L. No. 106-113, 113 Stat. 1501A-572, 1501A-572 to 1501A-573 (1999) (Title IV, Subtitle G, § 4712 of the Intellectual Property and Communications Omnibus Reform Act of 1999, included as Appendix I to an appropriations bill). According to the Supreme Court’s statutory construction jurisprudence, Congress has thereby ratified *Merck*’s “procedure, not substance” construction of § 2(b)(2)(A). See *Barnhart v. Walton*, 535 U.S. 212, 220 (2002); *Cottage Sav. Ass’n v. Comm’r*, 499 U.S. 554, 561 (1991) (quoting *Helvering v. Winmill*, 305 U.S. 79, 83 (1938)); *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)).

10. U.S. law provides for three types of patents: utility patents, design patents, and plant patents. Utility patents cover useful, new, and nonobvious products and processes. 35 U.S.C. §§ 101–103. This is the sort of patent most people think of as, simply, a patent. Design patents cover new, original, and ornamental designs for “article[s] of manufacture.” 35 U.S.C. §§ 171–173. Plant patents cover distinct and new varieties of asexually reproduced plants. 35 U.S.C. §§ 161–164. The Patent Office grants many more utility patents than design or plant patents. For example, during the ten years from 1999 to 2008 inclusive, the Patent Office granted 1,610,289 utility patents (or about 161,000 per year); 180,279 design patents (or about 18,000 per year); and 8,847 plant patents (or about 885 per year). See U.S. PATENT & TRADEMARK OFFICE, U.S. PATENT STATISTICS, CALENDAR YEARS 1963–2009 (Apr. 2010), http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.pdf (reporting annual application and grant totals).

11. Arti K. Rai, *Growing Pains in the Administrative State: The Patent Office’s Troubled Quest for Managerial Control*, 157 U. PA. L. REV. 2051, 2057–60 (2008) (discussing the Patent Office’s

continuing to work as it has in the past is surely not a sustainable strategy. A package of purportedly ameliorative rules that the Office first announced in January 2006, and finalized in August 2007,¹² never went into effect. The rules, which struck many patent applicants as too harshly constricting,¹³ stalled in litigation over whether they were substantive and thus invalid. The trial court, in what is known as the *Tafas I* case, concluded that all these new rules were substantive and thus enjoined them.¹⁴ The Federal Circuit, in the Office's appeal in *Tafas II*, concluded that the rules were procedural in a split panel opinion in March 2009.¹⁵ In July 2009, the full Federal Circuit granted en banc review in *Tafas III* of the question and vacated the panel opinion.¹⁶ In October 2009, the Office announced that it was rescinding the proposed rules¹⁷ and settling the litigation.¹⁸ The fitting scope of the Office's regulatory authority—the issue at the heart of the *Tafas* cases—thus remains in doubt. The agency problems that inspired the rules continue. New rules, likely to trigger strong objections from at least some of the patent system's repeat players,

“Increased Workload and Backlog”).

12. Changes to Practice for Continue Examination Filings, Patent Applications Containing Patentably Indistinct Claims, and Examination of Claims in Patent Applications, 72 Fed. Reg. 46,716 (Aug. 21, 2007).

13. See *id.* at 46,716–17 (reporting objections received during the public comment period on the draft regulations). The rules purportedly sought to streamline the process whereby applicants press their claims to utility patent protection over time. Specifically, the rules, if implemented, would have limited the availability of continuation applications and requests for continued examination (Final Rules 78 and 114), and—for applications containing either more than five independent claims or more than twenty-five total claims—would have required an applicant to submit a new “examination support document,” or ESD, explaining the prior art information presented to the Office (Final Rules 75 and 265). *Id.* The reader interested in more detailed discussion of the rules, which is beyond the scope of this article, should consult Kali Murray, *First Things, First: A Principled Approach to Patent Administrative Law*, 42 J. MARSHALL L. REV. 29, 30–32 (2008).

14. *Tafas v. Dudas (Tafas I)*, 541 F. Supp. 2d 805 (E.D. Va. 2008), *aff'd sub nom. Tafas v. Doll (Tafas II)*, 559 F.3d 1345 (Fed. Cir. 2009), *vacated en banc*, *Tafas v. Doll (Tafas III)* 328 Fed. App'x 658 (Fed. Cir. 2009) (appeal reinstated). Although the plaintiffs in the case—Mr. Tafas and Smithkline Beecham Corp.—raised several attacks on the rules, the district court adjudicated only one: “[T]he Court finds that the Final Rules are substantive in nature and exceed the scope of the USPTO's rulemaking authority under 35 U.S.C. § 2(b)(2).” *Id.* at 811.

15. *Tafas II*, 559 F.3d 1345.

16. *Tafas III*, 328 Fed. App'x 658.

17. Changes to Practice for Continued Examination Filings, Patent Applications Containing Patentably Indistinct Claims, and Examination of Claims in Patent Applications, 74 Fed. Reg. 52,686 (Oct. 14, 2009).

18. Press Release, U.S. Patent & Trademark Office, USPTO Rescinds Controversial Patent Regulations Package Proposed by Previous Administration (Oct. 8, 2009), *available at* http://www.uspto.gov/news/09_21.jsp.

seem inevitable.¹⁹

Thus far, the courts have failed to provide a robust standard for sorting proposed Patent Office rules into *procedure* and *substance* boxes, parsing the valid from the invalid. Perhaps this should be expected. *Procedure* and *substance* are protean concepts; they “carry no monolithic meaning at once appropriate to all the contexts in which courts have seen fit to employ them.”²⁰ Indeed, courts sort the two from one another with different standards, depending on the reason for sorting them in a given case. Although it is tough to frame a stable sorting standard for the Patent Office context, it can and should be done.²¹ The alternative—fitful ad hocery—frustrates planning and wastes resources. Thus, the Federal Circuit should put the scope of the Patent Office’s procedural power on firm ground, for the sake of the Office and patent applicants alike.

The courts have flirted with a range of power-defining options for the patent law context, most notably the substance–procedure distinction in notice-and-comment rulemaking conducted under § 553 of the Administrative Procedure Act (APA).²² This APA framework, however, is actually quite ill-suited for the Patent Office. This framework is designed to protect public participation in rulemaking proceedings conducted by agencies that—unlike the Patent Office—*have* the power to make substantive rules with the force of law (*if* they use notice-and-comment) but can dispense with notice-and-comment for “rules of agency organization, procedure, or practice.”²³ Such agencies may be tempted to save time and

19. The press release about the *Tafas* case settlement speaks in these terms. According to Director Kappos, “[t]his course of action represents *the most efficient way to* formally and permanently move on from these regulations and *work with the IP community on new ways to take on the challenges these regulations were originally designed to address.*” *Id.* (emphases added).

20. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724 (1974).

21. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1105 n.413 (1982) (“But the logical and practical difficulties of classifying a matter as procedure or substance are not sufficient reason to abandon the enterprise, at least when it is required by statute.”).

22. 5 U.S.C. § 553(b) (2006). In the *Tafas* litigation, both the district court and the Federal Circuit discussed the Administrative Procedure Act’s (APA’s) substance–procedure distinction. The Federal Circuit, however, was careful to state that it “d[id] not purport to set forth a definitive rule for distinguishing between substance and procedure in” that, or any, case. *Tafas II*, 559 F.3d 1345, 1356 (Fed. Cir. 2009), *vacated en banc*, *Tafas III*, 328 Fed. App’x 658 (Fed. Cir. 2009) (appeal reinstated).

23. 5 U.S.C. § 553(b), ¶ 2(A). See U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 26 (1947) (“In general, the purpose of section 4 [now codified at 5 U.S.C. § 553] is to guarantee to the public an opportunity to participate in the rule making process. With stated exceptions, each agency will be required under this section to give public notice of substantive rules which it proposes to adopt, and to grant interested persons an opportunity to present their views to it.”); see also *id.* at 9 (listing,

expense by miscategorizing a substantive rule as procedural.²⁴ When a court later analyzes whether a challenged rule from such an agency is substantive or procedural, what is really at stake is *how*—not *whether*—the agency can establish the substantive rule it wants. By contrast, the Patent Office question of interest here is precisely *whether* the Office can issue a rule *because* it is procedural.

This Article identifies a stable standard for sorting procedural from substantive rules that better fits the way Congress has split responsibility for granting patents between itself and the Patent Office. The allocation is straightforward: Under the general-purpose patent regime it established in 1836, and that continues today, Congress sets detailed substantive policy in the Patent Act to govern the patentability of all patent applications, and the Patent Office examines individual applications for Patent Act compliance in proceedings for which it has established procedures by rule.²⁵ What sorting standard fits this allocation of responsibility? The key is to recognize that the way that Congress has split its patent power echoes strongly in the

among the APA's "four basic purposes," the purpose "[t]o provide for public participation in the rule making process"). "The *Attorney General's Manual* . . . remains the principal guide to the structure and intent of the APA." ABA SECTION OF ADMIN. LAW & REGULATORY PRACTICE, AM. BAR ASS'N, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 2 (William F. Funk, Jeffrey S. Lubbers & Charles Pou, Jr. eds., 4th ed. 2008).

24. If an agency wants to defend its abbreviated process for generating a challenged rule on the ground that the rule is merely procedural, the reviewing court's task is—understandably—to beware an agency attempt to cut this rulemaking corner and thereby cut the public out of its commenting role. As the D.C. Circuit has put it, "[t]he issue . . . 'is one of degree,' and our task is to identify which substantive effects are 'sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA.'" *JEM Broad. Co. v. FCC (JEM)*, 22 F.3d 320, 327 (D.C. Cir. 1994) (quoting *Lamoille Valley R.R. v. Interstate Commerce Commission*, 711 F.2d 295, 328 (D.C. Cir. 1983)). On protecting public participation, see 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.5, at 351 (4th ed. 2002); on agency temptation to cut corners by misdesignating a substantive rule as "procedural," see WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW: EXAMPLES AND EXPLANATIONS 157 (3d ed. 2009).

25. Professor Kerr has described the Patent Office as Congress's contracting agent, urging that "[t]he patent system operates not through regulation, but rather through the private law mechanisms of contract, property, and tort." Orin S. Kerr, *Rethinking Patent Law in the Administrative State*, 42 WM. & MARY L. REV. 127, 129 (2000). According to Kerr,

[a]lthough Congress generates the offer that the patent laws represent, it cannot itself review the hundreds of thousands of applications filed every year in response to the offer. Instead, Congress created the PTO to serve as its agent. The PTO analyzes the submitted claims on Congress's behalf and determines which applicants have accepted Congress's offer.

Id. at 138 (footnote omitted); see also *id.* at 140 ("As an agent hired by Congress, the PTO acts as an offeror who must determine whether an offeree has triggered a legal obligation by accepting his offer."). Kerr's contract analogy captures the Office's role.

pattern Congress later set for federal law generally in 1934, in the Rules Enabling Act.²⁶ Under the Rules Enabling Act framework, Congress sets detailed substantive policy governing national law in the United States Code, and the federal judiciary adjudicates disputes under law in proceedings for which it has established procedures by rule (such as those embodied in the Federal Rules of Civil Procedure and related rules).²⁷ Following this echo back to its source, the courts should, *mutatis mutandis*, hold the Patent Office to the same procedural domain under the Patent Act to which they hold themselves under the Rules Enabling Act. Specifically, a Patent Office rule that incidentally affects applicants' substantive rights does not violate § 2(b)(2)(A) of the Patent Act if the rule is reasonably necessary to establish or preserve the fair and effective patent examination process that the Office's rules must organize.²⁸

This Article proceeds in three parts. Part I takes up two preliminary matters. First, Congress has created the necessity for Patent Office procedural rules by splitting the patent power's substantive and procedural parts between the Legislative and Executive Branches. Had Congress exercised the patent power entirely by itself, in the unified form in which the Constitution confers it, matters of patent-petition procedure might have

26. Act of June 19, 1934, ch. 651, 48 Stat. 1064. The Rules Enabling Act is now codified, in relevant part, at 28 U.S.C. § 2072(a)–(b) (2006):

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

27. The Judicial Conference's Committee on Rules of Practice and Procedure coordinates the judiciary's rulemaking process. 28 U.S.C. § 2073 (2006). The Administrative Office of the U.S. Courts maintains a helpful set of informal resources on the rulemaking process at <http://www.uscourts.gov/RulesAndPolicies.aspx>. For a formal description, with citations, see Daniel R. Coquillette, *Scope and Purpose*, in 1 MOORE'S FEDERAL PRACTICE § 1.04[3][b], at 1-19 to 1-20 (3d ed. 2009).

Professor Kerr has, in a similar vein, compared the Office's regulatory grant to a trial court's inherent power to manage its cases. See Kerr, *supra* note 25, at 166–67 (“Congress delegated to the PTO a narrowly circumscribed regulatory authority to manage PTO proceedings, roughly analogous to the power that a federal district court may exercise over the management of its own cases. Pursuant to this explicit grant of regulatory power, the PTO Commissioner has promulgated over 300 pages of regulations. . . . The Federal Circuit has properly applied deferential standards of review (including *Chevron*) to such rules, much like appellate courts afford deferential standards of review to district court trial-management decisions.” (footnotes omitted)).

28. Cf. *Burlington N. R.R. v. Woods*, 480 U.S. 1, 5 (1987) (“Rules which incidentally affect litigants’ substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules.”).

remained less differentiated from matters of patent-policy substance than they are today. However, having delegated patent application review to the Office, under a Patent Act text that is much longer on patentability substance than it is on examination procedure, Congress made Office-promulgated procedural rules inevitable. Second, it is a truism that procedural choices affect substantive results. As a consequence, courts cannot test the validity of Patent Office rules simply according to whether they affect substantive results. To do so would collapse the very separation of procedure from substance that Congress established in the Patent Act. Thus, “affects substance” is the one sorting standard that we know *to a certainty* is incorrect.

Part II explores the Rules Enabling Act model. This model yields a solid standard for sorting the Patent Office’s procedural sheep from substantive goats. This Part also draws on court oversight of Equal Employment Opportunity Commission (EEOC) administration of Title VII of the Civil Rights Act of 1964,²⁹ administration that—like Patent Office administration—is limited to the promulgation of procedural rules.³⁰ Part III shows the unsuitability of two other approaches for distinguishing procedure from substance—one from the APA context (where ensuring public participation dominates), and the other from the Rules of Decision Act³¹ context (where preventing forum shopping dominates).

29. 42 U.S.C. §§ 2000e-1 to 2000e-17 (2006).

30. See 42 U.S.C. § 2000e-12(a) (“The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter.”); Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency’s Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 56 (observing that “Title VII . . . expressly delegated to the agency only the power to issue *procedural* rules” and that the Supreme Court “has interpreted Title VII as denying the EEOC the power to engage in *substantive* legislative rulemaking”).

31. 28 U.S.C. § 1652 (2006) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”).

I. SPLITTING THE PATENT POWER

The Progress Clause³² empowers Congress to grant patents to inventors either directly by private bills, or indirectly by establishing an administrative system; both approaches “secur[e]” to inventors their exclusive rights. Inventors immediately began to petition the first Congress for private patent bills,³³ consistent with the historical practice whereby state—and, earlier, colonial—legislatures had granted utility patents by private bills.³⁴ “As far as the petitioners were concerned, the only effect of the constitutional clause was to transfer the familiar grant practice to the federal level.”³⁵

These petitions forced Congress to confront a basic question of patent system design: “Would it seek to enact individual private laws granting exclusive patent rights as the states had done, or would it instead enact a generic law under the authority of the [Progress Clause]?”³⁶ As Congress began to work out an answer, it referred the first utility patent petition,

32. U.S. CONST. art. I, § 8, cl. 8 (empowering Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”). Naming this clause presents a value choice. Some call it the Copyright and Patent Clause, though neither of those terms appears in it. Others call it the Intellectual Property Clause, though, again, the phrase is absent, and the word “property,” which *is* used in the Constitution (but *not* here), abounds with connotation. Still others call it the Exclusive Rights Clause, which at least has the virtue of a textual ground; but that name highlights the legal tool it gives Congress to use, rather than the social goal it empowers Congress to pursue. I call it the Progress Clause.

33. “The First Congress, having opened on March 4, 1789, was only a little more than a month old when it first received two petitions relating to intellectual property.” BRUCE W. BUGBEE, *GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* 131 (1967). Petitioner John Churchman “claimed that he had invented certain methods of navigation by means of magnetic variation,” and “[h]e asked for the passage of a law vesting in him the exclusive right to sell in the United States all globes, maps, and tables constructed according to the principles which he had devised.” *Id.* at 132. Several more petitions for private patent bills followed. *Id.* at 133–36; *see also* WALTERSCHEID, *supra* note 6, at 81–87 (discussing congressional receipt and consideration of these early petitions).

34. *See generally* P.J. Federico, *Colonial Monopolies and Patents*, 11 J. PAT. OFF. SOC’Y 358 (1929); P.J. Federico, *State Patents*, 13 J. PAT. OFF. SOC’Y 166 (1931). Bugbee also discusses colonial and state patents at length. *See* BUGBEE, *supra* note 33, at 57–68 (discussing colonial patents), 84–103 (discussing state patents).

35. Oren Bracha, *The Commodification of Patents 1600–1836: How Patents Became Rights and Why We Should Care*, 38 LOY. L.A. L. REV. 177, 217 (2004); *see also* Frank D. Prager, *Historic Background and Foundation of American Patent Law*, 5 AM. J. LEGAL HIST. 309, 320 (1961) (“A number of inventors expected that the new Congress would secure their rights by passing private laws, one for each of their respective inventions. The states had issued patents in such form.”).

36. WALTERSCHEID, *supra* note 6, at 82–83.

lodged by John Churchman, to an ad hoc committee of House members.³⁷ The committee interviewed Churchman and, reporting that “his ideas on the subject [of his invention] appear to be ingenious,” the committee recommended that “a law should pass to secure to Mr. Churchman, for a term of years, the exclusive pecuniary emolument to be derived from the publication of [his] several inventions.”³⁸ The vital thing to note here is that the House, in exercising the patent power directly, answered implicit questions of procedure (e.g., what papers to consider; whether, and how, to interview the inventor; whether to use one patent to protect multiple inventions) as well as questions of substance (e.g., what threshold level of utility, and of ingeniousness, to require). As more petitions arrived in the House, committee work continued.³⁹ Only by enacting a general law in 1790, which directed applicants to a patent board in the Executive Branch, did Congress spare itself the need to establish regular procedures for handling what would doubtless have been a rising tide of inventor petitions seeking utility patents by private bill.

Even after it enacted the first general patent law, Congress continued to exercise the patent power in an individualized way—specifically, to grant patent term *extensions* by private bill for specific patents. “Between 1808 and 1836, eleven private laws were passed granting term extensions for individual patents.”⁴⁰ This practice, too, embraced both procedural and substantive dimensions. Indeed, “[i]n response to numerous petitions for extension or renewal, Congress in 1832 finally statutorily established the conditions under which it would consider such petitions.”⁴¹ Section 2 of the statute set down requirements about timing, public notice, and the supporting disclosures:

[A]pplication to Congress to prolong or renew the term of a patent, shall be made before its expiration, and shall be notified at least once a month, for three months before its presentation, in two newspapers printing in the city of Washington The petition shall set forth particularly the grounds of the application. It shall be verified by oath; the evidence in its support may be taken before any judge or justice of the peace; it shall be accompanied by a statement of the ascertained value of the discovery, invention, or improvement, and of the receipts and expenditures of the patentee, so as to

37. *Id.*

38. 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 28–29 (Linda Grant DePauw et al. eds., 1977).

39. See WALTERSCHEID, *supra* note 6, at 84–87.

40. Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC'Y U.S.A. 19, 52 (2001).

41. WALTERSCHEID, *supra* note 6, at 313.

exhibit the profit or loss arising therefrom.⁴²

This procedural statute, which shaped the inputs that Congress would assess, demonstrates the inevitability of procedural requirements within a general patent regime for an innovation-hungry, market-driven republic like our own. And, although this particular statute was long ago repealed,⁴³ Congress continues to extend the terms of individual patents legislatively, using whatever procedural and substantive standards it deems best in the circumstances.⁴⁴

The patent power's procedural component did not, of course, disappear when Congress delegated the review of patent applications to the Executive. Procedural power flowed, inexorably, to the Executive. For example, under the 1790 Patent Act, the patent board "gradually developed a few rules and regulations, as to matters of form as well as to matters of substance."⁴⁵ At its second meeting, the board "instructed several inventors who were present to provide models of their inventions," and it requested more information, in varied forms, from the inventors with whom it met in the succeeding weeks.⁴⁶ Such practices (applicant interviews, disclosure requests) ripened into regular procedure. Under the 1793 Act, which changed the Executive's role from one of examining compliance with substantive requirements to one of managing a registration system (with court review of substantive validity in any later infringement case),⁴⁷ Secretary of State Thomas Jefferson established a standard form for the patent document (to which an applicant-drafted

42. Act of July 3, 1832, ch. 162, § 2, 4 Stat. 559, 559.

43. Act of July 4, 1836, ch. 357, § 21, 5 Stat. 117, 125 (providing "that all acts and parts of acts heretofore passed on this subject, be, and the same are hereby repealed").

44. See Ochoa, *supra* note 40, at 76–86 (detailing recent private bills and other extension mechanisms).

45. Federico, *supra* note 5, at 242.

46. WALTERSCHEID, *supra* note 6, at 179. Walterscheid concludes, from his review of the extant materials, that "the board seems to have spent a considerable amount of time and effort trying to get more information from inventors." *Id.* at 181.

47. Act of Feb. 21, 1793, ch. 11, 1 Stat. 318. "Gone was the patent board and consideration of patent petitions by top-rank cabinet members. Under the 1793 regime, patents were handled by clerks of the State Department, and by the Patent Office, established by Madison as a subdivision . . . in 1802." Bracha, *supra* note 35, at 227.

By 1802 it was obvious that patent matters could no longer be handled routinely and that an administrator of unique ability was needed to oversee their issuance. To this post Secretary of State James Madison appointed William Thornton . . . [who] had both the intellect and the administrative ability needed to guide the fledgling bureau through its early years. He served until his death in 1828.

Daniel Preston, *The Administration and Reform of the U.S. Patent Office, 1790–1836*, 5 J. EARLY REPUBLIC 331, 334 (1985).

“schedule” describing the invention would be attached).⁴⁸ A Patent Office pamphlet published in 1811 directed the use of a similar basic form.⁴⁹ Under the 1836 Act, which reinstated a full examination system, Commissioner Henry Ellsworth quickly published a procedures pamphlet entitled *Information to Persons Having Business to Transact at the Patent Office*.⁵⁰ Ellsworth not only provided information about the new Patent Act, he also set out rules for applicants—stating, for example, that “[w]hen the specifications refer to the drawings, duplicates of them are required, as one must accompany the patent when issued, as explanatory of it, and one must be kept on file in the office.”⁵¹

Admittedly, none of these rules packages approaches the complexity and detail of Title 37 of the *Code of Federal Regulations*, under which patent applicants now operate. All, however, show that, from the beginning, the executive officials empowered to grant applications under our Patent Acts have established procedural rules for handling those applications fairly and efficiently.

The Office acted out of necessity in promulgating procedural rules, for the Patent Acts themselves focused on substantive patentability standards and top-level features of the patent system, rather than the fine details of examination procedure. Consider, again, the 1836 Patent Act.⁵² Its twenty-one sections occupy approximately eight pages in the *Statutes at Large*. In §§ 1 to 4, it creates both the Office and the Commissioner and clerk positions, and addresses formal matters such as employee oaths and bonds, the Office seal, and the charge for certified copies of official documents. Section 5 prescribes the form of the issued patent document. Section 9 sets application fees, § 10 makes a pending application inheritable, and § 11 makes a patent assignable by a writing. Sections 14 to 17 address court jurisdiction over infringement suits, as well as the cognizable defenses and allowable remedies in such cases. Section 19

48. Karl B. Lutz, *Evolution of U.S. Patent Documents*, 19 J. PAT. OFF. SOC’Y 390, 396–97 (1937) (describing the form); see *id.* at 408–09 (reproducing the standard form, with an explanatory memorandum from Secretary Jefferson to Attorney General Edmund Randolph).

49. WILLIAM THORNTON, PATENTS (1811), reprinted in 6 J. PAT. OFF. SOC’Y 98, 101 (1923).

50. The pamphlet was reprinted, for example, in the August 1836 issue of the *Journal of the American Institute*. HENRY L. ELLSWORTH, INFORMATION TO PERSONS HAVING BUSINESS TO TRANSACT AT THE PATENT OFFICE (1836), reprinted in 1 J. AM. INST. 586 (1836), available at <http://books.google.com/books?id=FA1AAAAAYAAJ&dq=%22Information%20to%20Persons%20Having%20Business%20to%20Transact%20at%20the%20Patent%20Office%22&pg=PA586#v=onepage&q&f=false>.

51. *Id.* at 588.

52. Act of July 4, 1836, ch. 357, 5 Stat. 117.

establishes a library for the Office, § 20 obliges the Commissioner to display the models of inventions the Office receives, and § 21 repeals prior patent statutes and provides transition rules for pending patent applications and court actions. In short, the bulk of the Act focuses on matters *other than* the details of how the Office is to carry out its primary job, the detailed examination of patent applications to determine whether they meet substantive patentability standards.

The core of the 1836 Act—§§ 6 through 8—establishes the substantive standards for patentability⁵³ and the basic framework for Office examination of an applicant's eligibility for patent protection.⁵⁴ Section 6 does require the application to be in writing, but says nothing about the form of that writing. Indeed, it does not even specify the particular language in which the application should be provided. Section 6 also requires an applicant to submit drawings “where the nature of the case admits of drawings” without stating who makes that determination or how to do so; similarly, it requires an applicant to “furnish a model . . . in all cases which admit of a representation by a model,” without providing who determines the propriety of a model or how to do so.⁵⁵ Perhaps most striking, § 7 sets a basic framework for the Office to examine an application for patentability, including an applicant's right to respond to an initial rejection and right to appeal to a board of examiners, but does not state a single time period, timeline, or deadline for doing so. Section 8 requires the Office to decide who among interfering applicants to the same subject matter has priority as the true first inventor, but says nothing about how to make such a determination. Such bare bones demand more detailed implementation procedures.⁵⁶ If the Office did not provide them, who would?

Congress, by delegating patent examination to the Executive in broad terms, made Office-promulgated procedural rules inevitable. The

53. In today's patent law terminology, § 6 requires utility, novelty, and an adequately detailed supporting disclosure. *Cf.* 35 U.S.C. §§ 101 (requiring utility), 102 (requiring novelty), 112 (requiring adequate supporting disclosure).

54. Act of July 4, 1836, ch. 357, §§ 6–8, 5 Stat. 117, 119–20.

55. *Id.* § 6.

56. *See* 2 WILLIAM C. ROBINSON, *THE LAW OF PATENTS FOR USEFUL INVENTIONS* § 422, at 8 (1890) (“The proceedings relating to the grant of letters-patent are regulated in part by the acts of Congress, and in part by rules established by the Patent Office itself. While the general features of these proceedings may properly be made the subject of permanent provisions in the statutes, their numerous and ever varying details can be controlled only by the vigilant and flexible authority of the department in which they arise. For this reason power has been conferred upon the Commissioner of Patents to adopt such regulations as he may deem expedient for the conduct of the business committed to his charge.”).

regulatory grant in the 1870 Patent Act was, in a sense, simply an acknowledgment of facts already on the ground: “The 1870 [Patent Office] rules, although they professed to be under the amended laws of 1870 . . . , were quite similar to the rules of 1869.”⁵⁷ The allocation thereafter, at any rate, is plain: Congress sets the substantive standards of patentability, and the Patent Office prescribes procedures for examining applications for compliance with those patentability standards.

This substance–procedure allocation, like every such allocation, separates in name things that remain interrelated in fact. It is widely acknowledged, for example, that “virtually all procedural rules may, and on occasion do, affect the result of the litigation.”⁵⁸ As then-Professor Easterbrook put it, “[s]ubstance and process are intimately related. The procedures one uses determine how much substance is achieved, and by whom.”⁵⁹ For example, “[w]hen the discovery rules were adopted in 1938, they were expected to make a trial less about sport and ambush, and more about truth and evidence. ‘This presupposed that [those rules] would change the results in many cases.’”⁶⁰ Or, to take an example from contemporary patent law, consider this: the patent application document that one files with the Patent Office must “[b]e in the English language.”⁶¹ This requirement does not appear in the Patent Act. Instead, it originates from a Patent Office regulation. If it is a valid rule, it is valid because it is

57. Herbert C. Wamsley, *The Rulemaking Power of the Commissioner of Patents and Trademarks (Part I)*, 64 J. PAT. OFF. SOC’Y 490, 500 (1982); *see also* LEVIN H. CAMPBELL, *THE PATENT SYSTEM OF THE UNITED STATES SO FAR AS IT RELATES TO THE GRANTING OF PATENTS: A HISTORY* 50 (1891) (“The law of 1870 . . . gave the Commissioner authority, subject to the approval of the Secretary of the Interior, to establish regulations for the conduct of proceedings in the Office. As early as 1828 the Office began to print for free distribution circulars containing information as to what the law relating to the issuing of patents was, and how to proceed to obtain a patent. These circulars were revised and enlarged from time to time, as various changes and additions were made in the law affecting the practice before the Office. The information contained in them was divided into numbered sections and conveniently arranged under suitable headings. At length these circulars took the form of a pamphlet, which began to be called the Rules of Practice, but prior to the act of 1870 the rules did not have the force of law.”).

58. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 678 (1953); *see also* *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring) (observing that “any rule, no matter how clearly ‘procedural,’ can affect the outcome of litigation if it is not obeyed”); *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 445 (1946) (“Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants.”).

59. Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 112–13.

60. Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 819 (2010) (quoting Charles Alan Wright, *Procedural Reform: Its Limitations and its Future*, 1 GA. L. REV. 563, 570 (1967)).

61. 37 C.F.R. § 1.52(b)(1)(ii) (2009).

not substantive, but procedural, at least for purposes of § 2(b)(2)(A). Of course, the requirement that applicants present their applications in the English language *is* procedural in that it regulates the formal manner in which an applicant presents her patent claims for examination, in much the same way that the rules about paper type and margins,⁶² the sequence of application components,⁶³ and drawings⁶⁴ do. The requirement also has profound substantive consequences, however, because the numbered claim paragraphs at the close of every patent define the very substance of the patentee's right to exclude others from his or her invention.⁶⁵ Indeed, "[t]he first step in any [patent] invalidity or infringement analysis is claim construction."⁶⁶ Choosing English for Patent Office proceedings, then, plainly contributes to fair and efficient patent examination, and equally plainly affects the scope of the resulting patent rights.

Procedural choices affect substantive outcomes. As a result, were we to use the "affects substance" criterion for sorting Patent Office rules into the *substance* and *procedure* categories, the *procedure* category would collapse to an empty set. But Congress has explicitly ruled out treating procedure as an empty set by the very act of splitting the patent power's application-processing role off from the patentability-defining role and delegating the former to the Patent Office, along with the power to promulgate procedural rules. The trial court in *Tafas*, by leaning so heavily on an "affects substance" sorting standard,⁶⁷ sharply curtailed the Office's regulatory power in the teeth of the Patent Act's basic allocation of responsibilities. The Federal Circuit panel in *Tafas II*, by contrast, had the good sense to reject this antistatutory standard.⁶⁸

What sorting standard *should* the courts use in policing the boundary the Patent Act creates between valid procedural rules and invalid substantive

62. 37 C.F.R. § 1.52(a)(1)(i)–(ii).

63. 37 C.F.R. §§ 1.71–1.75, 1.77.

64. 37 C.F.R. §§ 1.83–1.84.

65. See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 373–74 (1996) (describing the patent claim's function in defining the scope of the patentee's grant). As one commentator recently put it, "[a]sk any patent lawyer what the most important part of a patent is, and the answer will invariably be 'the claims.'" Tun-Jen Chiang, *Fixing Patent Boundaries*, 108 MICH. L. REV. 523, 524 (2010) (footnote omitted).

66. *Rockwell Int'l Corp. v. United States*, 147 F.3d 1358, 1362 (Fed. Cir. 1998).

67. *Tafas I*, 541 F. Supp. 2d 805, 814 (E.D. Va. 2008), *aff'd sub nom. Tafas II*, 559 F.3d 1345 (Fed. Cir. 2009), *vacated en banc*, *Tafas III*, 328 Fed. App'x 658 (Fed. Cir. 2009) (appeal reinstated).

68. See *Tafas II*, 559 F.3d 1345, 1354 (Fed. Cir. 2009) ("Substantive rules certainly 'affect individual rights and obligations,' but that inquiry does not necessarily distinguish most procedural requirements, which will also 'affect individual rights and obligations.'"), *vacated en banc*, *Tafas III*, 328 Fed. App'x 658 (Fed. Cir. 2009) (appeal reinstated).

rules? I take up this question next.

II. FITTING THE BEST MODEL

Common sense and experience indicate that “substance and procedure differ even if, at the margin, they become difficult to distinguish.”⁶⁹ They differ as follows: “Substantive law refers to that body of principles designed to regulate primary human activity; procedural law refers to that body of principles designed to provide a means for adjudicating controversies over rights derived from the substantive law.”⁷⁰ Thus, for example, the requirement that an invention must be nonobvious to be patentable⁷¹ and the patentee’s right to sue an infringer⁷² are clearly on the substantive side of the line, whereas the required use of white paper for a patent application⁷³ and the availability of interrogatories in a patent infringement suit⁷⁴ are just as clearly on the procedural side of the line.

Some matters, however, “are rationally capable of classification as either” substance or procedure.⁷⁵ They effectively “fall within a twilight zone between both classifications.”⁷⁶ In this twilight area we see courts calibrate the standards they use for sorting procedure from substance, according to the function that sorting serves in a given context.⁷⁷ My

69. Paul D. Carrington, “Substance” and “Procedure” in the Rules Enabling Act, 1989 DUKE L.J. 281, 284; *see also* Edgar H. Ailes, *Substance and Procedure in the Conflict of Laws*, 39 MICH. L. REV. 392, 413 (1941) (“All procedural rules affect substantive rights; the question is one of degree and, since this cannot practicably be debated in every case, the orthodox distinction is valuable.”).

70. Allan Ides, *The Supreme Court and the Law to Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the Erie Doctrine and Related Problems*, 163 F.R.D. 19, 82 (1995); *see also* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 477 (2002) (“Substantive rules regulate the primary behavior of parties outside the walls of the issuing agency—addressing how much pollution they can emit, what they must disclose in proxy statements, and so forth. . . . Procedural rules, in contrast to substantive rules, govern what happens inside an agency—how it is organized, how it conducts hearings, and so forth.”). Courts describe the distinction in similar terms. *See, e.g.,* *Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 883 (10th Cir. 2006); *In re Fla. R. Crim. P.*, 272 So. 2d 65, 65–66 (Fla. 1972).

71. 35 U.S.C. § 103 (2006).

72. 35 U.S.C. § 271.

73. 37 C.F.R. § 1.52(a)(1)(i) (2009).

74. FED. R. CIV. P. 33.

75. *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

76. *Carota v. Johns Manville Corp.*, 893 F.2d 448, 450 (1st Cir. 1990). According to Professor Main, the following “doctrines have long been difficult to classify as either substantive or procedural: statutes of limitation, testimonial privileges, fee-shifting statutes, burdens of proof, the availability of equitable relief, and other remedial matters.” Main, *supra* note 60, at 813–14 (footnotes omitted).

77. *See, e.g., Hanna*, 380 U.S. at 466–74 (differentiating the substance–procedure

discussion here focuses on these twilight cases, for they are the ones likely to generate a court challenge.⁷⁸

What function *should* courts serve by sorting procedural from substantive rules in the Patent Office context? A durable answer must begin with the recognition that Congress has nearly a free hand in determining what it wants to delegate to the Office as procedure and what it wants to keep for itself (or delegate to the courts for common law elaboration) as substance.⁷⁹ And the courts best aid Congress if they support, rather than undermine, the basic structure of the patent system that the Patent Act creates. As a result, when an applicant challenges an Office rule under § 2(b)(2)(A), the court should ask, has the Patent Office improperly invaded the patentability policy territory of Congress? Or, instead, has the Office properly sought to establish and preserve a fair and efficient examination system? The courts, if they attend to the purpose of § 2(b)(2)(A), should tune their sorting standard so that it preserves this basic allocation of responsibility. Other bases for distinguishing procedure from substance that arise in different contexts, such as ensuring public participation in the rulemaking process or preventing forum shopping in diversity cases, simply do not apply.⁸⁰

To translate the proper court goal, just described, into a workable legal standard that the Office and private parties alike can apply, it helps to distinguish between two distinct errors the Office can make in determining the validity of a given rule and compare them to the analogous errors a court can make when adjudicating a challenge to that rule. Thinking about the possible errors, and possible congressional responses, can highlight which actor—the Office or the court—is in a better position to evaluate a rule’s procedural bona fides in the same manner Congress would.

Suppose the Office considers changing the examination rules, and it knows that the change will generate more accuracy gains than process costs. The Office can adopt the rule, or forbear from adopting the rule. Congress, in response, can leave the new rule in place, or countermand it

distinction used in applying the *Erie* doctrine from the substance–procedure distinction used to test the validity of a Federal Rule of Civil Procedure under the Rules Enabling Act).

78. The Patent Office will not promulgate plainly substantive rules, and patent applicants will not attack plainly procedural rules on § 2 grounds.

79. I concede that, as a formal matter, either Due Process rationality review or the nondelegation doctrine marks the outer boundary of Congress’s power to delegate a portion of the patent power to the Office. But those boundaries are on the very distant horizon, given the Patent Act’s detailed substantive patentability standards and the Office’s regulatory focus on examination for patentability. As for delegating to the courts the common law task of elaborating on the broadly phrased substantive patentability and infringement criteria set forth in the Patent Act, Congress has long done so. *See generally* Craig Allen Nard, *Legal Forms and the Common Law of Patents*, 90 B.U. L. REV. 51 (2010).

80. *See infra* Part III.

by amending the Patent Act. To simplify the analysis, assume for this hypothetical that Congress responds, primarily, out of the desire to preserve the existing allocation of powers between itself and the Office.⁸¹ What errors could the Office make? And how would Congress respond? Consider the table below:

Congress would deem the rule to be . . .	The Patent Office . . .	
	Adopts a Rule	Forbears
Procedural	<i>Valid</i>	<i>Invalid</i>
Substantive	<i>Invalid</i>	<i>Valid</i>

The Office can err by forbearing when Congress would not countermand the change, i.e., by failing to make an efficient change to examination in the mistaken belief that Congress would view the change as an invasion of its power to set substantive patent policy. Congress can correct this error, of course, by enacting the change itself, assuming that Congress learns about the error; and, were Congress to consider doing so, the Office (by hypothesis) would support the change in the legislative process. It is not clear, however, how the courts could correct this type of error.⁸²

The Office also can err by adopting a rule that Congress would reject, in the mistaken belief that Congress would not view the change as an invasion of its preserve of substantive patent policy. Congress can correct this error by amending the Patent Act, and Congress will learn about the new rule if it falls especially hard on applicants from a particular technology domain. The courts, too, can correct this error, in an action against the Office under the APA.⁸³

81. Obviously, Congress could respond, or fail to respond, for a host of reasons having nothing to do with the substance–procedure distinction I analyze here. The existence of those other potential reasons, however, does not affect my analysis.

82. Perhaps there is a way for a private party to petition the Office to change its rules and sue if the Office rejected, or failed to act on, the petition. The APA does provide for review of agency failure to act. *See* 5 U.S.C. §§ 702, 706(1) (2006). But it is not at all clear what *duty* the Office would have violated in such a scenario, and the courts appear to hold petitioners in this context to a very high, mandamus-like standard. *See In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004). The Patent Act’s directive that Office regulations “shall facilitate and expedite the processing of patent applications,” 35 U.S.C. § 2(b)(2)(C) (2006), does not seem nearly crisp enough to establish a violated duty in a case where there are good arguments for and against promulgating the proposed rule.

83. 5 U.S.C. §§ 702, 706(2)(C). The *Tafas* case was just such an action. *See Tafas I*, 541

This is not a domain that cries out for judicial second-guessing. The Office should, if it is concerned with efficiency, minimize the sum of the expected costs of the two foregoing types of errors. Given the Office's long success with its procedural rules, and its ongoing relations with its congressional oversight committees, the Office should have a reasonably strong sense for what Congress will, and will not, allow. And, putting court review to one side, the root criterion of what is procedural for Patent Act purposes is whether "Congress will allow it."

Now assume the Office has gone ahead and actually adopted a new rule governing patent examination. A court reviewing the rule's validity faces a profile of potential hits and misses not unlike the one the Office faced. The court can void the rule or uphold it. The rule itself embodies the Office's assessment that Congress would deem the new rule to be procedural and thus leave it intact. In that sense, the imagined reaction of Congress to the new rule is key to both error profiles. The court, however, *is a step further removed from Congress* in this scenario. The court is, in effect, reassessing the Office's assessment of congressional reaction. Consider the table below:

The Office thinks that Congress would deem the rule procedural, and the Office is . . .	The court . . .	
	Upholds the Rule	voids the Rule
Correct	<i>Valid</i>	<i>Invalid</i>
Incorrect	<i>Invalid</i>	<i>Valid</i>

The court can err by voiding a rule that the Office had correctly surmised Congress would leave in place. The court also can err by upholding a rule that the Office had incorrectly concluded Congress would leave in place. Congress can correct either type of court error, at least as to future applications.

As a doctrinal matter, the Federal Circuit gives *Chevron* deference⁸⁴ to the Patent Office's reasonable exercise of the procedural power so long as it is satisfied that the regulation in question is indeed procedural.⁸⁵ The court,

F. Supp. 2d 805, 808 (E.D. Va. 2008), *aff'd sub nom. Tafas II*, 559 F.3d 1345 (Fed. Cir. 2009), *vacated en banc*, *Tafas III*, 328 Fed. App'x 658 (Fed. Cir. 2009) (appeal reinstated).

84. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

85. *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1337 (Fed. Cir. 2008) ("Because the Patent Office is specifically charged with administering statutory provisions relating to 'the

given its relatively greater distance from Congress, should also embrace some form of deference on the prior question whether a challenged regulation is procedural.⁸⁶ As a policy matter, court deference makes sense in light of the Office's superior ability and experience—compared to the court—to assess whether Congress would view a particular new rule as an improper invasion of its substantive turf, at least in a case where the Patent Act is ambiguous. (Where the Act is *not* ambiguous, the Office and the courts alike are bound to follow it.⁸⁷)

In sum, § 2(b)(2)(A) allocates power between Congress and the Patent Office. Congress can fend off invasions from the Office. The Office has long enjoyed success in framing rules that meet with apparent congressional approval, if the lack of countermands is any indication, and its ongoing relations with oversight committees give it helpful guidance for staying on its side of the line between procedure and substance. Courts can play backstop for Congress, policing the substance–procedure boundary for the (admittedly unlikely) extreme outlier. These arrangements and the error profiles they produce suggest that the standard for distinguishing procedure from substance should give the Office substantial freedom to treat as procedure the matters in the twilight zone between clear procedure and clear substance. Put another way, a court should not void a Patent Office rule as substantive unless it is a rather glaring invasion of Congress's turf

conduct of proceedings in the Office,' we give *Chevron* deference to its interpretations of those provisions." (quoting 35 U.S.C. § 2(b)(2)(A)). In *Cooper*, "the Patent Office ha[d] interpreted a statutory provision . . . that created inter partes reexamination and established rules for inter partes reexamination proceedings before the Patent Office," i.e., that "plainly 'govern[s] the conduct of proceedings in the Office' within the meaning of § 2(b)(2)(A)." *Id.* at 1336. See generally *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

86. Professor Merrill argues persuasively that *Skidmore* deference fits well for these "scope of agency jurisdiction" questions, at least as to typical agencies. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2174–75 (2004). My sense here, by contrast, is that *Skidmore*, with its focus on a new regulation's "consistency with earlier and later pronouncements," *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), may bring too heavy a status quo bias to bear on the question whether a given innovation in the Patent Office examination process runs afoul of the substance–procedure line in § 2(b)(2)(A). Unprecedented Patent Office filing rates and backlogs may well call for unprecedented procedural mechanisms. My goal here is to explore a different model for measuring the reach of the Patent Office's regulatory writ, one not confined to the *Skidmore–Chevron* deference continuum.

87. See, e.g., *Wyeth v. Kappos*, 591 F.3d 1364, 1369–70 (Fed. Cir. 2010) (concluding, *contra* the Patent Office, that the patent term extension provision at 35 U.S.C. § 154(b) is unambiguous).

that lacks any credible examination management rationale. And a court should uphold a rule against a § 2 attack where the Office can explain the way in which that rule reasonably helps the Office establish or preserve a fair and effective examination process for applicants, notwithstanding some incidental effects on applicants' substantive rights.

The courts have not yet used this standard for distinguishing procedure from substance under the Patent Act. In *Tafas II*, the Federal Circuit's most recent effort to articulate a sorting standard, the panel opinion (now vacated) adapted the APA-based sorting standard the D.C. Circuit used in *JEM Broadcasting Co. v. FCC*.⁸⁸ *JEM* involved a challenge to a rule the Federal Communications Commission (FCC) had issued *without* notice-and-comment, i.e., without providing the opportunity for public participation mandated by § 553 of the APA. According to the Federal Circuit in *Tafas II*, adapting *JEM*,

the Final Rules challenged in this case are procedural. In essence, they govern the timing of and materials that must be submitted with patent applications. The Final Rules may “alter the manner in which the parties present . . . their viewpoints” to the USPTO, but they do not, on their face, “foreclose effective opportunity” to present patent applications for examination.⁸⁹

Even though it was “most persuaded in this case by the D.C. Circuit's approach in *JEM*,”⁹⁰ the court was also at pains to underscore that it “[d]id not purport to set forth a definitive rule for distinguishing between substance and procedure.”⁹¹ Admittedly, the *Tafas II* panel opinion would not have had a different bottom-line result if the Federal Circuit had used the framework I outline above. The case would, however, have provided a robust standard for future cases, rather than an explicit flight from any “definitive rule.”

It is, of course, fair to ask whether the courts have confronted a substance–procedure distinction analogous to the Patent Act's, and whether, in that other domain, the courts afford the procedural rulemaker the kind of leeway I urge for the Patent Office. The short answer to both

88. *JEM*, 22 F.3d 320 (D.C. Cir. 1994).

89. *Tafas II*, 559 F.3d 1345, 1356 (Fed. Cir. 2009), (quoting *JEM*, 22 F.3d at 328) (omission in the original), *vacated en banc*, *Tafas III*, 328 Fed. App'x 658 (Fed. Cir. 2009) (appeal reinstated). I have quite a bit more to say below about *JEM*, and about the substance–procedure distinction that § 553 of the APA creates. See *infra* Part III.

90. *Tafas II*, 559 F.3d at 1355.

91. *Id.* at 1356. One can hope this is judicial humility, rather than an effort—unconscious or not—to keep case-by-case court review the main event in any major Patent Office rulemaking process. In any event, both the Office and the public would be better served by the humility of a clearly stated general standard that they can apply and predict.

questions is, “yes.”

The analogous distinction is the one Congress established in the Rules Enabling Act (REA),⁹² first enacted in 1934.⁹³ The literature on the REA is vast and rich.⁹⁴ It is not my aim to canvass it in detail here, much less to take sides in the many nuanced debates it contains. Rather, my goal is simply to show the way in which the Supreme Court’s REA jurisprudence provides a ready template that fits the sorting function the Patent Act’s structure suggests. The Patent Act is, in effect, a rules enabling act.

One last point before discussing the REA: The legislative history of the 1870 Patent Act—the original source of the § 2 standard—supports the view that courts should analyze the scope of the Patent Office’s power to make rules for the conduct of proceedings in the Office along the same lines that courts use to analyze the Supreme Court’s power under the REA to make rules for the conduct of federal litigation. Specifically, during a floor debate in the House, “Congressman Jenckes, who was the committee chairman and the sponsor of the pending legislation,”⁹⁵ described the new grant of regulatory power to the Office this way:

[T]he power which the Commissioner shall have and ought to have shall be that of regulating the manner in which proceedings shall be conducted in his office; the rules of court, so to speak, not the rules of decision but of government.⁹⁶

At least one congressman, then, thought of the Office’s regulatory power as akin to the power to make rules of court.

The Rules Enabling Act provides both that “[t]he Supreme Court shall

92. 28 U.S.C. § 2072 (2006).

93. Act of June 19, 1934, ch. 651, 48 Stat. 1064.

94. The articles I have found especially instructive are as follows: Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319 (2008); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1999); Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington’s “Substance” and “Procedure” in the Rules Enabling Act*, 1989 DUKE L.J. 1012; Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677 (2004); Burbank, *supra* note 21; Carrington, *supra* note 69; Ely, *supra* note 20; Ides, *supra* note 70; Mary Kay Kane, *The Golden Wedding Year: Erie Railroad Company v. Tompkins and the Federal Rules*, 63 NOTRE DAME L. REV. 671 (1988); Leslie M. Kelleher, *Taking “Substantive Rights” (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47 (1998); Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303 (2006); Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26 (2008); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

95. Wamsley, *supra* note 57, at 494.

96. CONG. GLOBE, 41ST CONG., 2D SESS. 2856 (1870) (emphasis added).

have the power to prescribe general rules of practice and procedure” for federal trial and appeals courts, and that “[s]uch rules shall not abridge, enlarge or modify any substantive right.”⁹⁷ “Taken together, the goal of these two [requirements] is to ensure that any given federal rule is, in fact, a rule of procedure and not a disguised rule of substantive law.”⁹⁸ In other words, Congress “intended to allocate lawmaking power between the Supreme Court as rulemaker and Congress.”⁹⁹ Sound familiar? It tracks the congressional division of the patent power between the Patent Office and Congress.

The Court has upheld this delegation of rulemaking power from Congress.¹⁰⁰ Summarizing current doctrine, Redish and Amuluru describe the Supreme Court’s broad implementation of the REA-delegated rulemaking power this way:

Recognizing that the Rules will often have incidental impacts on substantive concerns, the Court has confined the Act’s substantive right limitation to exclude from its reach primarily procedural rules whose impact beyond the courthouse walls is merely incidental. This is so, even if that incidental and unintended substantive impact is substantial.¹⁰¹

Generally speaking, the analysis tilts strongly in favor of upholding a Rule.¹⁰² With this summary in view, it is helpful to trace the major cases

97. 28 U.S.C. § 2072(a)–(b). The Rules process also has, as a formal matter, an explicit window for congressional disapproval of proposed Rules, but there is less to it than meets the eye. See *infra* notes 134–38 and accompanying text.

98. *Ides*, *supra* note 70, at 30.

99. Burbank, *supra* note 21, at 1106; see also *id.* at 1113 (“The purpose of the procedure/substance dichotomy is . . . to *allocate* policy choices—to determine which federal lawmaking body, the Court or Congress, shall decide whether there will be federally enforceable rights regarding the matter in question and the content of those rights.”); Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1180 (2006) (“The Rules Enabling Act establishes a detailed mechanism through which the Court may create procedural law with input from Congress, reserving to Congress the right to enact prospective federal legislation implicating substantive rights.”).

100. See *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992) (“Article I, § 8, cl. 9, authorizes Congress to establish the lower federal courts. From almost the founding days of this country, it has been firmly established that Congress, acting pursuant to its authority to make all laws ‘necessary and proper’ to their establishment, also may enact laws regulating the conduct of those courts and the means by which their judgments are enforced.” (quoting U.S. CONST. art. I, § 8, cl. 18)); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941) (“Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States . . .” (footnotes omitted)).

101. Redish & Amuluru, *supra* note 94, at 1333 (footnote omitted).

102. See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442–43

whereby the Court, applying the REA, arrived at this approach to sorting valid procedural rules from invalid substantive encroachments on congressional power.

The Supreme Court first considered an REA-based challenge to a Federal Rule of Civil Procedure in *Sibbach v. Wilson & Co.*¹⁰³ Sibbach brought a tort claim in diversity in Illinois federal court arising from an accident that took place in Indiana. The court, upon the defendant's request, ordered Sibbach to submit to a physical examination by a physician pursuant to Rule 35. Affirming that the Federal Rules are within the power of Congress to regulate federal court procedure and to delegate rulemaking to the courts, and that a valid Rule "has the force of a federal statute," the Court considered two REA constraints for a valid Rule.¹⁰⁴ Was the Rule one of "practice and procedure"? The Court thought so,¹⁰⁵ offering little analysis on the point, and that seems correct: the Rule "was a rule of practice or procedure in the sense that it provided a method of discovery directed toward the resolution of an underlying substantive claim."¹⁰⁶ Did the Rule abridge any substantive right of Sibbach's, in violation of the REA, even assuming it contradicted her right in Illinois *state* court to be free of such a compelled physical examination?¹⁰⁷ The Court thought not:

The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.

That the rule[] in question [is] such is admitted.¹⁰⁸

Rule 35 altered a state procedural rule, not a substantive right.¹⁰⁹ It thus passed muster under the REA.

(2010) (plurality opinion) ("[W]e have rejected every statutory challenge to a Federal Rule that has come before us. . . . Each of these rules had some practical effect on the parties' rights, but each undeniably regulated only the process for enforcing those rights; none altered the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either.").

103. 312 U.S. 1 (1941).

104. *Id.* at 13.

105. *Id.* at 11.

106. *Ides*, *supra* note 70, at 31.

107. *Sibbach*, 312 U.S. at 10.

108. *Id.* at 14; *see also* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (plurality opinion) (quoting this portion of *Sibbach* as the foundation of the framework for analyzing a rule's validity under the Rules Enabling Act (REA)).

109. Professor *Ides* has described the *Sibbach* issue this way: "The federal rule at issue . . . did not alter the standards of liability pertaining to the primary human activity at issue in the case; rather, it provided a means for determining whether the defendant was liable under those standards." *Ides*, *supra* note 70, at 82.

Five years later, in *Mississippi Publishing Corp. v. Murphree*,¹¹⁰ the Court considered its second REA challenge to a federal Rule. Murphree sued Mississippi Publishing in diversity in Mississippi federal court on a defamation claim. The case turned on the validity of Rule 4, governing the process for validly serving a summons. The publisher argued that the Rule effectively expanded the trial court's jurisdiction. The Supreme Court rejected that contention, notwithstanding the reality that "most alterations of the rules of practice and procedure may and often do affect the rights of the litigants."¹¹¹ Did Rule 4 abridge the publisher's substantive rights in violation of the REA? No, because "it d[id] not operate to abridge . . . the rules of decision by which th[e] court will adjudicate its rights."¹¹² Indeed, it "relate[d] merely to the manner and the means by which a right to recover is enforced."¹¹³ The fact that the Mississippi court with valid jurisdiction, rather than some other court, would adjudicate Murphree's claim did not undermine the Rule: "Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure . . ."¹¹⁴ Like *Sibbach*, *Murphree* accommodated rulemaking broadly.

In its 1965 decision in *Hanna v. Plumer*,¹¹⁵ the Court reaffirmed the REA boundary analysis developed in *Sibbach* and *Murphree*.¹¹⁶ Hanna sued in diversity in Massachusetts federal court on a tort claim arising from a car accident in South Carolina.¹¹⁷ Hanna served the deceased defendant's executor validly under Rule 4, but invalidly under a Massachusetts state statute applicable to executors.¹¹⁸ Quoting the reasoning from *Sibbach* and *Murphree* liberally for support, the Court concluded that the Rule "clearly passes muster. Prescribing the manner in which a defendant is to be notified that a suit has been instituted against him, it relates to the practice and procedure of the district courts."¹¹⁹ And, after a lengthy discussion disentangling REA analysis from the *Erie* doctrine's focus on "discouragement of forum-shopping and avoidance of inequitable

110. 326 U.S. 438 (1946).

111. *Id.* at 445.

112. *Id.* at 446.

113. *Id.* (internal quotation marks and alteration omitted).

114. *Id.* at 445.

115. 380 U.S. 460 (1965).

116. *See Kane*, *supra* note 94, at 676.

117. *Hanna*, 380 U.S. at 461.

118. *Id.* at 461–62.

119. *Id.* at 464 (internal quotation marks omitted).

administration of the laws,”¹²⁰ the Court underscored the wide latitude rulemakers have under the REA’s two constraints. The “congressional power to make rules governing the practice and pleading in th[e] courts” delegated under the REA “includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.”¹²¹ A matter in the twilight area between procedure and substance is thus open to regulation by Rule, so far as the REA constraints are concerned.

The post-*Hanna* Supreme Court cases follow the *Hanna* pattern.¹²² In *Burlington Northern Railroad Co. v. Woods*,¹²³ a defendant railroad company had removed an Alabama state tort case to federal court. The railroad lost at trial, “posted a bond to stay the judgment pending appeal,” and then lost again on appeal.¹²⁴ The Woods, who had won at trial and on appeal, moved in the Eleventh Circuit for the Alabama state statute-mandated affirmance penalty of 10% of the money judgment. Reversing the Eleventh Circuit, the Supreme Court held that the mandatory Alabama statute conflicted with the discretionary model established in Federal Rule of Appellate Procedure 38.¹²⁵ Because the federal rule conflicted with the

120. *Id.* at 468.

121. *Id.* at 472.

122. For recent REA analyses in the circuit courts, see *Morel v. DaimlerChrysler AG*, 565 F.3d 20, 24 (1st Cir. 2009); *Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1299 (11th Cir. 1999). The Supreme Court’s most recent REA/*Erie* decision, though fractured, does not call the *Hanna* pattern into doubt. In that case, *Shady Grove Orthopedic Associates. v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010), the Court split 5–4 on the threshold question whether Federal Rule of Civil Procedure 23 conflicted with the New York state statute that defendant Allstate Insurance sought to apply in a diversity-based federal class action. The majority concluded the Federal Rule and state statute “flatly contradict each other,” *id.* at 1441, whereas the dissenters “perceive[d] no unavoidable conflict between” them, *id.* at 1469 (Ginsburg, J., dissenting). The majority itself, however, split 4–1 on the question of how best to analyze whether Rule 23, having trumped the conflicting state statute, is valid under the REA. *Id.* at 1449–51 (Stevens, J., concurring in part and concurring in the judgment). The plurality applied *Hanna*, *id.* at 1442–43, but there is no majority opinion on the REA question.

123. 480 U.S. 1 (1987).

124. *Id.* at 2.

125. “If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.” FED. R. APP. P. 38. The Rule was amended in 1994 to provide for pre-imposition notice and an opportunity to respond. Other than that, the present Rule is the same as the one the Court evaluated in *Burlington Northern*. See 480 U.S. at 4 (“Entitled ‘Damages for delay,’ Rule 38 provides: ‘If the court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.’”).

Alabama statute that would otherwise have applied in this diversity case,¹²⁶ the Court tested its validity. Did it regulate procedure? Yes: “Federal Rule 38 regulates matters which can reasonably be classified as procedural, thereby satisfying the constitutional standard for validity. . . . The choice made by the drafters of the Federal Rules in favor of a discretionary procedure affects only the process of enforcing litigants’ rights and not the rights themselves.”¹²⁷ Did it abridge a substantive right? No: “The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants’ substantive rights do not violate this [anti-abridgment] provision if reasonably necessary to maintain the integrity of that system of rules.”¹²⁸

Most recently, in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, the Court upheld Rule 11 sanctions against a copyright plaintiff who failed to adequately investigate its infringement claim before filing its case and requesting a temporary restraining order.¹²⁹ The sanctioned plaintiff argued, among other things, that “imposing sanctions against a represented party that did not act in bad faith violates the Rules Enabling Act.”¹³⁰ Noting that this REA challenge “ha[d] a large hurdle to get over,” the Court applied *Hanna* and *Burlington*: “There is little doubt that Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure, and that any effect on substantive rights is incidental.”¹³¹

The pattern is plain. In all these cases there were, of course, reasonable arguments that the challenged rules were substantive, not procedural. In that sense, the cases were hard; indeed, the Supreme Court likely would have refused review had it been otherwise. But in each case the Court gave wide berth to REA rulemaking. If a rule regulates a matter that one can reasonably classify as procedural, it is valid under the REA, notwithstanding incidental effects the rule may have on a litigant’s substantive rights. Congress can, of course, change any rule it likes, either by stopping a proposed rule from going into force or by passing a procedural statute that creates a rule directly.¹³²

126. *Burlington Northern*, 480 U.S. at 7.

127. *Id.* at 8.

128. *Id.* at 5.

129. 498 U.S. 533, 554 (1991).

130. *Id.* at 551 (citation omitted).

131. *Id.* at 552.

132. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010) (“Congress . . . has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit—either by directly amending the rule or

The courts should verify the procedural bona fides of Patent Office rules using the same standard. To wit: A Patent Office rule that incidentally affects applicants' substantive rights nevertheless passes muster under § 2(b)(2)(A) of the Patent Act if the rule is reasonably necessary to establish or preserve the fair and effective patent examination process that the Office's rules must organize.¹³³

One might object to adapting the REA sorting standard for use in the Patent Act context on the ground that the federal court rulemaking process, unlike the Office's rulemaking process, expressly provides for a period of congressional review before a new court rule takes effect. According to the statute,

[t]he Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.¹³⁴

One could argue that, under this provision, the failure of Congress to prevent a rule from taking effect is strong evidence that Congress thinks the rule is on the right side of the line between procedure and substance. In *Sibbach*, in fact, the Supreme Court expressed just this view.¹³⁵ This makeweight has largely vanished from the Court's REA cases, however, and—although a duly promulgated rule is presumptively valid—there is no question that a litigant harmed by the rule can challenge its validity. Moreover, although it disavowed the technique early on,¹³⁶ the Court now uses the REA's bar on changing substantive rights as a policy canon when

by enacting a separate statute overriding it in certain instances.”).

133. The Patent Office, in its opening appeal brief at the Federal Circuit in the *Tafas II* case, devoted two pages to arguing that the Office's rules were procedural under the REA, *Sibbach*, *Murphree*, and *Hanna*: “Here, the Final Rules clearly fall on the procedural side of the line drawn by *Hanna*.” Brief for Appellants at 36–37, *Tafas II*, 559 F.3d 1345 (Fed. Cir. 2009) (No. 2008-1352), *vacated en banc*, *Tafas III*, 328 Fed. App'x 658 (Fed. Cir. 2009) (appeal reinstated). This was too little space, it seems, for developing this alternative argument. The Federal Circuit, in any event, made no mention of the REA theory in the panel opinion.

134. 28 U.S.C. § 2074(a) (2006). Waiting periods were part of the original REA. Act of June 19, 1934, ch. 651, §§ 1–2, 48 Stat. 1064, 1064.

135. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 15–16 (1941). Justice Frankfurter, in dissent, was quite skeptical of the argument, opining that “to draw any inference of tacit approval from non-action by Congress is to appeal to unreality.” *Id.* at 18 (Frankfurter, J., dissenting).

136. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980) (“This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a ‘direct collision’ with state law. The Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies.”).

construing the rules themselves. Specifically, it construes disputed terms in the rules more narrowly to avoid overstepping the REA's prohibition against a rule's abridging, enlarging, or modifying substantive rights.¹³⁷ This policy canon makes no sense if one takes seriously the idea that congressional scrutiny from May to December, under the § 2074(a) waiting period, largely squares the rule's text with existing substantive law. The policy canon seems, in other words, to acknowledge that congressional acquiescence is a sign of indifference, not a sign of full vetting by Congress.¹³⁸ The fact that the Patent Office promulgates rules without a formal congressional review period is thus no reason to abjure the REA framework in the Patent Act context.

Federal law offers another substance–procedure distinction resembling the one the Patent Act establishes—namely, the EEOC's power to issue procedural rules (but not substantive rules) under Title VII of the Civil Rights Act of 1964.¹³⁹ “The EEOC was created in 1964 with the enactment of Title VII,” and it “has primary enforcement authority over Title VII,” as well as other civil rights statutes.¹⁴⁰ As part of this enforcement regime, the EEOC investigates charges of unlawful discrimination that private parties bring to its attention.¹⁴¹ In a recent case challenging a rule that the EEOC had promulgated pertaining to the lodging of charges against an employer, the Supreme Court approached

137. See *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 842 (1999) (adopting a narrower construction of Rule 23(b)(1)(B) on the ground that, among other things, “this limiting construction . . . minimizes potential conflict with the Rules Enabling Act, and avoids serious constitutional concerns”); *id.* at 845 (“The Rules Enabling Act underscores the need for caution.”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (“Rule 23’s requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure ‘shall not abridge, enlarge or modify any substantive right,’ 28 U.S.C. § 2072(b).”); *Kamen v. Kemper Fin. Serv., Inc.*, 500 U.S. 90, 96 (1991) (“Indeed, as a rule of procedure issued pursuant to the Rules Enabling Act, Rule 23.1 cannot be understood to ‘abridge, enlarge or modify any substantive right.’” (quoting 28 U.S.C. § 2072(b))).

138. In a different context, criticizing the canon against repeal of a statute by implication, Judge Posner made the point crisply: “Congressmen do not carry the statutes of the United States around in their heads any more than judges do.” *Friedrich v. City of Chicago*, 888 F.2d 511, 516 (7th Cir. 1989), *vacated*, 499 U.S. 933 (1991).

139. 42 U.S.C. § 2000e-12(a) (2006) (“The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter.”).

140. Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937, 1941 (2006); see also 42 U.S.C. § 2000e-4 (creating the Commission), § 2000e-5(a) (“The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.”).

141. 42 U.S.C. § 2000e-5(b).

the substance–procedure distinction in a manner similar to its REA cases.

By way of background, a private party initiates EEOC involvement by filing a “charge” with the Commission. Under the statute, “[c]harges shall be in writing *under oath or affirmation* and shall contain such information and be in such form as the Commission requires.”¹⁴² The statute also sets time limits within which a charge must be filed: “within one hundred and eighty days after the alleged unlawful employment practice occurred,” or, if the charging party “has initially instituted proceedings with a State or local agency with authority to grant or seek relief” from unlawful employment practices, “within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier.”¹⁴³ Title VII does not, however, make clear whether a charge that is lodged with the EEOC *before* the statutory time has run, but is verified by oath or affirmation *after* that time has run, is valid or fatally defective. The EEOC, by regulation, relates a subsequent verification back to the date the charge was originally filed.¹⁴⁴

In *Edelman v. Lynchburg College*,¹⁴⁵ the Supreme Court considered the validity of the EEOC’s regulation treating a later-verified charge as timely. Edelman, the complaining party, filed his charge with the EEOC 161 days after the alleged discriminatory event but did not verify it until 313 days after that event.¹⁴⁶ The Fourth Circuit, affirming the district court’s dismissal of Edelman’s case, “held that the plain language of the statute foreclosed the EEOC regulation allowing a later oath to relate back to an earlier charge.”¹⁴⁷ The Supreme Court reversed, concluding that “[t]he statute is . . . open to interpretation and the regulation addresses a legitimate question.”¹⁴⁸ Specifically, as a textual matter,

[s]ection [2000e-5(b)] merely requires the verification of a charge, without saying when it must be verified; § [2000e-5(e)(1)] provides that a charge must be filed within a given period, without indicating whether the charge must be verified when filed. Neither provision incorporates the other so as to give a

142. *Id.* (emphasis added).

143. 42 U.S.C. § 2000e-5(e)(1).

144. 29 C.F.R. § 1601.12(b) (2009) (“A charge may be amended to cure technical defects or omissions, including failure to verify the charge Such amendments . . . will relate back to the date the charge was first received.”).

145. 535 U.S. 106 (2002).

146. *Id.* at 109–10. “In Edelman’s case, the filing period was 300 days after the alleged discriminatory practice.” *Id.* at 109.

147. *Id.* at 110–11.

148. *Id.* at 113.

definition by necessary implication.¹⁴⁹

The EEOC bridged this statutory gap in procedure as part of its mandate to fairly and efficiently deal with the charges it receives. Indeed, the Court dismissed Lynchburg College's argument that the rule was impermissibly substantive as "really nothing more than a recast of the plain language argument" that the Court found unpersuasive.¹⁵⁰ Moreover, as a policy matter, the Court approved the EEOC's "reasonable" gap-filling regulation for both "ensur[ing] that the lay complainant, who may not know enough to verify on filing, will not risk forfeiting his rights inadvertently" and "look[ing] out for the employer's interest by refusing to call for any response to an otherwise sufficient complaint until the verification has been supplied."¹⁵¹ Most importantly, for my purposes, the Court analogized the EEOC rule to Federal Rule of Civil Procedure 15(c), concluding that "if relation back is a good rule for courts of law, it would be passing strange to call it bad for an administrative agency."¹⁵² The Court thus viewed the EEOC's procedural regulation through the same lens it views the rules the federal courts promulgate under the REA. There is no reason to approach Patent Office procedural rules any differently.

In sum, the courts should sort procedure from substance in Patent Office rules using the same basic approach the Supreme Court has used in the REA context. Specifically, a Patent Office rule that incidentally affects applicants' substantive rights does not violate § 2(b)(2)(A) of the Patent Act if the rule is reasonably necessary to establish or preserve the integrity of the patent examination process that the Office's rules must organize. This approach, which gives the Office substantial leeway in the twilight zone of matters that one could rationally classify as procedure or substance, recognizes the Office's superior ability (relative to the courts) to frame rules that establish or preserve a fair and efficient examination process without running afoul of Congress's reserved power over substantive patent policy.

149. *Id.* at 112.

150. *Id.* at 113.

151. *Id.* at 115.

152. *Id.* at 116 & n.10; *see also id.* at 123 (O'Connor, J., concurring in the judgment) ("The regulation at issue here, which permits relation back of amendments to charges filed with the EEOC, is clearly such a procedural regulation. *See, e.g.,* Fed. Rule Civ. Proc. 15 (establishing rules for amendments to pleadings and relation back as part of the Federal Rules of Civil Procedure). Thus, as the Court recognizes, *see [Edelman]*, at 113–114, the EEOC was exercising authority explicitly delegated to it by Congress when it promulgated this rule.").

III. QUITTING THE BAD MODELS

In addition to the REA, two other prominent federal statutes—the Administrative Procedure Act¹⁵³ (APA) and the Rules of Decision Act¹⁵⁴ (RDA)—give rise to frameworks for distinguishing procedural from substantive rules. Each may tempt a court confounded about how best to analyze a Patent Office rule attacked under § 2(b)(2)(A). Courts should resist these temptations, for both the APA and RDA sorting standards were developed to serve goals far removed from that of the Patent Act’s aim of allocating responsibility for different facets of our long-divided patent power. Before discussing these inapposite frameworks in detail, however, I explain the idiosyncratic way the Patent Act invokes the APA’s rulemaking requirements.

A. *The Patent Act’s Reliance on Notice-and-Comment Rulemaking*

For at least a decade, it has been clear that “the PTO is an ‘agency’ subject to the APA’s constraints.”¹⁵⁵ And for several decades, the Office has followed the APA’s notice-and-comment framework for promulgating binding rules of practice.¹⁵⁶ Commissioner Caspar Ooms, for example, speaking at an New York University Law School conference about administrative law in February 1947, described the Office’s past and planned compliance with the strictures of notice-and-comment rulemaking under the APA.¹⁵⁷ More recently, in 1999, Congress codified that tradition. At the same time that it moved the longstanding grant of procedural regulatory power from § 6 to § 2 of the Act,¹⁵⁸ Congress qualified the grant with an explicit reference to the part of the APA that establishes notice-and-comment rulemaking. The operative language in the Patent Act now states as follows:

153. 5 U.S.C. §§ 551–559, 701–706 (2006).

154. 28 U.S.C. § 1652 (2006).

155. *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999) (rejecting the Patent Office’s contention that it was not bound by the standards of appellate review set forth in the APA).

156. *See, e.g.*, Rules of Practice in Patent Cases: Different Inventions in One Application, 14 Fed. Reg. 5279, 5279 (Aug. 25, 1949) (proposing change to Rule 141, inviting comment, and setting deadline for comments of Sept. 30, 1949); 14 Fed. Reg. 6639, 6639 (Nov. 1, 1949) (finalizing change to Rule 141).

157. Casper W. Ooms, *The United States Patent Office and the Administrative Procedure Act*, 38 TRADEMARK REP. 149, 149 n.*, 153 (1948).

158. *See supra* note 8.

The Office . . . may establish regulations, not inconsistent with law, which—

(A) shall govern the conduct of proceedings in the Office; [and]

(B) shall be made in accordance with section 553 of title 5[.]¹⁵⁹

In other words, when it wants to issue a rule to “govern the conduct of proceedings in the Office” that binds the public and appears among the formal rules of Patent Office practice in Title 37 of the *Code of Federal Regulations*, the Office must use notice-and-comment rulemaking to promulgate that rule.

Those familiar with the APA will appreciate that my construction of § 2(b)(2) of the Patent Act is, of necessity, purposive rather than literalistic. This is so because a literalistic reading of the provision would render the command to adhere to § 553 of the APA an empty gesture, if not an outright absurdity. Consider: The Federal Circuit has construed § 2(b)(2)(A) to confine the Patent Office to making procedural, not substantive, rules.¹⁶⁰ Section 553 of the APA generally provides that, to promulgate a rule, an agency must give the public notice of the proposed rule and an opportunity to comment on the proposal.¹⁶¹ Section 553 also expressly provides, however, that the requirements for notice-and-comment do not apply to certain types of rules—namely, “to interpretative rules, general statements of policy, or rules of agency organization, *procedure*, or practice.”¹⁶² Given that § 553 exempts agency procedural rules from notice-and-comment, and procedural rules are all that the Patent Office can promulgate, commanding the Office to comply with § 553 does not literally require the use of notice-and-comment rulemaking. How, then, to break out of this logic trap?

The critical distinction that § 2(b)(2) of the Patent Act sets up is the one between more formal rules that bind members of the general public (i.e., patent applicants) and less formal rules, such as guidelines and policy statements, that do not. The Office frequently issues guidelines and other guidance documents that help inform the public of the Office’s views on patent law, and, under § 553(b)’s exceptions, the Office can do so without resort to notice-and-comment. For example, in the wake of the Supreme Court’s recent landmark decision about the patent law doctrine of

159. 35 U.S.C. § 2(b)(2)(A)–(B) (2006). For the provision that § 2(b)(2)(B) codifies, see the Patent and Trademark Office Efficiency Act, Pub. L. No. 106-113, 113 Stat. 1501A-572, 1501A-573 (1999) (Title IV, Subtitle G, § 4712 of the Intellectual Property and Communications Omnibus Reform Act of 1999, included as Appendix I to an appropriations bill).

160. See *supra* note 9.

161. 5 U.S.C. § 553(b)–(c) (2006).

162. 5 U.S.C. § 553(b), ¶ 2(A) (emphasis added).

nonobviousness,¹⁶³ *KSR International Co. v. Teleflex Inc.*,¹⁶⁴ the Patent Office published a policy document to “assist USPTO personnel to make a proper determination of obviousness under 35 U.S.C. [§] 103 and to provide an appropriate supporting rationale.”¹⁶⁵ By publishing these guidelines, the Office also informed the public about the Office’s perspective—admittedly nonbinding—on the scope of a core substantive patentability standard. To modify the formal rules of practice before the Patent Office, by contrast, the Office must use notice-and-comment rulemaking. Indeed, the Office proposed the rules challenged in the *Tafas* cases in just this manner.¹⁶⁶

This construction of § 2 finds support in related Patent Office provisions and in the legislative history of the 1999 insertion of the reference to § 553. First, a portion of § 3 of the Patent Act, which was also added in 1999, states that the Patent Office Director “shall consult with the Patent Public Advisory Committee . . . on a regular basis on matters relating to the patent operations of the Office.”¹⁶⁷ The Patent Public Advisory Committee, created in 1999, is established in § 5 of the Act, along with a parallel committee for the trademark side of the Office.¹⁶⁸ Section 3 further states that the Director “shall consult with the respective Public Advisory Committee before . . . proposing to change . . . patent or trademark regulations which are subject to the requirement to provide notice and opportunity for public comment under section 553 of title 5.”¹⁶⁹ This mandate presupposes,

163. 35 U.S.C. § 103(a).

164. 550 U.S. 398 (2007).

165. Examination Guidelines for Determining Obviousness Under 35 U.S.C. [§] 103 in View of the Supreme Court Decision in *KSR International Co. v. Teleflex Inc.*, 72 Fed. Reg. 57,526, 57,526 (Oct. 10, 2007).

166. See Changes to Practice for Continued Examination Filings, Patent Applications Containing Patentably Indistinct Claims, and Examination of Claims in Patent Applications, 72 Fed. Reg. 46,716 (Aug. 21, 2007). I have identified at least one other recent federal statute that appears to work much the same way as the Patent Act’s reference to § 553. Specifically, as part of the Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (codified at 2 U.S.C. §§ 1301–1438 (2006)), Congress created the Office of Compliance to administer the Act, 2 U.S.C. § 1381(a) (2006). Congress also empowered the Office’s Executive Director to “adopt rules governing the procedures of the Office,” 2 U.S.C. § 1383(a), and at the same time provided that “[t]he Executive Director shall adopt [these procedural] rules . . . in accordance with the principles and procedures set forth in section 553 of title 5,” 2 U.S.C. § 1383(b). The provision also lays out some changes from § 553, relying on *Congressional Record* notice rather than *Federal Register* notice. *Id.* § 1383(b). Given that the phrase “in accordance with section 553 of title 5” appears eighty times in the *United States Code* (according to my search in Westlaw’s USC database), it seems likely there are additional similar provisions.

167. 35 U.S.C. § 3(a)(2)(B).

168. 35 U.S.C. § 5.

169. 35 U.S.C. § 3(a)(2)(B) (emphasis added).

then, that at least *some* patent regulations *are* subject to notice-and-comment rulemaking under § 553 of the APA. Were one to construe § 2(b)(2) literalistically, dispensing with any need for notice-and-comment rulemaking in a puff of logic, one would also render § 3's consultation command a nullity; it too, would refer to an empty set. Second, the legislative history of the 1999 enactment shows that, for at least three years preceding the final bill, both the House and Senate measures on this point referred not to rules "made in accordance with section 553,"¹⁷⁰ but rather to rules "made after notice and opportunity for full participation by interested public and private parties,"¹⁷¹ i.e., notice-and-comment rulemaking. The legislative history materials do not record the reason for the surface shift to the text now codified in § 2(b)(2)(B). Whatever the reason, the best reading of § 2 is the one that harmonizes it with § 3.¹⁷² On this reading, the Patent Office can bind the public with the procedural rules it promulgates with the benefit of public comment after adequate notice, and not otherwise.

B. The APA's Substance-Procedure Distinction

Section 553 of the APA, as just noted, requires notice-and-comment for substantive rules but expressly excepts "rules of agency . . . procedure" from that mandate.¹⁷³ This different treatment for substantive and procedural agency rules prompts challenges to agency rules alleged to be substantive but imposed without the requisite notice-and-comment.¹⁷⁴ The courts adjudicating these challenges have thus developed a jurisprudence distinguishing procedural from substantive rules for purposes of § 553. "The problem in this area, as in other areas of law, is that the distinction between procedure and substance is not always clear."¹⁷⁵ Indeed, "[g]iven

170. 35 U.S.C. § 2(b)(2)(B).

171. See H.R. 3460, 104th Cong. § 112 (1996); S. 1961, 104th Cong. § 112 (1996); H.R. 400, 105th Cong. § 112 (1997); S. 507, 105th Cong. § 112 (1997); H.R. 1907, 106th Cong. § 612 (as introduced by Rep. Coble, May 24, 1999).

172. "Courts have a 'duty to construe statutes, not isolated provisions.'" *Graham Cnty. Soil & Water Conservation Dist. v. United States*, 130 S. Ct. 1396, 1404 (2010) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)). Indeed, "[s]tatutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988) (citations omitted).

173. 5 U.S.C. § 553(A) (2006).

174. See *PIERCE*, *supra* note 24, § 6.5, at 353.

175. Jeffrey S. Lubbers & Nancy G. Miller, *The APA Procedural Rule Exemption: Looking for a Way to Clear the Air*, 6 ADMIN. L.J. AM. U. 481, 484 (1992); see also GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 297 (5th ed. 2009) (noting that "courts have had difficulty

the inherent difficulty of the enterprise, the boundary between substantive rules and procedural rules is likely to remain murky.”¹⁷⁶

Murky or not, the § 553 jurisprudence might appear—at least superficially—to be a helpful resource for distinguishing procedural from substantive rules in the Patent Office context. “After all,” one could reason, “Patent Act § 2(b)(2) invokes § 553’s rulemaking requirements, albeit idiosyncratically.” This surface connection may help explain the Federal Circuit’s cautious flirtation, in the *Tafas* cases, with the D.C. Circuit’s § 553 jurisprudence.¹⁷⁷ Even as it “recognize[d] that the definitions of ‘substance’ and ‘procedure’ in the notice and comment rulemaking context may embody policy considerations that are not coextensive with the considerations at issue” in a § 2(b)(2) challenge to a Patent Office rule, the *Tafas II* majority found “that these [§ 553] cases are nevertheless helpful to the task of drawing a similar line between ‘substance’ and ‘procedure’ in [a § 2(b)(2)] case.”¹⁷⁸

But the § 553 jurisprudence is *not* helpful for Patent Act cases, any more than salt water is helpful for quenching thirst. The APA distinguishes procedural from substantive rules for a purpose quite removed from that of the Patent Act; the tasks are similar in name alone. In the patent system, to hold that a rule is substantive is to put it beyond the Patent Office’s reach, to conclude that it invades a matter of substantive patent policy that Congress has kept for itself. The purpose of the substance–procedure distinction in the Patent Act is to preserve the division of responsibility that Congress first put in place in 1836 and that Congress can adequately police itself. By contrast, in the typical agency context governed by the APA—where Congress has empowered an agency to issue substantive as well as procedural rules—to hold that a rule is substantive is to require the agency to promulgate the rule only with the benefit of public comment after proper notice. The purpose of the substance–procedure distinction in the APA is to protect the general public’s right to participate in an agency’s formulation of the rules that regulate the public’s primary conduct,¹⁷⁹ and

distinguishing exempt rules of ‘agency organization, procedure, or practice’ (which are generally known collectively as ‘procedural rules’) from non-exempt substantive rules”).

176. PIERCE, *supra* note 24, § 6.5, at 353.

177. See *supra* notes 88–91 and accompanying text.

178. *Tafas II*, 559 F.3d 1345, 1355 n.4 (Fed. Cir. 2009), *vacated en banc*, *Tafas III*, 328 Fed. App’x 658 (Fed. Cir. 2009) (appeal reinstated).

179. See *supra* note 23; see also Tracy Corell Hauser, *The Administrative Procedure Act, Procedural Rule Exception to the Notice and Comment Requirement—A Survey of Cases*, 5 ADMIN. L.J. 519, 521 (1991) (“Congress enacted section 553 of the APA to make agencies more accountable to the public.”). Indeed,

any interested party who so desires can participate in the ordinary rulemaking processes. . . . At least at the level of responding to notice with comments about an

courts are thus a vital check on agencies. In short, the arc of § 553 bends toward substance, whereas the arc of § 2 bends toward procedure.

The D.C. Circuit's § 553 cases develop a method for using the substance–procedure distinction to protect public participation in agency development of substantive rules. This method, even if a bit “untidy,”¹⁸⁰ is clear enough to rule itself out as an aid in deciding boundary disputes under Patent Act § 2(b)(2)(B). The best way to dispel the temptation to rely on these cases when evaluating Patent Office rules is to discuss the cases in a bit of detail.

The foundational case in this line is *Batterton v. Marshall*,¹⁸¹ on which the D.C. Circuit continues to rely.¹⁸² In *Batterton*, the state of Maryland challenged a new Department of Labor (DOL) method for calculating a locality's unemployment rate for purposes of disbursing federal job program funds.¹⁸³ DOL adopted the new method without using notice-and-comment rulemaking.¹⁸⁴ Maryland attacked the rule as procedurally defective, and DOL defended it as, among other things, within the exception to notice-and-comment for procedural rules. The rule *was* procedural, in that it provided the procedure for calculating an unemployment rate from observable variables. But it was also substantive, in that it gave the rate that dictated the size of a jurisdiction's federal payment. The court began by “focus[ing] on the underlying purposes of the procedural requirements at issue,” stating that “[t]he essential purpose of according § 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.”¹⁸⁵ In light of this protective purpose, “[e]xemptions should be recognized only where the need for public participation is overcome by good cause to suspend it, or

agency's proposed rule, there are no restrictions or limitations. Doing so requires parties only to keep abreast of an agency's proposed rules. And such comments need take no particular form. As a formal matter, then, rulemaking is an entirely open and inclusive process of decisionmaking.

Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 110 (1998) (footnotes omitted).

180. PIERCE, *supra* note 24, § 6.5, at 353.

181. 648 F.2d 694 (D.C. Cir. 1980).

182. See, e.g., *James V. Hurson Assoc. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000) (quoting *Batterton*'s discussion of the “critical feature” that characterizes procedural rules for purposes of § 553).

183. 648 F.2d at 696–99.

184. *Id.* at 698 (“This new method was never formally announced or published; [the Department of Labor] simply sent descriptive memoranda announcing the change to regional commissions and state unemployment security agencies.”).

185. *Id.* at 703.

where the need is too small to warrant it”¹⁸⁶ Public participation is the default, and departures must be justified. Applying this exemption-wary approach to the question whether DOL’s new method for determining the unemployment rate was a procedural rule under § 553, the court acknowledged that “[t]he problem with applying the exception is that many merely internal agency practices affect parties outside the agency—often in significant ways.”¹⁸⁷ It framed its test thusly:

A useful articulation of the exemption’s critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency. . . . The exemption cannot apply, however, where the agency action trenches on substantial private rights and interests.¹⁸⁸

Pulling examples from prior cases, the court put “a freeze placed on the processing of applications for radio broadcast stations” and “a directive specifying that requisite audits be performed by nonagency accountants” on the procedural side of the line, and deemed it substantive “when drug producers are subject to new specifications for the kinds of clinical investigations deemed necessary” for new drug approval and “when motor carriers are subject to a new method for paying shippers.”¹⁸⁹ Finally, turning to the new DOL rule for measuring unemployment, the court concluded that it required public participation and was thus substantive:

Here, recipients of [federal] emergency job program monies are subject to a new method for determining the one undefined variable in the statutory fund allocation formula. . . . The critical question is whether the agency action jeopardizes the rights and interest of parties, for if it does, it must be subject to public comment prior to taking effect. As that is the case here, the exemption [for procedural rules] cannot apply.¹⁹⁰

Maryland prevailed in its § 553 challenge.

Three years later, in *Lamoille Valley Railroad Co. v. Interstate Commerce Commission*,¹⁹¹ the D.C. Circuit confronted a § 553 challenge to an expedited schedule in a proceeding to review a railroad merger.¹⁹² This expedited schedule “gave competing railroads 60 days (instead of the usual 90) to file responsive applications,” and the Interstate Commerce Commission (ICC)

186. *Id.* at 704 (footnote omitted).

187. *Id.* at 707.

188. *Id.* at 707–08.

189. *Id.*

190. *Id.* at 708 (footnote omitted).

191. 711 F.2d 295 (D.C. Cir. 1983).

192. *Id.* at 327.

issued it without using notice-and-comment rulemaking.¹⁹³ The D.C. Circuit held that the schedule was within § 553's exception for procedural rules. The court "put to one side cases like *Batterton* where a rule has definite substantive consequences but can arguably be called either 'procedural' or 'substantive,' and a court must decide which it is."¹⁹⁴ In this case, the court found it "hard to characterize the agency statement at issue . . . as anything other than a rule of 'procedure.'"¹⁹⁵ Nevertheless, because "all procedural rules affect substantive rights to greater or lesser degree," further inquiry was required to determine "whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA."¹⁹⁶ The court tailored the inquiry to the scheduling context:

When a rule prescribes a timetable for asserting substantive rights, we think the proper question is whether the time allotted is so short as to foreclose effective opportunity to make one's case on the merits. This standard allows an agency ample discretion to structure its proceedings as it sees fit. However, when an agency abuses that discretion by creating extreme procedural hurdles that foreclose fair consideration of the underlying controversy, a court, by remanding for notice and comment, can ensure that the agency explores the substantive consequences of its "procedural" rule.¹⁹⁷

Comparing the details of the standard and expedited schedules for the ICC railroad merger review under this foreclosure standard, the court concluded that the competitor railroads' opportunity to file responsive applications with the ICC had not been unduly abridged. Were it not for the *Batterton* default in favor of treating agency rules as matters for notice-and-comment (i.e., as substantive), one imagines the court would not have gone to such lengths to ensure that the plainly procedural rule at issue had only modest substantive effects.¹⁹⁸

193. *Id.*

194. *Id.* at 328.

195. *Id.*

196. *Id.*

197. *Id.*; see also *Nat'l Whistleblower Ctr. v. Nuclear Regulatory Comm'n*, 208 F.3d 256, 263 (D.C. Cir. 2000) (upholding a Nuclear Regulatory Commission (NRC) "unavoidable and extreme circumstances" standard for granting leave to file late papers in the license renewal proceedings for the Calvert Cliffs nuclear facility and applying the *Lamoille* approach, on the ground that the NRC "standard did not foreclose participation by third parties seeking to intervene in the Calvert Cliffs proceeding").

198. Cf. FED. R. CIV. P. 4(m) (providing the time within which to serve a summons); 6(a) (providing rules for computing time under the Rules); 6(c)(1) (providing that, generally, a written motion must be served at least fourteen days before the noticed hearing date); 12(a) (providing times within which an answer must be filed, depending upon stated criteria). I could go on, but you get the point. If any of these time period Rules were challenged under

In *American Hospital Ass'n v. Bowen*,¹⁹⁹ a group of hospitals challenged a series of directives, transmittals, and guidelines that the Department of Health & Human Services (HHS) issued in the wake of a 1982 change to the Medicare program. Congress enacted a new review program using peer review organizations (PROs) to “crack down on excessive reimbursements to hospitals for treatments of Medicare patients.”²⁰⁰ Enacting only a “skeletal” framework, “Congress left much of the specifics of the hospital–PRO relationship to the inventiveness of HHS, empowering it to promulgate regulations governing PROs in order to implement the peer review program.”²⁰¹ HHS issued numerous rules, but without using notice and comment. An association representing 6,000 member hospitals sued to invalidate the rules. The D.C. Circuit began by affirming “that Congress intended the exceptions to § 553’s notice and comment requirements to be narrow ones”: “In light of the obvious importance of these policy goals of maximum participation and full information, we have consistently declined to allow the exceptions itemized in § 553 to swallow the APA’s well-intentioned directive.”²⁰² Drawing on *Batterton* and other cases, the court explained that it “ha[d] generally sought to distinguish cases in which an agency is merely explicating Congress’ desires from those cases in which the agency is adding substantive content of its own.”²⁰³ It then described this approach to the exception for procedural rules as “inquiring more broadly whether the agency action,” in addition to having a substantial impact on parties, “also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior.”²⁰⁴ The court analyzed the series of directives at issue in the case in great detail, concluding that each of them was exempt from notice and comment.²⁰⁵

Batterton, *Lamoille*, and *Bowen* together established a framework for scrutinizing agency rules with an eye toward strongly protecting public participation in agency formulation of the rules designed to regulate people’s primary conduct out in the world, and not merely secondary

the REA, they would surely pass muster under *Hanna* and *Burlington Northern* without the need to conduct anything like *Lamoille*’s fair-consideration-foreclosure standard under the APA. And that is as it should be, for the REA and APA use a substance–procedure distinction for quite different purposes.

199. 834 F.2d 1037 (D.C. Cir. 1987).

200. *Id.* at 1041.

201. *Id.* at 1043.

202. *Id.* at 1044.

203. *Id.* at 1045; *see also id.* at 1047 (quoting “critical feature” language from *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)).

204. *Bowen*, 834 F.2d at 1047.

205. *Id.* at 1048–57.

conduct in presenting a matter to the agency. Thus, for example, in *JEM Broadcasting Co. v. FCC*,²⁰⁶ the D.C. Circuit held that the FCC was *not* required to use notice and comment to promulgate a set of “stringent application processing rules designed to streamline the agency’s review” of a large number applications for 689 newly allotted commercial frequency modulation (FM) channels.²⁰⁷ Citing *Batterton*, *Lamoille*, and *Bowen*, the court reasoned that “a license applicant’s right to a free shot at amending its application is not so significant as to have required the FCC to conduct notice and comment rulemaking, particularly in light of the Commission’s weighty efficiency interests.”²⁰⁸ Moreover, the new rules “did not change the *substantive standards* by which the FCC evaluates license applications, *e.g.*, financial qualifications, proposed programming, and *transmitter location*.”²⁰⁹ By contrast, in *Chamber of Commerce v. United States Department of Labor*,²¹⁰ the D.C. Circuit invalidated an Occupational Safety and Health Administration (OSHA) directive that placed “12,500 relatively dangerous workplaces” on a new “primary inspection list,” with a guaranteed “comprehensive inspection before the end of 1999,” at the same time the agency promised to remove a workplace from the list—thereby “reduc[ing] by 70 to 90 percent the probability that it [would] be inspected”—*if* “it adopt[ed] a comprehensive safety and health program designed to meet standards that in some respects exceed[ed] those required” by statute.²¹¹ OSHA issued the directive without notice and comment, and the court held this defect invalidated the rule because the rule was substantive. Drawing explicitly, again, on *Batterton* and *Bowen*, as well as *JEM*, the court reasoned that “[t]he Directive is intended to, and no doubt will, affect the safety practices of thousands of employers. The value of ensuring that the OSHA is well-informed and responsive to public comments before it adopts a

206. *JEM*, 22 F.3d 320 (D.C. Cir. 1994).

207. *Id.* at 322. The Federal Communications Commission (FCC) had dismissed JEM’s application for a station, and would not permit JEM to refile, when it determined that JEM’s application provided conflicting geographic coordinates for its proposed transmitter site in violation of the rules. *Id.* at 323.

208. *Id.* at 327.

209. *Id.* Similarly, in *James V. Hurson Associates v. Glickman*, 229 F.3d 277 (D.C. Cir. 2000), the court upheld against a § 553 attack a United States Department of Agriculture rule canceling an in-person-meeting method it had used for granting quicker approval of a producer’s proposed food safety label. Quoting liberally from *JEM*, the court held that “[t]he agency’s abolition of face-to-face [meetings] did not alter the substantive criteria by which it would approve or deny proposed labels; it simply changed the procedures it would follow in applying those substantive standards.” *Id.* at 280–81.

210. 174 F.3d 206 (D.C. Cir. 1999).

211. *Id.* at 208.

policy is therefore considerable.”²¹²

Batterton and its progeny do yeoman service in protecting the public’s right to participate when the typical federal agency writes a substantive rule, the very goal that § 553 sets in distinguishing substantive from procedural rules for notice-and-comment treatment. But these cases have nothing to teach us about the scope of the Patent Office’s rulemaking power, which binds the public only when deployed with notice-and-comment and which must avoid substantive patent policy even with the most punctilious notice-and-comment. The enabling act approach is a far better fit for the Patent Act, because it is tailored closely to the goal of enabling the Patent Office to make rules reasonably calculated to establish or preserve a fair and effective examination process for applicants, while at the same time prohibiting any glaring invasions of Congress’s substantive patent policy turf.

C. *The Rules of Decision Act’s Substance–Procedure Distinction*

The Rules of Decision Act (RDA) provides that “[t]he laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States.”²¹³ The text is identical in substance to its predecessor in the Judiciary Act of 1789,²¹⁴ even as so much else around it has changed. In *Erie Railroad v. Tompkins*,²¹⁵ a diversity case, the Supreme Court held that the RDA requires federal courts to apply not only state positive law, but also state decisional law.²¹⁶ Federal courts also, at the same time, apply federal procedural law, even in diversity cases. Indeed, “[t]he rules that were developed under the authority of the [REA] were adopted by the Supreme Court on December 20, 1937, and took effect on September 1, 1938, less than five months after *Erie* was handed down.”²¹⁷

The RDA thus sets up its own substance–procedure distinction: “Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive

212. *Id.* at 212.

213. 28 U.S.C. § 1652 (2006). The Rule of Decision Act’s (RDA’s) full text is quoted *supra*, note 31.

214. Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73, 92 (“*And be it further enacted*, That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”)

215. 304 U.S. 64 (1938).

216. *Id.* at 78. The same is true when state law supplies the rule of decision for a claim as to which a federal court has supplemental jurisdiction under 28 U.S.C. § 1367. *See Felder v. Casey*, 487 U.S. 131, 151 (1988).

217. *Houben v. Telular Corp.*, 309 F.3d 1028, 1033 (7th Cir. 2002).

law and federal procedural law.”²¹⁸ How does this distinction play out, and might it help us work out an approach to determining the scope of the Patent Office’s regulatory power? The breadth and depth of the *Erie* jurisprudence and commentary is staggering.²¹⁹ Even a modest exploration of the materials would take us far beyond the scope of this Article. But a small number of its settled principles suffice to show that *Erie*’s choice-of-law framework offers no help at all in sorting procedural from substantive Patent Office rules under § 2(b) of the Patent Act.

In *Erie* itself, the operative question was the scope of a railroad’s duty to a person who was injured by a passing train while walking along the railroad’s right of way.²²⁰ As the Seventh Circuit recently observed, this was an “obvious rule[] of substance,”²²¹ and the Supreme Court held that Pennsylvania state tort decisions supplied the rule of decision in the case.²²² In *Hanna*, as I described earlier,²²³ the operative question was the manner of serving process. The Massachusetts statute that would have applied in state court conflicted with Federal Rule of Civil Procedure 4, with which the diversity plaintiff had fully complied.²²⁴ The Supreme Court opined that “[w]hen a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice.”²²⁵ Where there is a Federal Rule on point, “the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, th[e Supreme] Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.”²²⁶ These polar

218. *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996). For a recent application of the *Erie* doctrine in the circuit courts, see *Kohlrautz v. Oilmen Participation Corp.*, 441 F.3d 827 (9th Cir. 2006).

219. For an excellent start, the interested reader should consult Adam N. Steinman, *What is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245 (2008).

220. *Erie R.R. v. Tompkins*, 304 U.S. 64, 69–70 (1938).

221. *Houben*, 309 F.3d at 1033.

222. *Erie*, 304 U.S. at 78–79.

223. See *supra* notes 115–21 and accompanying text.

224. *Hanna v. Plumer*, 380 U.S. 460, 461–62 (1965).

225. *Id.* at 471; see also *id.* at 473 (“*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules.”); *Erie*, 304 U.S. at 92 (Reed, J., concurring) (“The line between procedural and substantive law is hazy but no one doubts federal power over procedure.”). This collision *vel non* between federal rule and state law is the question that sharply divided the Supreme Court in the *Shady Grove* case. See *supra* note 122.

226. *Hanna*, 380 U.S. at 471; see also *Burlington N. R.R. v. Woods*, 480 U.S. 1, 4–5 (1987) (“In *Hanna v. Plumer*, we set forth the appropriate test for resolving conflicts between

cases are relatively straightforward.

Middle cases have presented a deeper challenge. “The Court’s first effort to grapple with the middle ground came in *Guaranty Trust Co. v. York*,^[227] in which it had to decide whether a state statute of limitations barred a claim brought for breach of trust.”²²⁸ Applying what it would later call “[o]utcome-determination’ analysis,”²²⁹ the *York* Court concluded that the state limitations statute applied: “The question is . . . does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?”²³⁰

The *York* approach did not last, however, for it “swept too much under state law.”²³¹ *Hanna* adjusted *York* by refracting it back through *Erie*’s policy lens. “The ‘outcome-determination’ test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”²³² This *Hanna* gloss on *York* established the anti-forum-shopping approach that the Supreme Court continues to follow in such “unguided *Erie* choice” cases.²³³ Each of these moves—from *Erie* to *York* to *Hanna* and beyond—is, in its

state law and the Federal Rules. The initial step is to determine whether, when fairly construed, the scope of Federal Rule 38 is sufficiently broad to cause a direct collision with the state law or, implicitly, to control the issue before the court, thereby leaving no room for the operation of that law. The Rule must then be applied if it represents a valid exercise of Congress’ rulemaking authority, which originates in the Constitution and has been bestowed on this Court by the Rules Enabling Act.” (internal quotations and citations omitted)).

227. 326 U.S. 99 (1945).

228. *Houben v. Telular Corp.*, 309 F.3d 1028, 1033 (7th Cir. 2002).

229. *Hanna*, 380 U.S. at 466.

230. 326 U.S. at 109.

231. *Houben*, 309 F.3d at 1034; *see also* Ely, *supra* note 20, at 709 (“But although it held sway for quite a time, *York*’s outcome determination test seemed overbroad.”).

232. *Hanna*, 380 U.S. at 468.

233. *See, e.g.*, *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427–28 (1996); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52–53 (1991); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 n.6 (1988); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752–53 (1980); *see also* *AXA Corporate Solutions v. Underwriters Reins. Corp.*, 347 F.3d 272, 276 (7th Cir. 2003) (“[T]he distinction between ‘substantive’ issues and ‘procedural’ issues in cases applying the doctrine first announced in *Erie* . . . should be understood as shorthand for a more complex inquiry. That inquiry requires courts to refer to the twin aims of the *Erie* doctrine, which are to discourage forum-shopping and to avoid the inequitable administration of laws.” (citation omitted)); Steinman, *supra* note 219, at 265 (“For the last forty years (since *Hanna*), the Supreme Court has consistently stated that such choices must be made with reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws. If federal judicial lawmaking would disserve these two policies, then the federal court must follow state law.” (internal quotation marks and footnote omitted)).

way, the stuff of nuance and filigree, subject to heartfelt debate among judges and scholars. But the broad outline recounted here, at least, is uncontroversial.

The RDA, and the *Erie* jurisprudence implementing it, focus on preventing forum shopping between the state and federal courts, and the frictions such forum shopping can produce. This policy response has no bearing on the Patent Act context, for the simple reason that *obtaining* a U.S. patent offers no prospect of forum shopping. There is one, and only one, forum in which to obtain a U.S. patent as a matter of right, and that forum is the U.S. Patent & Trademark Office. No amount of judicial parsing of substantive from procedural Patent Office rules under § 2(b) can change this fact.

CONCLUSION

Two years after *Erie* and the first Federal Rules of Civil Procedure, Professor Thomas Green quipped that “[t]he answer to the question, ‘What is procedure?’ depends upon the answer to another question, ‘Why do you want to know?’”²³⁴ This is functionalism, not fatalism. And a functional approach to the patent law version of the question—what is a procedural rule for purposes of § 2(b)(2)(A) of the Patent Act?—takes cognizance of the basic allocation of substantive and procedural roles that Congress made when it split the patent power in 1790. The primary rigors of congressional oversight permit the courts to serve as a secondary backstop, affording the Office substantial freedom to treat as procedural the matters it finds in the twilight zone between clear procedure and clear substance. A court should thus uphold a Patent Office rule against a § 2(b)(2)(A) attack where the Office can explain how the rule reasonably helps the Office establish or preserve a fair and effective examination process for applicants, notwithstanding an incidental effect on applicants’ substantive patent rights.

234. Green, *supra* note 1, at 483.

* * *

WHAT DO THE STUDIES OF JUDICIAL REVIEW OF AGENCY ACTIONS MEAN?

RICHARD J. PIERCE, JR.

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INTRODUCTION

Over the past twenty years, scholars have published numerous empirical studies of the patterns of decisions of reviewing courts.¹ Each of the studies

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1. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006) [hereinafter Miles & Sunstein I]; Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008) [hereinafter Miles & Sunstein II]; Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984; Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679 (2002); David Zaring, *Reasonable Agencies*, 96

subjected to statistical analysis large numbers of decisions in which courts at all levels of the judiciary have applied six administrative law doctrines to a wide variety of agency decisions. In this Article, I will summarize the findings of ten of those studies and attempt to explain what they mean to lawyers, judges, teachers, and scholars.

In Part I, I describe the six doctrines. In Part II, I summarize the findings of the studies and address the question: How much does doctrine matter? In Part III, I address the question: What other factors can explain the patterns of decisions? I focus particular attention on two variables that many scholars have studied—the political or ideological preferences of the judges and the composition of panels of circuit court judges. In Part IV, I address the question: Is the D.C. Circuit different, and if so, why? In Part V, I address the question: What do these studies mean for lawyers, judges, teachers, and scholars?

I. THE SIX DOCTRINES

The doctrine that has been studied the most was announced in the Supreme Court's 1984 opinion in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.²

In other parts of its opinion, the Court equated "permissible" with "reasonable."³

Some scholars argue that only the second part of the *Chevron* test is important.⁴ They maintain that the first part of the test has no independent meaning because any agency construction of a statute that is inconsistent with congressional intent is, by definition, unreasonable. In this view, the

VA. L. REV. 135 (2010).

2. 467 U.S. 837, 842–43 (1984) (footnotes omitted).

3. *Id.* at 844.

4. *E.g.*, Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 599 (2009).

Chevron doctrine can be simplified and restated as the following: a reviewing court must uphold any reasonable agency construction of an agency-administered statute.

Between 1984 and 2000, the *Chevron* doctrine dominated judicial review of agency statutory interpretations. Before 1984, the doctrine the Court applied most frequently in reviewing agency statutory interpretations was announced in the Court's 1944 opinion in *Skidmore v. Swift & Co.*:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.⁵

The *Skidmore* doctrine largely disappeared between 1984 and 2000. Most scholars and judges believed that it had been displaced by the *Chevron* doctrine. In 2001, however, a majority of the Court resurrected the *Skidmore* doctrine and held that it, rather than the *Chevron* doctrine, applies to some uncertain category of cases.⁶ Since 2001, the Justices have engaged in a lively debate about the circumstances in which each of the two competing doctrines applies.⁷ That debate indicates that all Justices believe that the doctrines differ and that the *Chevron* doctrine is more deferential than the *Skidmore* doctrine.

The third doctrine that has been studied was announced in the Court's 1983 opinion in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁸

The *State Farm* doctrine is often described as imposing a duty to engage in reasoned decisionmaking, i.e., a court will uphold an agency action if, but only if, the agency adequately explains how it reasoned from the

5. 323 U.S. 134, 140 (1944).

6. *United States v. Mead Corp.*, 533 U.S. 218, 231–33 (2001).

7. For a thorough discussion of the debate, see Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005).

8. 463 U.S. 29, 43 (1983).

language of the relevant statute and the available evidence to the conclusions it reached.⁹ The *State Farm* doctrine is based on the Court's interpretation of the arbitrary and capricious standard of review. The federal Administrative Procedure Act (APA) instructs reviewing courts to apply that standard to all agency actions.¹⁰

There is broad agreement that the *Chevron* and *State Farm* doctrines overlap, but there is disagreement with respect to the extent of the overlap.¹¹ Some scholars believe that step two of *Chevron* is the same as the duty to engage in reasoned decisionmaking announced in *State Farm*, i.e., a statutory interpretation is "reasonable" within the meaning of *Chevron* step two if, but only if, the agency adequately explained why it adopted that interpretation. It follows that a scholar who believes that step two of *Chevron* renders step one irrelevant by subsuming that step sees a complete overlap between the two doctrines.

The fourth doctrine that has been studied is the substantial evidence doctrine. It was originally announced by the Court in its 1938 opinion in *Consolidated Edison Co. v. National Labor Relations Board*¹² and was qualified by the Court's 1951 opinion in *Universal Camera Corp. v. National Labor Relations Board*.¹³ Combining the critical passages from the two opinions, the Court defined the doctrine to require "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"¹⁴ "tak[ing] into account whatever [evidence] in the record fairly detracts from its weight."¹⁵

In its original form, the substantial evidence doctrine had a narrower role than the first three doctrines. It applied only to agency findings of fact made in formal adjudications. Gradually, however, it has taken on a broader meaning. The transformation of the substantial evidence test into a broad doctrine of judicial review has taken place through three mechanisms. First, while the APA instructs reviewing courts to apply the substantial evidence standard only to findings of fact made in formal adjudications,¹⁶ modern agencies use informal adjudication and informal rulemaking to "find" the facts that are the predicates for their actions in a high proportion of cases.¹⁷ As a technical matter, an agency is not required

9. For a detailed discussion of *State Farm*, see 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.4 (5th ed. 2010).

10. 5 U.S.C. § 706(2)(A) (2006).

11. For a discussion of this debate, see PIERCE, *supra* note 9, § 3.6, at 218–21.

12. 305 U.S. 197 (1938).

13. 340 U.S. 474 (1951).

14. *Consol. Edison Co.*, 305 U.S. at 229.

15. *Universal Camera Corp.*, 340 U.S. at 488.

16. 5 U.S.C. § 706(2)(E) (2006).

17. See generally PIERCE, *supra* note 9, chs. 7–8.

to make findings of fact when it acts through informal adjudication or informal rulemaking, but courts require agencies to identify the factual predicates for their actions in both contexts.¹⁸ Reviewing courts also require agencies to explain why they have chosen the factual predicates on which they rely. Since the APA does not authorize a court to apply the substantial evidence standard for this purpose, courts usually use the ubiquitous arbitrary and capricious standard for that purpose. Thus, courts regularly refer to the choice between arbitrary and capricious review and substantial evidence review as a choice between doctrines that perform the same functions.¹⁹

Second, while the APA authorizes courts to apply the substantial evidence standard only to findings of fact made in formal adjudications, some important agency-specific statutes require courts to apply that standard to all actions agencies take to implement their statutes, including informal adjudications and informal rulemakings.²⁰ These congressional instructions to courts to apply the substantial evidence standard to all agency actions and not just to formal adjudications has forced courts to adapt the doctrine to the quite different contexts of informal adjudication and informal rulemaking.²¹ In those contexts, agencies are not required to make formal findings of fact based on “evidence” of the type courts usually consider in “hearings” of the type familiar to courts. The evidence on which the agency relies in informal adjudications and rulemakings usually consists of scientific and economic studies contained in a “record” that consists solely of written submissions to the agency. As a result, the version of the substantial evidence doctrine courts apply in such cases is virtually identical to the version of the arbitrary and capricious standard that was the basis for the Court’s opinion in *State Farm*. A court can apply the substantial evidence doctrine to uphold an agency action taken through use

18. In a rulemaking, the agency must incorporate in its final rule a statement of basis and purpose in which it discusses the relationship between the available evidence and the factual predicates for its action. See *State Farm*, 463 U.S. 29 (1983). If a party petitions for review of an agency decision taken in an informal adjudication, the reviewing court requires the agency to provide a statement of its reasons for acting that includes a discussion of the relationship between the available evidence and the factual predicates for the agency action. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654–55 (1990).

19. E.g., *Bangor Hydro-Electric Co. v. FERC*, 78 F.3d 659, 663 n.3 (D.C. Cir. 1996).

20. E.g., 15 U.S.C. § 717r(b) (2006) (“The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.”).

21. Initially, courts found this task difficult. See, e.g., *Indus. Union Dep’t v. Hodgson*, 499 F.2d 467, 469 (D.C. Cir. 1974) (stating that Congress had “explicitly combined an informal agency procedure with a standard of review traditionally [used for] formal adjudication or rulemaking”). Over time, however, they became comfortable with the process. E.g., *Am. Pub. Gas Ass’n v. Fed. Power Comm’n*, 567 F.2d 1016 (D.C. Cir. 1977).

of informal adjudication or informal rulemaking only by determining whether the agency engaged in reasoned decisionmaking, including a statement of the agency's reasons in support of the factual predicates for its action.

Third, even in the original context of judicial review of findings of fact made in formal adjudications, courts now combine the substantial evidence standard with the duty to engage in reasoned decisionmaking announced in *State Farm*. Thus, courts often apply the substantial evidence doctrine as the basis to reject an agency finding because the agency has not stated adequate reasons for crediting some evidence and discrediting other evidence.²² As one circuit court described the modern version of the substantial evidence doctrine in 2007, an agency "must give 'specific, cogent' reasons for [its] findings" in the common situation in which there is conflicting evidence in the record.²³

The Supreme Court has recognized that the substantial evidence standard and the arbitrary and capricious standard perform analogous functions today.²⁴ The Court also has characterized the substantial evidence standard as more demanding than the arbitrary and capricious standard.²⁵ Circuit courts and scholars have expressed skepticism that the two doctrines actually differ, however.²⁶ Even the Supreme Court has recognized that the doctrines rarely, if ever, yield different results.²⁷

The fifth doctrine that has been the subject of empirical studies had its origin in the Supreme Court's 1945 opinion in *Bowles v. Seminole Rock & Sand Co.*:

Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is *plainly erroneous or inconsistent with the regulation*.²⁸

But the Court now refers to the doctrine by reference to its 1997 opinion in *Auer v. Robbins*.²⁹

22. See the cases described in 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 11.2, at 988–89, 997–99 (5th ed. 2010).

23. *Chen v. Mukasey*, 510 F.3d 797, 801–02 (8th Cir. 2007).

24. *Dickinson v. Zurko*, 527 U.S. 150, 161–63 (1999).

25. *E.g.*, *Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 412 n.7 (1983).

26. See the cases discussed in PIERCE, *supra* note 22, § 11.4, at 1020–21.

27. *Zurko*, 527 U.S. at 162–63.

28. 325 U.S. 410, 413–14 (1945) (emphasis added).

29. 519 U.S. 452, 461 (1997).

The *Auer* doctrine performs the same function as the prior four doctrines, except that it applies to agency interpretations of rules rather than to agency interpretations of statutes. Of course, a court must apply both the *Auer* doctrine and one or more of the other doctrines in the common situation in which the agency supports its action based on both an interpretation of a statute and an interpretation of a rule.³⁰

The sixth doctrine is *de novo* review. It differs significantly from the other five, at least in theory. Each of the other five doctrines instructs a reviewing court to confer some uncertain degree of deference on the agency decision the court is reviewing. As the name suggests, *de novo* review refers to an approach to judicial review in which the court does not confer any deference on the agency; the court resolves the issue before it as if the agency had never addressed the issue.³¹

II. THE FINDINGS OF THE STUDIES: DOES DOCTRINE MATTER?

Most of the studies analyzed patterns of decisions by circuit courts, but two analyzed Supreme Court opinions, and one analyzed district court decisions. William Eskridge and Lauren Baer analyzed 1,014 Supreme Court opinions issued between 1983 and 2005.³² They found that the overall affirmance rate was 68.3%.³³ Disaggregating the cases by doctrine, they found the following affirmance rates: *Chevron*, 76.2%; *Skidmore*, 73.5%; *Auer*, 90.9%; and *de novo*, 66.0%.³⁴ The only other study of Supreme Court decisions was published by Thomas Miles and Cass Sunstein in 2006.³⁵ They analyzed the sixty-nine Supreme Court opinions issued between 1989 and 2005 in which the Court invoked the *Chevron* doctrine.³⁶ They found that the Court affirmed 67% of agency actions,³⁷ an affirmance rate approximately 9% lower than the rate Eskridge and Baer found for the period 1984 to 2005. Since the period studied by Miles and Sunstein overlaps almost completely with the last fifteen years of the period studied by Eskridge and Baer, the lower affirmance rate found by Miles and Sunstein implies a decline in the Supreme Court's rate of affirmance in

30. *E.g.*, *Shipbuilders Council of Am. v. U.S. Coast Guard*, 578 F.3d 234 (4th Cir. 2009).

31. *See* Verkuil, *supra* note 1, at 688 (“Indeed, under *de novo* review, there should be no deference at all.”).

32. Eskridge & Baer, *supra* note 1, at 1094 (analyzing cases “in which a federal agency interpretation of a statute was at issue”).

33. *Id.* at 1100.

34. *Id.* at 1142 tbl.15.

35. Miles & Sunstein I, *supra* note 1.

36. *Id.* at 825.

37. *Id.* at 849.

Chevron cases after 1990.

Most of the studies analyzed circuit court decisions. Several studies reported rates of affirmance in circuit courts when they apply the *Chevron* doctrine. The findings are 81.3% in 1985,³⁸ 75.5% in 1988,³⁹ 65.2% from 1991 to 1995,⁴⁰ 73% from 1995 to 1996,⁴¹ and 64% from 1996 to 2006.⁴² The findings are in a narrow range—64% to 81.3%—and do not indicate any trend toward more or less deference over time.

The studies included several findings with respect to the rate of affirmance when courts apply the *Skidmore* doctrine. They are: 55.1% in 1965,⁴³ 60.6 % in 1975,⁴⁴ 70.9% in 1984,⁴⁵ and 60.4% from 2001 to 2005.⁴⁶ Again, the range of findings is narrow—55.1% to 70.9%—and does not indicate a clear trend toward more or less deference over time.

Two studies included findings with respect to the affirmance rate when courts apply the substantial evidence doctrine, and one included a finding with respect to the rate of affirmance when courts apply the *State Farm* doctrine. The findings are as follows: *State Farm* affirmance rates of 64% from 1996 to 2006;⁴⁷ and substantial evidence affirmance rates of 64% from 1996 to 2006⁴⁸ and 71.2% from 2000 to 2004.⁴⁹ The range of findings for the *State Farm* and substantial evidence doctrines—64% to 71.2%—is even narrower than the ranges of findings applicable to the *Chevron* and *Skidmore* doctrines, and again the findings do not show any clear temporal trend.

I have found only one empirical study of district court review of agency decisions. Paul Verkuil studied district court decisions that applied the substantial evidence doctrine to Social Security disability decisions and district court decisions that engaged in de novo review of agency denials of requests for information under the Freedom of Information Act (FOIA).⁵⁰ He found that district courts affirmed disability decisions in only 50% of

38. Schuck & Elliott, *supra* note 1, at 1038.

39. *Id.*

40. See Cross & Tiller, *supra* note 1, at 2168, 2172 tbl.3 (analyzing opinions from the D.C. Circuit).

41. Kerr, *supra* note 1, at 30.

42. Miles & Sunstein I, *supra* note 1, at 849.

43. Schuck & Elliott, *supra* note 1, at 1007.

44. *Id.* at 1007–08.

45. *Id.* at 1030 tbl.3.

46. Hickman & Krueger, *supra* note 1, at 1275.

47. Miles & Sunstein II, *supra* note 1, at 766, 776.

48. *Id.* at 766–68, 779.

49. Zaring, *supra* note 1, at 177–78.

50. Verkuil, *supra* note 1.

cases, while they affirmed agency decisions under FOIA in 90% of cases.⁵¹ Those findings differed dramatically both from the findings in the studies of Supreme Court decisions and circuit court decisions and from the pattern of decisions Verkuil hypothesized based on the highly deferential nature of the substantial evidence doctrine and the non-deferential nature of de novo review.⁵²

With one notable exception, the studies suggest that a court's choice of which doctrine to apply in reviewing an agency action is not an important determinant of outcomes in the Supreme Court or the circuit courts. The ranges of affirmance rates by doctrine are as follows: *Chevron*, 60% to 81.3%; *Skidmore*, 55.1% to 73.5%; *State Farm*, 64%; substantial evidence, 64% to 71.2%; and de novo, 66%. All of the ranges of findings overlap, and doctrinally-based differences in outcome are barely detectable. The one notable exception is the *Auer* doctrine. The Supreme Court affirms agency interpretations of agency rules at a much higher rate—90.9%—than the roughly 70% rate at which it upholds other agency decisions.⁵³ There are no studies of circuit court decisions that apply *Auer*, but the Supreme Court seems to be sending the lower courts an unmistakable, if implicit, message that they should confer extraordinary deference on agency interpretations of agency rules.

The unusually high rate at which the Court affirms agency interpretations of agency rules suggests strongly that the Court has rejected John Manning's sophisticated argument against judicial deference to agency interpretations of agency rules.⁵⁴ The Court seems instead to have internalized the traditional common sense reasons in support of such deference—agencies are in a much better position than courts to know what their rules mean and to understand the functional implications of alternative interpretations of their rules.

The contrast between the findings of the studies of Supreme Court and circuit court decisions, on the one hand, and the findings in Verkuil's study of district court decisions, on the other hand, adds credence to Verkuil's interpretation of his findings. Verkuil argued that the stark disparity between the results he hypothesized and the results he found suggested the need to study in greater detail the two decisionmaking contexts in an effort to identify and address the unique institutional characteristics that led to such anomalous results.⁵⁵ The studies of Supreme Court and circuit court

51. *Id.* at 719.

52. *Id.*

53. Eskridge & Baer, *supra* note 1, at 1142.

54. See generally John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996).

55. Verkuil, *supra* note 1, at 724–33.

decisionmaking indicate that the norm for the results of judicial review of agency decisions is about a 70% affirmance rate. Any study that finds an affirmance rate that varies significantly from that norm in some context suggests the need for detailed study of the decisionmaking context to identify and to address the causes of the variation from the norm.

While the studies find that a court's choice among the six doctrines has little if any explanatory value, it does not follow that doctrine is irrelevant to the decisionmaking process, if we conceive of doctrine more broadly. In the final section of this Article, I argue that five of the six doctrines courts apply are just alternative ways of stating the same broad doctrine: A court should uphold a reasonable agency action.

In deciding whether an agency action is reasonable, a court always asks the same three questions. First, is the agency action consistent with relevant statutes? Second, is the agency action consistent with the available evidence? Third, has the agency explained adequately how it reasoned from the relevant statutory language and the available evidence to the conclusions it reached?

If we conceive of doctrine in that broader way and ignore the subtle differences in the Court's description of the doctrines, the studies are entirely consistent with a decisionmaking process in which each of the specific doctrines can be considered as an incomplete description of the review process, with emphasis on one of the three criteria all courts apply in reviewing all agency actions.

III. WHAT FACTORS CAN EXPLAIN THE PATTERNS OF DECISIONS?

If choice of doctrine explains little, if any, of the variation in the outcome of cases in which courts review agency actions, it would be helpful to know what other factors help to explain the pattern of decisions. The studies have identified five other variables that may help to explain outcomes: procedures used to produce the agency decision, agency consistency over time, the extent of judicial comfort with the subject matter of the agency decision, ideological perspectives of the judges and Justices, and panel effect, i.e., whether a circuit court panel consists of three judges of the same political party or of a mixture of judges of different political parties.

The findings with respect to an agency's choice of decisionmaking procedures suggest that this factor has little, if any, effect on the rate of judicial affirmance of agency actions. Eskridge and Baer found that the Supreme Court upholds agency actions taken through use of notice-and-comment rulemaking in 72.5% of cases versus 65.4% for actions taken

through formal adjudication.⁵⁶ That difference is modest, however, and its significance is called into question by some of Eskridge and Baer's other findings, e.g., the Court upholds agency positions taken in amicus briefs and in various informal documents at a rate higher than the rate at which the Court upholds positions taken in legislative rules or formal adjudications.⁵⁷ Moreover, Peter Schuck and Donald Elliott found that circuit courts uphold agency adjudications more frequently than agency rules,⁵⁸ while Orin Kerr found no difference in the rate of affirmance of rules and adjudications.⁵⁹

Several studies found that the rate of affirmance is higher with respect to longstanding agency positions than for newly adopted agency positions.⁶⁰ The differences were small, however. Those findings are consistent with applicable doctrine. The Court has long said that an agency can depart from precedent or change its policy if, but only if, the agency acknowledges and explains the change.⁶¹ That aspect of applicable doctrine suggests a pattern of decisions like that found in the studies—courts uphold longstanding agency positions only slightly more often than they uphold newly adopted positions.

Several studies found differences in affirmance rates depending on the substantive context of the agency decision. Thus, for instance, Eskridge and Baer found that the Supreme Court affirms agency decisions involving bankruptcy or business regulation in 75% to 77.1% of cases but that it affirms decisions involving criminal law or labor law in only 62.3% to 65.5% of cases.⁶² This difference also fits reasonably well with applicable doctrine. The Court has long emphasized comparative institutional advantage and specialized agency expertise as bases for its deference doctrines.⁶³ It is not surprising that it attaches less significance to an agency's comparative advantage when the agency is addressing a subject like labor law or criminal law that is relatively familiar to the Justices than

56. Eskridge & Baer, *supra* note 1, at 1147.

57. *Id.* at 1147–48.

58. Schuck & Elliott, *supra* note 1, at 1021–22.

59. Kerr, *supra* note 1, at 30.

60. See Eskridge & Baer, *supra* note 1, at 1148–49; Hickman & Krueger, *supra* note 1, at 1286–87; Kerr, *supra* note 1, at 33.

61. See, e.g., *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810–11 (2009) (holding that an agency need only assert its belief that a new policy is better than an old policy to have the new policy upheld); *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (holding that courts must overturn an irrational departure from precedent). See generally PIERCE, *supra* note 22, at § 11.5.

62. Eskridge & Baer, *supra* note 1, at 1144–45 & tbl.16.

63. E.g., *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983).

when the agency is addressing a subject like bankruptcy or business regulation, where the agency has a distinct expertise advantage over the Justices.

Comparative institutional advantage may explain some of the other findings of differences in affirmance rates based on subject matter as well. Thus, for instance, David Zaring found that the D.C. Circuit affirms agencies that appear frequently before it 12% less often than agencies that appear before it less frequently.⁶⁴ It is not surprising to learn that a court gains confidence in its ability to understand a subject as it gains experience in addressing the subject.

Many studies found that the ideological preferences of judges and Justices have considerable explanatory power in the context of judicial review of agency actions.⁶⁵ The findings with respect to the voting patterns of the two former administrative law professors who are now Justices are illustrative. Eskridge and Baer found that Justice Breyer votes to uphold 79.5% of liberal agency actions, while Justice Scalia votes to uphold only 53.8% of liberal agency actions.⁶⁶ That 25.7% difference suggests strongly that the ideological preferences of the Justices are more important than any of the other factors that have been studied in explaining their votes in cases in which the Court reviews agency actions.

Eskridge and Baer found a smaller disparity between the votes of Justices Breyer and Scalia when the Court reviews conservative agency actions. Justice Scalia votes to uphold such actions in 71.6% of cases, while Justice Breyer votes to uphold them in 64.9% of cases—a difference of only 6.7%.⁶⁷ The difference between those two voting patterns reflects another robust finding in the studies. Liberal judges and Justices vote to uphold agency actions more often than do conservative judges and Justices.⁶⁸ This finding also illustrates the insignificance of choice of doctrine. Justice Scalia is the most outspoken proponent of the highly deferential *Chevron* doctrine,⁶⁹ while Justice Breyer is the most vocal critic of that doctrine.⁷⁰ Yet, Justice

64. Zaring, *supra* note 1, at 183–84; *see also* Miles & Sunstein II, *supra* note 1, at 796–97 (finding courts that review an agency more frequently uphold the actions of that agency less frequently).

65. Zaring was the only scholar who looked at this question and did not find a significant difference in voting patterns based on the ideological preference of judges. Zaring, *supra* note 1, at 180–82.

66. Eskridge & Baer, *supra* note 1, at 1154 tbl.20.

67. *Id.*

68. *See* Miles & Sunstein I, *supra* note 1, at 855 & tbl.9; Miles & Sunstein II, *supra* note 1, at 795–96 & tbl.5.

69. *See, e.g.,* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (praising *Chevron*).

70. *See, e.g.,* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L.

Breyer's voting pattern shows that he is more deferential than Justice Scalia. Justice Breyer votes to uphold agency actions more often than any other current Justice, while Justice Scalia votes to uphold agency actions less often than any other current Justice.⁷¹

Every study of circuit court decisions that has looked at the question has found that ideological preferences help to explain patterns of decisions in cases in which courts review agency actions. Most studies found large ideologically based differences in outcomes. Remarkably, three of the studies had identical findings with respect to the explanatory power of the ideological preferences of judges. Each of the three found that a circuit court panel was approximately 30% more likely to uphold an agency action when the action was consistent with the ideological preferences of the members of the panel than when the action was inconsistent with those preferences.⁷² Thus, ideology is the most important of the explanatory variables that have been studied.

Many studies also analyzed the patterns of decisions in an effort to detect a panel effect, i.e., a difference in patterns of decisions that varies depending on whether a panel consists of three judges of the same political party or instead consists of two judges of one party and one judge of the other party. Every study found large panel effects. Again, three of the studies included remarkably consistent findings with respect to panel effects. The tendency of circuit judges to vote in a manner consistent with their ideological preferences is about half as strong when judges sit in politically mixed panels as when they sit in politically unified panels.⁷³

Scholars have identified two plausible reasons for the panel effect. It may be attributable to a whistle-blower effect, i.e., the members of the majority party are deterred from voting in accordance with their ideological preferences by fear that their colleague of the other party will write a scorching dissent that will embarrass them.⁷⁴ Alternatively, it may be attributable to the effects of collegiality, i.e., when judges with differing ideological preferences are forced to discuss their differences they tend to

REV. 363, 372–82 (1986) (criticizing *Chevron*).

71. Eskridge & Baer, *supra* note 1, at 1154 tbl.20; see Miles & Sunstein I, *supra* note 1, at 826.

72. See Cross & Tiller, *supra* note 1, at 2171; Miles & Sunstein I, *supra* note 1, at 856; Miles & Sunstein II, *supra* note 1, at 788–90 (remarking on the increased likelihood of appointees voting in favor of decisions that correspond to their political ideology); see also Kerr, *supra* note 1, at 40 (finding a 20% differential based on ideology); Revesz, *supra* note 1, at 1742–43 (finding large ideologically based differences in nearly every time period studied). But see Zaring, *supra* note 1, at 180–82 (finding only small ideologically based differences).

73. See Cross & Tiller, *supra* note 1, at 2172; Miles & Sunstein I, *supra* note 1, at 856; Miles & Sunstein II, *supra* note 1, at 789–90.

74. Cross & Tiller, *supra* note 1, at 2173–74.

temper their views.⁷⁵

I suspect that the panel effect is caused by some combination of both factors. Whatever may be its cause, the effect seems to disappear when the number of decisionmakers increases from three to nine. Ideology is about as important a determinant of the decisions of the Justices as it is of circuit court judges, even though the nine Justices differ significantly with respect to their ideological preferences and the majority can be certain that its opinion will elicit a highly critical dissent in every case that has significant ideological content.⁷⁶

IV. IS THE D.C. CIRCUIT DIFFERENT?

Every study that has looked at the question has found that the D.C. Circuit is less deferential to agencies than any other circuit. That robust finding is important because the D.C. Circuit decides far more cases involving judicial review of agency action than any other circuit. The D.C. Circuit decides over one quarter of the cases in which circuit courts review agency actions.⁷⁷ Like many of the other findings in the studies, the findings with respect to the D.C. Circuit's affirmance rate are remarkably consistent. Schuck and Elliott found that the D.C. Circuit affirmed agencies in 12% fewer cases than other circuits in 1984, while Miles and Sunstein found that the D.C. Circuit affirmed agencies in 11% fewer cases than other circuits during the period 1996 to 2006.⁷⁸

There are at least four plausible explanations for the D.C. Circuit's consistently less deferential posture in cases in which it reviews agency actions. First, it might be attributable to the D.C. Circuit's greater familiarity with the subject matter of many of the administrative law cases it decides. A regional circuit court might decide one case involving telecommunications law every few years, for instance, while the D.C. Circuit typically decides several such cases each year. Over time, a judge who is regularly exposed to a body of law may come to believe that he does not suffer from a significant institutional disadvantage vis-à-vis the agency charged with responsibility to implement that body of law. The judge may come to believe that he need not defer to the agency because he knows as much about the subject as do the agency decisionmakers. This explanation for the D.C. Circuit's less deferential posture fits well with the finding that circuit courts have lower affirmance rates with respect to agencies they

75. See Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358–62 (1998).

76. See *supra* text accompanying notes 64–70.

77. Miles & Sunstein II, *supra* note 1, at 794–95.

78. *Id.* at 795; Schuck & Elliott, *supra* note 1, at 1041–42.

review frequently than with respect to agencies they review infrequently and with the finding that the Supreme Court affirms agencies less frequently in substantive contexts in which the Justices believe that they are not at a comparative institutional disadvantage.⁷⁹

Second, the D.C. Circuit's less deferential posture may be attributable to the composition of the court. The process of appointing judges to the D.C. Circuit differs markedly from the process of appointing judges to the regional circuit courts. In nominating people to be members of regional circuit courts, the President traditionally defers to the preferences of the Senators and Governor of each state who are members of the President's party. Thus, for instance, when a Democratic President has the opportunity to nominate someone to the "Maryland seat" on the Fourth Circuit, the President traditionally solicits and acts on the recommendation of the senior (Democratic) Senator from Maryland. The D.C. Circuit is one of only three courts to which the President makes nominations of people of his own choosing. The process of nominating people to the D.C. Circuit is dominated by the President's political advisors. This selection process may yield nominees with unusually powerful political and ideological perspectives who are less likely to defer to the (often rival) politicians who run agencies.

Third, the D.C. Circuit's less deferential posture may be attributable to the ambitions of many of the members of the D.C. Circuit. The President often chooses members of the D.C. Circuit as nominees for the Supreme Court. Four of the members of the current Supreme Court were members of the D.C. Circuit when they were nominated. It may be that members of the D.C. Circuit believe that they can improve their chances of being nominated to the Supreme Court by deciding high visibility cases in ways that coincide with the ideological preferences of the leaders of their party.

Finally, the D.C. Circuit's workload may contribute to its less deferential posture. The D.C. Circuit decides less than one quarter of the average number of cases per judge decided by the other circuit courts.⁸⁰ It takes a much longer time to read and understand the record in a typical administrative law case than in a typical criminal law or contract law case. Moreover, it takes much longer to write an opinion reversing an agency action than an opinion affirming that action. The D.C. Circuit can devote much more time to each case in which it reviews an agency action than can a regional circuit court. This explanation for the D.C. Circuit's greater willingness to overturn agency actions fits well with the finding that the

79. See *supra* text accompanying notes 61–63.

80. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 41 tbl.S-2 (2009).

D.C. Circuit writes much longer opinions than other circuits in such cases.⁸¹

I believe that each of these four factors contributes to the D.C. Circuit's unusually low rate of upholding agency actions. My belief is reinforced by an explanation I once heard from a friend who is a judge on another circuit. As he described the process his court often uses in deciding administrative law cases, he and his colleagues often use *Chevron* as a verb. Thus, for instance, after a long day of hearing oral arguments in several cases, one of which involved review of an agency action, the senior member of the panel would ask: "Should we *Chevron* that case?" In many administrative law cases, the other members would respond affirmatively for several good reasons.

The record in a typical agency review case is extremely long. It often includes multiple scientific studies with conflicting conclusions with respect to issues that are unfamiliar to the judges. Given their heavy load of other cases, the judges cannot devote nearly enough time to study of the record and the issues to be confident that they understand the issues well enough to pass judgment on the adequacy of the agency's treatment of those issues. They fear that they might cause more harm than good by attempting to grapple with the issues in a serious way. Finally, they can dispose of the case with relatively little use of scarce resources by instructing a clerk to write a draft of a relatively short opinion in which he summarizes the facts and issues, recites the applicable doctrines, and assures the reader that the court has dutifully applied those doctrines and has detected no fatal flaws in the agency's decisionmaking process. Of course, regional circuit courts overturn about one-third of the agency actions they review, so the judges must at least take a quick look at factors like the relationship between the agency's legal conclusions and the language of the applicable statute, the relationship between the agency's conclusions and the available evidence, and the quality of the agency's reasoning before they *Chevron* a case.

My friend went on to express the opinion that the members of the D.C. Circuit can take a less deferential attitude toward such cases largely because of their much lower caseload. Of course, he might have added that the members of the D.C. Circuit often can obtain a decent understanding of the issues in less time than the members of a regional circuit court because of their greater familiarity with the subject matter addressed in most agency decisions.

I do not intend my stylized and necessarily hypothetical description of the decisionmaking process of either the regional circuit courts or the D.C. Circuit as a criticism of either decisionmaking process or of the judges who

81. Schuck & Elliott, *supra* note 1, at 1004.

engage in either process. If my description is accurate, it may well be that both institutions are doing about what each should be doing given their quite different circumstances. What is clear, however, is that the D.C. Circuit is systematically different from the other circuit courts in its tendency to be less deferential to agencies. I leave until the last section of this Article the question of what, if anything, we should do about that tendency.

V. IMPLICATIONS OF THE STUDIES

A. *Implications for Practitioners*

The findings of the studies have several implications for practitioners. First, lawyers who play roles in administrative law cases should spend less time and energy arguing about which doctrine a court should apply, e.g., whether an agency action is subject to *Chevron* deference or *Skidmore* deference. There is no empirical support for the widespread belief that choice of doctrine plays a major role in judicial review of agency actions. I am not suggesting that lawyers ignore doctrine completely. There is anecdotal evidence that a court's choice of doctrine can be outcome determinative in a few otherwise close cases.⁸² Moreover, courts expect to read briefs and listen to arguments that include some discussion of applicable doctrine, and it is always a costly mistake to fail to meet the expectations of an individual or an institution.

Lawyers should make arguments with reference to specific doctrines for another reason as well. While a court's choice of doctrine is not an important determinant of the outcome of a case, a lawyer for a petitioner can improve his or her chances of prevailing in a case by framing his or her argument with reference to the doctrine that focuses the court's attention on the weakest element of the agency's action. Thus, for instance, if the agency has done a particularly poor job of explaining a potentially defensible action, the petitioner's brief should emphasize the *State Farm* doctrine. In all cases, lawyers should state their arguments with reference to the common elements of the doctrines, e.g., is the action consistent with the applicable statute and the available evidence, and has the agency adequately explained the reasoning process it used?

Lawyers also should emphasize the consequences of the action under review, e.g., this action will have the following good or bad consequences.

82. In a few cases, a court has applied *Chevron* and upheld an agency action when the same court previously applied *Skidmore* and rejected the action. *E.g.*, *Satellite Broad. & Commc'ns Ass'n v. Oman*, 17 F.3d 344, 347 (11th Cir. 1994); *Schisler v. Sullivan*, 3 F.3d 563, 568 (2d Cir. 1993).

Arguments of that type are far more likely to influence a reviewing court than are arguments with respect to the particular doctrine that a court should apply to an action. Of course, it would be helpful to know the ideological preferences of the members of the panel at the time the lawyer drafts a brief, since liberals are likely to find some consequential arguments more persuasive than conservatives and vice versa. In most cases, however, the lawyer will not know the composition of the panel until after briefs are submitted. In that common situation, the briefs should include as many consequential arguments as the record can support, preferably including some that are likely to appeal to conservatives and some that are likely to appeal to liberals. That will create a situation in which the lawyer can emphasize one or the other set of consequential arguments at oral argument once he knows the composition of the panel.

The findings also suggest that lawyers should put a lot of thought into selection of the forum in which to seek review of an agency action in the common situation in which the petitioner can choose among several forums. Some courts have a high proportion of liberal Democrats, while others have a high proportion of conservative Republicans. The findings of the studies indicate that forum selection can be an important determinant of outcome. Of course, *ceteris paribus*, the D.C. Circuit is a good choice for a petitioner, since it consistently reverses agencies more often than any regional circuit court.

B. Implications for Teachers

I have long struggled with the question of how I should treat this subject in my administrative law course. I believe that that I must continue to devote considerable class time to teaching doctrine because it is the vocabulary all lawyers must master to communicate effectively with agencies, courts, and clients. I also believe, however, that we owe our students a candid description of the role of doctrine. Thus, I feel the need to tell my students about the studies that show that choice of doctrine is not an important determinant of the outcome of administrative law disputes.

I provide that candid description of the largely inconsequential role of choice of doctrine with some regret, however. I fear that my students' knowledge of the minor role that choice of doctrine plays will discourage them from devoting time and energy to the study of doctrine and will induce them to resent the amount of course time I devote to the study of doctrine.

I temper my description of the relatively minor role that is played by a court's choice of a particular doctrine with two other points, however. First, effective advocacy requires a lawyer to frame his or her arguments

with reference to particular doctrines. That, in turn, requires the lawyer to understand each doctrine. Second, each doctrine is an incomplete reference to a decisionmaking process that has three elements. No matter which doctrine a court invokes in its opinion, it invariably looks at three factors in deciding whether to uphold or reject an agency action: (1) the relationship between the agency action and the applicable statute, (2) the relationship between the agency action and the available evidence, and (3) the quality of reasoning the agency used to explain its action.

I have even more ambivalence about telling my students about the studies that have found that the ideological preferences of judges and Justices are an important determinant of the outcome of many administrative law disputes. I fear that such a revelation will induce in my students a cynical perspective that is not healthy for them either as young lawyers or as citizens. I swallow hard and tell them about those findings as well, however, because I believe that my overriding duty to them is to be honest in describing the realities of the practice of administrative law. At a minimum, I will have provided them with information that will allow them to decide whether they want to devote their careers to this field, rather than to some other area of law that is less affected by politics.

I also temper my description of the findings with respect to the important role that politics and ideology play in the decisionmaking process by emphasizing the more reassuring inferences we can draw from the studies. If, as the studies suggest, 7% to 31% of the votes of judges and Justices can be explained as a function of the ideological preferences of the judges and Justices, it follows that 69% to 93% of the votes of judges and Justices are unaffected by their ideological preferences. Thus, it is fair to infer that in the large majority of cases in which courts review agency actions, the court engages in a politically and ideologically neutral decisionmaking process in which it focuses on the common elements of the doctrines: Is the action consistent with the applicable statute? Is the action consistent with the available evidence? Has the agency explained adequately why it took the action under review?

C. Implications for Courts

The Supreme Court should respond to the robust finding that choice of doctrine is not an important determinant of the outcome of a review proceeding by simplifying and clarifying review doctrine. I endorse David Zaring's suggestion that the Supreme Court should replace all six of the doctrines that it now applies with one simple doctrine—a reviewing court

must uphold any reasonable agency action.⁸³ An agency action is reasonable if it is consistent with the relevant statute and the available evidence, and if the agency has provided an adequate explanation of how it reasoned from the relevant statute and available evidence to reach its conclusions.

Every study of the subject has found that choice of doctrine is not an important determinant of the outcome of an administrative law dispute. Moreover, the doctrines are not mutually inconsistent. Rather, the doctrines complement each other by emphasizing one of the three criteria courts always apply in reviewing an agency action. The Court can, and should, acknowledge that each of the existing doctrines is just a partial explanation of how the Court decides whether an agency action is reasonable.

Thus, *Chevron* step one serves as a reminder that an agency interpretation of a statute cannot be reasonable if it is inconsistent with clear legislative intent. It follows that both agencies and reviewing courts must attempt to determine what Congress intended when it included a particular provision in an agency-administered statute. Similarly, the *State Farm* test is a reminder that an agency must explain how it reached a decision and that a court must review the agency's reasoning process as part of its task of deciding whether the agency action is reasonable. The *Skidmore* doctrine is a similar reminder that courts should consider the thoroughness of the agency's reasoning process as part of the judicial task of deciding whether the agency's action is reasonable. The substantial evidence doctrine is a reminder that one of the tasks of a reviewing court is to look at the record of a proceeding to see whether the factual predicates for the agency action bear some reasonable relationship to the available evidence. And, of course, the *Auer* doctrine is simply a paraphrase of Zaring's proposed test transposed to the context of review of agency interpretations of agency rules.

That leaves only the *de novo* review doctrine. The Court should acknowledge that the *de novo* review doctrine does not exist and that it never has existed. It would make no sense for a court to ignore completely an agency's reasons for acting as it did, and I doubt that any court has actually acted in that irrational matter. Once some other institution of government has devoted time and energy to resolution of a dispute, no court should ignore that institution's reasons for resolving the dispute as it did. The studies are consistent with common sense. Courts consider an agency's reasoning for what it is worth, whether or not Congress chooses to

83. Zaring, *supra* note 1, at 186–87.

label the review process de novo.⁸⁴

I believe that adoption of Zaring's proposal would respond adequately to the finding that doctrine is not an important determinant of the outcome of a review proceeding. I find it far more difficult to identify a promising response to the troubling finding that the ideological preferences of judges and Justices are the most important determinant of the outcome of review proceedings.

I once believed that the Court could reduce significantly the role of politics and ideology in the process of judicial review of agency actions by announcing a more objective and less malleable doctrine that all courts must apply. For years, I argued that *Chevron* was such a doctrine.⁸⁵ For a while, I could point to studies that supported that argument. The more recent studies do not support my prior view, however. Any beneficial effect *Chevron* once had has now disappeared. I now share the view of many scholars that courts will never announce a doctrine that cannot accommodate the powerful tendency of judges and Justices to act in ways that are consistent with their strongly held political and ideological perspectives.⁸⁶

The findings with respect to the role of panel composition in the review process tempt me to urge circuit courts to adopt a practice of assigning a politically mixed panel to every review proceeding. The studies suggest that such a practice might cut in half the explanatory power of the political and ideological views of judges in the review process.⁸⁷ I am not prepared to make such a proposal at present, however. I fear that adoption of such a practice might have unintended adverse effects that would more than offset its beneficial effects. In particular, I fear that treating judges as members of a political party might reinforce their tendency to think and act as members of a political party.

I am troubled by the D.C. Circuit's consistently less deferential posture in agency review cases, particularly when I factor in the finding that a high proportion of judicial decisions that reject agency actions are driven in part by the ideological preferences of the judges. It is not healthy for a handful of politically unaccountable judges to make a high proportion of the nation's policy decisions under the guise of reviewing actions taken by politically accountable agencies. The only action I can suggest that might have a beneficial effect on the D.C. Circuit's approach to review actions is

84. See Eskridge & Baer, *supra* note 1, at 1142.

85. *E.g.*, PIERCE, *supra* note 9, § 3.4.

86. *E.g.*, Miles & Sunstein I, *supra* note 1, at 869–70; Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1063–64 (1995).

87. See *supra* text accompanying notes 71–75.

one the Supreme Court has taken on many prior occasions: issuance of a unanimous opinion in which the Court chastises the D.C. Circuit harshly for misperceiving its role and overstepping the appropriate boundaries of judicial review.⁸⁸ There is little evidence that the D.C. Circuit has internalized that message when the Court has sent it in strong language in the past, but I can think of no other means of trying to keep the D.C. Circuit within permissible bounds.

D. Implications for Scholars

The studies have several implications for scholars. We should spend less time engaging in debates about the alleged differences among the remarkably similar judicial review doctrines and about the circumstances in which each should be applied. We should focus instead on the three common elements of the doctrines: consistency with applicable statutes, consistency with available evidence, and quality of agency reasoning. We should also devote more attention to consequential arguments, e.g., if the Environmental Protection Agency or Federal Communications Commission takes the following action, it will have the following good or bad effects.

Most importantly, we should put more time and effort into the kinds of empirical studies I have discussed in this Article. Teachers, scholars, lawyers, agency heads, judges, Justices, and legislators need to know what agencies and courts do and why. The language agencies and courts use to describe what they do and why they do it is a useful starting point in that process, but empirical studies can provide additional insights into administrative and judicial practices that can help all of us gain a better understanding of the roles that agencies and reviewing courts play in the administrative state.

88. The Court has issued at least three unanimous opinions in which it has criticized the D.C. Circuit harshly for exceeding the appropriate boundaries of judicial review. *See Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 845 (1984); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 544–45 (1978); *Fed. Power Comm'n v. Trans. Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976). *See generally* Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345.

RULEMAKING IN THE SHADE: AN EMPIRICAL STUDY OF EPA'S AIR TOXIC EMISSION STANDARDS

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INTRODUCTION

Open government and equal access to decisionmaking processes are cornerstones that ensure an accountable and democratically legitimate Fourth Branch. The major statutes that govern administrative policymaking—the Administrative Procedure Act (APA),¹ the Federal Advisory Committee Act,² the Freedom of Information Act,³ and the Government in the Sunshine Act⁴—advance these principles. They do so by providing formal opportunities for all interested parties to comment on proposed rules and place data, studies, and other information into the public record that then can serve as a basis for challenging agency decisions in court.⁵ While there are disagreements about whether interest group

1. Administrative Procedure Act (APA), 5 U.S.C. § 500 (2006).
2. Federal Advisory Committee Act, 5 U.S.C. app. § 2 (2006).
3. Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006).
4. Government in the Sunshine Act, 5 U.S.C. § 552b (2006).
5. APA, 5 U.S.C. §§ 553(c), 706; *see* Richard B. Stewart, *The Reformation of American*

representation is the best way to ensure government accountability, there are few disagreements that this is currently the method of choice in administrative law.⁶

What remains much less settled, however, is whether or how well these pluralistic mechanisms of oversight are working in the large and important area of informal rulemakings. At one end of the spectrum, there is a good deal of optimism that vigorous and balanced engagement in informal rulemakings is occurring successfully, particularly in areas of social regulation like environmental law. Professor James Q. Wilson, for example, observes that the Environmental Protection Agency (EPA) “has had to deal with as many complaints and lawsuits from environmentalists as from industry, despite the economic and political advantages industry presumably enjoys.”⁷ In their study of interest group politics, Professors Burdett Loomis and Allan Cigler conclude that by the early 1980s, a “participation revolution” had arisen comprised of citizens and special interest groups seeking collective material benefits for the public at large.⁸ Professor Christopher Bosso adds to this positive characterization in his study of pesticide politics: “[b]y the mid-1980s, however, we find a diversity in representation that, on the surface at least, gives pluralists some vindication.”⁹ More recently, in his book on public interest regulation,

Administrative Law, 88 HARV. L. REV. 1667, 1723, 1748 (1975) (documenting and critiquing the liberalization of standing rules and the resulting greater judicial oversight of agency rulemakings through what he calls the “interest representation” model).

6. Stewart in particular expressed great skepticism that broad participation rights would transfer naturally to the vigorous representation of all interests affected by the regulatory proceedings. See Stewart, *supra* note 5, at 1763; see also *id.* at 1803 (stating that “[f]ull implementation of the formal participation and standing rights that are central to the interest representation model of administrative law would enormously increase the expense of the administrative process and might, in practice, increase the barriers to participation by interests that are not well-organized or affluent”). See also Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95 (2003) (arguing that the current version of the APA, which relies on public participation, should be amended to reflect a modern, administrative form of governance).

7. James Q. Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 385 (James Q. Wilson ed., 1980).

8. Burdett A. Loomis & Allan J. Cigler, *Introduction: The Changing Nature of Interest Group Politics*, in INTEREST GROUP POLITICS 1, 11 (Allan J. Cigler & Burdett A. Loomis eds., 1983) (opining that “[t]he free-rider problem has proven not to be an insurmountable barrier to group formation, and many new interest groups do not use selective material benefits to gain support”).

9. CHRISTOPHER J. BOSSO, PESTICIDES AND POLITICS: THE LIFE CYCLE OF A PUBLIC ISSUE 245 (1987). This is in part because “[e]nvironmental policies, by their nature, prompt acrid disputes among equally determined and almost permanently mobilized sets of claimants because they exhibit structures of incentives more contagious to conflict than do agricultural subsidies or water projects.” *Id.* at 252.

Professor Steven Croley argues that “[w]hile one can still distinguish among regulatory decisions according to the amount of public attention they generate or the number of outside participants they involve, few agency decisions with significant stakes escape public attention or participation completely. Regulatory decisionmaking is seldom done in the dark anymore.”¹⁰

At the other end of the spectrum, a number of scholars, particularly in the political sciences, question whether administrative processes actually provide this type of balanced access to and influence over the rulemaking process for all affected groups.¹¹ A common thread in this literature is the superior influence over agencies that business groups enjoy by virtue of their organization and financial resources.¹² Business groups further benefit from the agencies’ need for information that only regulated interests can provide.¹³ The resultant, regular communications between agency officials and industry are alleged to induce the former to see the world through the eyes of the latter.¹⁴

Lying just beneath these general debates over *who* participates in publicly important rules is the equally important question of *how* they participate. In administrative law, notice and comment is the formal vehicle that provides affected parties with equal access to agency rulemakings.¹⁵ Yet over the last decade there have been suggestions that in practice, notice-and-comment rulemaking may only be the tip of the iceberg in providing avenues for interest groups to inform agencies’ rulemaking projects.¹⁶ Specifically, considerable negotiations may take place between the agency and interest groups during the development of the rule and also after the promulgation of the final rule that fall wholly outside of the APA’s

10. STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 291–92 (2008).

11. See *infra* notes 32–37 and accompanying text.

12. See, e.g., JOHN E. CHUBB, INTEREST GROUPS AND THE BUREAUCRACY: THE POLITICS OF ENERGY 251 (1983) (concluding from his study that interest group participation in energy policymaking consists almost exclusively of “the most technically competent groups”—i.e., industry).

13. See, e.g., RONALD J. HREBENAR, INTEREST GROUP POLITICS IN AMERICA (3d ed. 1997) 261–62 (discussing a range of ways that regulated parties can control agencies, including by wearing them down with information-intensive claims).

14. See, e.g., MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, in PUBLIC ADMINISTRATION AND POLICY 58 (Peter Woll ed., 1966).

15. See APA, 5 U.S.C. § 553 (2006).

16. See, e.g., William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC’Y 576 (2009).

regulatory reach, both in terms of the required recordkeeping and in equalizing access to the agency at key points in policy development.¹⁷ Similar imbalances may occur for related reasons during the notice-and-comment process itself, at least for rulemakings that become so bloated with technicality, complexity, and the fragmentation of issues into minutiae that the rulemaking project becomes practically inaccessible to less resourceful groups.¹⁸

Despite the diversity of views regarding how well this administrative process is working, surprisingly little empirical work has been conducted on the nature and effects of public participation in federal rulemakings.¹⁹ A critical reason for this gap is the difficulty in obtaining and analyzing data. Methodological barriers also impede empirical study of the capacity of legal procedures to ensure that federal agencies are publicly accountable and that their rules fairly reflect the public interest.²⁰ Fortunately, the empirical work that has been done on the administrative system has produced not only important findings, but also some significant methodological breakthroughs.²¹ This work suggests that interest group imbalances may be occurring throughout administrative law and provides new and promising tools for exploring these imbalances in greater detail.

In an effort to build on preceding empirical research, in this Article we trace the engagement and to a lesser extent, the influence of interest groups over the entire life cycle of a complete set of complex EPA rules that set emissions standards for the industrial release of air toxins. In particular we focus on three of the most worrisome phases of administrative process where imbalances in interest group engagement and influence may be occurring. The thesis of this study is that imbalances in interest group engagement are occurring at critical, albeit somewhat obscure stages of the

17. See *infra* Parts I.B.1 and I.B.2.

18. See *infra* Part I.B.3.

19. See, e.g., Steven J. Balla, *Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking*, 1 I/S: J.L. & POL'Y FOR INFO. SOC'Y 59, 67 (2005) (highlighting the dearth of research on interest group engagement in rulemakings); Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353, 355 (2005) (discussing research about interest group participation in rulemaking); William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 70–72 (2004) (describing work by several authors regarding participation in rulemaking).

20. See, e.g., CROLEY, *supra* note 10, at 125–33 (discussing various methodological and data barriers to studying the administrative process); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006).

21. See *infra* notes 39–45 and accompanying text.

rulemaking life cycle and that these imbalances are impacting the substance of the rulemaking project.

This Article proceeds in five parts. Part I explores three stages in the rulemaking life cycle that may be afflicted with imbalanced interest group engagement that in turn might distort the outcome of the rulemaking project. Part II describes the methods of the Article, which examine the nature of interest group engagement and activity at these problem stages in a complete set of rules promulgated by EPA governing the industrial emissions of air toxics. Part III describes the findings, and Part IV collects information from disparate sources in detective-like fashion to explain some of the surprises and new questions that emerge from this research. In the Conclusion, we retell the story that emerges from our data and consider whether it suggests more pervasive problems in administrative law that will benefit from further study.

I. INTEREST GROUPS AND ADMINISTRATIVE LAW: BACKGROUND AND PROBLEM AREAS

Interest group participation is vital to ensuring the accountability and legitimacy of the administrative state, yet this participation also carries the potential to derail the work of agencies in ways that cause rulemakings to depart substantially from the four corners of the authorizing statute and the goals of public interest regulation. This Part provides a brief orientation to the conflicting role of interest groups in administrative process and then focuses on three phases of administrative process that appear most at risk of suffering from imbalances in interest group participation and influence.

A. *Interest Group Representation and Administrative Accountability*

Rigorous engagement by a diverse and balanced assortment of affected interests, reinforced by an ability of these interests to challenge regulations in court, provide one of the primary mechanisms to ensure at least some democratic legitimacy of the administrative state. Professor Rubin observes that this pluralistic engagement is so important to current conceptions of administrative process that the APA is essentially a one-trick pony: “All of its basic provisions rely on a single method for controlling the actions of administrative agencies, namely, participation by private parties.”²² Even in the Attorney General’s Report that helped make the case for passage of the APA, the need for this pluralistic oversight of agencies was considered pivotal to the success of the administrative state: “Participation by these [economic and community-based] groups in the rule-making process is

22. Rubin, *supra* note 6, at 101.

essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests.”²³ As Professor Rubin points out, moreover, a “due process” orientation runs throughout administrative process to ensure that affected parties are able to hold the agency accountable, not only in receiving their input, but in taking that input into account.²⁴ Notice-and-comment rulemaking, in particular, is designed to open the door to any and all information that a party wishes to provide.²⁵

Yet while the opportunity to lodge comments is a vital step that ensures that the agency is adequately educated about the issues, the comment process, standing alone, does not ensure that the agency will take the comments seriously. Indeed, throughout the 1960s and 1970s, there was increasing concern about “regulatory capture,” which generally (but not always) referred to the deployment of various financial inducements (i.e., the prospect of future employment, gifts, or bribes) by regulated parties to co-opt individual regulators.²⁶ In cases of these financially based forms of agency capture, all the information and comments in the world cannot budge agency staff from their predetermined course of favoring regulated parties in the development and enforcement of regulations.²⁷

23. ATT’Y GEN. COMM. ON ADMIN. PROCEDURE, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 103 (1941).

24. See, e.g., Rubin, *supra* note 6, at 111 (arguing that some of the APA’s procedural requirements are modeled after “due process” protections in adjudication).

25. See, e.g., *id.* at 114 (“Once the notice is given, anyone may send the agency a comment, and agencies always accept these comments (indeed, how could they not, unless they returned the envelope for insufficient postage?”)). A rule can even be remanded if the agency has neglected—however inadvertently—to make a complete library of relevant documents available for commenters to use in formulating their arguments. See, e.g., *Gerber v. Norton*, 294 F.3d 173, 181–82 (D.C. Cir. 2002) (holding that the Fish and Wildlife Service’s failure to make the map of an offsite mitigation area available for public viewing in the issuance of an incidental take permit deprived plaintiff of the meaningful opportunity to comment and required that the case be remanded back to the agency).

26. See, e.g., Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. OF ECON. POL’Y 203, 214–16 (2006) (emphasizing the research on the revolving door form of capture). Indeed, a recent illustration of this traditional agency capture is the Minerals Management Service’s (MMS’s) cozy relationship with the oil industry: the oil industry offered future employment opportunities (the revolving door), provided various gifts, and nurtured supportive and even intimate relationships with individual regulators. See Dan Froomkin, *Regulatory Capture of Oil Drilling Agency Exposed in Report*, HUFFINGTON POST (Sep. 8, 2010, 6:30 PM), http://www.huffingtonpost.com/2010/09/08/report-illustrates-regula_n_709681.html.

27. See generally Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284 (2006) (observing how capture theory is based on the premise that well-organized groups gain an advantage through contributing votes and resources); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the*

At the urging of both commentators and judges, the courts emerged in the 1970s as a critical counterforce to address the problem of this more traditional form of regulatory capture. While the APA requires the agency to “consider” comments in promulgating the final rule,²⁸ without the ability to sue the agency when it failed in this duty, the requirement was unenforceable. Liberalized standing requirements developed by the courts in the 1970s ultimately allowed public interest groups to file suit against captured rules that were also arbitrary, thus providing some assurance that the worst cases of capture would likely be caught.²⁹ Some courts even engaged in hard look review, which provided the agency with still a greater risk of being caught in cozy relationships with a narrow slice of interested parties.³⁰ The resulting design of administrative process evolved to depend on a diverse and broad set of interest groups to provide both input and oversight of the agencies.³¹

Even with this new and vigorous oversight facilitated by the courts, however, there remained concerns about other forms of capture of the administrative machinery by regulated parties. As early as the 1980s, top theorists in political science developed conceptual models that predicted that most institutionally based capture, resulting from intrinsic limits in the ability of diverse groups to participate, might occur in rulemaking settings where complexity was high and the costs of regulation was concentrated on a narrow group of well-financed stakeholders. In his classic four-quadrant

Public Agenda: Toward a Synthesis, 6 J.L. ECON. & ORG. 167, 178 (1990) (describing capture theory as the “adoption by the regulator for self-regarding (private) reasons, such as enhancing electoral support or postregulatory compensation, of a policy which would not be ratified by an informed polity free of organization costs”).

28. 5 U.S.C. § 553(c) (2006). See generally MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 44–49 (1988) (discussing the history of administrative law since 1946 and how the goal of expanding access to government led to the rule whereby interested groups could provide comments to rulemaking agencies that these agencies must consider); Stewart, *supra* note 5, at 1717–60 (discussing broadly the importance of responding to comments in surviving judicial review).

29. See, e.g., Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997) (“[T]he courts’ assertiveness during the period from roughly 1967 to 1983 can be explained by judicial disenchantment with the idea of policymaking by expert and nonpolitical elites. . . . The principal pathology emphasized during these years was ‘capture,’ meaning that agencies were regarded as being uniquely susceptible to domination by the industry they were charged with regulating.”).

30. See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring) (arguing for hard look review).

31. In his book, Professor Croley provides compelling case studies of high-visibility rules promulgated by several agencies, including EPA, that were subjected to impressive displays of public interest advocacy made possible by these overriding commitments to open and equal access to government. See CROLEY, *supra* note 10, at 242.

typology of regulation, for example, Professor James Q. Wilson predicts that when the benefits of a policy are diffused across the population and the costs are concentrated on a small group of regulated parties, the agency is more at risk of capture unless a charismatic entrepreneur emerges who acts as the “vicarious representative” of the public beneficiaries.³² Professor Gormley similarly predicted that for rules that are highly complex and non-salient, “board room politics” will prevail (i.e., a single set of interests work closely with the agency to develop the rule in a relatively nontransparent setting).³³ Moreover, in both settings capture occurs not only through inducements by regulated parties, but because regulated parties enjoy primary access to and control over critical information needed by agencies, with only limited oversight from other watchdog groups due to the low salience and high complexity of the rulemakings.

Although theoretical models on interest group engagement in rulemakings have not developed much beyond those originated by Gormley and Wilson in the 1980s, subsequent analysts have identified specific ways that legitimate administrative processes can be hijacked by a narrow group of affected parties at the expense of advancing the broader public interest. For example, various forms of “sophisticated sabotage” involve utilizing the tools of administrative law to control how issues are framed, conceived, and communicated.³⁴ Highly resourceful parties can also play information games to gain an edge in the regulatory proceedings. More than thirty years ago, Professors Owen and Braeutigam underscored how stakeholders’ “ability to control the flow of information to the regulatory agency is a crucial element in affecting decisions.”³⁵ Based on this power, they observe how these stakeholders can make available “carefully selected facts,” withhold others, and if delay is useful, “flood[] the

32. See Wilson, *supra* note 7, at 367–70 (1980). Professor Wilson’s four quadrants of politics categorize regulation according to the distribution of benefits (concentrated or diffuse) on the one hand, and the distribution of costs (concentrated or diffuse) on the other. The specific categories include not only “entrepreneurial politics,” in which benefits are broad but the costs of a policy are concentrated, but also “majoritarian politics,” in which society in general incurs both the benefits and the cost of the policy; “interest-group politics,” in which both the costs and benefits of a policy are concentrated on a narrow set of interests; and “client politics,” in which the benefits of a policy accrue to a narrow set of interests and the costs are spread over the entire population. *Id.*

33. See William T. Gormley, Jr., *Regulatory Issue Networks in a Federal System*, 18 *POLITY* 595, 607 (1986).

34. See generally THOMAS O. MCGARITY, SIDNEY SHAPIRO & DAVID BOLLIER, *SOPHISTICATED SABOTAGE: THE INTELLECTUAL GAMES USED TO SUBVERT RESPONSIBLE REGULATION* (2004).

35. BRUCE M. OWEN & RONALD BRAEUTIGAM, *THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS* 4 (1978).

agency with more information than it can absorb.”³⁶ When the agency seeks a particularly damaging piece of information that can’t be legally withheld, the interest group’s “best tactic is to bury it in a mountain of irrelevant material” or provide it, but simultaneously “deny its reliability and . . . commence a study to acquire more reliable data.”³⁷

Recent empirical evidence provides support for the possibility that this institutional capture is in fact occurring in some areas of administrative practice. Several different researchers find systematic biases that favor regulated parties in rules promulgated by several different agencies, including agencies like EPA that are generally viewed as resistant to traditional forms of agency capture.³⁸ Specifically, Professors Yackee & Yackee,³⁹ Golden,⁴⁰ Coglianese,⁴¹ and Cropper et al.⁴² all conducted studies that assess the diversity of interest group representation in environmental

36. *Id.*

37. *Id.* These techniques can also be deployed in more adversarial settings to overcome the opposition’s efforts. For example, “[i]f another party has supplied damaging information, it is important to supply contrary information in as technical a form as possible so that a hearing is necessary to settle the issues of ‘fact.’” *Id.* The authors even advise the regulated parties to deploy decentralized information systems so that officials can be selected who can testify truthfully on what they know, but be carefully protected from other, conflicting or damaging sources of information. *Id.*

38. See, e.g., CROLEY, *supra* note 10, at 290–96; RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE’S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT 45–47 (2010); Sally Katzen, *A Reality Check on an Empirical Study: Comments on “Inside the Administrative State,”* 105 MICH. L. REV. 1497, 1505 (2007) (drawing upon her stint as Administrator of the Office of Information and Regulatory Affairs (OIRA) under President Clinton to state EPA focuses like a laser on protecting the environment).

39. See Yackee & Yackee, *supra* note 20, at 131, 133 (studying forty lower-salience rulemakings promulgated by four different federal agencies and finding that business interests submitted 57% of comments, whereas nongovernmental organizations submitted 22% of comments, 6% of which came from public interest groups).

40. See generally Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245 (1998) (studying eight rules promulgated by federal agencies using content analysis to determine who participates and influences federal regulations and finding citizen engagement in five of the eight rules).

41. Professor Coglianese estimated that EPA promulgated 334 rules per year from 1986 to 1990. See Cary Coglianese, *Challenging the Rules: Litigation and Bargaining in the Administrative Process* 73, tbl.2-2 (1994) (unpublished Ph.D dissertation, University of Michigan) (on file with authors) (finding businesses participating in 96% and national environmental groups participating in 44% of rules).

42. See, e.g., Maureen L. Cropper et al., *The Determinants of Pesticide Regulation: A Statistical Analysis of EPA Decision Making*, 100 J. POL. ECON. 175, 178, 187 (1992) (examining interest group engagement in pesticide registrations between 1975 and 1989 and finding environmentalists participated in 49% of the cancellations).

and public health rules and each find the public interest groups absent from about half of the rules in their data set. In three of these four studies, moreover, the analysts found public interest groups were substantially outnumbered by regulated parties even when they did participate.⁴³ Golden and Yackee & Yackee went still further and actually tested whether regulated parties enjoyed more influence over the changes made by the agency in the final rule. Yackee & Yackee detected a distinct “bias toward business” in which the changes made to the final rule tended to favor regulated parties rather than the public interest.⁴⁴ Golden, on the other hand, found that in general the agencies resisted making any major changes to the rule, and when they did make changes, the changes tended to favor commenters who supported the proposed rule over the critics.⁴⁵

B. Rulemaking in the Shade

Even though administrative process considers sunlight as the best disinfectant,⁴⁶ it is also true as Professor Strauss notes, that “candor and the flexibility necessary for collaboration or compromise are more likely to flourish in the shade.”⁴⁷ The thesis of this Article is that it is in these shaded or partly shaded areas where much of the regulatory work gets done. In particular, this Article builds on prior findings of aggregate evidence of industry bias in rulemakings by examining three of the shadiest stages within the agency’s own rulemaking life cycle in search of evidence of interest group imbalance and bias.⁴⁸ At each of these stages, there are

43. See Coglianese, *supra* note 41, at 73; Golden, *supra* note 40, at 247; Yackee & Yackee, *supra* note 20, at 133.

44. See Yackee & Yackee, *supra* note 20, at 133–35.

45. See Golden, *supra* note 40, at 262.

46. Louis Brandeis, *What Publicity Can Do*, HARPER’S WEEKLY, Dec. 20, 1913, available at <http://www.law.louisville.edu/library/collections/brandeis/node/196>.

47. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 595 (1984).

48. Office of Management and Budget (OMB) review constitutes another worrisome shady area given the lack of transparency of OMB input, as well as the forces motivating OMB review. See, e.g., Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision making*, 108 MICH. L. REV. 1127 (2010) (discussing the lack of transparency in OMB review). In this Article, we examine only those stages of the rulemaking where the agency is engaged directly with interested parties and leave for a later time an investigation of the OMB-induced shade in rules that could potentially lead to even greater distortions in interest group representation. See generally Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 78, 86 (2006) (conducting this type of investigation at a broad scale); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 822–23 (2003) (examining presidential involvement in rulemaking).

opportunities for skewed interest group engagement and influence, in part as a result of the complexity and information intensiveness of the rulemaking task and in part as a result of the agency's own incentives to mollify litigious stakeholders in order to get their rule promulgated in a reasonable period of time. Individually, each of these stages can lead to some distortions in the diversity of interest groups that participate; cumulatively these stages may reveal systematic skews in the practical accessibility of the rulemaking process to the full range of affected stakeholders.

1. *Rule Development (the Pre-Notice of Proposed Rulemaking (NPRM) Period)*

The first opportunity for imbalanced interest group input into rulemakings occurs during the formative development of a proposed rule. The basic administrative process focuses interest group activity on an open notice-and-comment process, where parties comment on the agency's proposed rule.⁴⁹ Based on these comments, the agency may then revise the rule in final form and, if the agency arbitrarily rejects comments, it can be sued in the court of appeals.

Ironically, however, the emphasis on developing a proposed rule that is ready for comment pushes a great deal of the policymaking and true regulatory work earlier in the process, during the rule development stage.⁵⁰ Indeed, the courts have made it painfully clear that if a rule is to survive judicial review, it must be essentially in final form at the proposed rule stage.⁵¹ Material changes made after this point require a new notice-and-comment process and may even require the agency to start over.⁵² To

49. APA, 5 U.S.C. § 553 (2006).

50. See, e.g., West, *supra* note 16, at 580 (noting the irony of how mechanisms for institutional accountability may tend to shift the actual policymaking to an earlier point in the process where the mechanisms are not in full effect).

51. See, e.g., *Shell Oil Co. v. EPA*, 950 F.2d 741, 757–63 (D.C. Cir. 1991) (holding that the agency failed to provide meaningful notice-and-comment opportunities on issues in the final rule; the issues were raised by commenters during the notice-and-comment process); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1021–22 (D.C. Cir. 1978) (finding the same result as the *Shell* case); see also *Env'tl. Integrity Project v. EPA*, 425 F.3d 992, 995–98 (D.C. Cir. 2005) (vacating an EPA rule setting forth monitoring requirements because the agency “flip flopped” after notice and comment and the final rule was not a logical outgrowth of the proposed rule, thus violating the APA's notice-and-comment requirements); see generally *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098 (4th Cir. 1985) (holding that the Department of Agriculture failed to provide meaningful notice-and-comment opportunities on issues in the final rule).

52. See, e.g., Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 893–900 (2007) (criticizing courts for adding the requirement that agencies go through a second notice-and-comment process when the final rule is not the

avoid the need to make material changes, the agency is eager to “get it right the first time.”⁵³ Thus a basic incentive for agencies to produce nearly complete proposed rules arises from the courts’ commitment to due process, which demands that interested parties have an opportunity to comment on all significant aspects of a proposed rule.⁵⁴

Given these incentives, working relationships, primarily with regulated parties, are likely to form at the pre-proposal stage in large part to minimize the need to make “material changes” after notice and comment. Industry enjoys a particularly privileged position in the development of rules like the air toxic emission standards because industry possesses a great deal of in-house information on industrial processes that EPA needs to write the rules.⁵⁵ For agency staff eager to get the final rule in place so as to create some binding requirement on the polluting activities of industry, then, such pre-NPRM collaborations become legal necessities. Even agency staffers skeptical of industry claims may actively seek out industry’s help in developing the proposed rule to reduce the risk of successful challenges down the road. As one agency staffer put it, “[w]e help them; they help us.”⁵⁶

“logical outgrowth” of the proposed rule and discussing how this requirement impedes agency adaptability to new information during the notice-and-comment period). *See generally* RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE § 7.3 (4th ed. 2002) (discussing the extensive case law on whether an agency’s notice was adequate based on subsequent developments occurring after the proposed rule in the course of the rulemaking).

53. West, *supra* note 16, at 582 (quoting a senior attorney in the agency); *see, e.g.*, E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1495 (1992) (“Because of the need to create a record, real public participation—the kind of back and forth dialogue in which minds (and rules) are really changed—primarily takes place in various fora well in advance of a notice of proposed rulemaking appearing in the *Federal Register*.”).

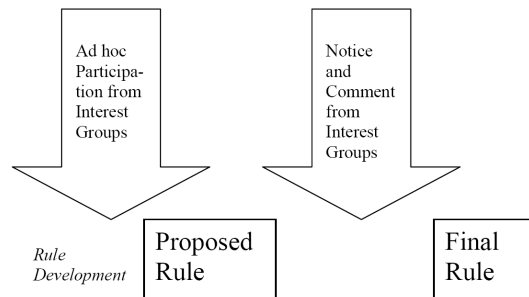
54. *Cf.* Rubin, *supra* note 6, at 111 (arguing that this type of procedural requirement is modeled after “due process” protections in adjudication).

55. *See infra* notes 87–88 and accompanying text. For example, one attorney interviewed in the Field and Robb report observed,

The reason that the Agency is generally receptive to well-reasoned technical comments . . . is that if you point out specific problems with a regulatory program, then those drafting the rules will generally try to solve those problems. They will do so not only because they want to appear to be reasonable and responsive to public comments, but also because their willingness to refine a regulatory program—to address identified flaws in the program—should help that program withstand judicial review.

Andrea Bear Field & Kathy E.B. Robb, *EPA Rulemakings: Views from Inside and Outside*, 5 NAT. RESOURCES & ENV’T 9, 50 (1990).

56. Coglianese, *supra* note 41, at 14.



Hypothesis: *Agency contacts with affected parties during rule development (pre-NPRM) will be extensive and will be dominated by regulated parties.*

At the same time that legal incentives encourage the agency to engage with interest groups in general and regulated parties in particular in advance of notice and comment, the agency at this stage is also free of docketing and related APA transparency requirements. The agency is required to log ex parte contacts in the public record only after publishing the proposed rule and generally not before.⁵⁷ By contrast, letters, conferences, meetings, telephone conversations, shared drafts of a proposed rule, and the like occurring during the development of the proposed rule are not limited and need not even be recorded in the rule's administrative record if the agency prefers to keep them under wraps.⁵⁸

Several administrative law theorists have expressed concern that this pre-NPRM rule development phase may largely eclipse the significance of the notice-and-comment period with respect to interest group input.⁵⁹ These

57. See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977) (holding that “communications which are received prior to issuance of a formal notice of rulemaking do not, in general have to be put in a public file. . . . [But once] a notice of proposed rulemaking has been issued . . . any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding, should [avoid ex parte contacts and place any such contacts in the public file]”).

58. Interested parties engaged in these communications, however, will include them in the administrative record when it suits their purposes. In some cases, interest groups even request EPA background documents through FOIA and include them in their comments to make sure they are part of the record. See, e.g., William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 68–70 (1975) (observing that “this tactic [to use FOIA to access agency documents and then to communicate them back to the agency to ensure that they make their way into the administrative record] has worked fairly well for those who use it, even though the statute probably wasn’t intended for that purpose”).

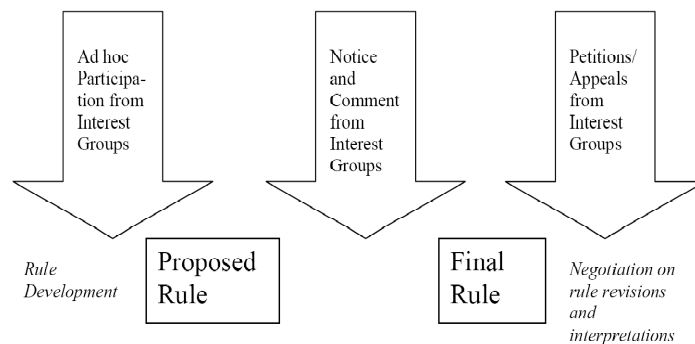
59. See, e.g., Furlong & Kerwin, *supra* note 19, at 353 (noting the possibility for important participatory opportunities in the development of the proposed rule); CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 73–85 (3d ed. 2003) (discussing participation in the various stages of rulemaking); West, *supra*

scholars also hypothesize that during the rule development stage, interest group contacts may not be anywhere close to diverse or balanced.⁶⁰

As an empirical matter, however, little is known about the rule development phase.⁶¹ West, Kerwin, and Coglianese conducted extensive interviews with agency staff, which only serve to reinforce the possibility that this phase is an important part of rulemaking.⁶² However, beyond their research, there has been very little empirical work into the extent or role of pre-NPRM discussions.

2. *After the Rule Is Final (the Post-Final Period)*

A second opportunity for ad hoc, unrecorded interest group influence of agency rules arises after the rule is promulgated as final. At this point, interest groups can file petitions for reconsideration and ultimately appeal the rule to the Court of Appeals.⁶³ Yet, short of taking a case all the way through court, there are numerous opportunities for invisible negotiations and reconciliations that could affect the substance of the rule, perhaps in dramatic ways.



Hypothesis: *After the rules are promulgated as final, interest group activity will continue on a significant percentage of them and revisions will be made to the rules that*

note 16, at 580–82, 584–85 (arguing that the pre-NPRM period provides rich opportunities for informal contacts and engagement by agencies with stakeholders).

60. In particular, and as discussed earlier, this “prenotice participation is *potentially* subject to the alleged bias in favor of the ‘special interests’ or ‘subgovernment actors’ that notice-and-comment requirements are designed to counter.” West, *supra* note 16, at 589.

61. “Scholars have practically ignored these earlier processes” that occur during rule development. *Id.* at 583.

62. See, e.g., Furlong & Kerwin, *supra* note 19, at 354, 362–65; KERWIN, *supra* note 59, at 64; West, *supra* note 16, at 584–85 (using interviews to probe the opportunity for interested parties to participate in rulemaking).

63. See APA, 5 U.S.C. §§ 701–706 (2006) (describing the appropriate scope of judicial review).

reflect these post-final negotiations. Regulated parties will again dominate this interest group activity.

In his unpublished study of EPA rulemakings, Professor Coglianese observes that post-rule “litigation offers interest groups and the agency an opportunity to do something they were not permitted to do in the notice-and-comment period: negotiate in secret.”⁶⁴ Administrative rules governing ex parte participation again do not apply in this post-final stage, and in fact, “settlement negotiations between interest group and EPA attorneys hold an added degree of secrecy given their privileged status.”⁶⁵ Because of their privileged status, these agreements can even help “immunize agency officials from oversight by third parties such as the Office of Management and Budget.”⁶⁶

In a way that parallels the opportunities for input during rule development, then, interest groups are allowed a second bite at the apple after the rule is final. Changes to guidances, enforcement protocols, and other non-rule documents emerging from the post-final rule discussions can be made with no public notice, despite their potentially substantial impact on how the rule is implemented.⁶⁷ A trade association’s general counsel elaborated: “[Litigation] is often a vehicle to kind of lead to a revision of regulations. . . . There are a number of cases that are filed and automatically stayed because we are filing them just so we go back to the agency and basically kind of renegotiate the regs.”⁶⁸ Another corporate counsel remarked, “It is almost like having another rulemaking with those people who care enough about the issues to spend the time, being the ones

64. Coglianese, *supra* note 41, at 153.

65. Cary Coglianese, *Litigating within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 LAW & SOC’Y REV. 735, 758 (1996); see also Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1029–30 (2001) (describing the problematic features of the secrecy of many of the settlements); Jeffrey M. Gaba, *Informal Rulemaking by Settlement Agreement*, 73 GEO. L.J. 1241, 1254 (1985) (discussing potential secrecy of rulemaking settlements).

66. Coglianese, *supra* note 41, at 190.

67. See, e.g., Gaba, *supra* note 65, at 1245–48 (describing the types of substantive agreements that can be reached in settlement agreements); see Patrick Schmidt, *Pursuing Regulatory Relief: Strategic Participation and Litigation in U.S. OSHA Rulemaking*, 4 BUS. & POL. 71 (2002), (highlighting the significance of rulemaking settlements that lead to changes in interpretive guidance); cf. Richard G. Stoll, *Coping with the RCRA Hazardous Waste System: A Few Practical Points for Fun and Profit*, 1 ENVTL. HAZARDS 6, 6–7 (1989), reprinted in ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 257, 257–58 (Robert C. Percival, et al. eds., 2d. ed. 1996) (describing how EPA’s private letters, obscure guidance documents, and hidden statements in unrelated final rule preambles have given industry participants considerable room to “play” while remaining compliant with hazardous waste rules).

68. Coglianese, *supra* note 41, at 127 (alteration in original).

who get to play.”⁶⁹ Even more troubling is the fact that, in some cases, these post-rule settlement negotiations may actually undo some of the pluralistic gains made earlier in the process. Professor Coglianese, for example, observed that

[i]n the wood preserving rule, the 267 individuals and groups filing comments on the rule narrowed down to three groups in court. Greenpeace and the Environmental Defense Fund were extremely active in the rulemaking, but did not enter the litigation. As a result, positions these environmental groups successfully advanced in the rulemaking were later directly undercut in the litigation process.⁷⁰

Again, the administrative process indirectly facilitates these post-final rule deals.⁷¹ Interested parties can threaten to hold up the rule in litigation, which can take years to resolve and ultimately may end in a reversal and remand of the rule to the agency.⁷² Faced with this uncertain fate for health-protective rules, agencies may find that further compromises are preferable to continued delay of the rule. Regulated parties may also have a leg up in gaining the agencies' attention because they are more likely to seek out claims that lead to rule delays, compared with environmental groups, who might choose remedies that avoid vacating a rule entirely.⁷³

The extent to which rulemaking challenges are ultimately settled by agencies like EPA is unknown, but there is evidence that it might be a relatively common occurrence.⁷⁴ There is also evidence that the form a

69. *Id.* at 131.

70. *Id.* at 153.

71. *See, e.g.*, Elizabeth Fisher & Patrick Schmidt, *Seeing the 'Blind Spots' in Administrative Law: Theory, Practice, and Rule-making Settlements in the United States*, 30 COMMON L. WORLD REV. 272, 288 (2001) (concluding that rulemaking settlements “are an unintended consequence of the system as it structured”).

72. *See, e.g.*, *Arteva Specialties S.A.R.L. v. EPA*, 323 F.3d 1088, 1092 (D.C. Cir. 2003) (remanding to EPA for clarification of a standard).

73. *See, e.g.*, *Sierra Club v. U.S. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999) (noting the plaintiff environmental group specifically requested the court to remand, but not vacate, the challenged rule promulgated by EPA).

74. *See, e.g.*, Gaba, *supra* note 65, at 1247 & n.26 (suggesting that EPA “has relied extensively on such agreements to implement major portions of its water, hazardous waste, and air programs”; and also pointing out that “[n]o filing system at the EPA could record the number or percentage of regulations preceded by a settlement agreement”); Rossi, *supra* note 65, at 1018 (observing that “[a]gencies routinely enter into settlements limiting the scope of their regulatory discretion”). Professor Coglianese found that “nearly half of all the petitions for review filed against EPA in the DC Circuit Court of Appeals between 1979 and 1990 ended with a voluntarily dismissal by the parties—before any oral hearing was held by a judge.” Coglianese, *supra* note 65, at 756 (footnote omitted). *See also* Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy-making*, 1987 U. CHI. LEGAL F. 327 (discussing the usefulness of consent decrees and the disadvantages to

rulemaking settlement takes varies widely with regard both to its terms and its transparency.⁷⁵ Despite the seemingly significant empirical and theoretical questions that rulemaking settlements raise, they remain largely unexplored in the administrative law literature.⁷⁶

3. *The Notice-and-Comment Process in Complex Rulemakings*

Finally, the notice-and-comment process itself may be “open” to all, but in practice accessible to only a few, at least when rules are very complex and technical. This occurs because of the important role of information costs in impeding engagement.⁷⁷ When a rule preamble is highly technical, complex, and exceedingly lengthy, and the issues are fractured into minute subparts, then the costs of understanding and processing the rule, and hence participating in the comment period, can be quite high. While expert, sophisticated public interest groups may be able to penetrate these costly rules, even they will lack resources to engage in all of them and may find they must dedicate resources to only a few.

Yet, if an interested party does not lodge detailed comments with the

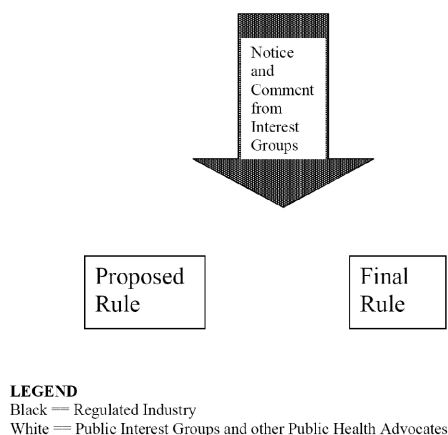
restricting their application); Peter M. Shane, *Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241 (discussing rulemaking settlements and efforts to limit them). Interestingly, some of the earlier literature discussing these settlements gives the impression that they largely occurred with public interest groups rather than industry. See, e.g., Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 274, 278 (1987) (discussing public interest use of rulemaking settlements).

75. See, e.g., Fisher & Schmidt, *supra* note 71, at 282–87 (detailing the various types and consequences of rulemaking settlements in broad terms); Gaba, *supra* note 65, at 1246–47 (discussing the various forms of settlement agreements); see also *supra* notes 64–66 and accompanying text (regarding transparency of rulemaking settlements).

76. See, e.g., Fisher & Schmidt, *supra* note 71, at 288–89 (bemoaning the lack of attention to rulemaking settlements, highlighting it as an illustration of a blind spot in existing administrative law theory, and calling for more empirical research on them as well as other blind spots). It is not that there is no literature, however. For the most comprehensive analyses of potential problems with rulemaking settlements, see Gaba, *supra* note 65, at 1255 (concluding that “[s]ettlement agreements work because of their secrecy and enforceability. Both of these ‘advantages’ raise questions about the legitimacy of the process and the final regulations it produces” and discussing these misgivings in considerable detail). See also Rossi, *supra* note 65, at 1031–32, 1044–57 (raising questions about the accountability of rulemaking settlements and offering suggestions for reform); *Citizens for a Better Env’t v. Gorsuch*, 718 F.2d 1117, 1136 (D.C. Cir. 1983) (Wilkey, J., dissenting) (lamenting the “evil[s] of . . . consent decree[s]” as methods for settling rulemaking disputes that involve policy considerations).

77. See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1379 (2010) (crediting the higher cost to nonprofits of accessing and mastering technical information with participation disparity relative to industry counterparts).

agency during this critical phase of the rule's life cycle, then it waives the opportunity to file an appeal later, and at least as a legal matter, loses all of its legal leverage.⁷⁸ The agency has no legal obligation to consider comments shared outside of the comment period.⁷⁹ Information costs that are high in rulemakings, then, can also work as a barrier to diverse participation by all affected parties and allow the more informed and better resourced to effectively dominate the proceedings.



Hypothesis: *The formal comments lodged on a complex rule will come predominantly from regulated industry, and the changes made to the proposed rule in the final rule will mirror this imbalance and generally favor industry.*

Thus, for highly complex and technical rules, the comment activity may be skewed in favor of industry, with the resulting rulemakings operating at least in partial shade, free of oversight and input from the full range of affected groups, particularly those representing the public interest. Indeed, to the extent that regulated parties have an advantage in understanding the nuances of the proposed rule as a result of their extensive pre-NPRM communications, the barriers to outsiders may be still higher. The agency's underlying logical processes and assumptions may be relatively obscure in its proposed rule, for example, which will require commenters to engage in added detective work and time-consuming re-creations of the agency's

78. See generally *McKart v. United States*, 395 U.S. 185 (1969) (setting out the reasons for exhausting remedies first within the agency before raising the issue with the court).

79. See, e.g., *Mossville Env'tl. Action Now v. EPA*, 370 F.3d 1232, 1238–40 (D.C. Cir. 2004) (holding that public interest groups had waived several challenges to EPA's Hazardous Air Pollutants rule because they had failed to file written comments and exhaust their administrative remedies and the state comments they attempted to rely on were not specific enough to provide EPA with notice of their concerns).

thought process in order to understand key decisions.⁸⁰ These costs may serve as a particularly significant barrier to the ability of resource-limited groups to participate in the rulemaking process.

During the notice-and-comment process, moreover, credible comments are likely to translate directly into influence in affecting the shape of the final rule. Specifically, if each detailed and well-supported comment raises a litigation risk, then the agency can be expected to make changes roughly proportional to the total number of comments, rather than favoring the comments of an underrepresented constituency. In his case study of the Occupational Safety and Health Administration, Professor Schmidt found that formal comments were the most influential source of input precisely because they posed immediate risks of litigation.⁸¹ Additionally, and in this same vein, industry comments are likely to be more factually and technically oriented given industry's specialized knowledge and attentiveness to compliance-related details. These technical facts constitute a particular soft spot for the agency in litigation, and agencies are purported to be especially amenable to making changes in their final rules based on comments that are technical in nature.⁸²

4. Summary

Individually, each of these opportunities for skews in the influence of affected parties takes a toll on the resulting rule. Together they can act in mutually reinforcing ways to lead to a process that can be badly imbalanced, yet still follow every administrative process requirement to the

80. See, e.g., Wagner, *supra* note 77, at 1384–86.

81. See Schmidt, *supra* note 667, at 80, 82, 86–87.

82. See, e.g., Field & Robb, *supra* note 55, at 10 (noting that industry counsel agree that “[t]he arguments that stand the greatest chance of being listened to by the Agency are those that address technical aspects of a proposed rule rather than the legal basis of that rule”); see also *id.* at 50 (explaining that “the Agency is generally more receptive to [technical] comments . . . not only because [it] want[s] to appear reasonable and responsive to public comments, but also because [its] willingness to refine a regulatory program . . . should help that program withstand judicial review”). Moreover, if industry has already had extensive discussions with the agency to convince it to consider its material changes during the pre-NPRM, its formal comments are likely to be aimed primarily at chipping away at the rule on smaller details rather than radically reconfiguring the proposal. In contrast, the public interest groups’ primary concerns and comments may take on some basic framing decisions fundamental to the development of the rule. To the extent that these groups’ changes tend toward this more “material” direction, they are more likely to receive a chilly reception from the agency because they technically require the agency to promulgate a supplemental, or second, proposed rule, which involves an additional notice-and-comment process. In terms of the time involved, it may be quicker to reject these groups’ significant comments and risk being sued than to accept their changes and trigger notice and comment all over again.

letter.

II. STUDY DESIGN

This Article assesses interest group participation and influence during three stages of the rulemaking process for one set of highly technical rules promulgated by EPA and predicts imbalances in interest engagement at each stage. The hypotheses are provided below.

Statement of Hypotheses

Hypothesis 1: Agency contacts with affected parties during rule development (pre-NPRM) will be extensive and will be dominated by regulated parties.

Hypothesis 2: The formal comments lodged with the agency on a complex rule will come predominantly from regulated industry, and the changes made to the proposed rule in the final rule will track this imbalance and generally favor industry.

Hypothesis 3: After rules are promulgated as final, interest group activity will continue on a significant percentage of them and revisions will be made to the rules that reflect these post-final negotiations. Regulated parties will again dominate this interest group activity.

The hypotheses are tested by examining the rulemaking life cycle for ninety air toxic emission standards (n=90), which constitute nearly all⁸³ of the rules promulgated by EPA to restrict the release of air toxins from major sources.⁸⁴ These Hazardous Air Pollutants rules (HAPs rules) were selected for several reasons. First, the HAPs rules are relatively typical examples of pollution control standards promulgated by EPA. The standards, like many of EPA's other pollution control standards, are mandated by statute and promulgated under statutory deadlines.⁸⁵ The

83. The exclusion of some rules became necessary because of limitations in EPA's record keeping practices or because the rules diverged significantly from the others (i.e., they were promulgated under two or more statutes rather than just § 112 of the Clean Air Act, like medical waste incinerators). See Appendix for a more detailed discussion of these exclusions.

84. See 42 U.S.C. § 7412(d) (2006) (outlining emission standards); 40 C.F.R. Pt. 63 (1999) (discussing the ninety rules included in the Appendix sample).

85. See, e.g., Clean Water Act, 33 U.S.C. § 1321 (2006) (prohibiting the point source discharge of oil and other hazardous waste pollution without a permit that, in turn, is based on the capabilities of the best available technology); Resource Conservation and Recovery

rules also require EPA to base pollution control requirements on what it determines to be the best available emission control methods, a mandate similar to many other pollution control statutes.⁸⁶ Specifically, under § 112 of the Clean Air Act, EPA is required to survey currently available (or soon-to-be available) pollution control technologies for classes and categories of industry and to select the top performers in each industry category that emit the lowest level of air toxins.⁸⁷ EPA then converts the pollution reduction capabilities of these best performers into numerical emission limits for each major industrial source of HAPs.⁸⁸ These standards are the primary, and often the exclusive, means for reducing public exposure to air toxins.⁸⁹ Each of the rules in our study set emissions limits for a different segment of industry, so, for example, one rule sets emissions standards for boat manufacturing, another for cellulose product manufacturing, and another for coke ovens.⁹⁰ While the rules obviously affect very different types of industries, the rules are comparable insofar as each one of them typically follows the same analytical process (e.g., definition of affected industry, requirements for compliance, emission limitations, monitoring requirements, etc.).

EPA's HAPs rules have several other attributes for this Article that go beyond their representativeness as general pollution control standards.

Act (RCRA), 42 U.S.C. §§ 6923–6925 (2006) (requiring transporters and treatment, storage, and disposal units handling hazardous wastes to self-identify potential problem areas and follow regulatory requirements).

86. See, e.g., 33 U.S.C. § 1321; 42 U.S.C. §§ 6923–6925.

87. See 42 U.S.C. § 7412(d)(3) (2006) (requiring that emissions from existing plants should meet at least “the average emission limitation achieved by the best performing 12 percent of the existing sources”).

88. This step, which requires making assumptions about “average” industry pollution loads and how well the selected technology reduces pollution, can be quite controversial. EPA must become familiar with the capabilities of the nation’s industries, the variety of pollution control equipment available, and how this equipment actually works when employed in the field. See D. Bruce La Pierre, *Technology-Forcing and Federal Environmental Protection Statutes*, 62 IOWA L. REV. 771, 810–11 (1977) (specifying three steps in setting technology-based standards: (1) categorizing industries; (2) identifying the contents of their respective wastewaters; and (3) identifying the range of control technologies available); see also Sanford E. Gaines, *Decisionmaking Procedures at the Environmental Protection Agency*, 62 IOWA L. REV. 839, 853 (1977) (discussing questions regarding the effectiveness of pollution control technologies under various plant ages, sizes, and manufacturing conditions).

89. See generally Thomas O. McGarity, *Hazardous Air Pollutants, Migrating Hot Spots, and the Prospect of Data-Driven Regulation of Complex Industrial Complexes*, 86 TEX. L. REV. 1445 (2008) (describing the pivotal role of air toxins in reducing health risks and the resultant inadequacies in their enforcement).

90. See *National Emission Standards for Hazardous Air Pollutants (NESHAP)*, EPA, <http://www.epa.gov/ttn/atw/mactfnlalph.html> (providing the table of complete HAPs rules) (last visited Feb. 2, 2011).

First, these rules were promulgated by EPA, an agency that is generally regarded as resistant to traditional types of capture, such as revolving door employment, gifts, bribes, and cozy relationships.⁹¹ To the extent that the rulemaking process does seem to tip in favor of industry, then, this imbalance is more likely to be due to defects in administrative process rather than peculiar vulnerabilities in individual agency staff.⁹² Additionally, EPA promulgated the selected HAPs from 1994 through 2009, making the records easily accessible and offering a chance for comparison of two very different presidential administrations.

Two sources of information provide the bulk of the data analyzed in this study: the index of the rulemaking dockets and the significant changes made to the proposed rule, as described in the final rule preamble. These textual sources were coded into quantitative information using student coders who categorized information in the docket—e.g., interest group communication by type and date—with the resulting numerical data entered into Excel and analyzed with Stata, SAS, and R. These two sets of data are described in more detail below. Information was also collected from a variety of sources on post-final rule activity.

A. Coding the Docket Index

The most straightforward component of the study involved collecting information on the type and number of interest group contacts with the agency throughout the rulemaking process. The EPA's docket index, which is the record upon which the rule is reviewed by the courts, provided the sole source of this information. In these lengthy docket indices, EPA logs hundreds of contacts and communications from interest groups occurring throughout the entire life cycle of the rule, including years before the rule was published in the *Federal Register* as a proposal.⁹³ These docketed records provide information on the nature of the contact (e.g., letter, telefax, meeting), the affiliation of the party, and the date of the communication. Law students trained in the coding protocol then translated the interest group participation recorded in the dockets into quantitative information using a relatively straightforward coding scheme.

91. See *supra* note 39.

92. Preliminary interviews with a handful of public interest and agency staff strengthen the reliability of this presumption; we are considering conducting a more exhaustive set of surveys that will provide solid documentation of this fact.

93. EPA is not required to docket communications prior to the publication of the proposed rule. In the HAPs rules, however, EPA recorded extensive communications which, although not complete, provide a useful quantitative measure for assessing interest group participation. See *supra* note 83.

The coding scheme itemizes, dates, and categorizes each interest group communication with EPA. The Appendix discusses the methods in greater detail.

B. Coding the Significant Changes in the Proposed Rule

The actual influence of interest groups in affecting the final rule was measured by content-coding the final rule preamble discussion of the most significant comments received on the proposed rule and the changes the agency made in response. In these preamble discussions, EPA often lists dozens and even hundreds, of significant comments and resultant changes. Law student coders identified each of these significant comments and agency responses and coded them with regard to whether the agency subsequently weakened or strengthened the rule (i.e., eliminating requirements weakens a rule, adding comments or more stringent requirements strengthens a rule), as indicated in Figure 1. Each suggested change was coded separately and categorized by the nature of the comment (e.g., substantive, paperwork, compliance deadline). Measures of influence are thus based on EPA's own characterization of the significant comments and its response.⁹⁴ The Appendix discusses the methods in greater detail.

Type of Response/Change	Decline weaken	Decline strengthen	Agree to weaken	Agree to strengthen	Can't tell
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Figure 1: Measuring Influence by Tracking the Comments and Their Fates

EPA's discussion of the significant comments and resultant changes generally does not identify industry commenters by name, however. As a result, changes that "weaken" the rule are simply assumed to stem from industry, and changes that "strengthen" the rule are assumed to come from public interest groups. Since there was a significant, direct correlation between the number of industry comments and the number of changes made to weaken the rule, the results appear to support the assumption.⁹⁵ While in some cases the changes made to a rule may be substantively minor, even when added together, the coding scheme does provide some indication of the tilt in the final rule with regard to the total number of changes.

94. This study takes for granted that these characterizations are accurate, although in future research we hope to test the validity of this assumption.

95. See *infra* note 117 and accompanying text.

C. Post-Final Rule Activity

Finally, this Article traces interest group activity after the final rule is published to determine whether additional changes are made under the shadow of judicial review. EPA's entries in the *Unified Agenda* and its discussions in the *Federal Register* preambles provided the primary source of data to determine whether one or more interest groups ultimately petitioned for reconsideration of the final rule, challenged the rule in court, and whether the rule was revised after being promulgated as final and how often. The Appendix discusses these methods in greater detail.

III. RESULTS

Professor Elliott observes that “[n]otice-and-comment rulemaking is to public participation as Japanese Kabuki theatre is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.”⁹⁶ Professor Elliott, a former EPA General Counsel, recounts how much of EPA's regulatory analysis is informed not by notice and comment but “from informal meetings with trade associations and other constituency groups, to roundtables, to floating ‘trial balloons’ in speeches or leaks to the trade press.”⁹⁷

The findings of this study underscore both the accuracy and the importance of Professor Elliott's remarks. While notice and comment may not exactly amount to window dressing, the results of this study reinforce the possibility that a great deal of interest group influence occurs outside of the glass box of notice and comment.

The findings also suggest that once one looks at the entire life cycle of rulemakings, at least in this set of highly complex and technical pollution control rules promulgated by EPA, one observes systematic evidence of imbalance in interest group engagement and influence. In HAPs rulemakings, these imbalances tilt strongly in favor of regulated industry, resembling the type of “board room” politics that Gormley envisioned for rules that were generally not central to public health and environmental protection.⁹⁸

96. Elliott, *supra* note 53, at 1492.

97. *Id.* at 1492–93.

98. See *supra* note 33 and accompanying text.

Hypothesis 1: Agency contacts with affected parties during rule development (pre-NPRM) will be extensive and will be dominated by regulated parties.

In administrative law, the multiple benefits for interest groups to engage in negotiations with the agency during rule development, coupled with the legal incentives for the agency to “get it right the first time,”⁹⁹ coalesce to create a rulemaking climate in which pre-NPRM contacts can be expected to be quite extensive. The results from this study support these hypotheses, as shown in Figure 2. The rulemaking dockets reveal extensive engagement with outside stakeholders during the rule development stage. On average, the agency engaged in 178 contacts with interest groups (including states) during rule development—before publication of the proposed rule—for each of the ninety rules. More than half of these contacts were informal and were not in response to information requests. As discussed later, these informal contacts alone are, on average, more than double the number of comments received on the rule.

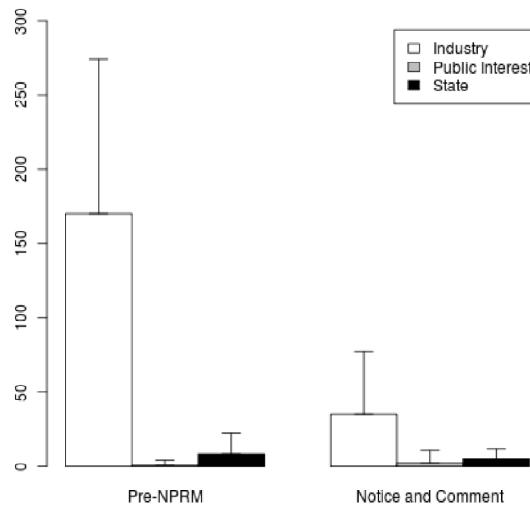


Figure 2: Interest Group Participation (Total Contacts) at Pre-NPRM and Notice-and-Comment Stages of Rulemaking

(The solid bars represent the mean number of contacts; the thin lines represent the standard deviation on these means).

99. West, *supra* note 16, at 582 (quoting a senior attorney at the department level of a federal agency).

An equally important finding is that this pre-NPRM period was almost completely monopolized by regulated parties.¹⁰⁰ Industry had, on average, at least 170 times more informal communications docketed with EPA during the pre-NPRM stage than public interest groups and more than ten times the informal contacts with EPA as compared with state regulators. Specifically, the data reveal extensive industry contacts made in the pre-NPRM stage for all rules under study. Industry informal contacts during the pre-NPRM stage averaged eighty-four per rule. This includes all forms of communications (i.e., meetings, phone calls, letters, etc.). Another eighty-six written communications per rule (on average) during the pre-NPRM stage involved formal information requests that resulted in additional correspondence between EPA and regulated parties. By contrast, the average number of public interest contacts during the pre-NPRM stage is 0.7 per rule, with about two-thirds of these contacts consisting of meetings rather than correspondence. State regulators logged nine contacts per rule on average during the pre-NPRM period. Figure 3 illustrates these disparities.

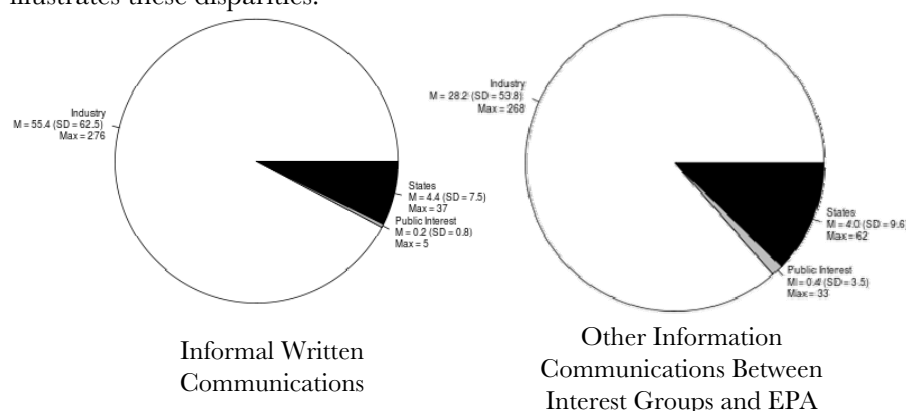


Figure 3: Interest Group Participation During Pre-NPRM by Type of Communication

(M=Mean; SD=Standard Deviation; Max=maximum value within the ninety rules). An additional 2% of communications came from regulated governments.

100. See Figures 2 and 3. In our study, and despite the fact that EPA is not required to log these contacts as a matter of law, EPA did record hundreds of these studies, contacts, and other information as part of its administrative record. As a legal matter, this may be a wise move. Because the rules are judged against the rulemaking record, evidence of extensive industry communications should help buffer the agency against accusations of sloppy or incomplete analysis, at least when the industry is the legal challenger. Discussions with former EPA employees suggest that when available, these contact logs are not substantially biased—that is, when EPA logged informal pre-NPRM contacts, they did so without regard to the source of the contact (e.g., industry, public interest, state, etc.).

The results provide one of the first, if not the only, quantitative measures of interest group contacts occurring during the development of a proposed rule by a federal agency. Available qualitative evidence reinforces the finding of significant imbalances in interest group participation at this stage. Based on more than forty interviews with EPA and stakeholders involved in EPA rules, for example, Professor Coglianese concludes that “[i]n the rule development phase, industry groups tend to dominate because of the information they can provide to the agency staff as they write a rule. . . . Corporations and trade associations get involved in the development of nearly every significant EPA rule.”¹⁰¹

What remains to be understood—to the extent that this is a trend that continues in other rulemaking areas—is why this imbalance in interest group engagement is so dramatic. One explanation is that a type of information symbiosis emerges between the agencies and the most knowledgeable and resourceful groups, at least in technology-based rules. The agency appreciates that the only way to get its rule through the process is to work closely with its fiercest allies early in the rulemaking process. Indeed, EPA’s own training materials openly encourage these early contacts with its adversaries. “[N]egotiation and consultation with outside parties are an important part of the rulemaking process at EPA [This contact] brings outside information and perspectives to the Agency’s decisions[,] . . . builds support for the Agency’s decisions[,] and increases the overall efficiency of EPA’s decision making process.”¹⁰² Professor Coglianese quotes an EPA official who further underscores the importance of close relations with industry during the development of the proposed rule:

We try to bring them in as early as possible on what we are required to do and request their help very early on and usually this is appreciated because that way they have input as opposed to EPA unilaterally going out and looking at various textbooks and writing rules that are ridiculous because we don’t fully understand what the hell we are regulating. So it works out better by working very closely with the people that we are going to regulate and we do this in various ways[.] We meet with them, we have industry-agency

101. Coglianese, *supra* note 41, at 75. Professor Coglianese’s dissertation is brimming with illustrative quotations. Among them is a quote from an EPA official who praised litigious trade groups for their diligence in assisting EPA, even after suing the agency for the same rule that the official helped developed: The trade association “cooperate[d] with the agency, bend[ing] over backwards to help us in any way that we wanted. All we had to do was ask and they would do that. It was literally a pleasure working with those people.” *Id.* at 191.

102. *Id.* at 48 (citing U.S. Environmental Protection Agency, Fact Sheet 12, Regulation Management Series (revised Feb. 1992)).

workgroups that will meet together.¹⁰³

Industry also likely appreciates that its best shot at having a significant influence is during the rule's formative stages. Legal counsel for industry participants advise them to "[g]et involved during the preproposal phase of an Agency rulemaking. That is when the regulation writers want reliable technical information . . . and are thus most receptive to comments from interested persons."¹⁰⁴ There are several accounts of industry not only commenting, but actually drafting the proposed rule as part of these pre-NPRM discussions.¹⁰⁵ For a variety of reasons, which include their more limited knowledge of industry-based technical issues central to the rulemaking, public interest groups might be expected to have a much weaker participatory presence at the pre-NPRM stage. Indeed, unlike industry, they may not even appreciate that policymaking work is underway because they do not receive letters seeking more information. Perhaps equally important, public interest groups may lack the resources to engage in this time consuming process that produces few opportunities for credit-taking, to the extent that their views prevail.

The results of this study lend support to the emerging view that administrative law needs to broaden its current focus on interest group engagement beyond the notice-and-comment and appeal processes. If the law creates incentives for the agency to attempt to prepare an essentially done deal at the proposed rule stage, then these incentives may have perverse effects on ensuring open, transparent, and balanced interest group engagement during the notice-and-comment process.¹⁰⁶ Yet, as discussed

103. *Id.* at 38–39.

104. Field & Robb, *supra* note 55, at 9.

105. *See id.* at 52 (crediting one attorney with pointing out the advantages of providing draft language for the proposed rule and concluding that "whatever the Agency does not take out [of your draft rule] reflects your thinking and has your perspective"). As an official in a corporate office explained with respect to involvement with EPA on a rule:

I led an effort—which took about 9 months—to develop using our internal design and operating practices for our [operations], to develop an actual regulation and a preamble and it wound up being a 300-page document with lots of technical data to submit to the agency before they even really started their regulatory process, as a way to influence their thinking on what it ought to look like. And we carefully tied it to the statutory mandate and documented all of the design standards and operating procedures that we used—why they were important, where they were used, what the benefits were—and put that in front of the agency well in advance of their process to influence how they went about it. It had a tremendous impact.

Coglianese, *supra* note 41, at 47 (alteration in original).

106. *See, e.g.*, Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 893–900 (2007) (criticizing courts for adding the requirement that agencies go through a second notice-and-comment process when the final rule is not the "logical outgrowth" of the proposed rule and discussing how this requirement impedes

previously and with a few important exceptions, little attention has been given to this potentially important pre-NPRM stage with respect to interest group representation.¹⁰⁷ Instead, the bulk of scholarly attention, both empirically and within the administrative law literature, seems focused primarily on the notice-and-comment process.¹⁰⁸

Hypothesis 2: Formal comments lodged with the agency on complex rules will come predominantly from regulated industry, and the changes made to the proposed rule in the final rule will track this imbalance and generally favor industry.

As a simple matter of economics, participating in highly technical and complex rulemaking requires greater resources. These rules are therefore likely to attract less balanced engagement because interest groups' time and resources, particularly those advocating on behalf of the diffuse public, are limited.¹⁰⁹ The data support this hypothesis and reveal significant imbalances in participation in the engagement of interest groups during the notice-and-comment process. On average, industry comments (industry plus industrial associations) comprised over 81% of the comments submitted on the HAPs rules during the notice-and-comment period, as shown in Figure 4 below. Industry, moreover, participated in *all* of the rules at this important juncture in the rulemaking; public interest groups, by contrast, participated in less than half (48%) of the rules. When the public interest groups did participate, moreover, they were badly outnumbered by industry participants. The mean number of comments per rule filed by

agency adaptability to new information during the notice-and-comment period).

107. See, e.g., Balla, *supra* note 19, at 81–83 (providing some data on the extent of informal contacts with the agency that are not solicited through formal channels); West, *supra* note 19, at 70–72 (discussing opportunities for influence during pre-NPRM stage); Furlong & Kerwin, *supra* note 19, 362–66.

108. All the empirical studies to date focus exclusively on the notice-and-comment process as the touchstone for interest group engagement. See *supra* notes 39–45. See also Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008).

109. Professor Neil Komesar observes that an individual's participation is based upon the relative costs and benefits of that participation, a calculation that varies not only by issue but by institution. When the costs of information are lowered and information becomes more accessible, participation increases. Similarly, when the benefits to participation rise—for example, through damage awards in tort claims—claimants' participation increases. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 8 (1994). It is the combination of lower costs and higher benefits that explains the comparative advantages of the tort system relative to the regulatory system in providing improved access to needed information regarding health and environmental protection.

public interest groups across all rules was 2.4 (4%) as compared to a mean number submitted by industry of thirty-five (81%) comments per rule.¹¹⁰

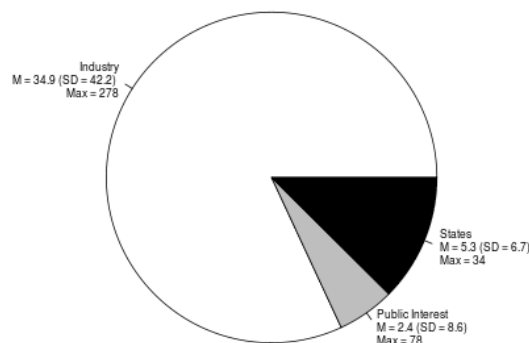


Figure 4: Interest Group Participation During the Notice-and-Comment Process

(M=Mean; SD=Standard Deviation; Max=maximum value within the 90 rules). An additional 7% of comments came from regulated governments and other/unknown groups.

Imbalances in interest group representation in the HAPs rules are greater than identified in other studies. Professors Yackee and Yackee found that for ten rules in each of four agencies, including EPA, business interests submitted over 57% of comments, whereas nongovernmental organizations submitted 22% and public interest groups submitted 6%.¹¹¹ In his study of the twenty-five significant rules promulgated by EPA from 1989 to 1991, Professor Coglianese found that businesses participated in 96% of the rules; national environmental groups participated in 44%.¹¹² Professor Coglianese does not report on the average number of comments filed by each group.

The influence of interest groups was also measured during the notice-and-comment period to determine whether EPA makes changes to the proposed rule in ways that generally track the comment activity.¹¹³ In

110. The mean number of comments filed per rule was thirty-nine, which appears to be slightly less comment activity than Yackee and Yackee found for their low salience rules, which averaged about forty-two comments per rule. See Yackee and Yackee, *supra* note 20, at 131.

111. See *id.* at 133.

112. See Coglianese, *supra* note 41, at 73 tbl.2-2.

113. By contrast, there was no readily available benchmark to measure the agency's pre-proposal before it was vetted through the range of interested parties. For example, during the pre-NPRM stage interest groups appear to become involved well before the first draft of

general, one would predict that the pressures placed on agencies through the threat of judicial review, triggered by comments, will translate into influence, if not on a one-to-one basis, then at least in a way that suggests that greater comments from one sector will lead to imbalanced influence in the final rules.¹¹⁴ Specifically, due to dominant industry participation during the comment period of the HAPs rules, one would expect final rules, on average, to be weakened, rather than strengthened in response to comments. In this Article, and as previously discussed in the Methods Section, this influence was measured by examining the changes made between the proposed and the final rule and categorizing the change as either weakening or strengthening the rule.¹¹⁵

The findings generally support the hypothesis that comments lead to changes, although there is not a one-to-one correspondence between comments and changes; instead the correlation is more like one change per every two issues raised by commenters. Specifically, on average each rule involved twenty-two significant issues raised by the commenters in their comments and EPA made changes in response to slightly more than half (thirteen) of these comments and rejected the rest. Consistent with dominant participation by industry, moreover, most of the significant changes made to the rules (83%) weakened them in some way, usually by eliminating some requirement that EPA originally suggested in the

a proposed rule is crafted; thus it is impossible to know what the agency may have had in mind before interest group participation. As discussed later, an opposite problem afflicts what might transpire as a result of negotiations after a rule is final. While changes to a final rule can be compared pre- and post-negotiation, existing empirical literature indicates that the results of these negotiations may take many forms and that actual changes to the text of the rule may not begin to capture the result of these negotiations.

114. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 223, 225 (2001) (underscoring how uncertainty in judicial review, coupled with adversarial processes, leads to counterproductive delays and skews in the resulting influence and power of different groups affected by a rulemaking); JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 165 (1997) (stating that “most seem to argue that the real impediment created by judicial review is uncertainty” in how courts will analyze the rule).

115. We were not able to determine reliably whether the changes were “big” or “little” using this method, however; thus, there is still the distinct possibility that even if there is some indication of interest group impacts on the proposed rule as a result of comments, whether these impacts are substantively important is unclear and has been questioned by others. See, e.g., West, *supra* note 16, at 579 (discussing how some scholars believe that changes made to the proposed rule tend to be made “at the margins” and rarely go to the heart of the policy). The only indication that they might be is that EPA identified the changes as “significant”; however, this may be a relative term that selects out the most important changes relative to the rest and does not indicate objectively that the changes are indeed important.

proposed rule.¹¹⁶

This power in numbers is further reinforced by the finding that the number of changes weakening the rule steadily increased as the number of industry comments increased, with a correlation coefficient of 0.56 that is significant at the 0.01 level,¹¹⁷ shown in Figure 5 below. This provides yet another reinforcing perspective on how comments translate into influence, at least from the vantage point of industry. The data also suggest that there is effectively no stopping point on the number of changes that can be made to a rule; it depends on the number of issues commenters raise in their comments.

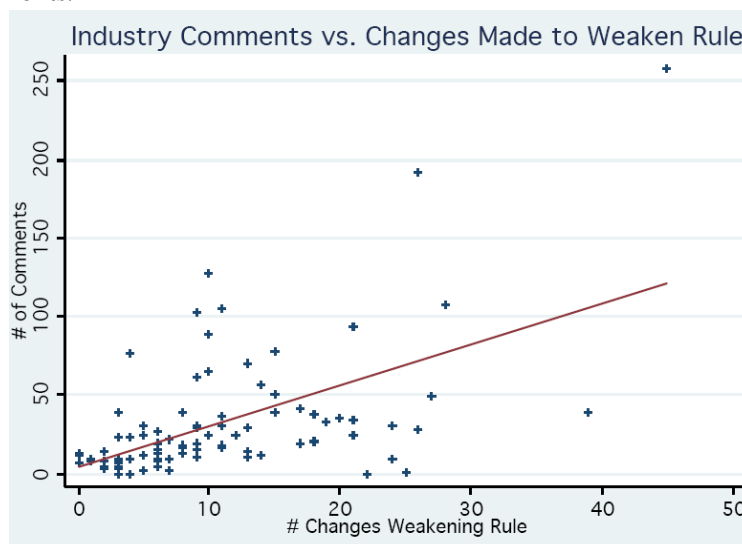


Figure 5

116. Industry enjoyed more affirmative changes relative to the public interest for 87% of the rules. Industry enjoyed more total favorable changes (both rejecting comments to make the standard stronger and accepting changes to make it weaker) relative to industry for 80% of the rules.

Intercoder reliability scores for some of these variables were quite weak and well below 0.75. See Appendix (detailing how reliability was measured). Reliability scores on public interest affirmative changes, the weakest of all, bottomed out at 0.36, a malady we attribute in part to the small numbers for this category of events. We will continue to examine the data to determine whether recoding can eliminate errors, whether revised protocol could avoid some of the reliability problems without losing validity of the data, or whether these reliability scores are generally the best that can be done with such a complex coding task, particularly when the units are small and the chance for even one unit variations can cause the reliability score to drop quite low.

117. There was a similarly significant positive correlation between the number of changes made in favor of industry and the number of public interest group comments, a finding that we attribute to the fact that as public interest comments increase, industry comments (and changes) also increase proportionately.

Less expected was the finding illustrated in Figure 6, that while EPA rejected about one-third of the comments intended to weaken the rule, it rejected more than half of the comments to strengthen the rule. Thus, the comments to strengthen the rule were not only fewer in number, but were less successful as compared with their counterparts striving to weaken the rule. This could be due to a number of factors. Perhaps the public interest group comments were more ambitious and demanded material changes to the rule. Or perhaps the agency views changes weakening a rule—which generally subtract from the rule—as less vulnerable to arguments that “material changes” were made as compared with comments that demand adjustments or additions to the text.¹¹⁸ These and other possibilities are ripe for further testing.

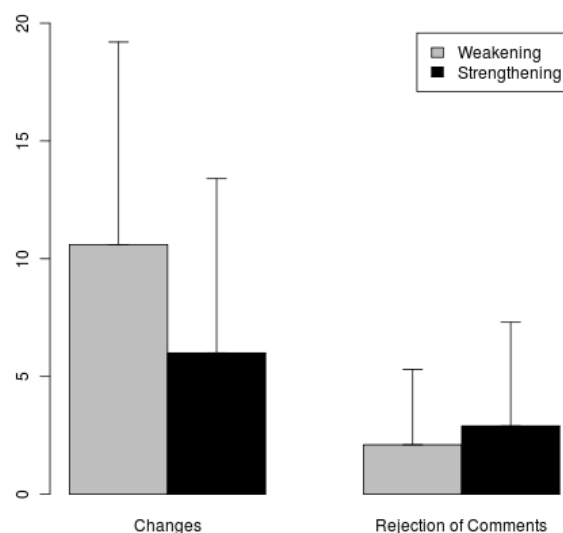


Figure 6: Comparison of Apparent Influence of Public Interest and Industry Interest Groups in Convincing EPA to Weaken or Strengthen the Proposed Rule¹¹⁹

(The solid bars represent the mean number of changes in each category; the thin lines represent the standard deviation on these means).

118. See West, *supra* note 16, at 581 (“One possible implication of the need to provide adequate notice is a bias in favor of subtractive changes in proposed rules. Deletions in response to public comment thus are not subject to the criticism that they have caught stakeholders by surprise.”).

119. Since the reliability of some of this data are low, these numbers, while statistically significant in terms of finding some difference, should be interpreted cautiously with respect to the absolute values.

Hypothesis 3: After rules are promulgated as final, interest group activity will continue on a significant percentage of them and revisions will be made to the rules that reflect these post-final negotiations. Regulated parties will again dominate this interest group activity.

Although administrative law scholarship has focused on the importance of the courts in reversing or remanding rules, surprisingly little attention has been given to what might be an even more important rulemaking influence—negotiations that occur on the courthouse steps after a rule is promulgated as final. Several scholars have observed that filing petitions and even appeals in court are relatively low cost measures for interest groups who have become deeply invested in the rulemakings. This is particularly true for regulated parties who also may enjoy implementation delays that postpone compliance costs while the appeals or petitions are being resolved.¹²⁰ At the same time, there is likely to be some negotiating room during the post-rule stage for interest groups who did not prevail on all of their comments. As a result, rules may not be set in stone when published as final, but many will continue to undergo more changes and revisions, some of which may be largely beyond the APA's reach.

In order to gain some sense of what occurs during the post-final rule stage, this study consulted several sources of data.¹²¹ First, evidence was

120. See, e.g., Sidney A. Shapiro & Thomas O. McGarity, *Not So Paradoxical: The Rationale for Technology-Based Regulation*, 1991 DUKE L.J. 729, 737–38 (observing that “[b]ecause judicial review ‘delay[s] the implementation of OSHA standards by an average of two years,’ a company or trade association could save its industry \$320,000 by filing an appeal, assuming an eight percent annual interest rate. . . . [Thus a trade] association could afford legal fees of up to \$640 an hour and still save its members money compared to the costs of immediate compliance with the OSHA standard” (second alteration in original) (footnote omitted)); Christopher H. Schroeder & Robert L. Glicksman, *Chevron, State Farm, and the EPA in the Courts of Appeals during the 1990s*, 31 ENVTL. L. REP. 10371, 10377 (2001) (explaining that “petitioners may add statutory interpretation challenges to cases brought on other grounds because the marginal costs of bringing a statutory challenge are relatively small”).

121. Because these post-final rule communications are again outside of the docket recording requirements and thus will be recorded at the whim of the agency, we expect the public records to be incomplete. Yet we lack any mechanism to determine just how incomplete. The same may be true for EPA's decision to publish changes resulting from petitions for reconsideration in the *Unified Agenda*, particularly if the changes take the form of minor amendments or alterations to guidance documents.

First, we consider whether and the extent to which post-final rule revisions actually take place in practice. Conveniently, EPA lists every published revision to each of the HAPs rules—a task that substantially streamlines data collection. See Appendix. This data does not tell us whether the revisions were triggered by interest groups or initiated spontaneously

collected on whether and to what extent rules are being revised after publication of the final rule. On this score, the data summarized in Table 1 below reveal a relatively high rate of revision activity; about 70% of all of the HAPs rules were revised at least once. More specifically and excluding the thirty percent of rules with no revisions, HAPs rules, on average, underwent about five revisions each since their promulgation in the 1990s or 2000s, which is, on average, one revision every other year. Most of these revisions do not involve notice and comment and about 13% of the revisions are entitled “stay,” “exemption,” or “exception” which appear—by their title—to favor industry.

	Mean	Standard Deviation	Maximum
Total number of revisions/rule	5.0	10.1	76
Major revision as formal rulemaking, with notice-and-comment	1.8	3.5	24
Technical amendment or clarification without notice-and-comment	2.5	4.2	28
Revision called a “stay, exemption, or extension”, usually occurring without notice-and-comment	.7	3.1	24
Number of revisions/year	.6	.9	5.75

Table 1: Revision Activity for Rules that Involved at Least One Revision (n=63)

Information on whom or what triggers these revisions is more difficult to determine.¹²² Drawing primarily from the Unified Agenda, it appears that

by the agency, however. The data are also limited to changes that resulted in published revisions in the *Federal Register*. Changes that are not published, i.e., amendments to interpretive guidance or enforcement guidelines, are thus not included in this data set even though the literature suggests that this is another common route that agencies use to amend rulemakings. See, e.g., Schmidt, *supra* note 67, at 79 (discussing the Occupational Safety and Health Administration’s settlement with one party, which involved altering its enforcement guidance).

122. This information comes from two public sources of information: EPA’s log of projects published in the *Unified Agenda* in the *Federal Register* and petitions logged into the docket index after promulgation of a final rule. This data, particularly when combined with targeted searches in the final rule preambles, allowed us to identify the filing party for all of

twenty-two of all of the HAPs rules (or 22% of our dataset) involved petitions for reconsideration or suits for judicial review. *See* Table 2. The public interest and industry were almost in equipoise by the time petitions for reconsideration and appeals were filed, although industry still enjoyed a slight edge at this stage of the rulemaking.

	Number of rules for which a petition/litigation was filed	Filed by industry	Filed by public interest groups	Filed jointly
Petitions for Reconsideration that did not result in litigation	8	4	1	3
Judicial appeals (some of which settled) as recorded in the Unified Agenda and Westlaw combined	12	5	3	4
Total filings post-final rule	20	9	4	7

Table 2: Petitions and Challenges Filed by Interest Groups Against HAPs Rules

the petitions and judicial appeals noted in these two sources of data. Yet both databases are probably incomplete in ways that are likely to lead to underreporting, and perhaps significant underreporting. This is because EPA records items in the *Unified Agenda* only when they lead to final decisions generally taking the form of formal rulemakings. For petitions or litigation that do not trigger published rule revisions (i.e., a nonmeritorious petition or a settlement that leads to changes in EPA's guidance that does not alter the rule itself), the changes seem unlikely to be noted in the *Unified Agenda*. Further, even when there are final decisions or rules that result from petitions or litigations, we do not know whether EPA consistently reports these revisions in its *Unified Agenda* filings, particularly when the revisions are minor. Finally, the *Unified Agenda* looks ahead to what EPA plans to do. If a settlement and rule revision occurs soon after a promulgated rule, it may not be mentioned as a future project.

The findings in this Article are thus consistent with Professor Coglianese's observation of important post-final rule interest group activity. While post-final rule activity seemed relatively strong in our dataset—constituting more than 20% of the rules—Coglianese observed almost double this activity in his subset of significant hazardous waste rules. Specifically, Coglianese observed that 44% of the rules in his dataset ended with at least one petition seeking reconsideration or judicial review.¹²³ About half of these cases settled, and most of those settlements involved only regulated industry. The other half of the petitioned rules proceeded to litigation.¹²⁴ The greater post-final rule activity observed by Coglianese might have occurred because he focused only on significant rules (although only 25% of the significant rules in our dataset resulted in petitions for reconsideration or litigation). It also could be because Professor Coglianese's databases on post-final rule activity were more complete than our two sources of information on filing activity.¹²⁵ When combined with Professor Coglianese's study, our findings suggest that more attention needs to be directed toward this potentially important, but generally ignored period of interest group engagement, as well as at the pre-NPRM stage.

IV. ADDITIONAL FINDINGS

In this Section, we take a step back and, with the help of additional exploratory data, probe deeper into several questions raised by the findings, while also attempting to place the findings within a larger administrative context.

A. *Where are the Public Interest Groups?*

As noted in the introduction, the findings of limited public interest group engagement in the development of HAPs rules do not comport with conventional wisdom.¹²⁶ While public interest groups may not be able to participate in every rule, one would not expect them to be so badly outnumbered and even absent from rulemakings that have important implications for public health.

As it turns out, however, public interest groups did play a forceful role in most of EPA's HAPs rules, but this role occurred much earlier in the process and only with regard to the timeline, not the substance, of the rulemakings. The early activity of public interest groups was not caught by

123. Coglianese, *supra* note 41, at 95.

124. *Id.* at 141–42, 155.

125. *See infra* Appendix (explaining in greater depth).

126. *See supra* Part I (revealing that public interest group engagement in the development of HAPs rules is limited).

our initial hypotheses since these hypotheses focus exclusively on interest group engagement and influence in the substance of the rulemakings and not on the timing of rule promulgation.

Specifically, the *Unified Agenda* data¹²⁷ reveal that 73% of the HAPs rules (sixty-six rules) in our study were promulgated under court order resulting from deadline suits filed in the U.S. Courts of Appeals.¹²⁸ Although references to judicially enforced deadlines do not reference public interest groups as the litigant, we expect, based on other commentary and observations, that these cases are brought predominantly, and likely exclusively, by public interest groups.¹²⁹

Efforts by public interest groups to engage vigorously in this early phase of the HAPs rulemakings make good strategic sense. Until the 1990 amendments to the Clean Air Act were passed, air toxics from large stationary sources were effectively unregulated.¹³⁰ Therefore, the promulgation of *any* standards reducing toxic pollutants provides a marked improvement over the status quo. An important way to keep EPA on track is the filing of deadline suits that force EPA to promulgate these standards roughly on time. Beyond the public health benefits of these cases, deadline suits can be filed with almost no investment of time or effort and almost always lead to success. The only facts in contention, moreover, are whether there is a statutory deadline for a rule and whether the agency has missed that deadline.¹³¹ Equally beneficial, these lawsuits can provide positive publicity and media attention for public interest groups.

The engagement of public interest groups in this early but important stage of the HAPs rulemaking process, demonstrated in Figure 7 also provides a broader view of interest group activity through the rulemaking life cycle. Disaggregating the rulemaking process into four distinct stages also partly supports those political scientists and legal academics who contend that pluralism is alive and well.¹³² At the same time, by breaking down the opportunities for interest group engagement into the distinct

127. See *infra* Appendix (discussing the data from the *Unified Agenda* in greater depth).

128. In the Clean Air Act, Congress set a strict timetable for when EPA is required to complete various groups of HAPs standards; deadline suits consist of litigation, almost always filed by environmental groups, which seek to hold EPA to this statutory schedule. See 42 U.S.C. § 7412(e) (2006) (establishing schedule for standards and review).

129. We will verify this in the course of completing this study. See Coglianese, *supra* note 41, at 41–42 (discussing how deadline suits tend to be brought by public interest groups).

130. See, e.g., U.S. CONG. OFFICE TECH. ASSESSM'T, IDENTIFYING AND REGULATING CARCINOGENS: BACKGROUND PAPER, 141–42 (1987) (stating that the performance standards were delayed for fourteen months due to OMB).

131. See, e.g., ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 999–1000 (2006) (describing the features of deadline suits).

132. See *supra* notes 7–10 and accompanying text.

stages, Figure 7 reveals the much more limited role of public interest groups in shaping the substance of most of the rules, at least in the HAPs rulemakings.

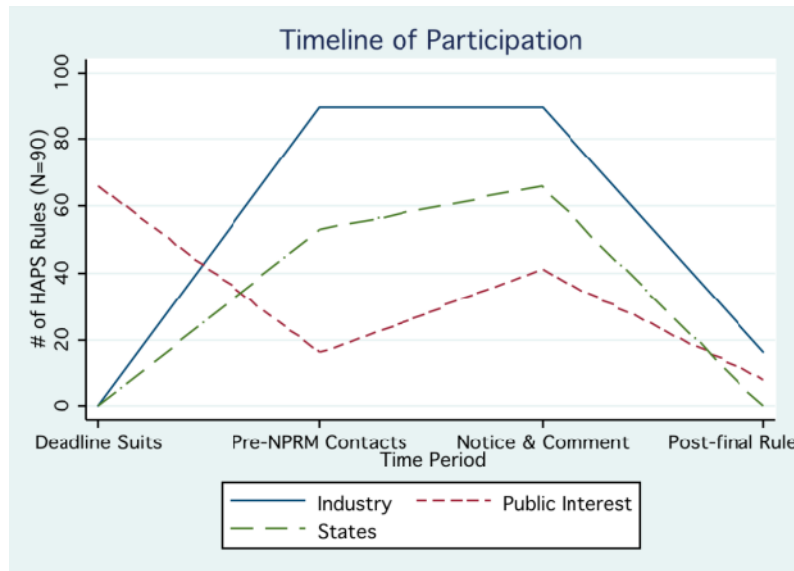


Figure 7: Participation in Each Stage of the Rulemaking Life Cycle by Number of Rules

Indeed, if this pattern of interest group activity turns out to be relatively typical of many EPA or other public health rulemakings (i.e., public interest groups are heavily involved in filing deadline suits and then back out of most of the substantive features of rulemakings until the end of the process), then involvement by public interest groups could actually lead to a somewhat perverse effect on the stringency of the resultant standards.¹³³ Given that the standard-setting is highly complex and technical, the fact that it also must be done in a relatively short time frame, often without vigorous adversarial presence by public representatives, may mean that the agency is even more dependent on regulated parties for information to get the rule promulgated on time. So, if the rulemakings are too hurried, they may be done more like a complex contractual negotiation between knowledgeable parties—here, regulated industry and EPA—rather than as a transparent deliberation amenable to vigorous public interest oversight.

133. See, e.g., HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS 248–49 (4th ed. 1997) (noting that the best manner to address organizational problems is to study the system that makes the decisions).

B. Participatory Predictors

Beneath the means and ranges, there is considerable variation in the extent to which interest groups participate in any given rule. In this Section, we explore possible connections within the data that serve as predictors for when an interest group will participate in a rule, or at least participate more vigorously or in higher numbers.

1. Industry Engagement and the Economic Costs of Rulemakings

Industry engagement is strong across all rules, yet one would expect that the cost a rule imposes on industry would be a useful predictor of the level of industry activity: the higher the cost, the higher the level of industry engagement at all stages of the rulemaking life cycle. While it was not feasible to identify the costs imposed on industry for each rule individually (these data may not be available), the rules could be divided into two categories: major rules where the costs to society exceed \$100 million annually; and rules that are not considered economically significant. We used negative binomial regression to compare participation during notice and comment, and pre-NPRM activity for industry, public interest, and states for economically significant versus economically nonsignificant rules. There was significantly greater participation (99% confidence) by both industry and states during the notice-and-comment process for economically significant rules as compared to rules that were not deemed significant.¹³⁴ Public interest group engagement in the notice-and-comment process, by contrast, was not affected by whether the rule was economically significant. During the pre-NPRM process, there were no statistically significant differences in participation activity between economically significant and nonsignificant rules for any of these three categories of interested parties.

2. Public Interest Group Engagement and Newsworthiness

Possible predictors of public interest group engagement are either the litigation potential or the newsworthy features of a rule. Since the litigation potential is difficult to assess *ex ante*, we focused on newsworthiness as a possible, simple predictor of public interest group participation. Specifically, we considered whether a correlation arises between the number of news hits for a rule and the level of public interest group activity. While this includes news that followed public interest group activity, rather than just news articles that preceded it, this measurement at least gives a

134. For industry ($\chi^2(1) = 12.10, p < .001$) and for states ($\chi^2(1) = 14.98, p < .001$).

general indication of whether public interest activity and newsworthiness go hand in hand.

We tested for this possible predictor by collecting all the major news coverage of individual HAPs rules by industry category over the entire period of EPA's rulemaking (1990 to the present).¹³⁵ Of this coverage, only twelve individual rules from the HAPs dataset (n=90) were covered in the major newspapers,¹³⁶ and there were only thirty-two articles on these twelve individual rules over the nineteen years of regulatory activity.¹³⁷ The difference in public interest comment activity between rules with media hits versus those that did not receive this coverage was in fact statistically significant at the 99% confidence level.¹³⁸ For rules covered in the major media, there was an average of 9.73 (SD=22.8) comments from public interest group participation per rule versus 1.35 (SD=2.91) for rules not covered in major newspapers. Most (about 60%) of this news attention was generated after the comment period had closed and in a number of cases after the rule was published as final. This time sequence makes the comment activity even more interesting as a predictor of media attention since it suggests that air toxic standards are much less newsworthy or salient (even for economically significant rules) when public interest groups are not vigorously engaged in the notice-and-comment process.

3. *Interest Group Participation and the Chief Executive*

One would also expect the identity of the Chief Executive to have some impact on interest group engagement and influence, particularly given the ideological differences between Presidents Bill Clinton and George W. Bush, the only two presidents who presided over promulgation of the HAPs rules. We are testing these differences more thoroughly in a separate study.¹³⁹ Preliminarily, however, the results do not show many significant

135. See *infra* Appendix (providing for a more detailed discussion of this search of major papers in LexisNexis).

136. Our study covers only the HAPs rules in 40 C.F.R. Part 63. There are a few other rules, as mentioned in the methods section, such as rules limiting toxic emissions from the incineration of hazardous and solid waste, and from the removal of asbestos. These rules received media coverage too, but are not included in the totals for source-specific Part 63 HAPs rules.

137. This light news coverage of individual HAPs rules stands in contrast to the 485 more general articles over this same time period documenting problems or sources of innovation with regard to air toxins emitted from large stationary sources.

138. A negative binomial regression model was used to compare public interest group participation counts, which revealed a significant difference ($\chi^2(1) = 12.05, p < .001$).

139. See generally Katherine Barnes, Wendy Wagner & Lisa Peters, Presidential Politics meets Regulatory Complexity: An Empirical Study of EPA's Hazardous Air Pollutant Rules Under Clinton and Bush II (July 16, 2010), available at <http://ssrn.com/abstract=1641551>.

differences between administrations with respect to either the balance in interest group engagement or influence at key stages of the rulemaking life cycle. Indeed, if anything, President Clinton was more amenable to pre-NPRM contacts with all groups, including industry. EPA under his watch was also more inclined to weaken rules based on industry comments than the George W. Bush EPA.

4. *The Role of the States*

Although the states were treated as a single unit in this study, they may have diverged considerably in their advocacy positions in the HAPs rules.¹⁴⁰ Given their relatively high level of engagement throughout the process, determining the nature and significance of the varying state roles is important. Recall that states outnumbered public interest groups during both the pre-NPRM and notice-and-comment process by almost two to one.¹⁴¹ Given this higher rate of activity, if states are serving predominantly as public interest advocates, then this alters the analysis to the extent that it suggests a more formidable public interest presence than is revealed by considering public interest group engagement, standing alone.¹⁴²

In an effort to gain preliminary insight into the advocacy positions taken by the states, we coded the text of the state comments filed for thirty-five rules in our dataset—this is nearly half of the rules (seventy-two) that triggered state comment. In their comments, the predominant role played by the states is to advocate on behalf of greater protection in EPA's HAPs rules, at least for those rules where the states actually staked out a clear position. This is not always the case, however. As shown in Figure 8, in most rules the states took diverse positions: some states advocated for greater protections while other states advocated for lesser protections. We intend to conduct further research on the role of the states to better understand these dynamics.

140. To our knowledge, none of the empirical studies of interest group participation in administrative law clear up this confusion regarding the states' multiple roles in public health rulemakings. Rather, they count states as "states" without discussing what that means in the constellation of interest group pressures. See Coglianese, *supra* note 41, at 70 (listing states as a unit of study); Yackee, *supra* note 20, at 132.

141. Specifically, the mean number of state comments on the 35 rules in our subsample was five. For pre-NPRM involvement, the mean number of contacts between EPA and the states was nine, although it reached a maximum of seventy-seven contacts during the rule development stage.

142. See, e.g., Paul A. Sabatier, *An Advocacy Coalition Framework of Policy Change and the Role of Policy-Oriented Learning Therein*, 21 POL'Y SCI. 129, 139 (1988) (discussing the types of advocacy coalitions that form during the policymaking process).

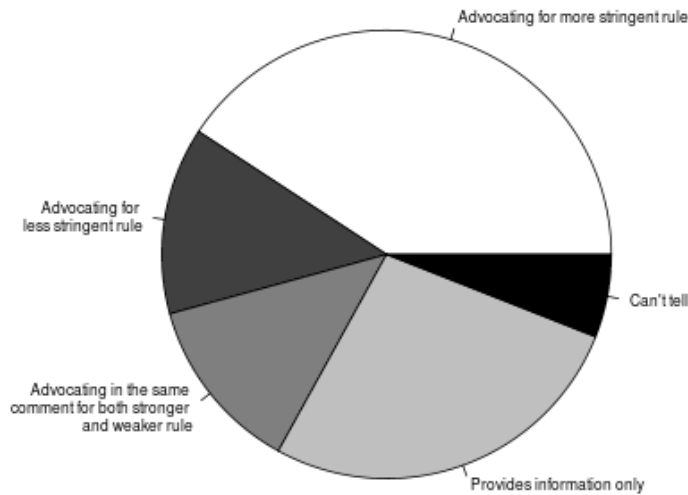


Figure 8: Various Positions Taken by the States in Their Comments

V. THE STORY EMERGING FROM THE DATA AND THE UNCERTAIN ENDING

The data and accompanying analysis illuminate some of the shadiest areas of rulemaking, but it seems to raise at least as many questions as it answers. In this last Part, we recount the story that we believe emerges from the data and highlight the uncertain implications of these findings.

A. The Story from the Data

Because the previous two Sections focus only on our hypotheses, it necessarily leaves out some of the unexpected discoveries that inevitably emerge from assembling the data. This Section draws from both these qualitative and quantitative findings to offer a fuller account of EPA's HAPs rulemaking process.

Under § 112 of the Clean Air Act, Congress directs EPA to promulgate a continuous stream of over 100 toxic air emissions rules in less than a decade, a timeframe that environmentalists reinforce through deadline suits and successful judicial orders.¹⁴³ Congress also provides relatively specific directions on the criteria EPA must use to promulgate these rules; specifically, in setting HAPs standards Congress instructs EPA to identify

143. 42 U.S.C. § 7412(e) (2006).

the best performing industries, including those that used nontechnological controls such as fuel-switching, and determine their achievable level of emissions of air toxics.¹⁴⁴ EPA must also identify the effectiveness and costs of the various control options to ensure they are feasible.¹⁴⁵ For example, if some of the raw materials can be substituted in ways that reduce toxic air emissions, EPA may want to investigate whether this input switching can be done in practice within an industry that might not have unlimited choices for input substitution.¹⁴⁶

In working through this daunting assignment for each of the 100-plus categories of industry, EPA typically relies initially on the available literature on pollution control technologies, which it supplements with commissioned background documents prepared by contractors (on average, each rule involved more than twenty commissioned contractor studies).¹⁴⁷ Quite early in the rulemaking life cycle—less than four years, on average, before publication of the proposed rule—EPA also begins requesting technical information from the regulated parties. EPA does this in part through formal information requests, which average eighty-six formal interactions between industry and EPA. The agency and regulated parties also begin to engage in a range of informal communications, which include not only letters and faxes, but also live meetings, telephone conversations, and teleconferences. The informal contacts with industry comprise another eighty-four communications per rule on average during the rule development process. Most of these communications involve written letters, although about one-third of the communications consist of phone calls and meetings. For written communications, EPA actually initiates more than one-third of the informal contacts with regulated parties; the rest of the informal communications are initiated by the regulated parties. In some cases, EPA also solicits feedback and critiques of its proposed rules from these same regulated parties before the proposed rule is published.¹⁴⁸

144. See *id.* § 7412(d)(2); see also *Sierra Club v. EPA*, 479 F.3d 875, 881, 883 (D.C. Cir. 2007) (analyzing EPA actions in the context of EPA legislative mandate).

145. See 42 U.S.C. § 7412(d)(2).

146. See *id.*; see also *Sierra Club*, 479 F.3d at 883 (describing the statutory prescription for EPA to look at the feasibility of complying with regulations through various means).

147. We recorded the presence of contractors only at the initial stages of preparing documents, but as a qualitative matter it was evident that their presence was continuous throughout the rules. EPA contractors would routinely serve as the contact for communications with industry, attend meetings, field phone calls, and provide the response to comments or at least to produce a first draft. Indeed, in some rules it appears that the contractor engaged in far more discussions with interest groups than did EPA staff. The role of contractors in rulemakings is a rich empirical area that we leave for future research.

148. See, e.g., Field & Robb, *supra* note 55, at 10 (discussing industry's role in drafting proposed rules); see also Coglianese, *supra* note 41, at 47–49 (commenting on industry's role in

Regulated parties are not the only group that communicates with the agency during rule development. The states were somewhat involved in this process, albeit roughly ten times less often than EPA's informal communications with regulated parties.¹⁴⁹ Moreover, in some of the dockets, the states provided actual permits and conditions they had imposed on industry. This information provided EPA with a more comprehensive basis for evaluating the capabilities of the pollution control technologies that were already in operation in some states. Least engaged during this pre-NPRM stage were the public interest groups, who averaged approximately 0.7 communications per rule.

The agency published a proposed rule a little less than four years, on average, after initiating the rulemaking.¹⁵⁰ Immediately upon publication, the rule was open for notice and comment, a process that typically lasted sixty to ninety days, but in some cases extended for months. During this notice-and-comment process, the agency continued to hear from these same interest groups. Public interest groups made a stronger appearance as compared with their pre-NPRM silence: public interest groups accounted for about 4% of all the comments filed with the agency; regulated parties accounted for about 81%. The agency received on average a total of approximately forty-three comments per rule. Late comments were also filed. About 11.4% of the comments were late and more of these late comments came from public interest groups (19% of public interest comments were late as compared to 9.5% of industry comments). In cataloging these comments, the agency typically relies on contractors. Their reports, which are often more than 100 pages in length, itemize the comments by issue and, in rare cases, by commenter and provide the agency's response to each comment.¹⁵¹ In a shorter section in the *Federal*

the drafting process).

149. EPA also engaged with governments when they acted as regulated parties, although this was relatively rare and occurred only for a few rules, with an average across rules of 0.3 total communications with governments as regulated parties during the pre-NPRM process.

150. In coding the docket indices, coders identified the date of the first substantive document logged into the docket. To calculate the time period over which EPA developed its rulemaking proposal, we subtracted this date from the date that EPA published the proposed rule. The mean period for the ninety HAPs rules was about four years. The considerable time spent during rule development—more than twice the time spent that was dedicated to responding to comments—suggests that empirical tests for ossification will need to include this early period in the rulemaking life cycle. To date, the tests of ossification appear to focus only on the agency's response to comments. It is also not clear whether the rules that are tested include rules, like HAPs, that are under statutory and judicial deadlines. In those cases, of course, ossification is much less likely.

151. For a sample of one of these documents, see, e.g., Summary of Comments and Responses on Proposed National Emission Standards for Automobile and Light-Duty Truck

Register, EPA summarizes the highlights of the “significant” comments and provides its responses—including identifying resultant changes made in response to the comments. This discussion of the agency’s response to significant comments appearing in the *Federal Register* preamble is, on average, about eight pages long.

EPA usually takes, on average, about 1.5 years to produce a final rule after publication of the proposed rule. The final rules were, on average, thirty-nine pages in the *Federal Register*. About 43% of the rules were considered major, resulting in greater than \$100 million in annual costs to society. These rules required cost-benefit analyses and were cleared through the Office of Management and Budget (OMB). Only 6% of the rules triggered small business protections.

In the final rule, EPA makes, on average, about thirteen “significant” (EPA’s characterization) changes to the proposed rule as a result of the comments. This constitutes about a 58% acceptance rate for the most significant comments, which average approximately twenty-two issues per rule. In fact, the number of industry comments correlates directly with the number of changes weakening the rule, averaging about one change weakening the rule for every two industry comments received. Industry also appears to enjoy a slight edge over the public interest advocates with respect to EPA’s acceptance of their comments: more than 82% of the changes made by EPA in response to comments weakened the rules in some way, and EPA tended to reject more of the comments advocating strengthening the rule than it did weakening the rule.

EPA’s response to significant comments provides a general indication of how the notice-and-comment process affects a rule’s development, but it leaves unanswered several major questions. First, the data do not give much indication of the significance of the changes that EPA makes. Some scholars maintain that most of the changes made during the final rule are minor and relatively insignificant.¹⁵² Our data do not speak to this question. The data do indicate that in most cases the changes involved more than compliance extensions or paperwork requirements (these comprise less than 20% of the changes). And while it is worth noting that EPA itself labels these changes as “significant,” our methods could not distinguish between changes that appear relatively “modest”—i.e., providing industry with more flexibility in how to meet a particular emission reduction—and those that seem significant—i.e., providing a new exemption that allows major industries to escape compliance requirements

Surface Coating, EPA (Feb. 2004), <http://www.epa.gov/ttn/atw/auto/autoresptocomment.pdf>.

152. See, e.g., Golden, *supra* note 40, at 259; West, *supra* note 16, at 580–81.

under the statute. Second, the data do not suggest why EPA rejects or accepts comments seeking changes. It seems likely that in some cases the commenters request changes that are not desirable from a political perspective. In other cases, the commenters may be requesting changes that are not legally credible, and thus, can be brushed aside. Or perhaps some comments necessitate material changes to the proposed rule that, from the agency's perspective, are not worth the risk of legal challenge. To actually discriminate among these possibilities will require more extensive coding and data collection.

Final rule promulgation does not mark the end of the rule's life cycle, at least for the majority of HAPs rules. At least 22% of the rules resulted in petitions for reconsideration and 13% percent involved appeals to court that were lengthy enough to make the agency believe rule delays or changes were likely, because these appeals were recorded as events in the agency's *Unified Agenda*. Additionally, 70% of the HAPs rules were revised at least once; and there were on average four revisions for each of these revised rules. Interest group petitions may explain some of this revision activity, but for at least half of the rules that were revised one or more times there is no evidence of petitions or litigation. Thus, some of the revisions may be done by the agency primarily to adjust the rule to changes in information or technical details; other revisions could result from political pressure on the agency. Again, additional data collection is warranted.

In contrast to the earlier stages of the rulemaking life cycle, interest group activity appears more evenly balanced during the post-final stage of rulemaking. Industry petitions for reconsideration or litigation were only slightly higher than public interest group petitions. By the time the rule was actually appealed to court and resulted in a judgment, the balance tipped to yield an almost level playing field between industry and public interest groups, with the former enjoying only a slight edge in terms of the recorded notices of appeal.¹⁵³

In sum, once one looks at the entire life cycle of rulemakings, at least in this set of highly complex and technical pollution control rules promulgated by EPA, there are significant opportunities for participation and influence by interest groups, of which notice and comment is only a part, and perhaps a small part. Our research also suggests that at least in the case of HAPs, much of this added engagement tends to be badly imbalanced at the pre-NPRM stage, although it levels out for a small subset of rules after promulgation of the final rule.

153. The litigation history of these HAPs rules is the subject of an ongoing project and will be developed in future work.

B. The Uncertain Ending

Regrettably, while imbalanced engagement and influence is occurring in the HAPs rulemakings, this does not actually tell us whether this imbalance has a meaningful impact on the substance of the final rules. This Section considers arguments about why imbalances may *not* affect the substance of the final rules in a meaningful way and finds each of them incomplete. At this point, the available evidence does not rule out the possibility that imbalances in interest group engagement and influence may significantly impact the substance of the final rules.

1. Anticipating Industry Pressure by Issuing a Super-Stringent Early Proposal?

One possible way that imbalanced engagement may not matter is if the agency anticipates an onslaught of industry opposition during the rulemaking life cycle and develops an early proposed rule that is twice as stringent in order to meet industry halfway. In this view, while the process may be skewed in representation, it would not ultimately affect the substance of the final rule because of the agency's own mediating role in representing the public interest against the industry barrage. To directly test this hypothesis, we would need access to the agency's earliest proposal.

Nevertheless, based on indirect evidence, it seems unlikely that the agency will ultimately be able to anticipate and guard against imbalanced industry engagement in ways that adequately protect the public interest. First, the notion that the agency can begin with an overly ambitious rule in terms of advancing the goal of health protection, knowing that it will get whittled to half as it goes through the rulemaking, does not describe how the rulemaking process works in practice or the incentives the agency face as a result of judicial review. Courts do not review rules based on whether the agency splits the difference between the litigious groups and the public interest; each objection is reviewed on its own terms. If the agency provides a reasonable response to an objection or request for change (recall that for rules, there were approximately twenty-two requests for change, on average), the agency's rule is safe. If not, it is at risk of remand. The fact that the agency's rule in the aggregate does a good job of accommodating all interest group concerns is not before the court. The court instead reviews only those specific objections a litigating party wishes to raise in challenging a final rule and it expects a reasonable response from the agency on each contested issue.

It is also difficult to imagine how the agency could anticipate the extent of pre-NPRM and post-final rule opposition and calibrate its early proposal in ways that ensure that the outcome will nevertheless meet halfway between industry and public health protection. For example, the data

suggest that the number of changes the agency makes to weaken a rule correlate with the number of industry commenters, a feature that the agency presumably cannot control or predict in advance.

Finally, there is some evidence that the substance of some final HAPs rules fell below what might be considered adequate for health protection. One public interest litigator observed that EPA's HAPs rules were sometimes less stringent than those in force in some states.¹⁵⁴ Perhaps even more telling, EPA often fared badly in litigation brought by environmentalists against its rules. Of the six HAPs rules that were ultimately litigated to judgment, five involved successful challenges by environmental groups, in some cases with strongly worded opinions that chastised the agency for not adequately protecting the public health.¹⁵⁵ For example, EPA repeatedly refused to set regulatory restrictions on toxic pollutants if most of the industry sources had not already developed ways to limit these toxic emissions. This is one among several examples of EPA's deviations from the statutory terms in ways that compromised the public health protection goals.¹⁵⁶ The case law thus suggests that the substantive rules that emerged from the HAPs process—at least those that were appealed—were not “just right,” but tilted too heavily in favor of regulated parties.

2. *The Statute Leaves Little Room for Maneuvering?*

A second source of potential comfort with the otherwise worrisome implications of the study is the possibility that, at least in the case of HAPs rulemakings, the public interest groups may not be engaged in the substance of many of the rules because they believe the operable statutory directions provide EPA with little discretion to make the HAPs standards more lenient. Congress did provide a relatively precise definition of the best performing industry.¹⁵⁷ Thus, the argument goes, there must be very

154. Informal interview with anonymous public interest litigator involved in HAPs rulemakings during the 1990s, May 29, 2009 (interview in Chicago, Ill).

155. See, e.g., *Sierra Club v. EPA*, 479 F.3d 875, 881, 883 (D.C. Cir. 2007) (criticizing EPA for failing to meet its mandate of protection). These cases are described in considerably more detail in a working paper, Wendy Wagner, *Are the Courts Guardians for the Public Interest?: A Case Study of EPA's Air Toxic Emission Standards* (2011) (unpublished paper) (on file with author).

156. See, e.g., *Sierra Club* at 883 (stating that the court found EPA failed to set floors for existing small tunner brick kilns and existing and new periodic brick kilns).

157. In the statute, Congress defined the best performers as the “average emission limitation achieved by the best performing 12 percent of the existing sources” or, if there are less than thirty sources in an industrial category or subcategory, based on the “average emission limitation achieved by the best performing 5 sources.” 42 U.S.C. § 7412(d)(3)(A)–

little wiggle room in this particular standard-setting project, and whatever remaining concessions EPA does make during the rulemakings are inconsequential.

However, the possibility that the HAPs standard-setting decisions are inconsequential seems refuted in part by the fact that so many industries invest so much time and effort in engaging in these rulemaking processes. If it is behaving rationally, industry is not likely to engage in an average of eighty-four pre-NPRM informal (voluntary) communications for each rule,¹⁵⁸ submit on average thirty-five comments for a standard,¹⁵⁹ or file petitions for review of more than a dozen of these rules once promulgated.¹⁶⁰ In fact, if the die is cast by the statute, then the involvement of the thinly spread public interest groups also seems misplaced. Further refuting the potential insignificance of the changes is the fact that the majority of comments seek substantive changes to the stringency or scope of the standard; only a minority of the comments raise issues regarding compliance deadlines or paperwork requirements.¹⁶¹ In any event, if public interest groups are not engaged in commenting on the majority of the rulemakings, then they are not able to sue if the agency does ultimately violate the statute in setting more lenient standards; stringent statutory constraints on EPA's rulemaking assignment do not matter in practice if nobody is able to enforce them.¹⁶²

(B) (2006). By contrast, in setting technology-based standards under the Clean Water Act, EPA must consider the cost to industry, but in doing so, generally considers features such as the age of equipment and facilities involved, the process employed, potential process changes, nonwater quality, environmental impacts including energy requirements, economic achievability, and other such factors as EPA Administrator deems appropriate. *See, e.g.*, Effluent Limitations Guidelines and New Source Performance Standards for the Concentrated Aquatic Animal Production Point Source Category, 69 Fed. Reg. 51,891, 51,896 (Aug. 23, 2004) (codified at 40 C.F.R. pt. 451); *see also* 33 U.S.C. § 1314(b)(2)(A)–(B) (2006).

158. *See* Figure 3.

159. *See* Figure 4.

160. *See* Table 2.

161. The coders identified not only the number, but the type of changes made by EPA in the final rule in their coding of the *Federal Register* preambles. The text provides the means from this coding effort.

162. In theory, some of the “greener” sources of HAPs could challenge the rule in an effort to impose more stringent requirements on their competitors; however, we are not aware of any lawsuits in the HAPs or many other areas of environmental law when this occurred.

3. *Political Branches to the Rescue?*

A final mitigating possibility arises from the hope that the diffuse public will be adequately protected in the end, if not from the strong ideological commitment to public health protection from within the agency, but from public-benefiting pressure exerted on the agency from without—through the Executive Branch or even through Congress.¹⁶³ In this political economy view, the political ballast—occurring through the White House or Congress—would push back against industry domination and keep these rules on a level playing field. While most would prefer that this political counter-pressure take place “in the light” rather than outside public oversight, as is currently the case,¹⁶⁴ the fact that it occurs at all may be chalked up as a victory.

The likelihood of congressional intervention seems the most improbable, both in theory and based on the existing data. EPA records congressional letters and contacts in the rulemaking dockets. Yet for all ninety rules combined, the number of congressional communications numbered forty-six, with an average of about three letters from a member of Congress for each of the sixteen rules. Beyond these formal written communications, there is no evidence of congressional involvement in HAPs rulemakings. There is no indication, for example, that Congress held hearings on any of EPA’s air toxic standards. While this evidence is not conclusive, it is at least suggestive of the possibility that Congress did not play a meaningful role in the HAPs standard-setting process.

The White House, primarily through OMB, is more directly involved in reviewing many of the HAPs rules since at least 40% of the rules were identified as economically significant rules through a cost-benefit analysis.¹⁶⁵ In terms of the extent of changes weakening (or strengthening) the rule during the notice-and-comment process, however, there were no statistically significant differences between the economically significant and nonsignificant rules. Thus, if OMB is involved in the economically significant rules, it is at least not involved in ways that lead to visible differences in the agency’s response to comments at the aggregate level.

163. Cf. John D. Graham, *Saving Lives through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 473–74 (2008) (describing White House deliberations over features of EPA rules that were not clear from regulatory impact analyses, but related to the costs and benefits of the regulation).

164. See, e.g., Bressman & Vandenberg, *supra* note 48, at 78, 85, 86 (noting that “97% of EPA respondents stated that White House involvement was either not visible” or “only somewhat visible to the public” and that a majority of EPA respondents believe the White House is more susceptible to faction capture than EPA).

165. See Exec. Order No. 12,866, 3 C.F.R. § 638 (1994), *reprinted as amended* in 5 U.S.C. § 601 (2006).

More to the point, the general literature provides no support for the possibility that OMB regularly intervenes to make EPA's rules more protective. Instead, recent studies of OMB identify a distinct anti-environmental bent that is consistent across administrations.¹⁶⁶ One of the primary justifications given for stronger White House and OMB involvement, in fact, is to counteract the perceived ideological bent of mission-oriented bureaucrats.¹⁶⁷ Thus, the available evidence provides little reason for thinking that White House and OMB review, in the aggregate, helps protect against regulatory imbalances that favor industry.

CONCLUSION: THE BUMPY EMPIRICAL ROAD AHEAD

This study reveals that at least some publicly important rules that emerge from the regulatory state may be influenced heavily by regulated parties, with little to no counterpressure from the public interest.¹⁶⁸ An important next step is to determine how or whether the results from the study of HAPs rulemakings extrapolate to other rulemaking activities, both within EPA and to other agencies like the Occupational Health and Safety Administration, the Food and Drug Administration, and the Consumer Product Safety Commission. Certainly, the additional opportunities for

166. In their study of top EPA officials' view of the Office of Information and Regulatory Affairs (OIRA) during the Bush I and Clinton administrations, Professors Bressman and Vandenberg report that the strong majority (70%) reported that the "White House readily sought changes that would reduce burdens on regulated entities, and veered from those that would increase such burdens." Bressman & Vandenberg, *supra* note 48, at 87. Professor Croley made similar, although not quite as strong observations about OIRA's tilt during the White House review process: 56% of the meetings OIRA conducted to discuss rulemakings were exclusively with industry as compared with 10% that were held exclusively with public interest groups. See Croley, *supra* note 48, at 858, 865–66 (noting that over half of the rules that were the subject of OIRA meetings were attended solely by persons representing narrow interests and that EPA issued more major rules than any other agency during the Reagan–Bush administration). Finally, in a General Accounting Office (GAO) study, approximately 70% of the rules that OIRA "significantly affected" and for which comments were available involved reinforcing the views of industry. U.S. GEN. ACCOUNTING OFFICE, GAO-03-939, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 11 (2003).

167. See, e.g., Bagley & Revesz, *supra* note 27, at 1261–62; Katzen, *supra* note 39, at 1505.

168. Ultimately, even modest reforms, like requiring agencies to record pre-NPRM and post-final rule contacts with interest groups, might help redress some of the unpoliced opportunities for lopsided interest group influence without imposing heavy costs on the agency. A number of other reforms are also ultimately possible, such as recalibrating the level of judicial scrutiny to the extent of pluralistic engagement by affected parties. Yet these reform discussions go well beyond the four corners of the instant empirical study and its immediate implications for administrative law reform. See generally Wagner, *supra* note 77, at 1431 (noting that there is "information capture" and a significant design flaw in administrative flow of information).

interest group influence highlighted in this study, most of which are only poorly accounted for by public transparency requirements in the APA, would seem to carry over to some rulemakings in these other agencies. Moreover, the incentives for an agency to “get it right” in the proposed rule, which invites extensive participation during pre-NPRM, also would seem to infect other agency rulemakings, since this incentive appears to stem from administrative law and not from statutory directions that are unique to EPA. Because imbalanced participation appears to be a recurring phenomenon in the limited empirical literature bearing on the subject and is also explained by relatively simple rational choice models for both regulated industry and public interest groups, it would in fact be surprising if most complex, lengthy rulemakings in other agencies are not beset by some pluralistic deficiencies. Of course, an occasional rule might overcome these odds and become accessible, which would in turn invite great public interest activity. Based on the growing body of evidence, however, this may be the exception rather than the rule.

Ultimately, even if interest group participation in rules like EPA’s HAPs rules is badly skewed, and even if this leads to rule changes that favor the dominant group, it is not clear what the substantive implications of this imbalance might be. Research methods that measure the substantive implications of skewed influence—specifically whether changes weakening the rule are meaningful—could shed valuable light on the actual consequence of imbalanced participation on resultant rulemakings. At this point, however, we are unaware of such methods.

There is a great deal that we do not know about the administrative process that we need to know to assess how well it works in advancing the goals set for it. Hopefully the findings generated by this Article, as well as by the few studies that preceded it, will pique scholarly interest in the empirical study of agency rulemakings. We encourage others to join us in the effort to increase our understanding of agency rulemaking, which for far too long has been viewed as a black box impervious to scrutiny.

APPENDIX: EMPIRICAL METHODS

This Appendix provides a more detailed description of the methods for data collection and analysis used to generate the findings discussed in this study.

1. *Docket Indices and Final Rule Preambles*

Once the HAPs rules were selected as the focus of study, the first order of business was to identify the individual rules within this larger set for coding, which proved more difficult than expected. As a first order matter, we concluded that it was preferable to study all of the HAPs rules since we did not know how similar the rules would be and were not comfortable relying on a subset of the data.¹⁶⁹ Yet this still left the identification of the individual rulemakings. EPA has promulgated 124 final, industry-specific HAPs rules in 40 C.F.R. Part 63, but several rules had to be merged because EPA created them in the same rulemaking process.¹⁷⁰ Another

169. We also excluded four sets of HAPs rules promulgated at other parts of 40 C.F.R., and not at Part 63 (NESHAPs for asbestos, benzene waste operations, the Clean Air mercury rule, and hazardous waste combustion). We excluded these rules because all four are quite different than the Part 63 HAPs: They either overlap with other statutes (i.e., hazardous waste) or were promulgated before the 1990 amendments, which was the basis for all of the Part 63 standards. We plan to study these four rules in an expanded version of this same study.

170. Twenty-two subparts were combined into six units because they were created by the same final rule and their creation is documented by one docket (Subparts AA and BB were merged as a single final rule published at 64 Fed. Reg. 31,358 (June 10, 1999) (docket no. A-94-02); Subparts DD, OO, PP, QQ, RR, and VV were merged as a single final rule published at 61 Fed. Reg. 34,140 (July 1, 1996), (docket no. A-92-16); Subparts HH and HHH were merged as a single final rule published at 64 Fed. Reg. 32,610 (June 17, 1999) (docket no. A-94-04); Subparts BBBB and CCCCC were merged as a single final rule published at 73 Fed. Reg. 1916 (Jan. 10, 2008) (docket no. EPA-HQ-OAR-2006-0406); Subparts DDDDD, EEEEE, FFFFF, and GGGGG were merged as a single final rule published at 72 Fed. Reg. 2930 (Jan. 23, 2007) (docket no. EPA-HQ-OAR-2006-0510); Subparts LLLLL, MMMMM, NNNNN, OOOOO, PPPPP, and QQQQQ were merged as a single final rule published at 72 Fed. Reg. 38,864 (July 16, 2007) (docket no. EPA-HQ-OAR-2006-0897). Nine subparts were combined into three units because they were created by the same final rule, however their creation is documented in several dockets: Subparts F, G, H, I were merged as a single final rule at 59 Fed. Reg. 19,402 (Apr. 22, 1994) (docket numbers: A-89-10, A-90-19, A-90-20, A-90-21, A-90-22, and A-90-23); Subparts JJJJ and KKKK were merged as a single final rule published at 68 Fed. Reg. 26,690 (May 16, 2003) (docket numbers: OAR-2002-0054 and OAR-2002-0055); Subparts RRRRR, SSSSS, and TTTTT were published as a single final rule at 72 Fed. Reg. 73,180 (Dec. 26, 2007) (docket numbers: EPA-HQ-OAR-2006-0424, EPA-HQ-OAR-2006-0360, and OAR-2006-0940).

twelve rules had to be excluded because of difficulties getting the dockets.¹⁷¹ Our study thus examines all of the HAPs rules promulgated at 40 C.F.R. Part 63, with the noted exceptions (n=90).

Because of the difficulty and time involved in obtaining archived records from EPA, the data were drawn from two publicly accessible documents available for each HAPs rule—the rulemaking docket index¹⁷² and the final rule published in the *Federal Register*.

The docket index is the source of data used to measure interest group participation. These indices provide a detailed inventory of many of the communications, documents, and comments the agency considered in preparing the final rule. In many HAPs rulemakings, the docket index includes more than 100 pages of entries of information, meetings, telephone calls, and comments that are logged in throughout the life cycle of a rulemaking. The agency docket also contains all communications occurring during the notice-and-comment period. While information received pre- or post-notice and comment that affects the agency need not be logged in, these HAPs docket indices, even in their incomplete form, still provide a great deal of information about how long the agency worked on the rule, at least some of the contacts it had in drafting the rule proposal, and who participated in various stages of the rulemaking process.

Coders were instructed to categorize each contact in the docket index by participant's affiliation and then record the number of contacts for each group. The types of contacts categorized included factual memoranda, written correspondence, meetings and telephone calls, written comments, and intergovernmental communications. This identification of participant affiliation was relatively straightforward for most entities and tracked the categories used by Professors Yackee and Yackee and Professor Coglianese:¹⁷³ EPA contractor, industry, industry association, public interest group, state regulator, governmental entity acting as a regulated party (i.e., Department of Defense or sewer district), unaffiliated party, and other. When coders were not able to determine the affiliation of a participant, they conducted a Google search; if that failed, they consulted Wagner; and if she could not determine the affiliation, the party would be classified as “other.”

171. These additional excluded subparts are S, SS, TT, UU, WW, YY, XX, EEE, FFFF, HHHHH, SSSSS, and TTTTT. 40 C.F.R. pt. 63. Several of these were created within the same rulemaking process. If we could have gotten the docket information for these subparts it would have resulted in another six units for analysis.

172. About 70% of the legacy indices are available on Regulations.gov. The rest had to be requested through the EPA docket center or were available as electronic dockets on Regulations.gov.

173. See Coglianese, *supra* note 41, at 71, 73; Yackee & Yackee, *supra* note 20, at 132.

The final rule provides our source of data for assessing interest group influence, as well as some other basic features of the rule—the rule's length, whether it was considered “significant” by EPA, and whether it affected small business. We initially attempted to compare the actual requests for changes filed by each interest group in their submitted comments with final rule changes following the content analysis methods developed by Professors Yackee and Yackee.¹⁷⁴ Given the large amount of comments and the multiple requests for change in each, it soon became clear that this would not be possible with a limited research budget and might not produce reliable results given the size of the records and rulemakings. We ultimately determined that EPA's section on its response to significant comments—a section that is provided in every final rule—provided an approximate barometer of both the nature of all significant requests for changes that EPA received and how EPA responded to each of them.¹⁷⁵

In its discussion of the major comments and its individual responses, EPA always provides a summary of a major comment first and follows it with its specific response. In each rule there are often many—usually dozens of these individual comment-responses—to explain the changes made in the final rule. Coders could thus not simply determine whether the rule was changed overall in ways that favored industry or not, following the methods of Professors Yackee and Yackee;¹⁷⁶ there were too many requests for change. Instead coders were directed to code each request for change separately according to the type of change (i.e., substantive change; change in the coverage of the rule, change in monitoring, change in recordkeeping). The coders then assessed, based EPA's summary of the comment, whether the request for change sought a stronger or weaker regulatory requirement, according to the categories in Table 3 below. Finally, the coder was asked to determine, based on EPA's response, whether the request for change was accepted or rejected by EPA in the final rule. When coders were not able to easily code a request for change following the categories in the coding sheet, the protocol involved

174. See, e.g., Yackee & Yackee, *supra* note 20 at 131–32.

175. For an example of this section, see EPA, National Emission Standards for Hazardous Air Pollutants for Brick and Structural Clay Products Manufacturing; and National Emission Standards for Hazardous Air Pollutants for Clay Ceramics Manufacturing, 68 Fed. Reg. 26,690, 26,694–706 (May 16, 2003). While EPA's characterization of what constitutes a major or significant comment is somewhat self-serving, a separate, supporting document that contains EPA's response to *all* comments provides an accessible check against the agency's characterization and could be used in litigation; we thus suspect that EPA does a relatively good job culling out the major comments in an honest and straightforward way.

176. See, e.g., Yackee & Yackee, *supra* note 20, at 131–32.

consulting a set of default rules intended to ensure consistent results; if that failed, the question would be raised to Wagner; and ultimately to record a question mark (“?”) if the issue could not be resolved.

Response/ Change	Decline Weaken	Decline Strengthen	Agree to Weaken	Agree to strengthen	?
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Table 3: Categories for Rule Changes in “Rule” Coding Sheet

Two sets of research assistants were trained in how to code either the docket or the rule using a coding sheet designed specifically for the HAPs rules through a training session and one-to-one practice session with Wagner. More extensive training—typically involving three sample rules—was required of research assistants conducting the rules coding.¹⁷⁷ The coding data were entered into Excel initially and then converted to Stata format for ease of analysis.¹⁷⁸ In the statistical analysis, we link the docket and rule together not only to evaluate general features—such as the balance in participation during the pre-NPRM and comment period—but to link those features to how the agency responds to significant comments from affected groups in a single rule. The strength of the relationship between industry dominance during the comment period and significant changes weakening a rule is tested using simple statistical correlations.

Intercoder reliability on both rules and dockets was also evaluated near the end of the study. 15% of the rules and 8% of the dockets were coded by at least two separate research assistants and the results were compared. Rather than test for exact matches, we investigated whether the tallies were within 20% of each other for each cell or combination of related cells (i.e., were the coders finding roughly the same number of industry correspondence pre-NPRM). The reliability was perfect (1.0) on simple coding cells—for example whether a rule was economically “significant,” a finding that EPA makes in very clear fashion. On the more subjective decisions—for example, whether EPA rejected a substantive change in coverage that weakened the rule—the reliability scores were lower and must be qualified, sometimes heavily. In this Article, we generally use only data that had strong reliability scores, above 75% reliability. When reliability drops below this level, we note that fact in footnotes. In some cases, reliability is difficult to achieve because of the small numbers of

177. All of the selected coders were second-year law students, third-year law students, or L.L.M. students. Virtually all of them also had taken coursework in environmental or administrative law or both.

178. The statistical analysis was performed using Stata 10.1.

changes requested; a difference between one and two changes is larger, in percentage terms, in the quantitative assessment of reliability than a difference between 200 and 201 requests for changes.

2. *Unified Agenda Database and EPA's Hazardous Air Pollutants Table*

In addition to coding final rules and dockets, information was collected on post-final rule activity through three publicly available sources. The first source of information came from formal reports of rule reconsiderations or litigation recorded by EPA in the unified agenda published in the *Federal Register*. OMB's online database¹⁷⁹ provided data for post-1995 *Unified Agendas*¹⁸⁰ and Westlaw searches provided data for the earlier (1990 to 1995) unified agendas.¹⁸¹ The hits were screened and NESHAPs rules (which are the HAPs rules) were pulled out, excluding the few that were not promulgated in 40 C.F.R. Part 63. The resulting hits were sorted into one pile for reconsideration and judicial challenges to the substance of the rule; and a second pile for deadline suits. After eliminating redundancies and locating the first date that the entry was published in the unified agenda, the dates and Regulation Identification Numbers for all of these petitions for reconsideration, petitions seeking judicial review of a rule, and deadline suits were entered into Excel. For the first two categories we were able to identify the filing parties either through the *Unified Agenda*, or when that was not possible, by tracking back to the final rule that ultimately resulted from the petition and locating the filing party in EPA's preambulatory discussion. We were not able to identify the identities of the filing parties for deadline suits before this Article went to press.

Another source of information about post-final rule activity came from the docket indices. In some cases, EPA records petitions for reconsideration or litigation that follows promulgation of the final rule. We supplemented the information collected from the unified agenda data with

179. See Advanced Search – Select Publication(s), <http://www.reginfo.gov/public/do/eAgendaAdvancedSearch> (last visited Feb. 3, 2011).

180. Advanced Search – Select Publication(s), OFFICE OF INFO. AND REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, REGINFO.GOV, <http://www.reginfo.gov/public/do/eAgendaAdvancedSearch> (select “Search all available publications;” then select “Environmental Protection Agency,” then “Air and Radiation;” search for “reconsideration” in the “Terms” box, or check the option next to “Judicial” under “Legal Deadline – Source”) (last visited Feb. 3, 2011).

181. We searched the Federal Register database in Westlaw with the following search terms: ““UNIFIED AGENDA” & (NESHAP* W/150 (JUDICIAL RECONSIDERATION)) & DATE(AFT 1/1/1990 & BEFORE 1/1/1996).” WESTLAW.COM, <http://www.westlaw.com> (search for “Federal Register” under “Search for a database;” input search query above without quotes) (last visited Feb. 3, 2011).

this additional information. In comparison to the information collected from the unified agenda data, docket recordings were quite limited; most of the petition activity reported in the unified agenda was not logged into the docket for the corresponding rule. Only one judicial challenge from a docket index was not listed in the unified agenda.

Finally, an EPA online webpage was used to provide the life history of most of the HAPs rules¹⁸² in order to track post-final rule revision activity. The date and nature of each revision for each rule subpart was tracked and recorded.

Together, these data sources provide at least preliminary evidence of what happens to EPA's HAPs rules after they are promulgated as final.

3. *News Data*

As part of an exploratory part of the study, discussed in Section IV, partial data on the media coverage of air toxic issues was also collected with particular focus on news coverage of the emissions of air toxics from stationary sources. The "major news" database in LexisNexis was searched for the entire period of the regulation of hazardous air pollutants using broad search terms.¹⁸³ Extraneous articles were culled out, specifically excluding articles on particulates if there was no mention of hazardous air pollutants; articles on hazardous air pollutants from mobile sources; and articles on hazardous air pollutants resulting from the terrorist attacks on September 11, 2001. News was categorized by topic and an article was not considered relevant unless two or more sentences were devoted to a discussion of air toxics. Data was entered on: the category of the article; the type of newspaper (top eight in circulation; top 100 in circulation; or not listed as a top 100 newspaper);¹⁸⁴ and the date of the article. Because these data are being used in a more exploratory way, intercoder reliability was not measured.

182. See National Emission Standards for Hazardous Air Pollutants, <http://www.epa.gov/ttn/atw/mactfnlalph.html> (last visited Feb. 3, 2011).

183. Our LexisNexis search was as follows: "air w/10 (toxic or hazardous or hap* or mact or 112 or neshap*) w/50 (standard* or limit) & (epa or "environmental protection agency") and date aft (1/1/1990)." LEXISNEXIS.COM, <http://www.lexisnexis.com> (select "News and Business" tab; check the box next to "Major Newspapers" and select "Go"; input search query above without quotes) (last visited Feb. 3, 2011).

184. BurrellesLuce.com, 2010 Top Media Outlets: Newspapers, Blogs, Consumer Magazines & Social Networks (updated May 2010), http://www.burrellesluce.com/system/files/BL_2010_Top_Media_List_Updated_May%202010.pdf.

RECENT DEVELOPMENT

THE APPLICATION OF ANTITRUST TO PUBLIC COMPANIES' DISCLOSURES

RICHARD M. STEUER,* JOHN ROBERTI** & DANIEL JONES***

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INTRODUCTION

The business culture for public companies demands transparency and openness. Investors and securities analysts demand information so that they can assess the strengths and weaknesses of a company. Underlying the securities laws is a policy that encourages full disclosure and information to the investing public. The Internet and other technology provide instant access and, more importantly, an almost limitless depth of historic statements and information.

Faced with this culture, executives are counseled to be open about business strategies. However, this new openness has created new issues. Public disclosures made in the context of conference calls with securities investors and analysts (Investor Calls or Calls) have recently become an area of focus for both antitrust plaintiffs and the government. Faced with more rigorous pleading standards after *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*,² plaintiffs have scoured transcripts of Investor Calls to find support for claims that defendants have reached an unlawful agreement and used these Calls to signal one another. The government charged at least two companies with violations of the antitrust laws largely by virtue of statements made in Investor Calls.³

The use of statements in Investor Calls to establish an antitrust claim creates tension between the securities laws and the antitrust laws. On the one hand, the securities laws encourage executives to be forthcoming in making disclosures of material information. On the other hand, antitrust law instructs executives to take care to avoid disclosing information that could be competitively sensitive.

Imagine an executive who is asked a question about future pricing plans. The executive is being counseled by the company's securities lawyers to be open and forthcoming in his response. At the same time, the executive is being counseled by the company's antitrust lawyers not to say too much. The tension is particularly strong where the information is not on its face anticompetitive—such as a new distribution plan, or a plan to create a more customer-friendly pricing structure. However, the disclosure of this information can be misconstrued or taken out of context, and serious antitrust liability can arise from keeping investors informed.

This Article considers the extent to which such Calls may be immune from the antitrust law. Particularly in light of the tension described above,

1. 550 U.S. 544 (2007).

2. 129 S. Ct. 1937 (2009).

3. See, e.g., Complaint at 5–7, *In re U-Haul Int'l, Inc.*, No. C-4294, 2010 F.T.C. LEXIS 61 (July 14, 2010); Complaint at 2–4, *In re Valassis Commc'ns, Inc.*, No. C-4160, 2006 F.T.C. LEXIS 25 (Apr. 19, 2006).

we conclude that many statements made during Investor Calls should be immune from antitrust attack under the implied preclusion doctrine, most recently explained by the Supreme Court in *Credit Suisse Securities (USA) LLC v. Billing*.⁴ We also conclude that public policy supports limiting the use of Investor Call statements in antitrust cases to those statements that are unambiguously anticompetitive.

While we highlight Investor Calls in this Article because of the government's recent focus on them in its antitrust enforcement, the analysis applies equally to any public statement or disclosure made by a public company. We note, however, that Investor Calls, compared to other forms of public disclosures such as quarterly filings or press releases, are more likely to result in unscripted or unvetted comments as executives respond to the inquiries of investors and securities analysts. Accordingly, as the government's recent cases anecdotally suggest, statements made in Investor Calls are more likely than other public statements to form the basis of an antitrust signaling claim.

I. BACKGROUND OF INVESTOR CALLS

Periodic conference calls and webcasts with investors and financial analysts are a fact of life for public companies. These communications promote confidence by disclosing earnings information and describing decisions, strategies, and challenges that could affect earnings. The Calls typically are open to the public today so that companies may avoid "selective disclosure" issues, and they often include questions and answers regarding competitive conditions.

Public companies provide the investors and analysts who follow those companies with information about the companies' performance on a periodic basis, and in many cases that information includes earnings guidance for future periods.⁵ Providing periodic information about a company's earnings, and its performance generally, helps ensure that analysts' forecasts are more reliable and stock prices less volatile.⁶ As a practical matter, many public companies provide information in order to

4. 551 U.S. 264 (2007).

5. See, e.g., Melissa Klein Aguilar, *Despite Slump, Cos. Not Abandoning Earnings Guidance*, THE FILING CABINET: COMPLIANCE WEEK (May 22, 2009, 1:14 PM), <http://www.complianceweek.com/blog/aguilar/2009/05/22/despite-downturn-cos-not-abandoning-earnings-guidance/> (reporting that 60% of companies are providing periodic earnings guidance to investors).

6. Joel F. Houston, Baruch Lev & Jennifer Wu Tucker, *To Guide or Not to Guide? Causes and Consequences of Stopping Quarterly Earnings Guidance*, 27 CONTEMP. ACCT. RES. 143, 144 (2010), available at <http://www.niri.org/findinfo/Guidance/To-Guide-Or-Not-to-Guide-Causes-and-Consequences-of-Stopping-Quarterly-Earnings-Guidance-academic.aspx>.

keep investment analysts satisfied. Investment analysts demand that they be regularly updated on developments at companies and believe that companies unwilling to provide such guidance will face adverse consequences in the market.⁷

In typical Investor Calls, companies often answer not only historical questions but also inquiries about expected performance, business plans, and strategies. These questions often lead to discussions about competitive strategies, including plans for pricing, output and dealing with the competitive environment.

Since the 2000 promulgation of the Securities and Exchange Commission's (SEC's) rules prohibiting selective disclosure—Regulation FD⁸—companies generally make their quarterly earnings conference calls available to anyone who dials in. Analysts have continued to ask about material information that could be competitively sensitive, and executives have been frank in their answers.⁹ The difference between the world prior to Regulation FD and the world after it is that competitors have readier access to this information as well. Competitors' access has changed the character of the communication, and increased the antitrust risk.

II. ANTITRUST RISKS FROM INVESTOR CALLS

Companies can face antitrust liability from statements made during Investor Calls if the statements amount to “signaling” competitors in an effort to instigate an agreement on prices, output, or other competitive terms. There are two theories of liability that antitrust enforcers and plaintiffs pursue in confronting these statements, each of which is described below.

A. *Invitations to Collude*

An “invitation to collude” claim involves a specific, directed offer from one competitor to another to agree on issues of competitive significance, such as price or output, where that offer is *not* accepted. The best known

7. See TONY ROSSI, MWW GRP., 2009 EARNINGS GUIDANCE SURVEY—EXECUTIVE SUMMARY 2 (2008), http://www.frbir.com/pdf/FRB_2009_Earnings.pdf?PHPSESSID=b8f610558bdf9c27203dbfa202b2163d (stating that 76% of investment analysts “believe that the stock market would penalize companies that suspend earnings guidance in this environment”).

8. Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716 (Aug. 24, 2000) (codified at 17 C.F.R. §§ 243.100–243.103 (2010)).

9. See, e.g., Richard H. Walker, Dir., Div. of Enforcement, SEC, Regulation FD—An Enforcement Perspective, Speech before the Compliance and Legal Division of the Securities Industry Association (Nov. 1, 2000), <http://www.sec.gov/news/speech/spch415.htm>.

invitation to collude case is *United States v. American Airlines, Inc.*¹⁰ There, American Airlines's president, Robert Crandall, called his competitor and said "Raise your goddamn fares twenty percent. I'll raise mine the next morning. . . . You'll make more money and I will too."¹¹ Thinking ahead, this competitor had taped the conversation and turned the tapes over to the Department of Justice. As a result, the Department of Justice charged American Airlines and Mr. Crandall with an attempt to monopolize through an invitation to collude. The case eventually settled. Over the next twenty years, the government brought a series of cases under invitation to collude theories that typically involved: (1) a direct and private communication between competitors, (2) in which a specific and unequivocal offer was made, and (3) the only thing preventing an unlawful agreement from being formed was the offeree's decision not to accept the offer.¹²

10. 743 F.2d 1114 (5th Cir. 1984).

11. *Id.* at 1116.

12. See, e.g., *United States v. Ames Sintering Co.*, 927 F.2d 232, 233–34 (6th Cir. 1990) (the defendant called its competitor and specifically proposed that they "enter into an agreement to 'rig' the bids so that both companies could maintain their previous shares" of 40% and 60% respectively, and followed up with several calls on the subject over the next few days); *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 45–46 (D.D.C. 2000) (in a private meeting between executives of both companies, Microsoft proposed that Netscape withdraw from "the market for browsing technology for Windows," leaving Microsoft a single-firm monopoly in that market), *rev'd in part on other grounds*, 253 F.3d 34 (D.C. Cir. 2001); *Biovail Corp. v. Hoechst AG*, 49 F. Supp. 2d 750, 771 (D.N.J. 1999) (at a private meeting between Hoechst and Biovail, Hoechst proposed that it "would refrain from instituting a patent infringement suit against Biovail if Biovail agreed to delay the launch of its generic form of Cardizem CD"); *In re Stone Container Corp.*, 125 F.T.C. 853, 854 (1998) ("Senior officers of Stone Container contacted their counterparts at competing linerboard manufacturers to inform them of the extraordinary planned downtime and linerboard purchases. In the course of these communications, Stone Container arranged and agreed to purchase a significant volume of linerboard from each of several competitors. . . . The specific intent of Stone Container's communications with its competitors was to coordinate an industry wide price increase."); *In re Precision Moulding Co., Inc.*, 122 F.T.C. 104, 105 (1996) ("[T]he President and General Manager of respondent visited the headquarters of the new competitor and met with an officer thereof. During the meeting, the General Manager of respondent told the competitor that its prices for stretcher bars were 'ridiculously low.'"); *In re YKK (U.S.A.) Inc.*, 116 F.T.C. 628, 629 (1993) ("an attorney for YKK sent a letter to the President of [a competitor] accusing [the competitor of predatory tactics] with a request that [the competitor] stop engaging in these 'unfair' practices" by ceasing to offer free equipment to customers. Later, at a meeting with the competitor, YKK's attorney restated its request); *In re AE Clevite, Inc.*, 116 F.T.C. 389, 391 (1993) (respondent told an Australian competitor that its prices were lower than respondent's and that it was "ruining the marketplace"; it thereafter faxed the competitor a comparative price list of its prices for certain locomotive engine bearings and prices in the United States); *In re Quality Trailer Prods. Corp.*, 115 F.T.C. 944, 945 (1992) ("[T]wo representatives of Quality Trailer

More recently, antitrust enforcers began relying on public communications in support of invitation to collude cases. In one of its more recent invitation to collude cases, *In re Stone Container Corp.*, the Federal Trade Commission (FTC) based its allegations on both “private conversations and public statements, including press releases and published interviews.”¹³ At least twice, antitrust enforcers have applied the invitation to collude theory to Investor Calls.

In *In re U-Haul International, Inc.*,¹⁴ which resulted in a consent decree, the FTC relied on an executive’s statements made during an Investor Call. According to the complaint, U-Haul’s CEO perceived that competition from Avis Budget Group (Budget), U-Haul’s closest competitor, was forcing U-Haul to lower its prices.¹⁵ In response, he invited Budget to collude in raising rates through a combination of private communications and public statements.¹⁶

U-Haul’s CEO made the allegedly problematic public statements during a quarterly earnings call, which was open to the public and monitored by Budget.¹⁷ U-Haul’s CEO stated that the company had raised rates approximately ninety days before the call in order “to force prices” and “function [as] a price leader.”¹⁸ At the time of the Investor Call, Budget had not matched U-Haul’s higher rates.¹⁹ U-Haul’s CEO indicated that U-Haul would “hold the line” on its higher rates in order to give Budget time to follow.²⁰ U-Haul’s CEO also made the point that U-Haul would tolerate a small price differential, and would maintain its higher rates so long as Budget stayed within 3% to 5% of U-Haul’s price.²¹ Finally, U-Haul’s CEO noted that if Budget’s pricing “starts to affect share I’m going

Products visited the headquarters of a competitor and met with an officer of the firm. . . . They told the competitor that its price for certain axle products was too low, that there was plenty of room in the industry for both firms, and that there was no need for the two companies to compete on price.”); Complaint at 5, *In re MacDermid, Inc.*, No. C-3911, 2000 F.T.C. LEXIS 35 (Dec. 21, 1999) (“[O]n several occasions [after the licensing agreement expired, the respondent] invited [its competitor] not to compete . . . in North America in return for [competitor’s] agreement not to compete . . . in Japan. These invitations, if consummated, would have had the purpose and effect of allocating or dividing markets . . . and restricting competition, including price competition between [respondent and competitor].”).

13. 125 F.T.C. at 854.

14. No. C-4294, 2010 F.T.C. LEXIS 61 (July 14, 2010).

15. Complaint at 2, *U-Haul*, No. C-4294, 2010 F.T.C. LEXIS 61.

16. *Id.* at 2–7.

17. *Id.* at 5.

18. *Id.* at 5–6.

19. *Id.* at 6.

20. *Id.*

21. *Id.* at 7.

to respond, that's all. . . . [W]e're not going to just stand still and let that go through."²²

The FTC staff considered this conduct "egregious" and claimed that the conduct "serve[d] no legitimate business purpose."²³ Even though there was no evidence that U-Haul and Budget ever reached an agreement to raise rates, the FTC reasoned that "the public statements made by the CEO of U-Haul could have encouraged competitors to raise rates."²⁴ The proposed consent order prohibits U-Haul from inviting collusion, but permits U-Haul "to communicate publicly any information required by the federal securities laws" and "to provide investors with considerable information about company strategy."²⁵

In *In re Valassis Communications, Inc.*,²⁶ which also resulted in an FTC consent decree, Valassis's CEO opened an Investor Call with a prepared statement detailing the company's strategy to end a three-year price war with its only competitor in the advertising insert business, News America. Valassis's CEO stated that Valassis would quote customers of News America the same price that was in effect three years prior, and would not go below that price. Outstanding price quotes below that price level would shortly be revoked. At the same time, Valassis's CEO promised to "defend our customers and market share and use whatever pricing is necessary to protect our share"; he then stated that Valassis would watch for News America's reaction.²⁷

The FTC claimed these statements went "far beyond a legitimate business disclosure" and that there was "no legitimate business justification to disclose the information."²⁸ The FTC charged that Valassis would not have disclosed such detailed information except to communicate it to News America, and that Valassis knew News America would be monitoring the call. At the same time, the FTC recognized that "[c]orporations have many obvious and important reasons for discussing business strategies and financial results with shareholders, securities analysts, and others" and that antitrust challenges are appropriate only in the "limited circumstances" where the "information would not have been publicly communicated, even to investors and analysts interested in [the company's] business strategy, but

22. *Id.*

23. U-Haul International, Inc. and AMERCO; Analysis of Agreement Containing Consent Order to Aid Public Comment, 75 Fed. Reg. 35,033, 35,035 & n.4 (June 21, 2010).

24. *Id.* at 35,035.

25. *Id.*

26. No. C-4160, 2006 F.T.C. LEXIS 26 (Apr. 19, 2006).

27. Complaint at *5, *In re Valassis*, No. C-4160, 2006 F.T.C. LEXIS 25 (Apr. 19, 2006).

28. Valassis Communications, Inc.; Analysis of Agreement Containing Consent Order to Aid Public Comment, 71 Fed. Reg. 13,976, 13,979 n.11 (Mar. 20, 2006).

for [the company's] effort to induce collusion."²⁹

U-Haul and *Valassis* are notable as the first invitation to collude cases relying heavily on public communications. As the cases indicate, antitrust enforcers can and do scrutinize Investor Calls for communications that appear to be directed at competitors, rather than analysts and the investing public. Executives participating in Investor Calls should therefore be aware of the risks of antitrust enforcement under an invitation to collude theory.

B. Anticompetitive Agreements

Section 1 of the Sherman Act prohibits agreements in restraint of trade.³⁰ When companies act in parallel with respect to pricing, output reduction, or other competitively significant decisions, antitrust enforcers and plaintiffs may suspect that there is an agreement guiding the behavior. The Supreme Court has made clear, however, that parallel behavior, standing alone, is not sufficient to prove a conspiracy.³¹ Therefore, plaintiffs alleging an antitrust claim based on parallel conduct among competitors must allege facts in addition to the parallel activities that may support an inference of a preceding agreement.

Prior to 2007, many plaintiffs, relying on liberal pleading standards, pointed to parallel conduct along with generalized allegations of collusion with the hope of finding something concrete in discovery.³² However, in *Twombly*, and subsequently in *Iqbal*, the Supreme Court held that plaintiffs must plead facts sufficient to plausibly suggest that the alleged anti-competitive conduct was the result of collusion.³³ Following *Twombly* and *Iqbal*, lower courts have required plaintiffs to plead facts such as dates and times of alleged meetings, participants in alleged meetings, and similar

29. *Id.* at 13,978–79.

30. 15 U.S.C. § 1 (2006) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”).

31. *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954); *see also In Re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1032 (8th Cir. 2000) (en banc).

32. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (“[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” (citation omitted)).

33. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009) (“A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007) (“Asking for plausible grounds to infer an agreement . . . simply calls for enough fact [sic] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”).

details.³⁴

In response to heightened pleading requirements, plaintiffs have begun looking harder at public statements, including Investor Call transcripts, to find evidence of signaling that, combined with parallel conduct, might be sufficient to state a claim. In *Avery v. Delta Air Lines Inc.*,³⁵ for example, a plaintiff alleged that Delta and AirTran conspired to set the fees for the handling of baggage based on a statement made by AirTran's CEO during an earnings call. In response to an analyst's question, AirTran's CEO stated as follows:

Let me tell you what we've done on the first bag fee. We have the appropriate programming in place to initiate a first bag fee. And at this point, we have elected not to do it, primarily because our largest competitor in Atlanta [i.e., Delta], where we have 60% of our flights, hasn't done it. And I think, we don't think we want to be in a position to be out there alone with a competitor who—we compete on, has two-thirds of our nonstop flights, and probably 80 to 90% of our revenue—is not doing the same thing. So I'm not saying we won't do it. But at this point, I think we prefer to be a follower in a situation rather than a leader right now.³⁶

Shortly after this call, Delta allegedly instituted a baggage handling fee and AirTran followed.³⁷ The plaintiffs claimed that the Investor Call had facilitated the agreement to set fees.³⁸

A number of other plaintiffs brought similar complaints and the cases were consolidated in a multidistrict litigation proceeding. The plaintiffs subsequently filed a consolidated amended complaint placing particular

34. See, e.g., *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 905–06 (6th Cir. 2009) (highlighting that a complaint cannot stand if it “furnishes no clue” as to who, when, or where the alleged conspiratorial agreements were made (quoting *Twombly*, 550 U.S. at 565 n.10)); *In re Urethane Antitrust Litig.*, 663 F. Supp. 2d 1067, 1076–77 (D. Kan. 2009) (denying a motion to dismiss when plaintiffs' complaint included specific information on meetings, measures taken to ensure secrecy, and date ranges during which the meeting occurred); *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1257 (W.D. Wash. 2009) (granting a motion to dismiss when a complaint lacked specific information concerning the locations or dates of meetings, or individuals involved in the alleged illegal communications); *Bailey Lumber & Supply Co. v. Ga.-Pac. Corp.*, No. 1:08CV1394, 2009 WL 2872307, at *5–6 (S.D. Miss. Aug. 10, 2009) (granting a motion to dismiss when a complaint lacked any allegations regarding when the defendant became involved in a conspiracy). But see *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 325 (2d Cir. 2010) (“In this case, . . . the claim of agreement rests on the parallel conduct described in the complaint. Therefore, plaintiffs were not required to mention a specific time, place or person involved in each conspiracy allegation.”).

35. Complaint at 8, No. 1:09-cv-1391-TCB (N.D. Ga. May 22, 2009).

36. *Id.*

37. *Id.* at 9.

38. *Id.* at 8–9.

weight on Investor Calls as the basis for the alleged agreement between AirTran and Delta.³⁹ The plaintiffs relied on statements made by Delta and AirTran executives in six earnings calls over the course of several months, in addition to executives' public statements at industry conferences and in press releases.⁴⁰ The plaintiffs' monopolization claims under § 2 of the Sherman Act have recently been dismissed, but their § 1 claim alleging an agreement in restraint of competition has been allowed to proceed.⁴¹

Other recent complaints have also quoted statements from Investor Calls to support the assertion that competitors were signaling through these calls.⁴² These complaints are indicative of a clear trend by the government and plaintiffs to place Investor Calls under the antitrust microscope in support of post-*Twombly* and *Iqbal* claims alleging an anticompetitive agreement.

III. IMPLIED PRECLUSION OF ANTITRUST CLAIMS

The use of Investor Calls to support antitrust claims creates a tension between SEC regulations, which encourage the free flow of material information to investors, and the antitrust laws, which punish companies that invite collusion or reach agreement with competitors through public statements. Where there are conflicts between the antitrust and securities laws, courts will find that the securities laws implicitly preclude application of the antitrust laws. The Supreme Court most recently explained this analysis in *Credit Suisse Securities (USA) LLC v. Billing*,⁴³ holding that there can be no antitrust liability where application of the antitrust laws is "clearly incompatible" with the securities laws in that particular context. In *Billing*, plaintiffs brought an antitrust action against underwriting firms marketing and distributing shares in connection with initial public offerings (IPOs).

39. Consolidated Amended Class Action Complaint at 10–11, *In re Airline Baggage Fee Antitrust Litig.*, No. 1:09-md-02089-TCB (N.D. Ga. Feb. 1, 2010) ("AirTran's and Delta's anticompetitive agreement was reached in at least three ways. First, AirTran and Delta used a series of earnings calls with analysts to signal their willingness to enter an agreement and ultimately reach an agreement. As publicly traded corporations, AirTran and Delta hold conference calls with securities analysts on a quarterly basis.").

40. *Id.* at 11–26.

41. Order Granting in Part and Denying in Part Defendants' Motion to Dismiss at 39, 45, *In re Airline Baggage Fee Antitrust Litig.*, No. 1:09-md-2089-TCB, 2010 WL 3290433, at *15, 17 (N.D. Ga. Aug. 2, 2010).

42. See, e.g., Complaint at 21–22, *Pemiscot Mem'l Hosp. v. CSL Ltd.*, No. 2:09-cv-03143-GP (E.D. Pa. July 15, 2009); Indirect Purchaser Plaintiffs' Consolidated Amended Complaint at 6, 23, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 1:07-mc-00489 PLF (D.D.C. Apr. 15, 2008); Direct Purchaser Amended Consolidated Class Action Complaint at 36, *In re Potash Antitrust Litig.*, No. 1:08-cv-6910 (N.D. Ill. Apr. 3, 2009).

43. 551 U.S. 264, 285 (2007).

The plaintiffs alleged that the underwriters unlawfully agreed to require buyers of a new security “(1) to buy additional shares of that security later at escalating prices (a practice called ‘laddering’), (2) to pay unusually high commissions on subsequent security purchases from the underwriters, or (3) to purchase from the underwriters other less desirable securities (a practice called ‘tying’).”⁴⁴

In *Billing*, the Supreme Court applied a four-factor test to assess whether the alleged anticompetitive conduct should be immunized: “(1) an area of conduct squarely within the heartland of securities regulations; (2) clear and adequate SEC authority to regulate; (3) active and ongoing agency regulation; and (4) a serious conflict between the antitrust and regulatory regimes.”⁴⁵ This test has been applied beyond the specific regulatory setting of *Billing*. For example, in *Electronic Trading Group v. Banc of America Securities LLC (Short Sale)*,⁴⁶ the Second Circuit extended *Billing* to preclude application of the antitrust laws to prime brokers who allegedly conspired to fix the borrowing rates for “hard to borrow” securities loaned to prime brokerage customers in connection with short sales.⁴⁷

One issue in *Short Sale* was “the level of particularity” at which to apply each *Billing* factor. The court held that the fourth factor—whether there is a serious conflict—“is evaluated at the level of the alleged anticompetitive conduct.”⁴⁸ The other three factors are each “evaluated at the level most useful to the court in achieving the overarching goal of avoiding conflict between the securities and antitrust regimes.”⁴⁹ Accordingly, the fourth factor appears to be the centerpiece of the *Billing* test, and the first three factors inform the analysis of the fourth.

With respect to the fourth factor, the appellants in *Short Sale* argued that

44. *Id.* at 267.

45. *Id.* at 285.

46. 588 F.3d 128 (2d Cir. 2009).

47. *Id.* at 131; *see also* Mayor & City Council of Balt., Md. v. Citigroup, Inc., No. 1:08-cv-07747-BSJ-DCF, at 17–19 (S.D.N.Y. Jan. 26, 2010) (applying *Billing* to preclude application of antitrust laws to underwriters of auction rate securities (ARS) for allegedly acting collectively to jointly withdraw support for the ARS market). Attempts to apply *Billing* outside of the securities context have been less successful. *See In re W. States Wholesale Natural Gas Antitrust Litig.*, 661 F. Supp. 2d 1172, 1183 (D. Nev. 2009) (holding antitrust laws not precluded by the Commodities Exchange Act for allegations of intentional collusive price manipulation, since “both preclude such conduct and no legal line drawing requiring particular regulatory expertise will be required”); *Energy Mktg. Servs., Inc. v. Columbia Gas Transmission Corp.*, 639 F. Supp. 2d 643, 652 (S.D. W. Va. 2009) (holding antitrust laws not precluded by Federal Energy Regulatory Commission (FERC) where “FERC lack[ed] the authority to remedy anticompetitive behavior that the SEC wielded in [*Billing*]”).

48. *Short Sale*, 588 F.3d at 131–32.

49. *Id.*

courts would have little difficulty distinguishing communications furthering illegal fee-fixing agreements from legitimate broker communications.⁵⁰ The Second Circuit flatly disagreed, noting that “the very communications in which short sellers do what the securities law allows would by ‘reasonable but contradictory inferences’ serve as evidence of conduct forbidden by the antitrust law.”⁵¹ As a result, the fear of antitrust liability would cause “brokers to curb their permissible exchange of information and thereby harm the efficient functioning of the short selling market.”⁵²

The Second Circuit also held that even though the SEC did not allow or encourage collusive fixing of borrowing fees, the fact that the SEC could later act upon its authority to regulate those fees satisfied the *Billing* analysis.⁵³ The potential conflict created by “the possibility that the SEC will act upon its authority” may exist even if there is no actual or immediate conflict.⁵⁴ *Short Sale* illustrates that when analyzing whether there is a serious conflict between the securities and antitrust laws, “the proper focus is not on the Commission’s current regulatory position but rather on the Commission’s authority.”⁵⁵

The specter of antitrust liability for public statements made during Investor Calls raises the concerns underlying the *Billing* and *Short Sale* holdings. We analyze each of the *Billing* factors in this context below.

A. Factor 1: An Area of Conduct Squarely Within the Heartland of Securities Regulations

Executives’ participation in Investor Calls falls within the heartland of securities regulations. In both *Billing* and *Short Sale*, this factor was applied at the level of the broad underlying market activity, and not at the specific alleged anticompetitive practices.⁵⁶ The underlying market activity companies are engaged in is providing earnings guidance to investors and

50. *Id.* at 137.

51. *Id.* at 137–38 (quoting *Billing*, 551 U.S. at 282).

52. *Id.* at 138.

53. *See id.* (describing how hard-to-borrow lists are not widely used, but if they become so “the SEC could move quickly to regulate borrowing fees charged by brokers for securities appearing on such lists”).

54. *Id.*

55. *Id.* (quoting *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134, 149 (2d Cir. 2003)).

56. *See Billing*, 551 U.S. at 276 (finding that the parties’ attempts to jointly promote and sell newly issued securities are a central aspect of a well-regulated capital market and thus lie at the “heart of the securities marketing enterprise”); *Short Sale*, 588 F.3d at 133–34 (agreeing with the district court’s determination that short selling falls within the heartland of securities regulation).

analysts, as well as responding to analyst questions. As noted above, companies that fail to do so would likely face adverse market consequences.⁵⁷ Moreover, as one SEC Commissioner has remarked, securities analysts “play a critical role in contributing to efficient securities markets,” so it is “in an issuer’s best interests to be responsive to inquiries by analysts following their stocks.”⁵⁸ It is “central to the proper functioning of well-regulated capital markets,”⁵⁹ therefore, for public companies to participate in Investor Calls and other public disclosures.

The SEC made clear in Regulation FD, which is specifically directed at disclosures to analysts, that “the market is best served by more, not less, disclosure of information by issuers.”⁶⁰ Regulation FD expressly permits and encourages companies to disclose material business information in Investor Calls and thereby ensures that the entire public—including business competitors—has simultaneous and nondiscriminatory access to that information. In other words, the SEC recognizes that prompt and full disclosure promotes efficient markets by giving all market participants equal access to current material developments.

Furthermore, Regulation FD is part of a larger legal and regulatory framework that promotes and ordinarily requires disclosures of material information. “Underlying the adoption of extensive disclosure requirements was a legislative philosophy: ‘There cannot be honest markets without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy.’”⁶¹ Congress enacted the Securities Exchange Act of 1934 (1934 Act or Act) to promote “prompt publicity” of material information.⁶² The “fundamental purpose” of the 1934 Act was to “implement[] a philosophy of full disclosure.”⁶³

The SEC implemented the 1934 Act’s disclosure mandate by calling on “publicly held companies to make prompt and accurate disclosure of information, both favorable and unfavorable, to security holders and the

57. See ROSSI, *supra* note 7 and accompanying text.

58. Laura S. Unger, Comm’r, SEC, Corporate Communications Without Violations: How Much Should Issuers Tell Their Analysts and When, Remarks at the 19th Annual Ray Garrett Jr. Corporate and Securities Law Institute (Apr. 23, 1999), <http://www.sec.gov/news/speech/speecharchive/1999/spch273.htm>.

59. *Billing*, 551 U.S. at 276.

60. Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716, 51,718 (Aug. 24, 2000) (codified at 17 C.F.R. §§ 243.100–243.103 (2010)) [hereinafter Regulation FD].

61. *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988) (quoting H.R. REP. NO. 73-1383, at 11 (1934)).

62. REP. SAMUEL RAYBURN, SECURITIES EXCHANGE BILL OF 1934, H.R. REP. NO. 73-1383, at 11.

63. *Basic*, 485 U.S. at 230 (internal quotations omitted).

investing public.”⁶⁴ The SEC made clear that it did not mean to limit required disclosures to the periodic filings required by the Act: “Notwithstanding the fact that a company complies with such reporting requirements, it still has an obligation to make full and prompt announcements of material facts regarding the company’s financial condition.”⁶⁵

Given this comprehensive regulatory framework governing public disclosure of material business information, participation in Investor Calls appears to fall squarely within the heartland of securities regulations.

B. Factor 2: Clear and Adequate SEC Authority to Regulate

The SEC has authority to supervise and regulate disclosures by public companies and has promulgated extensive rules that govern how and when public companies communicate with the investing public. In addition to promulgating Regulation FD to address the issue of selective disclosures, the SEC has repeatedly strengthened the disclosure provisions of the 1934 Act, most notably in recent years through the Sarbanes–Oxley Act (SOX). SOX requires public companies to establish procedures to capture and process information that must be publicly disclosed. Of particular note, § 409 of SOX requires each issuer to “disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, . . . as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest.”⁶⁶ The Act makes disclosure mandatory for material gains, losses, risks, or changes in business strategy.

It is necessary to distinguish the context here—in which public disclosure of information itself is the alleged anticompetitive conduct when characterized as signaling competitors or inviting competitors to collude—from cases in which the SEC requires public disclosures, but the alleged anticompetitive conduct is private and not substantively regulated by the securities laws. In *Dahl v. Bain Capital Partners, LLC*,⁶⁷ and *Pennsylvania Avenue Funds v. Borey*,⁶⁸ district courts rejected defendants’ arguments that the securities laws implicitly precluded application of the antitrust laws in the latter scenario.

64. Timely Disclosure of Material Corporate Developments, 35 Fed. Reg. 16,733, 16,733 (Oct. 29, 1970).

65. *Id.*

66. 15 U.S.C. § 78m(l) (2006).

67. 589 F. Supp. 2d 112 (D. Mass. 2008).

68. 569 F. Supp. 2d 1126 (W.D. Wash. 2008).

In *Dahl*, shareholders of publicly listed target companies brought an antitrust action alleging that private equity firms illegally colluded to purchase the target companies for less than fair value as part of leveraged buyouts (LBOs). In discussing whether the SEC had regulatory authority over the buyouts, the court reasoned: "Private equity LBOs do not lie within an area of the financial market that the securities laws seek to regulate as their *private*, as opposed to public, nature leaves them untouched by the securities laws."⁶⁹ The SEC had no authority to regulate the substance of the buyouts, and the fact that the SEC "merely requires certain disclosures be filed as part of an LBO transaction" was insufficient to satisfy the second *Billing* factor.⁷⁰

Similarly, in *Borey*, a shareholder of an acquired corporation brought an antitrust action alleging that the acquiring corporation and a competitor colluded to reduce the price of the tender offer bids for shares of the acquired corporation. Although the SEC required disclosure of tender offer bidding agreements, it had no authority to regulate their substance, as "the marketplace, not the SEC, govern[s] the substantive fairness of a tender offer."⁷¹

In contrast to LBOs and tender offers, the SEC *does* regulate the substance of public companies' disclosures, and has the "authority to supervise all of the activities here in question."⁷² In regulating disclosures by issuers to analysts, the SEC expertly considers questions of materiality, business justification, need to update previously disclosed information, and need to respond to marketplace rumors.⁷³ Section 78w(a)(2) of the U.S. Code, which governs SEC rulemaking, requires the SEC to "consider among other matters the impact any such rule or regulation would have on

69. *Dahl*, 589 F. Supp. 2d at 116.

70. *Id.*

71. *Borey*, 569 F. Supp. 2d at 1131.

72. *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 276 (2007).

73. See Jeffrey D. Bauman, *Rule 10b-5 and the Corporation's Affirmative Duty to Disclose*, 67 GEO. L.J. 935, 936 n.7 (1978-1979). In addition to mandating certain disclosures, e.g., 15 U.S.C. § 78m(l) (2006) (mandating the disclosure of material changes that affect the financial conditions of an issuer), the SEC can also expressly exclude certain subjects from disclosure requirements or from liability. For example, the SEC amended the National Association of Securities Dealers disclosure rules in 1994 to provide that issuers need not make disclosure of material events "where it is possible to maintain confidentiality of those events and immediate disclosure would prejudice the ability of the issuer to pursue its objectives." Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to Issuer Disclosure of Material Information to the Public and to the NASD, 59 Fed. Reg. 4736, 4736 (Feb. 1, 1994); see also 15 U.S.C. § 77z-2(c)(1)-(2) (creating, as part of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 102, 109 Stat. 737, 750-51, a safe harbor preventing liability for "forward-looking" statements accompanied by sufficient cautionary language).

competition.”⁷⁴ And the more general mandate of 15 U.S.C. § 77b(b) requires that when the SEC determines “whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.”⁷⁵ The SEC is obligated to take into account competitive concerns when it creates securities-related policy and embodies it in rules and regulations, including those governing disclosure for public companies.

C. Factor 3: Active and Ongoing SEC Regulation

The comprehensive scheme of disclosure regulations detailed above, including the many recent amendments, indicates that the SEC actively regulates disclosures by public companies. Public companies fail to make full disclosure of material information at their peril. Section 10(b) of the 1934 Act and SEC Rule 10b-5 require public companies to speak fully and truthfully when making statements to the investing public or risk charges of fraud from the SEC or private plaintiffs.⁷⁶

This disclosure obligation is heightened further when a company trades in its own stock because any material omission can be the basis of a claim of insider trading.⁷⁷ Rule 10b-5 not only forbids false statements of material facts, but also forbids omissions of facts that are necessary to prevent a statement from being misleading.⁷⁸ As the SEC has warned:

[U]nless adequate and accurate information is available, a company may not be able to purchase its own securities or make acquisitions using its securities, and its insiders may not be able to trade its securities without running a serious risk of violating Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.⁷⁹

Rule 10b-5 was drafted *specifically* to address situations in which an insider omits facts suggesting that the company is doing well, and then buys shares “at the resultant depressed prices.”⁸⁰

74. 15 U.S.C. § 78w(a)(2).

75. 15 U.S.C. § 77b(b).

76. See *Rubin v. Schottenstein, Zox & Dunn*, 143 F.3d 263, 268 (6th Cir. 1998).

77. See *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 848–53 (2d. Cir. 1968) (finding that insiders trading on material nonpublic information violate Rule 10b-5); see also *United States v. O’Hagan*, 521 U.S. 642 (1997).

78. See *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 152–54 (1972).

79. Disclosure of the Impact of Possible Fuel Shortages on the Operation of Issuers Subject to the Registration and Reporting Provisions of the Federal Securities Laws, Securities Act Release No. 5447, Exchange Act Release No. 10569, 3 SEC Docket 249, 250 (Jan. 2, 1974).

80. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212 n.32 (1976).

Companies are also subject to even more rigorous disclosure obligations imposed by self regulating entities such as the New York Stock Exchange (NYSE) and the NASDAQ Stock Market (NASDAQ). Companies listed on the NYSE, for example, are “expected to release quickly to the public any news or information which might reasonably be expected to materially affect the market for its securities.”⁸¹ The NASDAQ requires listed companies to “make prompt disclosure to the public . . . of any material information that would reasonably be expected to affect the value of its securities or influence investors’ decisions.”⁸² The SEC oversees and actively supervises the NYSE, the NASDAQ, and other self-regulatory exchanges. As the SEC interprets the exchanges’ disclosure requirements:

Whenever a listed company becomes aware of a rumor or report, true or false, that contains information that is likely to have, or has had, an effect on the trading in the company’s securities or would be likely to have a bearing on investment decisions, the company is required to publicly clarify the rumor or report as promptly as possible.⁸³

In short, the SEC “has continually exercised its legal authority to regulate conduct of the general kind now at issue”;⁸⁴ namely, disclosures by public companies. Statements made in Investor Calls appear to fall within this ambit of active and ongoing SEC regulation.

D. Factor 4: Serious Conflict Between the Antitrust and Regulatory Regimes

The Supreme Court in *Billing* explained that antitrust enforcement is inappropriate where the conduct at issue is supervised by the SEC and applying both antitrust and securities law would risk “conflicting guidance, requirements, duties, privileges, or standards of conduct.”⁸⁵ Where antitrust and securities law regulate the same conduct, “antitrust courts are likely to make unusually serious mistakes.”⁸⁶ This risk is particularly high where “evidence tending to show unlawful antitrust activity and evidence tending to show lawful securities marketing activity may overlap, or prove

81. 202.05 Timely Disclosure of Material News Developments, NYSE LISTED COMPANY MANUAL, <http://nysemanual.nyse.com/LCM/Sections/> (follow “Section 2” hyperlink; then scroll down to 202.05) (last modified Aug. 21, 2006).

82. NASDAQ Manual, Rule 5250(b)(1), <http://nasdaq.cchwallstreet.com> (follow “Rule 5000” hyperlink; then scroll down to 5250) (last modified June 13, 2010).

83. Report of Investigation In the Matter of Sharon Steel Corporation as It Relates to Prompt Corporate Disclosure, Exchange Act Release No. 18271, 23 SEC Docket 1519, 1523 n.3 (July 21, 1981).

84. *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 277 (2007).

85. *Id.* at 275–76.

86. *Id.* at 282.

identical.”⁸⁷

Antitrust suits based on statements made in Investor Calls could create these risks. An antitrust suit would subject public companies to conflicting advice from securities lawyers (urging disclosure of material business plans and strategies) and antitrust lawyers (counseling against such disclosure). As a result, companies fearful of antitrust attack could hold back on making prompt and truthful disclosures, especially when the disclosures relate to competitively sensitive information. However, this information may well be material under the securities laws since “there is a substantial likelihood that a reasonable investor would attach importance [to the information] in determining whether to buy or sell the securities registered.”⁸⁸

The issue of whether information is material defies bright-line categorization and is applied on a case-by-case basis.⁸⁹ Under SEC scrutiny and with the help of their securities lawyers, public companies have developed expertise in applying the materiality standard to their disclosures in compliance with securities regulations. Overlaying the prospect of antitrust litigation onto this inquiry would obliterate the lines drawn by the SEC, and would heavily discourage the full disclosures encouraged and often required by the SEC.

There is a fine line between permissible—and often required—disclosure and impermissible collusive signaling to competitors. It is no answer to the conflict analysis to say that the SEC has never authorized or encouraged companies to send signals to their competitors through statements to investors and analysts. The SEC did not authorize many of the practices challenged in *Billing* and *Short Sale*, yet the Court held that the agency’s supervision was enough to oust antitrust enforcement.⁹⁰

A “serious conflict” between the securities and antitrust laws does not mean that the securities laws squarely permit what the antitrust laws forbid (or vice versa); indeed, the heart of the conflict in both *Billing* and the public disclosure context is the *uncertainty*—the “fine, complex, detailed line”—between conduct the SEC encourages or mandates (material business disclosures) and conduct potentially open to attack under antitrust law

87. *Id.* at 281.

88. 17 C.F.R. § 240.12b-2 (2010) (definition of “material” for purposes of the 1934 Act).

89. See *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

90. *Billing*, 551 U.S. at 279; *Elec. Trading Grp., LLC v. Bank of Am. Sec. LLC*, 588 F.3d 128, 138 (2d. Cir. 2009); see also *Gordon v. NYSE*, 422 U.S. 659, 690–91 (1975), cited in *Billing*, 551 U.S. at 273 (noting that, in *Gordon*, “the Court found that the securities law precluded antitrust liability even in respect to a practice that both antitrust law and securities law might forbid”).

(signals to competitors).⁹¹ So long as the SEC engages in “administrative oversight” of the conduct at issue, and in particular where antitrust litigation would create a “substantial danger that [companies] would be subjected to duplicative and inconsistent standards,” the implied preclusion doctrine prevents antitrust claims from proceeding.⁹²

IV. POLICY CONSIDERATIONS IN APPLYING ANTITRUST LAW TO INVESTOR CALLS

There are logical limits to the application of implied preclusion to statements made during Investor Calls. For instance, if Robert Crandall had simply made the challenged statement—“Raise your goddamn fares twenty percent. I’ll raise mine the next morning. . . . You’ll make more money and I will too”—to his competitor in the course of an earnings call, there would be little danger of a conflict between the securities and antitrust regimes. Statements that are “uniquely unequivocal” and “not ambiguous” in terms of both the specificity of the offer and its anticompetitive import represent the easy cases.⁹³

The key issue will be the justification: it is reasonable to immunize any statement made in the context of an Investor Call where there is a legitimate business justification. This is consistent with the FTC’s suggestion in *Valassis* that there should be enforcement involving earnings calls only in those “limited circumstances” where there is no justification for the offending statement other than collusion.⁹⁴ In addition, precluding antitrust liability for many public disclosures or statements made by public companies does not immunize those companies from antitrust liability for private communications or any underlying anticompetitive conduct.

However, an expansion of the use of statements in Investor Calls, whether as part of an expansion of the “invitation to collude” doctrine or as evidence of a conspiracy, could be dangerous. Expanding antitrust liability beyond unambiguous and “uniquely unequivocal” offers, such as the one

91. *Billing*, 551 U.S. at 279.

92. *United States v. NASD*, 422 U.S. 694, 734–35 (1975).

93. *United States v. American Airlines, Inc.*, 743 F.2d 1114, 1119, 1122 (5th Cir. 1984).

94. *Valassis Communications, Inc.*: Analysis of Agreement Containing Consent Order to Aid Public Comment, 71 Fed. Reg. 13,976, 13,978–79 & n.11 (Mar. 20, 2006). The facts of *Valassis* may themselves fail to meet this standard. Although unprompted and specific, the CEO’s statement on pricing strategies was probably of interest to analysts and investors, as evidenced by the numerous follow-up questions on the subject posed by analysts to Valassis’s CEO later in the call. Complaint Exhibit A at 6–19, *Valassis Commc’ns, Inc.*, No. C-4160, 2006 F.T.C. LEXIS 25 (Apr. 19, 2006), available at <http://www.ftc.gov/os/caselist/0510008/060314cmpexha0510008.pdf>.

described in *American Airlines*, could deter competitively neutral activities. “[A]ntitrust law limits the range of permissible inferences from ambiguous evidence.”⁹⁵ As the Fifth Circuit recognized, the result in *American Airlines* would have been different if Crandall’s statements had been “ambiguous” or otherwise failed to manifest the “requisite intent.”⁹⁶ As commentators note, “blatant invitations” of the type made by Crandall “must somehow be distinguished from . . . unsuccessful ‘invitations’” that are highly ambiguous.⁹⁷

With no express solicitation to collude, judges and jurors can only speculate about possible meanings. Then-Chief Judge Breyer admonished that “antitrust rules . . . must be clear enough for lawyers to explain them to clients.”⁹⁸ Cases built on speculative constructions of ambiguous words and conduct cannot provide the clear and objective standards required by attorneys, businesses, enforcers, courts, and juries.

Similarly, as the FTC was bringing its first invitation to collude cases, the Director of the Bureau of Competition wrote that there should not be per se condemnation of invitations to collude involving public speech. While recognizing that “a public forum should not, of course, immunize communications that harm competition any more than a publicly arrived at agreement automatically avoids liability under Section 1 of the Sherman Act,” he wrote that “there are more likely efficiency justifications for public speech.”⁹⁹ He explained:

Firms have a legitimate interest in communicating publicly with shareholders and potential shareholders, lenders, employees, and others about business conditions. A per se approach to ambiguous public invitations to collude could inhibit procompetitive communications that only incidentally convey information to competitors. . . . Public speech is also more susceptible than private speech to detection by law enforcement authorities, and is less likely to result in a secret agreement. Market structure analysis and legitimate efficiency justifications should be given full consideration where public speech is concerned.¹⁰⁰

Years before *Billing* and *Short Sale*, FTC Commissioner Orson Swindle recognized this tension between antitrust enforcement and public disclosures, expressing that an FTC invitation to collude consent order

95. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

96. *American Airlines*, 743 F.2d at 1122.

97. 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1419e4, at 133 (2d ed. 2003).

98. *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990).

99. Kevin J. Arquit, *The Boundaries of Horizontal Restraints: Facilitating Practices and Invitations to Collude*, 61 ANTITRUST L.J. 531, 548 (1992–1993).

100. *Id.*

“may deter corporate officials from making useful public statements (e.g., in speeches to investors or presentations to securities analysts) that candidly address industry conditions, individual firms’ financial situations, and other important subjects.”¹⁰¹ Before allowing statements in Investor Calls to be used as a basis for antitrust claims, courts and enforcers should be sensitive to their important role in the securities regime, and exercise restraint before condemning them. Indeed, the likely net effect of an expansion of such claims would be to chill many legitimate disclosures without any clear offsetting competitive benefit from the increased antitrust scrutiny, given that the claims necessarily would be based on uncertain constructions of ambiguous words or conduct.

CONCLUSION

Aggressive scrutiny of public companies’ Investor Calls by the plaintiffs’ bar and government antitrust enforcers may be a fact of life. However, allowing that scrutiny to increase businesses’ exposure to antitrust liability will chill legitimate business communications. Furthermore, statements made in Investor Calls are already heavily regulated under the securities laws. Because overlaying the risk of antitrust litigation onto these statements would create the “serious mistakes” and “substantial danger that [companies] would be subjected to duplicative and inconsistent standards” that the Supreme Court sought to avoid in *Billing*,¹⁰² these statements should, with the exception of unambiguously anticompetitive statements, be immune from antitrust attack under the implied preclusion doctrine.

101. *In re Stone Container Corp.*, 125 F.T.C. 853, 860 (1998) (dissenting statement of Commissioner Orson Swindle).

102. *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 274, 282 (2007).

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