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Accountability and Interest Group
Participation in Comitology
Lessons from American Rulemaking

FRANCESCA BIGNAMI

RSC No. 99/3

EUI WORKING PAPERS



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WP
321. 0209
4 EUR





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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

ROBERT SCHUMAN CENTRE

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Lessons from American Rulemaking**

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Printed in Italy in April 1999
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy**

Many people think European Community law is made centrally in Brussels and carried out by the member states.¹ Although this characterization is accurate in certain respects, it has always been an oversimplification. From the Community's beginning, central institutions have been wholly responsible in some areas for enforcement and formulation of the more detailed rules necessary to implement policy (*administration communautaire directe*). Today Community administration is more extensive than ever as a result of the growing number of laws that must be put into effect and the establishment of European agencies with jurisdiction over new drug authorizations, trademarks, and other matters. The expert committees that bear a large part of the workload number well over 400² and that is not counting European agencies, the standardization organizations used by the Community for harmonization, and the numerous internal working groups set up by the Council and Commission.

Following the Danish "No" to the Maastricht Treaty the administrative facet of Community government, like all others, has come under attack as being undemocratic, removed from the European peoples and unaccountable to the person on the street. The term that has been coined to refer to a vast subcategory of Community administrative action, "comitology," says a lot about the common perception of administration in Brussels. In some minds it might conjure images of apparatchiks and in others an inaccessible and arid science, but it will certainly not evoke thoughts of cheerful civil servants happy to explain to the public-at-large what they are doing and, should it not approve, change course.

Policymakers and academics have looked to American administrative law as a source of inspiration for how Community administration can become more democratic.³ In this paper I consider a subset of the American law that has been proposed for the Community: the administrative procedure known as notice and comment rulemaking and the judicial review that apply when an administrative agency issues the detailed rules necessary to implement statutory regulatory

¹ For a description of executive federalism in the EC see Lenaerts, K. (1991) "Some Reflections on the Separation of Powers in the European Community", *Common Market Law Review*, 28, 1, 11-36, at 13-14.

² See General Budget on the European Union for the Financial Year 1997, 1997 *O.J.* (L 44) 1, at 485.

³ See, e.g., Majone, G. (1998) "Europe's Democracy Deficit: The Question of Standards", *European Law Journal* 4, 1, 5-28; Craig, P.P. (1997) "Democracy and Rule-making Within the EC: An Empirical and Normative Assessment", *European Law Journal*, 3, 2, 105-130; Majone, G. (1996) "Regulatory Legitimacy" in Majone, G., *Regulating Europe*, London, Routledge, 284-301.

schemes.⁴ The first section of this article lays down the basics of Community rulemaking, develops a set of criteria for the design of good Community administration, and evaluates Community rulemaking based on these criteria. In this section I find that Community rulemaking fares poorly on two criteria, accountability to democratic institutions and fairness. Next I argue that the Community can draw lessons from the United States because of an important similarity between their systems of government, a similarity that suggests that they face the same problems in designing their administrative states. In both constitutional systems, power is shared among independent branches of government. Consequently a divided lawmaking principal must hold the bureaucracy accountable. Moreover, the pluralist interest participation that already exists in policy formulation - largely a result of shared legislative power and independent branches of government - must be guaranteed in policy implementation. I then turn to one of the tools that has been used in the United States to address these structural problems, the administrative law of notice and comment rulemaking and judicial review. In sections three and four I describe how it operates, primarily through a case study of hazardous waste legislation. I proceed to draw on the considerable literature on notice and comment that has been generated by the American academy over the past twenty years to critically assess its advantages and disadvantages. Then, in section six, I describe the changes that notice and comment rulemaking and judicial review would entail in the Community. Finally, in the last section, I put forward a rulemaking proposal for the Community which incorporates the basic features of American notice and comment but also makes use of some of the reforms suggested by the academy. I argue that the expected improvements in accountability to democratic institutions and interest participation support the introduction of such a procedure but that it should be modified to reflect societal differences in attitudes toward experts and courts and in the nature of interest organization.

I. Community Rulemaking

A. *The Basics of Implementing Rules*

In the Community, lawmaking power is vested in the Commission, Council and Parliament acting together in a formula that depends upon the policy area and is set out in the Treaties. As in all modern governments, however, the Community legislature relies upon its bureaucracy to produce the more detailed rules that make the system work in practice. One of the principal classes of Community

⁴ In this paper I use "notice and comment" and "rulemaking" to refer to *both* the administrative process and judicial review. I use the term "agency" to refer to government administration generally.

rules are so-called implementing rules.⁵ They can be found in many different policy areas, from agriculture, to the environment, to transportation and generally fill in technical gaps, adapt legislation to changing circumstances, or bring legislation up-to-date with the newest science.⁶

Implementing rules may be issued following one of three basic procedures. Some earlier Community legislation gives the Commission sole rulemaking power. On the other extreme, the Council tends to retain decisionmaking power for itself when an issue is particularly sensitive, directly deciding the matter on a proposal from the Commission. The third and by far most common way in which implementing rules are adopted is by the Commission acting under the indirect control of the Council, so-called comitology. Control is indirect because a committee of member state experts is charged with day-to-day supervision of Commission rulemaking and the Council itself is called in only if the Commission and committee, after negotiation, are unable to agree.⁷

In comitology, Commission discretion is more or less fettered depending upon which of the three types of committees - advisory, management or regulatory - is established to monitor rulemaking.⁸ These are set out in the Comitology Decision,⁹ which serves as a framework to which the Community legislature generally resorts when it designs the administrative process to be used in implementing a particular piece of legislation. One or two representatives from each of the member states sit on the committees, a Commission representative serves as chair, and the representatives vote by qualified majority. In all cases, the Commission must submit its proposal to the committee for an opinion. When an advisory committee is involved, its opinion does not carry formal weight and the measure goes into effect regardless of the committee's vote. If either a management or regulatory committee votes against the Commission proposal or, in the case of a regulatory committee, fails to issue an opinion (because there does not exist a qualified majority in favor of the Commission proposal) the measure is sent to the Council.

⁵ The other major form of Community rules, technical standards, raises additional issues and falls outside of the scope of this paper.

⁶ See Schaefer, G.F. (1996) "Committees in the EC Policy Process: A First Step Towards Developing a Conceptual Framework" in Pedler, R.H. and Schaefer, G.F. (eds.) *Shaping European Law and Policy*, Maastricht, EIPA, 3-23, at 17.

⁷ Experts are appointed by their national executives and are generally national civil servants with the relevant technical expertise.

⁸ This discussion is drawn from Demmke, C. et al. (1996) "The History of Comitology" in Pedler, R.H. and Schaefer, G.F. (eds.) *Shaping European Law and Policy*, Maastricht, EIPA, 61-82 and Vos, E. (1998) "The Rise of Committees", *European Law Journal* 3, 3, 210-229.

⁹ Council Decision 87/373/EEC, 1987 O.J. (L 197) 33.

There exist two essential differences between the management and regulatory procedures. First, management committees have a veto power while regulatory committees have the greater power of assent. Although the point might seem a bit academic, the Commission in the first must simply get enough committee members on its side to escape a veto while in the second must obtain the votes necessary for a favorable opinion. Second, in the management variety, the Commission proposal may take effect immediately after the committee delivers its opinion, even if it is negative, whereas with the regulatory variety the Commission must wait and give the Council a chance to adopt a different decision.

Management and regulatory committees are subdivided into two different classes. With a *filet* (safety-net) management committee, the Commission may, if it chooses, defer application of the measure for a period no longer than one month from the date of communication to the Council and within this period the Council may adopt a different decision, by qualified majority if the Commission agrees and by unanimity if the Commission is not in agreement, or it may fail to act (there might be an even split in the Council, in which case qualified majority voting is impossible). If the management committee is of the *contre-filet* (double safety-net) variety, the Commission *must* defer application for a period to be laid down in the legislation, not to exceed three months from the date of communication to the Council, during which time the Council may adopt a different decision. Likewise, once a regulatory committee issues its opinion, the Commission proposal may take one of two routes. Under the *filet* procedure, the Council may adopt a different decision, by qualified majority if the Commission agrees and by unanimity if the Commission is not in agreement, or it may fail to act. Should the Council fail to act within a maximum of three months, then the Commission proposal takes effect. Under the second, *contre-filet* procedure the Council has an additional option: it may, by *bare majority*, vote against the proposal, thus making it easier for the Council to veto a Commission proposal.

As with all Community acts, implementing rules may be reviewed by the European Court of Justice. As I explain in greater depth below, under Article 173 of the Treaty Community institutions may go directly to the Court of Justice to challenge implementing rules.¹⁰ Individuals, on the other hand, must generally wait for rules to be enforced locally, challenge enforcement in their domestic courts, and then request that the national court obtain a preliminary ruling from the Court of Justice under Article 177 of the Treaty. The Court of Justice reviews implementing rules on procedural grounds, questions of statutory or Treaty interpretation, and rule-specific evidence and reasoning.

¹⁰ See *infra* Part VI.B-C.

B. *A Definition of Good Administration*

At first glance, the call for democratic administration is somewhat paradoxical. In our modern world, democracy cannot be understood as the Athenian *polis* or, less ambitiously, as citizens voting for representatives who in turn govern by majority vote. Powers are delegated to bureaucracies precisely because legislatures do not want to be in the business of legislating minutiae and deciding on the case-by-case application of the law. Administration accountable to democratic institutions at the same time as it is speedy, expert, and fair is the more exact way of putting what liberal democracies strive for when designing their bureaucracies.¹¹

Accountability, fairness, expertise, and speed figure differently in adjudication and rulemaking, the two major forms of government administration.¹² It is convenient to think of an agency as a court for some purposes and a legislature for others. When an agency makes a determination of individual liability based on past or present facts it is obliged to follow trial-type procedures because of their value as fact-finding tools and guarantees of individual rights in the face of state action. Judicial review tends to be demanding because even though the matter has been delegated in the interest of efficiency to a specialized agency, it is one that would traditionally have been handled by courts and therefore judicial notions of fair play and due process weigh heavily. In administration through adjudication, fairness ranks high, expertise less so, and speed and accountability are of equal importance.

In rulemaking, the class of government action to which Community implementing rules belong, the administration is generally allowed to resort to different, less cumbersome procedures. When an agency establishes future rights and liabilities for a class of individuals or other regulated entities, the relevant facts are mostly scientific or social scientific. Consequently, scientific experiments and epidemiological and statistical studies are generally more useful fact-finding tools than witness cross-examination and other trial-type procedures. Further, since the decision does not implicate the use of state coercion at a single individual's expense but rather represents a trade-off between different socioeconomic interests whose effects will be widely felt,

¹¹ See Dehousse, R. (1998) "Citizens' Rights and the Reform of Comitology Procedures: The Case for a Pluralist Approach", EUI Florence, RSC Policy Paper no. 98/4, at 9-10. Dehousse defines the values that legitimate Community administration as legislative mandate, accountability, due process, expertise, and efficiency.

¹² As should be clear from the discussion that follows, whether administrative action is considered adjudication or rulemaking depends on the nature of the decision being made and not the label given by the agency.

participation cannot be conceived as a right to push the state to the wall and test fully enforcement of the law in that instance. Rather it should be framed as the right of those who will be affected to give views and information that, together with a host of other considerations, aid government decisionmaking. Here, judicial review is generally narrow in scope because judges are neither trained to evaluate the scientific evidence nor institutionally suited to make the socioeconomic trade-offs entailed by rulemaking. To return to the list of values involved in the design of good bureaucracy, expertise ranks high, accountability and speed retain their importance, and fairness changes meaning, now defined as the right of interested parties to give views and information.

C. *Evaluating Implementing Rules*

Implementing rules score poorly on both accountability to democratic institutions and fairness. The comitology process is shrouded in secrecy, preventing the European Parliament from keeping an eye on national and Community officials. Although a series of interinstitutional agreements require the Commission to communicate to Parliament proposals, draft comitology committee agendas, and committee voting results, these procedures have proven unsatisfactory.¹³ Even if Parliament were to have adequate information, it would not have the tools necessary to influence the course of rulemaking. Formally, Parliament's institutional role in policy implementation is minimal. Under the *Modus Vivendi* signed by Parliament, the Council, and the Commission in 1994, Parliament's views on proposals intended to implement co-decision legislation must be "[taken] into account to the greatest extent possible" by the Commission and should Parliament give a negative opinion on an implementing measure being decided by the Council, an attempt must be made "in the appropriate framework" to find "a solution."¹⁴ Informally, Parliament may pressure the Commission to modify implementing rules with parliamentary questions and resolutions and by using its budgetary powers.¹⁵ While parliamentary questions and resolutions are a weak means of influencing implementation, the budgetary power is a strong but blunt tool that can only be called upon in situations where Parliament and the Commission are truly at loggerheads. Once policymaking is turned over to administrators, therefore, Parliament has only limited powers to ensure that the same agenda that drove policy formation will also guide implementation.

¹³ See Commission's Undertaking of 26 September 1996, Budget Resolution of October 1996; *Modus Vivendi*, 1996 O.J. (C 102) 1; Klepsch-Millan Agreement of 13 July 1993, 1993 O.J. (C 255) 19; Plumb-Delors Agreement of 1988.

¹⁴ *Modus Vivendi*, 1996 O.J. (C 102) 1, at 1-2.

¹⁵ For instance, Parliament can put the Commission's funding in reserve subject to the satisfaction of certain conditions.

Somewhat counter to popular perception, the Council is not much better situated than Parliament to hold Community administration accountable. Even though experts on comitology committees are supposed to represent their member states, national executives are hard-pressed to control the work of their experts. Domestically, even if ministry employees were to favor, say, a tough environmental regulation that imposed considerable costs on industry, they could expect to face opposition from political appointees mindful of party politics (and industry's clout within the party). The very same civil servants, even though they might be sent with strict instructions, once in Brussels decide matters with other environmental policy experts collectively and, apart from the rare occasions upon which the Council is called upon to intervene, without any direct political supervision. They are, therefore, more likely to consider the environmental protection goal as paramount, at the expense of other, legitimate policy objectives. National executives are even less able to monitor and control rulemaking through their position in the Council. Because comitology committees rarely issue negative opinions, implementing measures are generally not sent to the Council for a different decision or veto. The risk, therefore, is a cozy partnership between the Commission and national experts that is accountable to neither the Parliament nor the Council.

Implementing rules also do poorly on the fairness count. The process is secret. Those affected by rules only learn of them officially at the time of adoption when they must be published in the *Official Journal*. Aside from the statement of legal basis and the summary description of reasons that accompany the final rule, interested parties have no way of knowing the objectives, considerations, and alternatives that informed the policy choice. A rulemaking record exists - the Commission proposal and minutes of committee meetings - but it is not subject to mandatory disclosure. And even if interested parties were fully informed, they would have no right to participate in the administrative process and only rarely, in enforcement proceedings, would they be able to challenge rules in court. The main channel for participating in rulemaking - lobbying member states and the Commission - is informal and unreliable.

II. The Rationale for a Comparative Study of American and Community Administrative Law

American law can serve as a source of ideas for Community administrative reform. In this instance the law of the member states does not offer much guidance because of the fundamental difference between parliamentary systems and the Community political order. In parliamentary systems, in what is known as party government, power is concentrated in the executive. The party or coalition of parties that captures the majority of seats in parliament forms the government and the government, in turn, commands the state bureaucracy. The same party or group of parties controls both parliament and the government and therefore even though separation of powers theory would have parliaments legislate and governments execute, in practice the two functions tend to blur. Parliamentary majorities not only pass laws but also keep an eye on implementation through their relationship with the executive and, vice versa, the government not only executes the law but also proposes legislation and pushes it through parliament.

By contrast, in the Community and the United States power is shared among independent branches of government.¹⁶ In the Community, each branch of government draws its authority from a separate source: the Commission is staffed by civil servants and led by Commissioners under a duty to pursue the Community's supranational mission, members of Parliament are directly elected, and the bureaucrats, ministers, and heads of government in the Council are selected nationally. Legislative power is divided among all three. The Commission proposes and the Council and Parliament decide (Council voting rules and Parliament's role vary according to policy area). Likewise, under the U.S. Constitution each branch of government answers to a different constituency and represents different interests. Members of the House are directly elected every two years on a one-person-one-vote basis and are supposed to most directly represent local constituent interests; Senators are elected every six years in state-wide elections and are supposed to represent state interests; the President is selected in a nationwide election, national recognition originally thought to guarantee that only well-respected statesmen would serve in the office. A statute must be passed by both Houses and signed into law by the President.

¹⁶ On the American system, see Jones, C. O. (1997) "The American Presidency" in Von Mettenheim, K. (ed.) *Presidential Institutions and Democratic Politics*, Baltimore, John Hopkins University Press, at 23-26. Although the American system is often characterized as presidential, that label tends to overemphasize the executive's authority. See Von Beyme, K. (1987) *America as a Model*, Aldershot, Gower, at 59. Independent branches and shared powers is a more accurate description of the constitutional system.

The difference between parliamentary systems and, for lack of a better name, checks and balances systems, leads to very different bureaucratic design problems. First, as I develop in this section, accountability in parliamentary systems is accountability to only one actor - the majority party or coalition of parties that forms the government. Second, although interests initially have difficulty making themselves heard in the tightly knit community of party politicians and civil servants, once they do so they are assured a voice in policymaking from start to finish. By contrast, administrative accountability in checks and balances systems is accountability to multiple lawmakers. And interest group politics in such systems tend toward pluralism, meaning that many groups compete for a role in policy formation and must also have an opportunity to influence policy downstream, at the rulemaking phase. The common constitutional framework in the Community and the United States suggests that they face common bureaucratic design problems and therefore the American experience with the administrative state can contribute to the Community reform debate.

A. Accountability

Accountability is a classic principal-agent problem.¹⁷ Speed, expertise, and fairness are among the advantages that lawmakers gain by giving bureaucracies power. As with all agents, however, the bureaucracy might not do its principal's bidding and might neglect to carry out statutes as lawmakers intended. The legislative principal, therefore, uses various techniques to monitor and control bureaucrats. This is not only a question of what lawmakers typically do but what they are constitutionally obliged to do. A legislature that controls execution too carefully might violate separation of powers principles, but one that does not control enough might very well be charged with an unconstitutional abdication of its legislative powers because of the ease with which execution can become lawmaking. Thus the limits on delegation of powers enforced by national constitutional courts, the United States Supreme Court, and the European Court of Justice.

In parliamentary systems a single lawmaking principal exists - the party or coalition of parties that won the majority of seats in parliament and goes on to form the government - and controls state administration. Governments, not parliaments, are the key player in the bureaucratic control game because they are ideally located, by virtue of their central position in both legislative politics and the administration, to ensure that the same political agenda that drove

¹⁷ See McCubbins, M.D., Noll, R.G., and Weingast, B.R. (1987) "Administrative Procedures as Instruments of Political Control", *Journal of Law, Economics, and Organization*, 3, 2, 243-277, at 247.

lawmaking will also guide implementation.¹⁸ The civil servants who staff a ministry answer, through a hierarchical chain of command, to the minister, cabinet, prime minister, and majority party or coalition of parties. When it comes time to draft rules, therefore, bureaucrats are supervised by the same politicians who crafted the policy line laid down in the enabling statute. Accountability is achieved largely through the informal politics of government guidance, monitoring, and punishment.

Parliaments and courts take a backseat to governments in assuring accountability in parliamentary systems. Parliaments wield a number of institutional tools to keep the administration in check (e.g. parliamentary questions, calls for resignation, and the power of veto or amendment of executive rules) but, on the whole, these tools are weak and parliaments do not make heavy use of them. Courts also play a secondary role in making sure bureaucracies do lawmakers' bidding.¹⁹ Although national differences abound, courts generally only police for departures from statutory commands, and flagrant ones at that, because they assume that administrators will be kept on a tight leash by governments.

Methods of holding administration accountable in parliamentary systems offer little guidance for the Community. There two independent branches, Council and Parliament, pass legislation and both must control implementation, entrusted to yet a third independent branch, the Commission. American institutions, however, can contribute to the Community administrative reform debate because in the United States as well a dual lawmaking principal must hold the administration accountable. In the Constitution, the power to legislate is entrusted to Congress and the President but the power to execute the law is given to the President acting alone. Accountability to two principals, Congress and the President, is a recurring theme in American administrative law. Congress constantly seeks to control implementation or, at the very least, loosen the President's hold over the administration with oversight hearings, the Congressional Budget Office and General Accounting Office, independent agencies, and a series of other techniques. When Congress delegates rulemaking power in a piece of legislation it attempts to retain control by writing in statutory "hammers" and "citizen-suit provisions." (A hammer sends into effect undesirable, from the point of view of regulated industry, provisions if the agency fails to act by a certain date; citizen-suit provisions entitle members of the public to sue agencies to force them to take regulatory action.)

¹⁸ See generally Wilson, J.Q. (1989) *Bureaucracy*, New York, Basic Books, at 295-312.

¹⁹ See generally Stroink, F. (1995) "Judicial control of the administration's discretionary powers (le bilan executif-judge administratif)" in Bakker, R., Heringa, A.W., Stroink, F. (eds.) *Judicial Control*, Antwerpen, Maklu, 81-99; Craig, P.P. (1994) *Administrative Law*, London, Sweet and Maxwell, at 438.

And, most important for this paper, some have argued that Congress (as well as the President) uses administrative procedure and judicial review to control agency rulemaking.

B. Interest Group Participation

Governments involve interest groups in policy implementation, including rulemaking, for a variety of reasons. As I argued above, it is indispensable to the fairness of the process. Those who will be expected to comply with rules as well as those who stand to benefit should have the opportunity to tell administrators how they believe they will be affected and express their views. Interest groups also contribute valuable information to rulemaking. They and their members can be expected to have considerable experience in the field and therefore can inform administrators as to the nature and extent of the regulatory problem as well as the expected costs and benefits of various regulatory options.²⁰ To return to the definition of good administration offered at the outset of the paper, interest groups add to expertise in bureaucratic decisionmaking. Of course, some of the information that they make available is slanted, but administrators can handle the problem by taking the information with the necessary grain of salt. Further, through their relationship with members, access to the media, and legislative lobbying activities, interest groups contribute to public debate on regulatory issues and therefore render bureaucrats more accountable to the general public.²¹ Finally, interest group participation can improve compliance. To the extent that interest organizations command the loyalty of their members, their inclusion in the rulemaking process gives some assurance that their members will acquiesce in agency policy choices.

The degree to which interests influence policy implementation as well as the form that participation takes vary greatly across Western Europe.²² As a consequence of the strong, unitary nature of government in most parliamentary systems, however, interests must win insider status within the policy community of party politicians and civil servants, after which they are informally consulted on everything from major legislative proposals to

²⁰ See Schuck, P. (1997) "Against (And For) Madison: An Essay in Praise of Factions", *Yale Law and Policy Review*, 15, 2, 553-597, at 583-586.

²¹ See *id.* at 580-583.

²² French government is generally characterized as closed to interest influence and ready to impose policy choices upon social groups; German government as open to interest groups and anxious to obtain social consensus; and Great Britain as somewhere in between. See Richardson, J. (ed.) (1982) *Policy Styles in Western Europe*, London, Allen and Unwin.

technical implementing rules.²³ Note two features of this system of interest group participation. First, state actors can and do wield a heavy hand in selecting which interests will have a say in policymaking. Second, the same set of party politicians and civil servants are responsible for policy formulation and implementation and therefore once an interest group is recognized as legitimate, it is relatively sure of access to policymaking from start to finish. Formal guarantees that interests will have a voice in policymaking downstream at the rulemaking phase, namely legal procedures, are unnecessary.

The relationship between interest groups and government is far less orderly in the Community and tends towards the pluralist model.²⁴ First, in a constitutional system of independent branches and shared power, agreement as to which interests should be consulted is difficult to achieve and therefore more groups participate in policymaking. This is especially the case where policymakers come out of different national traditions of interest representation. Second, without a system of strong parties and central administration, the interests that influence policy formulation are not assured

²³ The most extreme form of this type of interest representation is neo-corporatism. Germany, Austria, Denmark, and Sweden are considered neo-corporatist states, meaning that government both privileges certain interests and relies heavily on those interests in policy formulation and implementation. Philippe Schmitter, the well-known political scientist credited as one of the first to analyze the return in Europe to corporatist forms of state-society relations in the 1970s, has developed a handy definition:

Corporatism can be defined as a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, non-competitive, hierarchically ordered and functionally predetermined categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain governmentally imposed controls on their selection of leaders and articulation of demands and supports.

Schmitter, P.C. (1974) "Still the Century of Corporatism?", *Review of Politics*, 36, 85, 93-94.

²⁴ See, e.g., Greenwood, J. and Aspinwall, M. (1998) "Conceptualising Collective Action in the European Union" in Greenwood, J. and Aspinwall, M. (eds.) *Collective Action in the European Union*, London, Routledge, 1-30, at 2. Here I borrow another convenient definition from Schmitter:

Pluralism can be defined as a system of interest representation in which the constituent units are organized into an unspecified number of multiple, voluntary, competitive, non-hierarchically ordered and self-determined (as to type or scope of interest) categories which are not specially licensed, recognized, subsidized, created or otherwise controlled by the state and which do not exercise a monopoly of representational activity within their respective categories.

Schmitter, *supra* note 23, at 96.

access to policy implementation. The Commission alone, supervised only loosely by the Council and even less so by the Parliament, is charged with rulemaking and therefore the interests that had a say in the lawmaking process through a national minister or a European parliamentarian, will not necessarily have one in implementation.

Here again the American political system contains important parallels. Interest representation in the United States is considered the prototype of pluralism.²⁵ A wide array of interest groups compete for influence in a fragmented political system that contains many points of access--members of Congress, the President, political parties, and the federal administration. They influence lawmaking by shaping public opinion, making contributions to powerful members of Congress, the President, and political parties, and delivering votes. When it comes time for policy implementation, they use politics as well as legal procedure to shape outcomes. The United States, therefore, serves as one example of how a pluralist system can guarantee interest group participation when policymaking is turned over to regulators.

III. American Rulemaking

A. *The Basic Framework*

The standards governing agency procedure and judicial review in an American rulemaking proceeding are to be found in the Administrative Procedure Act of 1946 (APA), the specific statute being implemented, and administrative case law. The most important APA provisions are the following:

(b) General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

....

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments with or

²⁵ See, e.g., Wilson, G. K. (1990) *Interest Groups*, Oxford, Blackwell, at 5.

without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.²⁶

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

.....

(2) hold unlawful and set aside agency action, findings, and conclusions found to be---

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations or short of statutory right;

(D) without observance of procedure required by law;

... .²⁷

These provisions contain a number of critical features. First, the public must be informed of the rule through publication in the official government journal, the Federal Register (notice). Second, interested individuals may submit comments in which they marshal data, opinions, and legal arguments in favor or against the proposed rule (comment). Third, the agency must briefly justify the rule, setting out the regulatory problem it is intended to address and the considerations that led to its adoption (statement of basis and purpose). Finally, courts are to catch administrators who transgress the outer limits of their statutory mandates and regulate when not authorized to do so and are to strike unconstitutional or arbitrary and capricious rules.

Although the APA is the essential backdrop in any rulemaking proceeding, the starting point is the statute conferring regulatory authority upon an agency in that instance. The relationship between the APA and enabling legislation is easy to understand if the statute is silent as to rulemaking procedure because the APA operates as a default rule. The intersection of the two is also straightforward where, as is more often the case, the legislation independently sets down agency procedure and a judicial review standard but the APA is repeated word for word or incorporated by reference. Only when the

²⁶ 5 U.S.C. § 553 (1994) ("Rulemaking").

²⁷ 5 U.S.C. § 706 (1994) ("Scope of Review").

statute departs from the APA scheme does a difficulty arise. Many laws passed in the 1970s require rulemaking agencies to go through additional procedural hoops such as oral, trial-type hearings and impose higher burdens of proof such as judicial review for "substantial evidence on the record as a whole" or review for "clear and convincing evidence."²⁸ To come full circle, however, even when APA procedure is supplanted by statute the APA conceptual framework (developed, as we shall see, in the case law) is so powerful that usually rulemaking still follows the APA course.

B. The Evolution of Rulemaking from its Beginnings to the Present Day

The APA rulemaking provisions, as originally drafted, favored New Deal government activism.²⁹ They trod lightly upon agency decisionmaking power. Notice of the proposed rule, an opportunity for comment, and the statement of basis and purpose accompanying the final rule were designed to guarantee openness in the policymaking process. The judiciary was to ensure that agency rules were constitutional (as with all government action) and that they did not fly in the face of reason. Courts were not to delve too deeply into a plausible agency explanation to check the facts and logic.

In the 1960s, agency rulemaking was transformed. The standard *modus operandi* of the prototype New Deal agencies, adjudication, fell out of favor for a number of reasons.³⁰ Most important for our purposes was a change in public perception of administration and experts. Expertise at the service of public ends came to be perceived as more complicated than a statutory instruction to an agency to solve a given problem.³¹ In a number of cases, the experts seemed to act not in the public good but in the interests of the industry they were supposed to be regulating. It thus appeared that decades of agency interaction with industries, an unavoidable part of the regulatory task, had transformed a once adversarial relationship into a cozy partnership ("agency capture"). Furthermore, the legitimacy of the administrative state had fallen prey to a general decline in confidence in science and, more broadly speaking, the possibility of objective, impartial knowledge. It was no longer possible to believe that advances in technology were inevitably tied to progress when they had led to pollution, atomic weapons, and other problems. Thus, went the view,

²⁸ Rulemaking that must, by statute, satisfy these more demanding procedural and substantive standards is known as hybrid rulemaking.

²⁹ See generally Shapiro, M. (1988) *Who Guards the Guardians*, Athens, University of Georgia Press, at 36-77.

³⁰ See generally Pierce, Jr., R.J. (1996) "Rulemaking and the Administrative Procedure Act", *Tulsa Law Journal*, 32, 2, 185-201.

³¹ See, e.g., Shapiro, *supra* note 29, at 62-73; Ackerman, B.A. and Hassler, W.T. (1981) *Clean Coal, Dirty Air*, New Haven, Yale University Press, at 1-7.

experts routinely made judgment calls with significant normative ramifications and *society*, not the experts, had to somehow control those decisions.

Public law reformers thought that rulemaking could go a long way in remedying these defects. Agency action would be more public-spirited because rulemaking, unlike adjudication, was a process open to all, rendering administrators accountable to the entire community and not simply firms with a high financial stake in the outcome.³² They promoted rulemaking, over-optimistically as I shall discuss later, as the primary institutional means by which administrators were to solve contemporary social problems. This new mission for rulemaking led to dramatic changes in how it operated. Agencies had to solicit and incorporate the views of a variety of groups that previously had been excluded from the administrative process. Courts had to police rulemaking to protect against regulatory capture and ensure that proceedings were accessible and responsive to the public.

As courts took on their new role, the character of judicial review changed considerably and it is this framework, formally based on the APA text from 1946 but developed in the case law of the 1970s, that still stands today.³³ As before, courts reviewed rules for constitutional violations, agency action that went beyond what was authorized in the statute, and misinterpretation of statutory text guiding agency action. Unlike the past, however, when courts were called upon to decide whether rules were arbitrary and capricious, they showed themselves far more willing to get into the technical merits of agency policy choices and carefully scrutinize the rationale offered for such decisions. Courts had to be satisfied that agencies had considered and adequately answered the challenges put forward by rulemaking participants. Patricia Wald, a judge on the federal court of appeals that handles the overwhelming majority of rulemaking cases, describes the variety of complaints that masquerade behind the deceptively simple claim that a rule is "arbitrary and capricious":

"Arbitrary and capricious" has turned out to be the catch-all label for attacks on the agency's rationale, its completeness or logic, in cases where no misinterpretation of the statute, constitutional issue or lack of evidence in the record to support key findings is alleged. Frequently the arbitrary and capricious charge is grounded on the complaint that the agency has departed from its prior rationale in other cases without admitting it or explaining why. Sometimes the agency is rebuffed because it did not give adequate consideration to an alternative solution. But most often the court simply finds

³² See Stewart, R.B. "The Reformation of American Administrative Law", *Harvard Law Review*, 88, 8, 1667-1813 (1975); Mashaw, J.L. (1997) *Greed, Chaos, and Governance*, New Haven, Yale University Press, at 22-23.

³³ See generally Mashaw, J.L. and Harfst, D.L. (1990) *The Struggle for Auto Safety*, Cambridge, Mass., Harvard University Press, at 147-156.

the agency's explanation for what it is doing "inadequate." . . . In a surprising number of cases, the court is most frustrated about the agency's failure to communicate any reason for taking certain actions.³⁴

Part of this willingness to roll up sleeves and get mired in policy debates was the need for an extensive agency record. Without a written record (and in the absence of independent fact-finding) courts could not evaluate whether attacks on agencies' scientific evidence and policy analysis had any merit. Agencies, therefore, were required to compile a contemporaneous record that included the scientific evidence and reasoning that served as the foundation for the agency rule and justified setting aside the other options advocated by notice and comment participants.

At the same time standing was liberalized, expanding the class of litigants entitled to challenge agency rules.³⁵ Previously, litigants had to show that they had a legal right specifically protected by the regulatory statute at issue to challenge agency action. Under a Supreme Court case decided in 1970, anyone who fell "arguably within the zone of interests to be protected or regulated by the statute" was allowed into court, and allowed into court not to protect individual legal rights but as a "reliable private attorney general to litigate the issues of the public interest in the present case."³⁶ Congress also had a hand in liberalizing standing. Many of the regulatory statutes enacted in the late 1960s and early 1970s ("citizen-suit provisions") permitted anyone to challenge agency action on the theory that they would serve as private attorneys general, protecting the public interest in the correct application of the law.

Quite obviously, the more active role that courts took on in policing the rulemaking process fed back into and altered the very nature of that process. Constructing an agency record that would hold up in court did not simply entail more paper and ink but required more extensive and accessible (to the non-expert judge) fact-finding and reasoning from the very beginning. Before an agency could even publish notice of a *proposed* rule it had to document the need for regulatory change and the nature of the different policy options through surveys, scientific studies, and consultation with the regulatory community. Agencies could not rely as extensively on the quick and convenient, but occasionally inaccurate, rules of thumb and informal information gathering techniques that they had used in the past.

³⁴ Wald, P.M. (1996) "Judicial Review in Midpassage", *Tulsa Law Journal*, 32, 2, 221-258, at 233-234.

³⁵ See Shapiro, *supra* note 29, at 45-46.

³⁶ *Ass'n of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153-154 (1970).

IV. A Case Study on Notice and Comment: Waste Regulation

A. *The Statutory Scheme*

To illustrate the American system of rulemaking I take an example from the environmental field. The Resource Conservation and Recovery Act of 1976 (RCRA), significantly amended by the Hazardous and Solid Waste Amendments of 1984, is the environmental statute that governs the handling of waste in the United States.³⁷ Under the RCRA, the Environmental Protection Agency (EPA) has primary responsibility for regulating hazardous waste while the states are delegated responsibility for non-hazardous waste.³⁸ All of the rulemaking provisions require that the EPA undertake a notice and comment proceeding before promulgating rules. For instance, the provision directing the EPA to draw up two types of hazardous waste lists, one which identifies the characteristics that waste must display to be considered hazardous and the other which identifies hazardous waste by name, says that regulations shall be promulgated "after notice and opportunity for public hearing."³⁹ Moreover, the statute contains a catch-all provision that requires the EPA to proceed through notice and comment whenever it promulgates regulations:

Public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under this Act shall be provided for, encouraged, and assisted by the [EPA] Administrator and the States. The [EPA] Administrator, in cooperation with the States, shall develop and publish minimum guidelines for public participation in such processes.⁴⁰

Finally, the statute requires that whenever a state acts in lieu of the EPA that it follow the same notice and comment procedures.⁴¹ Thus even when a state instead of the EPA is responsible for implementation, the public is guaranteed the same level of participation.

Judicial review of EPA rules is expressly guaranteed under the RCRA. Courts are directed to follow the standards set out in the Administrative Procedure Act, namely arbitrary and capricious review, subject to certain

³⁷ 42 U.S.C. §§ 6901 et seq. (1994).

³⁸ The EPA is a federal executive agency, meaning among other things that the administrator (agency head) is appointed and removed at will by the President. Most of the policymaking occurs at its headquarters in Washington, D.C. whereas enforcement is carried out by its ten regional offices, which work closely with the states.

³⁹ 42 U.S.C. § 6921(b)(1) (1994).

⁴⁰ 42 U.S.C. § 6974(b)(1) (1994).

⁴¹ See 42 U.S.C. § 6926(b) (1994).

exceptions that are irrelevant here.⁴² Before a plaintiff may challenge an EPA regulation, a number of conditions applicable in administrative litigation generally must be satisfied. The litigant must have exhausted her administrative remedies or else risk a finding that she has waived her rights. Further, the party must demonstrate that she satisfies constitutional and prudential standing requirements. More specifically, to fulfill the constitutional part of the test she must show that she has suffered concrete injury, that such injury is traceable to the complained of event, and that it is redressable through judicial action;⁴³ to satisfy the prudential part, she must show that she falls within the "zone of interests" that Congress intended to regulate or protect with the RCRA.⁴⁴ Lastly, even though rules may be challenged prior to enforcement, the suit must still be "ripe," a two-part inquiry that takes into account the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."⁴⁵ Whereas exhaustion, and to a lesser extent, standing, can operate as barriers to judicial review in rulemaking cases, ripeness very rarely is an obstacle.

B. Rulemaking

In 1991, pursuant to its RCRA mandate, the EPA promulgated the Burning of Hazardous Waste in Boilers and Industrial Furnaces Rule (BIF Rule). Existing regulation had already placed controls on incinerators that burned hazardous waste for purposes of waste treatment and disposal. The BIF Rule added to the pre-existing framework by extending the regulatory net to industrial boilers and furnaces that used hazardous waste for fuel recovery purposes. Facilities treating hazardous waste in this fashion were among the last to be regulated because of the obvious benefits from using hazardous waste as fuel. Hazardous waste is cheap compared to fossil fuels. In addition, combustion can destroy waste's dangerous chemical compounds thus treating it and using it for its fuel value at one and the same time. Yet there exists a significant risk that dangerous chemical compounds will not be fully destroyed and that, when they react with other fuels used in the process, even more toxic substances will result. The rule eventually promulgated attempted to strike a balance between these two sets of competing considerations.

⁴² See 42 U.S.C. § 6976(a) (1994).

⁴³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

⁴⁴ *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C. Cir. 1989).

⁴⁵ *Abbott Laboratories v. Gardner*, 386 U.S. 136, 149 (1967). Fitness for review includes consideration of whether the issues can be classified as legal or factual, the former lending themselves more easily to pre-enforcement review than the latter. See *id.* at 149.

In May 1987, the EPA published notice of a proposed rule and request for comment.⁴⁶ Although it is common to give warning with an advanced notice of proposed rulemaking, the EPA had already issued a regulation imposing notification requirements on hazardous waste burners⁴⁷ and had indicated almost two years earlier that it planned to introduce a permitting system.⁴⁸ Thus the proposed rule came as no surprise to the regulated community.

The notice contained several parts. First it laid out the Agency's statutory authority to promulgate the rule and described the environmental and safety hazards caused by the burning of hazardous waste in boilers and industrial furnaces, making a case for the need for regulation. Then the notice discussed and justified a number of critical policy choices made by the Agency in drafting the rule, among which figured the decision to base controls on national performance standards rather than on case-by-case risk assessments. It also set out in detail the controls that the EPA proposed for emission of toxic organic compounds, toxic metals, and hydrogen chloride and the risk assessment methodology the Agency had used to calculate the controls, including the decision to set limits so as to ensure that the increased lifetime risk of developing cancer from direct inhalation of carcinogenic stack emissions would not exceed one in 100,000. Throughout this discussion and in a separate section at the end of the proposal, the EPA estimated what it thought would be the costs of compliance, the economic impact of such costs on the profitability of the industry as a whole and on individual plants, and the reduction in the risk of cancer to exposed individuals. Although this information was mandated by an executive order on regulatory impact statements⁴⁹ and a Congressional statute concerning small businesses⁵⁰ it is safe to assume that even in their absence, agencies would need to develop some of the same information when explaining and justifying the regulatory approach chosen upon review in court.

The public was given two months to submit comments. On top of soliciting comments generally, at various points during the discussion of the proposed rule the EPA asked for comments on specific issues such as the approach to take to toxic organic compound emissions standards. It also announced that three public hearings would be held in different spots around the country. Persons wishing to make a statement were directed to inform the EPA, to restrict oral presentations to 15 minutes, and to come with written

⁴⁶ Burning of Hazardous Waste in Boilers and Industrial Furnaces, 52 Fed. Reg. 16,982 (May 6, 1987).

⁴⁷ Burning of Hazardous Waste Fuels and of Fuels Derived from Used Oil, 50 Fed. Reg. 49,164 (November 29, 1985).

⁴⁸ 50 Fed. Reg. 49,192 (November 29, 1985).

⁴⁹ Executive Order 12,291, reprinted in 5 U.S.C. § 601 note (1988).

⁵⁰ Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1994).

copies of their comments for inclusion in the official record. Further, after notice was issued the EPA conducted negotiations with various industry representatives.

Two years later, in October 1989, the EPA published a supplement to the proposed rule.⁵¹ It contemplated several revisions to the proposed rule, many of which were provoked by comments. First, it had received numerous comments suggesting the need for a control on particulate emissions. This was based on the fear that toxic metals and organic compounds might be absorbed onto particulate matter which might itself pose a health risk because of the ease with which it is inhaled and absorbed by the lungs. Therefore, even though the EPA thought that this risk was already covered by another regulatory scheme, it proposed to apply the particulate standard currently in use for hazardous waste incinerators to boilers and industrial furnaces. Second, the Agency responded to comments from boiler and cement kiln operators claiming that it would be impossible to comply with the control set for toxic organic compounds. It proposed an alternative standard to "avoid major economic impacts on the regulated community." Third, the Agency set down what it considered to be the scope of its statutory authority to regulate facilities that burned *both* fossil fuels (not covered by the RCRA by virtue of the Bevill Amendment, about which more shall be said later) and hazardous waste. This was an issue that had been addressed only marginally in the initial proposal but evoked reactions from the regulated industry in the comments and thus occupied a significant portion of the supplement.

Again the EPA issued a general call for comments on the changes and in addition, at specific points in the discussion, asked for the public's reaction. As before, the public had two months to respond and the Agency conducted negotiations with industry and trade groups.⁵² In April 1990, the EPA published a second and minor supplement to the proposed rule⁵³ and in February 1991, almost four years after the initial proposal, the final rule was promulgated.⁵⁴ The final rule included a few modifications but most of the significant changes had already been made between the proposed rule and first supplement.

⁵¹ Burning of Hazardous Waste in Boilers and Industrial Furnaces, 54 Fed. Reg. 43,718 (October 26, 1989).

⁵² See, e.g., Peggy Abrahamson, EPA-Proposed Changes Cause Concern at AMC, American Metal Market, November 16, 1989, at 2.

⁵³ Standards for Owners and Operators of Hazardous Waste Incinerators and Burning of Hazardous Wastes in Boilers and Industrial Furnaces, 55 Fed. Reg. 17,862 (April 27, 1990).

⁵⁴ Burning of Hazardous Waste in Boilers and Industrial Furnaces, 56 Fed. Reg. 7,134 (1991) (codified as amended by subsequent corrections and technical amendments at 40 C.F.R. pt. 260, 261, 264, 265, 266, 270, 271 (1992)).

C. Judicial Review

In *Horsehead Resource Development Co. v. Browner*⁵⁵ a number of firms, industry associations, and environmental groups challenged the rule. They objected on a number of grounds: the EPA had misinterpreted the statutory provisions at issue, had given inadequate notice of a portion of the rule, and had issued a rule that was arbitrary and capricious in parts.

The BIF Rule rested on RCRA § 3004(q) and an amendment to the RCRA known as the Bevill Amendment. The first directed the EPA to establish standards for facilities that burn fuel containing hazardous waste in order to "protect human health and the environment."⁵⁶ The second exempted waste generated from fossil fuel from the RCRA regulatory scheme.⁵⁷ What the statute failed to address was the status of facilities that burned *both* fossil fuel and hazardous waste. The EPA adopted a policy under which only hazardous residues "significantly affected" by hazardous waste fuel would be caught by the regulatory scheme. Operators of facilities that gave off cement kiln dust and combustion residues, classified as exempt wastes under the Bevill Amendment, contested this policy. They argued that the Bevill exemption applied as long as some fossil fuel was burned, regardless of whether hazardous waste was also used to produce the cement kiln dust and combustion residues. The opposite camp--a coalition of environmental groups--claimed that *all* cement kiln dust and combustion residues produced from hazardous waste, no matter how small the quantity of waste, should be treated as hazardous. The court rejected both challenges and upheld the EPA's interpretation. It applied the Supreme Court standard of review in cases involving agency statutory interpretation which directs courts to first assess whether the unambiguous meaning of the statute settles the question, and if not, to defer to reasonable agency constructions.⁵⁸ The court found that the RCRA did not clearly speak to the issue and that the EPA's decision to regulate only hazardous residues "significantly affected" by hazardous waste was reasonable.⁵⁹

Another challenge, brought by operators of wet process kilns (a type of cement kiln) involved procedural APA rights. In the BIF Rule, carbon monoxide (CO) emission levels and total hydrocarbon (THC) emission levels are used to gauge how fully hazardous waste is destroyed in the combustion

⁵⁵ 16 F.3d 1246 (D.C. Cir. 1994).

⁵⁶ 42 U.S.C. § 6924(q) (1994).

⁵⁷ 42 U.S.C. § 6921(b)(3)(a) (1994).

⁵⁸ *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 842-843 (1984).

⁵⁹ 56 Fed. Reg. 7,196-99 (1991).

process.⁶⁰ High CO and THC emissions indicate that the principal hazardous organic constituents in the waste fuel were only partially broken down in combustion. Left over are products of incomplete combustion, some of which are known carcinogens, others of which may be. In the rulemaking proceeding, wet kiln operators had complained that they could not comply, for reasons unrelated to environmental safety, with either the CO or the alternative THC standard, and in response the EPA added a third emissions standard that combined CO and THC limits and would be formulated on a case-by-case basis.

According to the wet kiln petitioners, they had not received adequate notice of and opportunity for comment on the third standard. The court agreed. It found that although the EPA had given notice that it was considering a site-specific standard for wet kilns, it had not suggested--in the proposed rule, the first supplement, or the second supplement--that it was contemplating a combined CO and THC baseline. The court explained that the adequacy of notice and opportunity for comment rests on the relationship between the proposed and the final rule: even though the "EPA undoubtedly has authority to promulgate a final rule that differs in some particulars from its proposed rule" the final rule must be "a 'logical outgrowth' of the one proposed."⁶¹ This, it elaborated, entails a description of the subjects and issues that is sufficiently detailed to allow interested parties an opportunity for meaningful participation. Here the standards using CO and THC separately could be expected to operate differently from a standard that combined the two, and therefore without notice of the dual baseline, wet-kiln operators were not afforded an adequate opportunity for comment.

Last came an arbitrary and capricious challenge to the substance of the third standard tailored specifically for wet kilns. Wet kilns had proven troublesome because of their design. A wet kiln is a slightly inclined cylinder that rotates on its own axis. The raw material (e.g. clay, shale, limestone) is poured into the top end and, as it slides down the kiln, is heated to very high temperatures. The kiln is powered by a furnace at the bottom end that can use powdered coal, other fossil fuel, or hazardous waste. Since carbon monoxide and hydrocarbons are generated by the raw materials poured into the top end *and* the furnace at the bottom end and since, due to wet kiln design, it is impossible to tell which of the emissions comes from the raw material and which from the furnace, wet kilns that burned negligible quantities of hazardous waste still ran the risk of exceeding the Rule's CO and THC controls. Recognizing this problem, the EPA added a site-specific, combined CO/THC

⁶⁰ The THC emissions standard was added after the first round of comments.

⁶¹ *Shell Oil Co. v. EPA*, 950 F.2d 741, 747 (D.C. Cir. 1991).

emissions standard that it maintained would not pose compliance difficulties for environmentally sound wet kilns.

Petitioners contended that there was no rational basis for this conclusion. The issue turned on whether it was possible to calculate site-specific "non-hazardous" fuel emissions baselines that operators could be required to stick to when they burned hazardous fuel. The EPA pointed to two pieces of the record in support of its position. First, it argued that the results of test runs on a single wet kiln in Hannibal, Missouri showed that THC emissions were quantifiable and indeed decreased when hazardous waste was burned. The court examined the test burn results and found that, rather, they showed that combustion emissions depended entirely on the raw material used and thus rendered a reliable baseline impossible. Indeed at oral argument, EPA counsel admitted that the Hannibal test runs had been conducted for a different purpose and could not be used to support the wet kiln standard. Second, the EPA pointed to comments saying that, when hazardous waste was burned, hydrocarbon levels did not increase, thus making a "non-hazardous" THC baseline feasible. The court held that such evidence was inadequate because it did not deal with the CO component of the baseline. It concluded:

The agency thus had no information on this issue and was relying on pure speculation when it decided that a standard of no increase of CO and THC over quantifiable CO and THC baselines was achievable. Such speculation is an inadequate replacement for the agency's duty to undertake an examination of the relevant data and reasoned analysis; thus the EPA's action in promulgating the . . . standard was arbitrary and capricious.⁶²

V. Assessing Notice and Comment

The principal features of American rulemaking are readily apparent from the hazardous waste example. First, the rulemaking proceeding and judicial review generated considerable information about the BIF Rule. Just from reading the proposed rule, first supplement, second supplement, final rule, and court opinion we have learned a lot about the science, efficiency considerations, industry costs, and health risks that went into choosing the BIF Rule as *the* means of ensuring that hazardous waste, when used as fuel, is burned safely. And it is not difficult to imagine the additional reams of paper and, presumably, information contained in a rulemaking record that includes EPA-commissioned scientific studies, comments from over thirty major participants, and individual responses to those comments.

⁶² 16 F. 3d at 1269.

Second, a variety of interests had a say in rulemaking. The hydrocarbon standard was added (in the first supplement) as an alternative regulatory solution to the hazardous organic compound problem because firms in the cement kiln industry complained that, even though their emissions were not necessarily hazardous, it would be impossible for them to comply with the carbon monoxide standard. The EPA also listened to those concerned that the initial proposal was not protective enough of human health: it added a control on particulate emissions. In court, both industry representatives and environmental protection groups challenged the regulation, the former arguing for a more restrictive interpretation of the EPA's regulatory authority, the latter for a broader one.

Finally, the judiciary played an active role in policing rulemaking. When the governing statute was ambiguous or failed to address the question at hand, the *Horsehead* court carefully examined the EPA's regulatory choices for reasonableness. It analyzed the organic compound emissions standards to ensure that the agency had, in actual fact, given notice. And it picked through the record, checking the evidence pointed to by the EPA in support of the third emissions standard, to decide the "arbitrary and capricious" claim. In sum, the court forced the agency to explain its decision in terms comprehensible to the general public and answer objections from rulemaking participants.

Information, interest participation, and extensive judicial review are the principal characteristics of American rulemaking. These features of the system are inextricably linked: more information about a rule lays the groundwork for interest group critique and thorough judicial review; interest groups generate information because of their familiarity with the industry and their strong incentives to contest or promote agency action, which in turn permits more extensive court scrutiny; and tough judicial review feeds back into expectations as to how much information must be provided by agencies and how seriously rulemaking participants' objections and suggestions must be taken.

In this section I return to the values important to good administration identified earlier in the paper--accountability, fairness, expertise, speed--and see how American rulemaking fares. I draw on the voluminous academic literature on notice and comment to argue that it improves accountability to lawmakers and allows significant room for interest participation. On a less positive note, I discuss claims that notice and comment gives too much say to special interests and slows down the pace of rulemaking.

A. Accountability

American administrative procedure and judicial review render bureaucrats accountable to the system's dual lawmaking principal. Both Congress and the

President use notice and comment to control rulemaking outcomes.⁶³ Mathew McCubbins, Roger Noll, and Barry Weingast, a team of political scientists, have explored the full range of techniques that Congress and the President (lawmaking principals) use to monitor, punish, and reward the federal bureaucracy (the agent).⁶⁴ Among these figures rulemaking procedure. First, the information generated in the course of rulemaking and judicial review enables lawmakers to keep tabs on agencies and react, if need be, before the rule goes into effect.⁶⁵ Because a proposed rule is announced well in advance and the issues thoroughly fleshed out (by private actors with strong incentives to contest bureaucrats and courts that require explanation in language comprehensible to agency outsiders) in the lengthy process of comments, replies to comments, supplemental proposed rules, and judicial review, Congress and the President have ample time and information upon which to act. Second, McCubbins, Noll, and Weingast argue that interest groups and courts function as third-party monitors in the principal-agent relationship between Congress and the President on the one hand and agencies on the other. By allowing the public to participate in agency rulemaking and bring court challenges, Congress and the President ensure that the coalition of interests that originally backed a piece of legislation will control its implementation as well. By giving courts the power to strike rules that deviate from enabling legislation, Congress secures agency adherence to legislative policy choices.

Congressional and Presidential control through administrative procedure is certainly not mathematic.⁶⁶ Legislative aides are unlikely to read the Federal Register from cover to cover, time and circumstance may very well lead one coalition of interests to press for passage of a law and another one to support subsequent regulations, and courts tend to have a mind of their own, even though they work from statutory text and legislative history. An administrative process, however, that generates copious and intelligible public information about regulatory change and is open to interest groups who themselves have

⁶³ Martin Shapiro argues that the only real masters in this principal-agent relationship are courts. See *supra* note 29, at 124. While there is some truth to this position, it neglects the limits that legal texts place on judicial interpretive options and the ability of political actors to influence rulemaking before courts appear on the scene.

⁶⁴ See McCubbins, Noll, and Weingast, *supra* note 17, at 243.

⁶⁵ Many rules contain long lead times for compliance and therefore they may be reviewed in court before coming into effect, allowing political actors to react to issues raised in the course of the judicial proceedings.

⁶⁶ See generally Mashaw, J.L. (1990) "Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development", *Journal of Law, Economics, and Organization*, 6, Special Issue, 267-298, at 280-284. Mashaw criticizes principal-agent theory on the grounds that it is logically flawed, for the legislature does not necessarily have an interest in ensuring that the same coalition that supported legislation influences rulemaking and, more generally, on the grounds that its empirical claims are non-falsifiable.

access to politicians is undoubtedly more accountable than one where information is scarce because secret or only available upon request and debate is limited to bureaucrats.

B. Interest Group Participation

Notice and comment allows for pluralist interest participation in rulemaking. In a system where lawmakers are fairly open to a variety of interest groups, an administrative process that legally guarantees participation and information ensures that those same, diverse interests will be included in policymaking once it is turned over to regulators removed from Congressional politics. And, as I argued earlier, such participation is critical. A role for interest groups in rulemaking contributes to fairness, improves the substantive quality of rules, adds to public accountability, and smoothes the road to compliance.

Many American scholars, however, do not take such a rosy view of public participation in notice and comment. According to so-called public choice scholars, interest groups politics in government administration can be harmful to the public good.⁶⁷ This claim is related to the vociferous opposition wet kiln operators mounted to the BIF Rule. Although both industry and environmental protection groups took part in the EPA proceeding, business interests proved most difficult to accommodate and occupied a disproportionate share of the Agency's and the court's time. The first supplement to the proposed rule, in which the Agency answered the bulk of the comments, contained a little for everyone: particulate emissions standards for environmental interests and a new toxic organic emissions standard for business interests. The following four years, however, were spent dealing with complaints from cement kilns operators (especially the wet kiln subset) and other industry interests. Fewer than fifty-seven furnace operators and within that set a particularly obstinate group of six to ten wet kiln operators caused the bulk of the EPA's worries.⁶⁸ And the extra time trying to find a regulatory solution that would make wet kiln operators happy, i.e. the third toxic organic compound emissions standard, was very likely spent with a view to fending off a successful challenge in court. In

⁶⁷ For an overview of public choice scholarship see Mashaw, *supra* note 32. Another critique of American rulemaking which deserves more attention than allowed here by space constraints has been made by Donald Elliott, former general counsel to the EPA. He claims that real public participation, what he describes as "the kind of back and forth dialogue in which minds (and rules) are really changed" does not occur through notice and comment. See Elliott, E.D. (1992) "Re-Inventing Rulemaking", *Duke Law Journal*, 41, 6, 1490-1496, at 1495.

⁶⁸ See *Burning of Hazardous Waste in Boilers and Industrial Furnaces*, 52 Fed. Reg. 16,982 (May 6, 1987) (regulatory impact analysis); *Horsehead Resource Development Co. v. Browner*, 16 F.3d 1246, 1266 (D.C. Cir. 1994).

other words, where the costs of regulation were especially concentrated interests mobilized against it.

Public choice scholars argue that interest groups such as the furnace operators, through their involvement in policymaking, appropriate public resources for private ends and thus are ultimately destructive of public welfare. The public choice critique came in response to the view, popular in the 1970s, that rulemaking embodies pluralist democracy.⁶⁹ In this decidedly optimistic picture of interest participation in public life, a rulemaking proceeding is a mini-legislature in which debate generates widely accepted and mutually beneficial public policy. In contrast, public choice thinkers, drawing on the work of Mancur Olson and other members of the rational choice school, maintain that pluralist interest politics fail to generate administrative rules in the general welfare.⁷⁰ Special interest coalitions, called special because they speak for a small group of firms or individuals and not for larger constellations such as consumers, benefit at the expense of the environmental protection, consumer welfare, and other public goals that, in theory, statutes and regulations are designed to accomplish.⁷¹ Groups with few members who stand to win or lose heavily from regulatory change are most likely to organize and put pressure on politicians and administrators because each single member has a significant stake in the outcome. By contrast, large groups are likely to be poorly organized because the same benefits and costs of regulatory change are spread thinly across a large membership and therefore individual members do not have the necessary incentive to contribute to the collective effort. Consequently, the argument goes, even though many of the ambitious statutes of the 1960s and 1970s were designed for groups of the large and diffuse variety (e.g. consumers and environmentalists) when one looks closely at the statutory text and the regulatory schemes developed to implement them, they tend to work to the advantage of small groups of business and regional interests. A number of empirical studies on agency regulation bear out the public choice hypothesis.⁷²

⁶⁹ This theory is widely accepted as Richard Stewart's brainchild. See Stewart, *supra* note 32.

⁷⁰ See Olson, M. (1965) *The Logic of Collective Action*, New York, Schocken Books. For the more recent version of rational choice theory that takes a broader view of the costs and benefits of collective action, see Moe, T.M. (1980) *The Organization of Interests: Incentives and the Internal Dynamics of Political Interest Groups*, Chicago, University of Chicago Press.

⁷¹ George Stigler is considered one of the pioneers of the so-called "capture" theory of public regulation. See, e.g., Cohen, M.F. and Stigler, G.F. (1971) *Can Regulatory Agencies Protect Consumers?*, Washington, D.C., American Enterprise Institute for Public Policy Research, at 1-17.

⁷² See Bartel, A.P. and Thomas, L.G. (1985) "Direct and Indirect Effects of Regulation: A New Look at OSHA's Impact", *Journal of Law and Economics*, 28, 2, 1-25; Linneman, P.

Even though the literature has generated a series of reform ideas that would transfer policymaking power to institutions less susceptible to special interest pressure, none is particularly convincing.⁷³ The defects public choice identifies are endemic to politics and no one has, as of yet, convincingly argued that either Congress or the executive branch is better at fending off private interest demands. Moreover, the exceedingly dark view public choice takes of interest participation is unwarranted. Notwithstanding its predictions, legislative politics and administrative procedure are used by public interest groups as well as "special" ones.⁷⁴ Further, public choice theory rests on the assumption that the public welfare, what special interests tend to thwart, may be determined absent reference to politics by summing up individual preferences and utilities and arriving at an optimal policy outcome. Such preferences and utilities, however, are themselves the product of a political process in which interest groups are vital participants.⁷⁵ They represent their constituencies, which indeed may be broader than appearance would have it as in the case of firms and consumers interested in lower prices, strike unlikely coalitions with other, temporarily like-minded interest groups (e.g. firms that produce environmental technologies and the environmental lobby), and galvanize public opinion. Public life in a liberal democracy without interest groups is not only impossible but also undesirable.

C. Speed

1. The Critique

The slowness of American rulemaking is one of its main drawbacks. The four years it took the EPA to complete the BIF Rule (and that is not even counting the time used to draft the initial proposed rule) and the additional two years it took the court to hand down its decision are not at all uncommon. In this area of administrative law, the labels of choice are "ossification"⁷⁶ and "gridlock."⁷⁷

(1980) "The Effects of Consumer Safety Standards: The 1973 Mattress Flammability Standard", *Journal of Law and Economics*, 23, 2, 461-479.

⁷³ See Aranson, P.H., Gellhorn, E. and Robinson, G.O. (1983) "A Theory of Legislative Delegation", *Cornell Law Review*, 68, 1, 1-67. These authors argue that Congress should take responsibility for rulemaking because special interest deals would occur in the light of day and therefore legislators would be held publicly accountable. On the opposite end of the spectrum, Jerry Mashaw argues that administrators should retain rulemaking authority because they are responsible to the President and special interests wield less influence in the President's nationwide constituency. See Mashaw, *supra* note 32, at 147-155.

⁷⁴ See Schuck, *supra* note 20, at 574-576.

⁷⁵ See generally *id.* at 587-88. Schuck argues for a procedural conception of the public interest in which interest groups figure prominently.

⁷⁶ Verkuil, P.R. (1995) "Rulemaking Ossification--A Modest Proposal", *Administrative Law Review*, 47, 3, 453-459.

Fewer rules is not the only cost of slowness. To avoid rulemaking's cumbersome record-building requirements and tough judicial review, agencies sometimes resort to adjudicatory regulatory techniques such as product recalls.⁷⁸ Yet adjudication can be an inefficient form of agency action and can cause uncertainty for the regulated community, violating rule of law principles. Rather than fostering openness and participation in administration, therefore, a sluggish rulemaking process may actually cause a return to unaccountable and arbitrary agency action.

By common agreement, courts and judicial review must take some of the blame for the snail's pace at which rulemaking proceeds. Although the critical view has always been somewhat exaggerated and was probably truer in the 1970s than at present, it nonetheless captures the relationship between tough judicial review and agency process. In response to each legal challenge, courts require that administrators point to a part of the rulemaking record where they entertained the objection but marshaled scientific evidence and policy arguments against it. Rulemaking, therefore, has turned into a protracted deliberation before agencies in which regulators must carefully document and explain rules so that, when hauled into court, they can mount a successful defense. Agencies bear an especially high burden of explanation because of the unpredictable quality of so-called "hard look" judicial review. They cannot be certain of which issues will appear salient to the group of three non-expert judges who review the rule and therefore the paper trail must cover the entire world of possible issues and non-issues, large and small. Consequently, rulemaking has become a long process of comments, agency answers, second-round comments, second-round agency answers, legal challenge, and, if the agency failed to do a thorough job, a court judgment remanding the rule to the agency for further explanation and development of the evidentiary record, or, albeit rarely, a judgment vacating the rule and forcing the agency to start from scratch.

2. Proposed Reforms

How can American administrative law be changed to ensure control without gridlock? Much of the reform debate centers on reducing the role for judicial review. One option is to relax the standard of review employed by courts. Another, proposed by Richard Pierce, an administrative law scholar, is that the judicial branch get out of the business of arbitrary and capricious review altogether and, by way of compensation, that the legislature exercise a veto power over rules.⁷⁹ Lastly, Jerry Mashaw, the author of an influential case study on automobile regulation as well as a number of other works, argues that

⁷⁷ Mashaw, *supra* note 32, at 203.

⁷⁸ See Mashaw and Harfst, *supra* note 33, at 95-100, 161-163.

⁷⁹ See Pierce *supra* note 30.

the judicial burden can be lightened by changing the availability rather than the nature of review.⁸⁰ Because fines for non-compliance only start running once a rule comes into effect (a regulation that requires large capital investments necessarily includes some lead time) and courts will generally review rules prior to enforcement, a firm that challenges a rule will only incur the cost of legal fees. This and a series of other considerations induce firms to litigate rather than comply, even though their legal claims may not be particularly strong. Mashaw argues that if review is delayed until *after* rules come into effect, so that the choice to litigate carries with it the extra cost of non-compliance fines, litigants will be less ready to turn to courts.

D. The Future of Rulemaking

Notwithstanding the debate surrounding notice and comment, it will remain an important part of the American administrative state. If anything, regulatory reformers in Congress appear to be interested in legislating more, not less, intrusive judicial review.⁸¹ To a certain extent, the excesses of the American system and the reluctance to do anything about them is symptomatic of a political system with fragmented legislative power and pluralist interest representation. Congress does not write the Environmental Defense Fund, the Chemical Manufacturers of America, and the courts out of rulemaking because it seeks to retain a modicum of control in the face of the President's powerful position at the apex of the federal bureaucracy. Regulation at times can appear a thicket of special interest deals because a system of independent branches and shared powers is unable to wield a heavy hand in mediating interest group relations.⁸²

The system's flaws, however, are also a function of American attitudes towards experts and courts. Americans are, rightly or wrongly, highly skeptical of expertise.⁸³ By contrast, they are confident that courts can guarantee

⁸⁰ See Mashaw, *supra* note 32.

⁸¹ An amendment to the Administrative Procedure Act ("Bumpers Amendment") which would have introduced *de novo* judicial review of agency statutory interpretation, was proposed in 1979. S. 1477, 96th Cong., 1st Sess. § 503 (1979). A significantly revised text was later passed by the Senate but died in the House of Representatives. S. 1080, 97th Cong., 1st Sess. (1981); see Shapiro, S.A. (1996) "Symposium on the 50th Anniversary of the APA: A Delegation Theory of the APA", *Administrative Law Journal of the American University*, 10, 1, 89-109, at 103.

⁸² I do not wish to overemphasize the difference between special interest power in pluralist as opposed to corporatist polities. What an umbrella organization may tout as a consensus position, say, one that mediates between small and big business, may simply be a patchwork of special interests that comes at the expense of the group's welfare as a whole.

⁸³ See Wilson, *supra* note 18, at 295-312. This description of American attitudes toward expertise is, by necessity, overly general. For a quite different view of expertise, see, e.g.,

accountability in administration and promote the public welfare. True, in a democratic system of government, elected officials should make the policy decisions and unelected bureaucrats should carry them out. To understand the role of courts in American administrative law, however, this principal-agent relationship must be set against the larger principal-agent relationship that exists between the Constitution and all other government acts. In a familiar passage, Hamilton contrasts the Constitution, which he calls "the people themselves" with the legislature, a mere collection of "representatives of the people."⁸⁴ One is the "principal" the other the "deputy," one the "master" the other the "servant."⁸⁵ Hamilton therefore argues in favor of a judiciary separate from the legislative and executive branches that will be institutionally capable of defending the Constitution against the "fleeting passions of the people" that can be so powerful in electoral politics. And not simply one constitutional court, but both lower and higher, state and federal courts.

The part that courts play in rulemaking stems from this view of how government should be designed to foster the public good. Courts initially took on for themselves extensive powers of judicial review, Congress has continued to write statutes which contemplate discretionary agency action and strict judicial review, and academic commentators have continued to show faith in the ability of courts to review agency rules because of the place that courts occupy in the broader scheme of government. To be sure the Administrative Procedure Act is not the Constitution. Yet when a party comes to court and claims that a rule is arbitrary because it did not take into account elementary scientific principles or failed to respect the governing law, it is asking the court to undertake an inquiry similar to a constitutional challenge to a statute. Thus the court steps in as a co-equal branch of government, indeed perhaps in a stronger position than is normally the case because here it is not dealing with a government act passed by elected representatives but one that is the work of unelected bureaucrats. In a society where experts are distrusted and courts held in high regard it should come as no surprise that the public and courts play an important role in rulemaking.

Breyer, S. (1993) *Breaking the Vicious Circle*, Cambridge, Mass., Harvard University Press, at 59-68; Schuck, P.H. (1987) *Agent Orange on Trial*, Cambridge, Mass., Belknap Press, at 286-294.

⁸⁴ Hamilton, A. (1992) "The Federalist No. 78" in Hamilton, A., Madison, J., and Jay, J., *The Federalist or, the New Constitution*, London, Everyman's Library, 397-404, at 400.

⁸⁵ *Id.*

VI. The Possible Impact of Notice and Comment on Community Rulemaking

A. Administrative Procedure

If the Community were to adopt notice and comment, the public would receive far more information about rules before adoption and would have a right to participate in rulemaking. To take the example of the Community's hazardous waste legislation, identification and listing of hazardous waste is delegated to a regulatory committee *filet* procedure.⁸⁶ The provision delegating authority to the Commission and a comitology committee would also require the Commission to publish its proposed measure in the *Official Journal*, solicit comments, and perhaps hold a public hearing. Thus the Commission would have to take into account scientific evidence on, say, waste toxicity submitted by businesses, environmental protection groups, and other interested parties. This on top of the evidence and advice already solicited from the Commission's expert group in the area (the Waste Committee) and the regulatory committee.⁸⁷ The same would be the case for the Council should the regulatory committee issue an unfavorable opinion and the Council be called upon to decide the matter. As a result, the regulated community and Parliament would have notice of implementing rules well before they were adopted. And not only would they know that a rule was in progress but they would be informed of the different regulatory approaches being considered and have a right to participate in the debate.

B. *Locus Standi*

If American standing rules were adopted as part of notice and comment reform, more parties would have access to the Court of Justice to challenge implementing rules. Currently, few may directly challenge implementing rules. Article 173, the Treaty provision which confers jurisdiction upon the Court to review Community acts, gives member states, the Council, and the Commission automatic *locus standi*. Parliament, however, may only bring suit if it can claim that its powers have somehow been violated, for instance if a Community act was passed without respecting the role set down for Parliament in the enabling Treaty provision. For individuals to gain access to the Court, the Community act must be of "direct and individual concern." This has been interpreted

⁸⁶ Council Directive 91/689, 1991 O.J. (L 377) 20, art. 1.4.

⁸⁷ See Demmke, C. (1997) "The Europeanization of Civil Services and the Role of National Civil Servants in the Decision-Making Process" in Demmke, C. (ed.) *Managing European Environmental Policy: The Role of the Member States in the Policy Process*, Maastricht, EIPA, 3-22, at 7. Demmke lists the expert and comitology committees in the environmental sector.

narrowly by the Court as requiring that the act be intended to regulate a situation that specifically concerns the litigant.⁸⁸ Consequently, those affected by implementing rules will generally be denied *locus standi* because, by their very nature, rules are written to regulate entire industries and benefit the public-at-large. Instead, prospective litigants must wait for the rule to be enforced locally and then challenge enforcement in their domestic courts on the grounds that the Community rule is invalid, at which point the court may refer the matter to the Court of Justice and obtain a preliminary ruling on the issue under Article 177. Not only is this procedure long, but it is highly contingent on national *locus standi* law which in some member states precludes challenges from public interest groups and others not directly involved in rule enforcement.⁸⁹ To take the hazardous waste example again, more liberal *locus standi* rules would allow both waste producers and environmental groups access to the Court of Justice to challenge waste listings issued following the comitology procedure.

C. Judicial Review

Lastly, notice and comment would significantly change the nature of judicial review. Currently legal challenges to implementing rules come in three basic types. A litigant may oppose a rule on procedural grounds, arguing for instance that it was adopted without an adequate statement of reasons or that the Commission failed to submit the measure to the apposite comitology committee for an opinion. Second, a litigant may complain that the measure contravenes or rests upon a flawed interpretation of a Treaty or statutory term. Third, a challenge may be based upon the claim that the evidence or reasoning that led to the rule's adoption was flawed. The latter set of arguments can be framed in a variety of ways.⁹⁰ Most on point is the claim that the Community institution committed a "manifest error of appraisal" when assessing the data and policy considerations. Or the litigant may complain that the measure violates the principle of proportionality, a means-ends test that finds its origins in German

⁸⁸ For the Court's most recent statement on standing, see Case C-321/95 P, *Greenpeace v. Commission*, April 2, 1998, para. 28.

⁸⁹ The lack of uniform access of public interest litigants to national courts is widely recognized as problematic. See Rehinder, E. (1996) "*Locus Standi*, Community Law and the Case for Harmonization" in Hans Somsen (ed.) *Protecting the European Environment: Enforcing EC Environmental Law*, London, Blackstone Press, 151-166; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, 1998 O.J. (L 166) 51.

⁹⁰ See generally Cases C-157/96 and C-180/96, *The Queen v. Ministry of Agriculture, Fisheries and Food and United Kingdom v. Commission*, May 5, 1998. In this case the Court upheld a Commission emergency measure banning export of UK beef against challenges of lack of competence, misuse of powers, and breach of the principle of proportionality.

administrative law and may be invoked in any case involving a Community or member state act. In a recent restatement of the principle the Court explained:

[I]n order to establish whether a provision of Community law complies with the principle of proportionality, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it.⁹¹

The litigant would argue that a rule is technically flawed and therefore cannot solve the problem the legislator or administrator is attempting to address or is unduly burdensome, given the existence of other, less onerous policy options, and consequently is not proportionate to the stated objective of the rule.

Judicial review in rulemaking cases is narrow in scope.⁹² It is no great secret that the Court tends to be tough on national measures accused of violating the Treaties, Community legislation, or general principles of Community law and go easy on those issued by Community institutions.⁹³ Take the way that the principle of proportionality is applied. Because national laws run the risk of operating as barriers to trade, the Court tends to engage in an exhaustive inquiry, carefully weighing a measure's burden against its supposed aims and considering alternative, less cumbersome policy options. Community measures, which do not pose a threat to free trade, rarely run afoul of the proportionality principle.⁹⁴ As between a Community legislative and

⁹¹ Case C-233-94, *Germany v. Parliament and Council*, 1997 E.C.R. I-2405, para. 54.

⁹² See generally Joerges, C. (1996) *Scientific Expertise in Social Regulation and the European Court of Justice: Legal Frameworks for Denationalized Governance Structures*, EUI Florence, RSC Working Paper no. 96/10.

⁹³ See Dehousse, R. (1992) "The Legacy of Maastricht: Emerging Institutional Issues" in *Collected Courses of the Academy of European Law*, 3, 1, 181-239, at 212. Dehousse describes the Court's leniency towards Community measures.

⁹⁴ For instance, in *Criminal Proceedings v. Wurmser*, the Court found that a French law requiring importers to prove conformity of imported products with consumer protection rules would only be proportionate if it allowed importers to rely on means of proof normally available to them, e.g. certificates and attestations provided by the manufacturer as opposed to actual analysis of the product. Case 25/88, 1989 E.C.R. 1105. In *Südzucker Mannheim and Ochsenfurt AG and Hauptzollamt Mannheim*, by contrast, the Court upheld a Commission common sugar market regulation imposing an economic penalty on traders failing to produce a specific Community certificate. The Court reasoned that other certificates could not substitute for the Community one because of the excessive administrative work such alternative means of proof would cause for member state authorities. Case C-161/96, January 29, 1998. Similarly, in *Kieffer and Thill*, the Court upheld a Community regulation imposing certain information-collection obligations on firms involved in trading goods between the member states. The litigants claimed that such duties were burdensome and costly, especially for small and medium-sized enterprises, but the Court found the duties to be reasonable and held that the measure was a legitimate exercise of the Community legislature's discretionary powers. Case C-131/96, 1997 E.C.R. I-3629.

administrative measure, however, the Court does not draw much of a distinction even though one is passed pursuant to the Treaty and therefore undergoes the full legislative process and the other follows an abbreviated procedure. The failure to distinguish between legislation and administrative acts is tied to the idea that regardless of which Community institution issues a measure, it can be trusted to protect against national parochialism and make the right, pro-Community policy choice.⁹⁵

With notice and comment rulemaking, the Court would be called upon to enforce a wider array of procedural rights. Litigants could have the implementing rule annulled if the Commission failed to give adequate notice (remember *Horsehead Resource Development Co. v. Browner*) or did not give the public enough time to submit comments. Further, when conducting substantive review, the Court would be under more pressure to carefully consider the scientific and technical judgment calls made by the implementing body, for instance a claim that a type of waste was incorrectly listed as hazardous. Currently, without a public record of rulemaking proceedings, it cannot assess whether a decision was sound at the time it was made, and to the extent it wishes to engage in retrospective review, it must rely on the pleadings which are likely to contain unsubstantiated, ad hoc policy arguments. An administrative record of the type compiled in *Horsehead Resource Development Co. v. Browner* would give the parties stronger grounds for challenging scientific decisions and put the Court in a better position to evaluate such decisions. The litigants would be fully informed as to the policy calls made by the Commission and would already have had one shot, before the Commission, to develop their positions. They would only need to fine tune their arguments for the Court. The Court, with a record in hand, would know what the Commission's reasons were at the time it formulated the rule and will not be swayed by ex post, ad hoc policy arguments, arguments that tend to be poorly substantiated and miss the point, since the issue is not whether the Community administrator acted reasonably in retrospect but at the time the rule was adopted.

D. *Limits to the Possible Reach of Notice and Comment in the Community*

Two important qualifications must be made to the possible reach of notice and comment in the Community and any impact it might have on administration, positive or negative. First, Community administration in no way has powers

⁹⁵ This being said, the Court in one case showed itself to be more demanding when assessing whether the Community had successfully cleared all of the procedural hurdles for adoption of an administrative act. See *Angelopharm v. Freie und Hansestadt Hamburg*, Case C-212/91, 1994 E.C.R. I-171, para. 33-38.

comparable to American agencies. Community legislation does not contain the far-reaching agency mandates that are characteristic of American statutes.⁹⁶ For instance, hazardous waste legislation in the Community hammers out regulatory detail (categories and properties of hazardous waste) that in the United States is left to the EPA's discretion, a consequence of member states' reluctance to relinquish too much power in favor of the Commission.⁹⁷ Furthermore, national governments shoulder the bulk of the responsibility for developing and enforcing regulation. To return to the hazardous waste example, rules on the precautions to be taken by hazardous waste treatment facilities are issued by member state authorities in the Community and by the EPA in the United States.⁹⁸ Thus if comitology were reformed to include notice and comment, interest groups and the Court would still participate far less than in the U.S. for the simple reason that there is relatively little Community rulemaking.

Second, even though member states administer a *Community* regulatory scheme, their role is far more independent than that of American states that administer federal programs. To take the example of waste regulation again, states may develop and administer their own hazardous waste programs but they must first be authorized by the EPA (which reviews the program to ensure that it is at least as environmentally protective as the federal program) and they are obliged to proceed through notice and comment when they draw up the programs.⁹⁹ Under the Community scheme, member states are obliged to inform the Commission of their national hazardous waste programs but need not obtain authorization from the Commission nor follow any particular procedure in developing their waste programs.¹⁰⁰ (It is important to bear in mind that the Commission can enter into negotiations with and ultimately sue member states if it believes that national programs fail to guarantee Community standards but this is an extraordinary measure unlike program authorization.) Not only does this mean that the Commission is poorly placed to ensure uniform implementation of hazardous waste legislation but also that it cannot require national governments to allow for public participation in rulemaking. And it is difficult to picture stricter Commission supervision because of the

⁹⁶ Many American regulatory statutes are more detailed than the RCRA and therefore the balance between legislative and agency influence is more decidedly tipped toward the legislature. On the whole, however, American administrative agencies dispose of greater discretion in rulemaking than the Commission and comitology committees.

⁹⁷ Compare Council Directive 91/689, 1991 O.J. (L 377) 20, annexes I II, and III with the Resource Conservation and Recovery Act, 42 U.S.C. § 6921 (1994).

⁹⁸ Compare Council Directive 91/156, 1991 O.J. (L 78) 32, art. 3, 4, 5, 6, 7 and Council Directive 91/689, 1991 O.J. (L 377) 20, art. 2.2, art. 6 with 42 U.S.C. § 6924 (1994).

⁹⁹ 42 U.S.C. § 6926 (1994).

¹⁰⁰ Council Directive 91/689, 1991 O.J. (L 377) 20, art. 6.

various constitutional and political obstacles. In sum, due to narrow delegations of power and member state autonomy in the Community's federal system, the import of notice and comment reform would be limited: the rulemaking activity to which it would apply, *administration communautaire directe* is narrow in scope and the Community rulemaking to which it would not apply, implementation by national governments, is extensive.

VII. A Proposal for Notice and Comment in the Community

A. *The Case for a Modified Version of Notice and Comment*

Notice and comment would improve public accountability and fairness in Community rulemaking. First, the combination of information, interest participation, and judicial review would guarantee greater accountability to Parliament, the lawmaking agent currently without control instruments, as well as the Council, which notwithstanding its comitology veto has very little effective power over the tightly knit network of national experts and Commission civil servants. Indeed notice and comment is more promising than the reform proposals currently on the table because it would generate far more information about Community rulemaking and permit more constant political oversight. Under the Commission's proposal, Parliament would receive agendas for comitology committee meetings, draft measures submitted to the committees, and the results of voting.¹⁰¹ The underlying scientific evidence and policy analysis, however, would not necessarily be communicated to Parliament. And even if Parliament were to receive all of the information used by the Commission and committees in rulemaking, it would not have the staff and resources necessary to review it for objectionable policy choices and questionable scientific rationales. In notice and comment, politicians can count on interest groups and courts to force information from agencies, carefully scrutinize regulatory choices, and bring controversial rules to their attention. The Commission and Parliament proposals also include a formal role for Parliament in rulemaking. According to the Commission proposal, upon a negative comitology committee opinion (or if no opinion is delivered) the proposed rule would no longer be sent to the Council but would be submitted to the legislative process, thus bringing in both Parliament and the Council.¹⁰² Parliament's proposal would allow Parliament (and the Council) to veto all proposed rules, in response to which the Commission could either withdraw the

¹⁰¹ Proposal for a Council Decision laying down the procedures for the exercise of implementing powers conferred on the Commission, 24 June 1998, art. 7, COM (1998) 380 final.

¹⁰² *Id.* at art. 5.

rule, amend it, or submit it to the full legislative process.¹⁰³ In both, involvement of the Parliament or the Council would be sporadic, in the first because comitology committees very rarely issue negative opinions and in the second because a majority vote against a proposed rule is a time-consuming step that would only occur in the event of highly controversial policy issues that politicians feel they cannot ignore. In notice and comment, by contrast, interest groups and courts serve as proxies for lawmakers in each and every rulemaking proceeding.

The second benefit of notice and comment would be interest group participation in rulemaking, something which the current reform proposals overlook entirely. In the Community's pluralist order where multiple interest groups compete to influence the legislative process, notice and comment would ensure that the wide spectrum of interests involved in policy formulation would also have a say in policy implementation. In other words, the Commission and national experts (and sometimes the Council when charged with passing implementing rules) would no longer have the power to shut out interests downstream in the policymaking process.

Moderation, however, should be the cornerstone of any eventual reform. Along with notice and comment comes a slower, more cumbersome rulemaking process. This flaw is to a certain extent unavoidable in a system with multiple lawmakers but Americans tolerate more than the inevitable because of their distrust of experts and respect for courts. Although it is even more difficult to generalize about "European" beliefs than American ones, experts appear to command more prestige in Europe. Regulators unfettered by politicians is perceived by many as the best means of enforcing antitrust law, deregulating telecommunications, protecting privacy, and achieving a host of other objectives. As part of the market liberalization efforts of the past two decades, much of which has been prompted by the Community, a host of agencies that escape the normal chain of command from party and prime minister to cabinet, minister, and bureaucrat have been set up in the member states.¹⁰⁴ Several academic works on Community government argue that regulation should be left almost entirely to the experts.¹⁰⁵ In light of these views, any eventual reform should be careful to retain a greater role for expertise than is the case in the United States.

¹⁰³ Resolution on the modification of the procedures for the exercise of implementing powers conferred on the Commission - 'commitology' (Council Decision of 13 July 1987), 16 Sept. 1998, art. 2(b).

¹⁰⁴ See, e.g., Cassese, S. (1995) *La nuova costituzione economica*, Rome, Laterza.

¹⁰⁵ Majone, *supra* note 3; Joerges, C. and Neyer, J. (1997) "From Intergovernmental Bargaining to Deliberative Political Processes", *European Law Journal* 3, 3, 273-299.

Furthermore, courts in Europe are not perceived and accepted as quasi-political, policymaking institutions as in the United States. In the member states, judges other than constitutional judges are thought to be skilled professionals who scientifically apply codes and statutes and, to the extent they must engage in gap-filling, do so using accepted canons of construction that leave little room for discretion and value judgments.¹⁰⁶ The European Court of Justice, the only directly relevant court for the purpose of our discussion because of its jurisdiction over Community acts, is recognized as a powerful constitutional court. The Court has its limits as policymaker though. Its role rests on enforcement of the Treaties and Community law against non-complying member states and not so much against the Community institutions themselves. It is therefore unclear whether tough review by the Court of Justice of Community implementing measures of the sort that it applies to member state laws would be considered legitimate. In the absence of a strong tradition of quasi-political judicial action either in the member states or in the Community, institutional reform must take pains to carefully define a restrained role for courts. Otherwise the Community bureaucracy might come to be perceived as accountable to fifteen unelected judges in Luxembourg, not the European public.

Another disadvantage of American rulemaking, special interest influence, might also be a cost of reform. A secretive, closed process like the one currently in place in the Community allows a certain degree of freedom from interest group pressure for the simple reason that lobbying groups do not know when their national representatives act or fail to act in their interest. Although, for reasons already mentioned, the public choice critique is not particularly forceful, in Brussels special interests, principally multinational corporations, appear to overwhelm interest groups with more diffuse constituencies such as small business associations and consumers.¹⁰⁷ Until these imbalances in interest representation are remedied, a more modest version of notice and comment is in order. The combination of information, formal interest participation, and courts should be tempered to avoid excessive manipulation of the system by a few small but powerful interests.

¹⁰⁶ See Brewer-Carías, A.R. (1989) *Judicial Review in Comparative Law*, Cambridge, Cambridge University Press, at 168; Landfried, C. (ed.) (1988) *Constitutional Review and Legislation*, Baden-Baden, Nomos; Cappelletti, M. (1971) *Judicial Review in the Contemporary World*, Indianapolis, Bobbs-Merrill, at 45-68.

¹⁰⁷ See Cawson, A. (1997) "Big Firms as Political Actors: Corporate Power and the Governance of the European Consumer Electronics Industry", in Wallace, H. and Young, A. R. (eds.) *Participation and Policy-Making in the European Union*, Oxford, Clarendon Press, 185-205; Young, A. R. (1997) "Consumption Without Representation? Consumer in the Single Market", in Wallace, H. and Young, A. R. (eds.) *Participation and Policy-Making in the European Union*, Oxford, Clarendon Press, 206-234.

B. *The Reform Proposal*

Community rulemaking that would combine the basic elements of the American system with some of the reform ideas advanced to curb litigation and special interest excesses would take the following form. The Commission would issue notice of a proposed implementing rule in the *Official Journal*, solicit comments, and where appropriate hold a public meeting. At this first stage, the Commission might very well be required to disclose opinions expressed by national representatives on the comitology committee (it regularly consults the committees before submitting proposals for a formal vote) to justify its policy choices. It would then issue a revised proposal, explaining why it did or did not choose to adopt the suggestions made by the participating individuals and organizations. Although the scientific studies and other evidence relied upon by the Commission could not, for obvious practical reasons, be published along with the proposed rule, they would be made available to members of the public through other means. The measure would then be submitted to the comitology committee for its opinion. If positive, the final implementing rule would be published in the *Official Journal* and would contain a statement of basis and purpose essentially replicating the explanation and justification set forth in the Commission's initial and revised proposals. If the opinion were negative (or in the case of a regulatory committee, not forthcoming), the Commission proposal would be sent on to the Council, which would be obliged to give a detailed statement of reasons only if it decided to modify the Commission measure. Again, the final implementing rule published in the *Official Journal* would contain a statement of basis and purpose reproducing either the Commission's or the Council's rationale.

Individuals or firms would be able to challenge implementing rules but only after they were enforced by national authorities. Domestic courts would ensure that requests for preliminary references were well-founded by examining the statement of basis and purpose published with the final rule or requesting that parts of the record be sent from Brussels. The Court would review statutory interpretation claims based upon text and canons of interpretation and fact-based claims for manifest error of appraisal, a deferential standard of review with considerable Court precedent. These old judicial review tools, however, would have more bite because of the extensive record at the Court's disposal. The parties and the rulemaking institution would be limited to the claims and evidence already advanced in the rulemaking proceeding. Lastly, the Court would either uphold the implementing rule, declare invalid the measure, or, in what would constitute a novel remedial power, remand the measure to the responsible Community institution for further explanation or development of the factual record.

C. Dissecting the Proposal

This rulemaking proposal contains three basic elements: administrative procedure, *locus standi* rules, and review in the Court of Justice. The administrative procedure component is a straightforward application of American rulemaking to comitology. This part of the reform would require a Community legislative act, most likely a decision.

The part of the proposal concerning *locus standi* rules departs fairly radically from the American system. Here I incorporate Mashaw's suggestion on limiting the availability of review. Post-enforcement review would discourage firms from turning to courts in the absence of strong claims against the Community bureaucrat, limiting judicial interference with bureaucratic expertise. To accomplish this part of the reform nothing in the current system of *locus standi* and preliminary references would have to change. As explained earlier, Community implementing rules can only be challenged by individuals and firms through national court systems. Although national *locus standi* rules vary tremendously, a firm must generally wait until sued by its member state for non-compliance and then defend on the grounds that the Community act was illegal, requesting the domestic court to refer the question to the Court of Justice. Leaving *locus standi* as is would not only reduce incentives to resort to litigation but might also ameliorate the current imbalance in Community interest representation. National courts would serve as point of access to the judicial review component of rulemaking and therefore interest groups would not need to be well-organized in Brussels with the resources to employ expensive Brussels lawyers but could rely on local counsel in their national courts and even in the European Court.¹⁰⁸

Undoubtedly, there are drawbacks to preliminary references. The most serious is that groups not called upon to comply with rules but that nevertheless suffer their consequences might be denied access to national courts. Recently, *locus standi* rules have been harmonized for public interest groups that seek to enforce Community consumer protection legislation, an innovation that holds promise for equity in rulemaking review.¹⁰⁹ A second problem with access to the Court through the preliminary reference system is the legal uncertainty that would very likely result. Unlike direct review, litigants are not bound by strict time limits when they challenge Community acts through preliminary

¹⁰⁸ In a system that limits parties to the record developed before the agency, the success of such a challenge rests on the comments submitted during the rulemaking proceeding and therefore interests, to stand a chance in court, would nevertheless need the resources to track Community proposed rules, analyze them, and submit comments.

¹⁰⁹ See Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, 1998 O.J. (L 166) 51.

references. They must raise the issue during national enforcement proceedings, which in some countries will be initiated much later than in others, thus creating the danger that a Court decision declaring an implementing rule illegal will be handed down after widespread application in other member states. One possible solution would be to write Community implementing rules to include a time limit applicable to legal challenges through the preliminary reference system. This would put pressure on groups that wish to exercise this legal right to coordinate Community-wide their opposition and litigate the issue when the rule is first enforced at national level, wherever that happens to be. Notwithstanding all the possible flaws, rulemaking review through national courts is still the best course because it would reduce the risk of unwieldy, cumbersome litigation of the sort that frustrates American administrative action. And if access to the Court proves unsatisfactory, Community *locus standi* rules can always be liberalized, after the basics of a notice and comment system are already in place.

The last element of my reform proposal, judicial review, would involve a mix of old and new. First is the standard of review issue. The Court would analyze claims that an implementing rule rests upon a flawed interpretation of the Treaties or legislation (known as basic measures) as it always has, using text and canons of interpretation. It would also entertain more fact-based, policy-oriented challenges to implementing rules. In including a role for the Court on such issues, I reject Pierce's suggestion that arbitrary and capricious review be eliminated. His proposal would cut down too drastically on the benefits of notice and comment: a rulemaking process without substantive judicial review risks being one in which agencies do not explain their decisions in terms comprehensible to the general public and interest group comments go unread in agency filing cabinets.¹¹⁰ The standard of review for fact-based claims, however, should be written (in the Community act setting down notice and comment) to suggest a deferential attitude toward Commission policy calls. This standard could be "manifest error of appraisal," one of the headings under which such challenges may be brought currently and which suggests unintrusive judicial review.

The second issue that arises is a procedural one concerning the arguments the parties and rulemaking institution would be permitted to raise. In American rulemaking review, under what is known as the Chenery rule,¹¹¹ the parties and agency are normally only permitted to raise arguments and evidentiary claims that were already raised in the administrative proceeding.

¹¹⁰ But see Dehousse, *supra* note 11, at 18-22. Dehousse argues that Community notice and comment procedure with Court review exclusively for violation of procedural rights would create public debate and openness.

¹¹¹ SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

This makes the process more efficient by requiring litigants to express their views at the first opportunity possible and therefore, with any luck, settling the dispute without any need for a court. The Chenery rule also ensures that the agency, the institutional actor responsible for rulemaking and best-suited to assess the scientific evidence and make the policy choices, has had an opportunity to consider all of the parties' objections and suggestions. Such a principle in the Community context would improve the quality of the debate before the Commission as well as lighten the Court's caseload.

The last issue that crops up in judicial review is remedies. The Court currently may afford only one type of remedy if it finds an implementing rule illegal in a preliminary reference proceeding: it may declare the rule or selected parts of the rule invalid. My proposal would give it the alternative, again taken from American administrative law, of sending the implementing rule back to the responsible Community institution for further explanation or development of the evidentiary record. This is a question of expediency and good judicial practice more than anything else. A remand is far less time-consuming and disruptive for the agency than a judgment striking the rule and forcing the agency to start the proceeding from scratch. Ironically, this might be the most radical feature of my proposal, for the Treaty does not contemplate this form of judicial remedy and therefore might require an amendment.

VIII. Conclusion

The complex and constantly changing nature of Community government can sometimes obscure the basic issues of institutional design that must be settled. In the sphere of administrative action those design problems, tied to the Community's constitutional structure, are unmistakable. First, the public institutions charged under the Treaties with lawmaking, most notably Parliament and to a lesser extent the Council, lack the devices needed to ensure that the administration executes their policy choices as intended. Second, the full constellation of interests that influence policy formulation are not guaranteed a voice in policy implementation. The improvements that reform would bring are also plainly visible. First, by generating copious information and enlisting interest groups and courts in the accountability endeavor, notice and comment would put Parliament and the Council in a better position to monitor and control Community rulemaking. Second, the formal procedure for public participation in rulemaking would carve out a place for interests that had taken part in the pluralist lawmaking process, not entirely automatic in a system where only one of three lawmakers, i.e. the Commission, shoulders most of the responsibility for rulemaking. Thus all the advantages that interest groups bring to administrative action--fairness, information, public debate, and compliance--would be assured. And the drawbacks of reform, that is stymied administrative

action and special interest capture, can be contained by tinkering with the place courts occupy in the rulemaking system. Even though improved democratic accountability and interest participation come at a price they are worth it.



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