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## THE SUBSTANCE OF RULES AND THE REASONS FOR RULEMAKING

**W**e have known for decades that smoking is detrimental to human health and that nicotine, a substance contained in tobacco, is highly addictive. Government actions to combat this threat have employed various means to prevent people, particularly the young, from acquiring the habit in the first place. In fact, the issue of smoking provided the platform for a seminal case study of rulemaking, the topic of this book. Federal and state laws and regulations now prohibit the sale of tobacco products to minors, and labeling requirements make the dangers plain to all consumers. These serial actions that have involved all branches and levels of government have done virtually everything short of outright prohibition to make the consumption of nicotine by smoking as expensive, inconvenient, and unattractive as possible.

But, as in so many areas where private behavior and public interest compel government action, the evolution of technology, economics, and behavior presents new challenges. An alternative to cigarettes and other tobacco products emerged in the form of a new technique that delivers nicotine by inhaling it from an “e-cigarette” or some other form of battery-powered vaporizer. First sold in 2004, these alternatives to smoking became immediately popular and were until recently largely unregulated in the United States. The vaping products take a variety of forms, but a general public health concern about the rapid growth in use of these devices, the long-term health effects of which have not been extensively studied, led the Food and Drug Administration (FDA) to act. In 2016, invoking authorities they found in several acts of Congress, officials at the FDA issued a rule hundreds of pages long placing restrictions on new vaping products entering the market, outlining requirements that retail establishments must meet to sell them, and prohibiting sales to persons under the age of 18.<sup>1</sup> Under consideration for some time, when finally announced, the new rules prompted strong reactions.

Noting the change in technology, the secretary of Health and Human Services stated, “We’ve agreed for many years that nicotine does not belong in the hands of children. . . . Progress has been made but the context has changed so we need to act.” The action by the FDA was welcomed by some public health groups, including the Campaign for Tobacco-Free Kids. But views and positions on the health effects of vaping and the wisdom and value of the new rule were anything but unanimous.

Referring to the relative safety of vaping compared with smoking, the head of the American Vaping Association was quoted as stating, “This is going to be a grim day in the history of tobacco harm reduction.” Others voiced concerns that the requirements for licensing would be so onerous as to force thousands of small businesses to close and would leave the industry to large tobacco companies already quite active in the market. Critics of the action noted the need for congressional action, ostensibly to blunt the effects of the FDA’s action, and, perhaps not surprisingly, others mentioned that lawsuits to challenge the rule were likely.<sup>2</sup> The former course of action, an act of Congress, held little promise of success with President Obama and his certain veto awaiting any legislation that eliminated or weakened the regulation. An appeal to the courts, however, was an entirely different matter. As many as five different challenges to the rule were filed in various federal courts, questioning various elements of the FDA’s action. As litigation does, these cases created at least some uncertainty about the fate of the rule when scrutinized from so many angles by a varied group of judges. But as these cases began their crawl through complex judicial proceedings, a most remarkable event changed the political and policy landscapes, altering the calculus for both the opponents and supporters of the vaping rule.

The election of Donald Trump as president of the United States sent seismic shocks across our political and policy systems. With him came an agenda with deregulation as its cornerstone and a vision of a nation with 75 percent fewer regulations burdening the American economy. We will explore in much greater detail how he has pursued that agenda later in the book, but because rulemaking is, in effect, the beating heart of regulation, it is reasonable to expect that the new vaping regulations would be a prime target. Indeed, it appears that Trump’s campaign promises have already had an impact on the vaping rule within the first year of his administration. Almost immediately after President Trump’s inauguration, an emboldened opposition turned to Congress for help, and the legislative branch responded. The House of Representatives passed a bill that effectively prohibited the FDA from deeming that vaping products were within the agency’s regulatory authority. At this writing, the legislation has not been endorsed by the Senate and sent to the president for his signature. While opponents did not achieve the complete victory they sought, the dynamics set in motion by the election did bring relief. In late July, the Trump-appointed commissioner of the FDA announced a delay in the implementation of key elements of the vaping rule as part of a sweeping new effort to consider a fresh, comprehensive approach to the regulation of nicotine and aspects he acknowledged to be a health crisis attributable to smoking.

This recent example of governmental intervention highlights many of the dimensions of the instrument of law and policy that is the subject of this book. To deal with an important matter involving multiple issues and affecting a large and diverse group of people, a government agency, in this case the FDA, employs

rulemaking to establish a new set of standards that both compel and prohibit actions. The rule that emerged from the FDA is based on more fundamental authorities found in statutes Congress enacted but that require agency interpretation in order to apply to products and behavior that were not contemplated by the legislative branch when these laws were adopted. Powerful interests arrayed around the issue of vaping and attempted, with varying degrees of success, to influence the rule that was ultimately produced. Winners and losers emerged, and the latter promised to use whatever means available to approach other branches or offices of government to repair the damage they believed was incorrectly or unnecessarily imposed on them.

The opponents were good to their word and approached the Congress. Congress took action but as yet has not completed it. The president, by appointing a new head of the FDA whose approach to policy issues presumably reflects the priorities of the administration, took action that effectively suspends key elements of the regulation with the promise of a new, wider approach that may be friendlier to the vaping industry. The irony here is that the new commissioner seeks to address the possible shortcomings in the existing rule with—you guessed it—yet another rule.

In short, the vaping rule, as it has come to be known, is both a microcosm of our current political and policy systems and one among thousands of examples of the degree to which we as a democratic society have come to rely on rulemaking as the crucible for the making of law and policy.

Throughout our history, in crisis and in the normal course of the public's business, Congress deferred to the expertise, management, and administrative capabilities of an agency to carry out what they, as elected representatives, perceived to be the will of the people.

Rulemaking has been used in this case, and countless others, because as an instrument of government it is unmatched in its potential for speed, specificity, quality, and legitimacy. Rulemaking is a ubiquitous presence in virtually all government programs. For a variety of reasons, Congress is unable or unwilling to write and the president to sign laws specific enough to be implemented by government agencies and complied with by private citizens. The crucial intermediate process of rulemaking stands between the enactment of a law by Congress and the president and the realization of the goals both Congress and the people it represents seek to achieve by that law. Increasingly, rulemaking defines the substance of public programs. It determines, to a very large extent, the specific legal obligations we bear as a society. Rulemaking gives precise form to the benefits we enjoy under a wide range of statutes. In the process, it fixes the actual costs we incur in meeting the ambitious objectives of our many public programs.

Rulemaking is important for many reasons. The best place to begin a discussion of those reasons is with a definition of rulemaking and an explanation of why it is crucial to our system of government.

## THE DEFINITION OF RULEMAKING

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Colin Diver, former president of Reed College and former dean of the University of Pennsylvania Law School, and one of the most thoughtful observers of rules and rulemaking, defined the term *rule* in a paraphrase of the great jurist Oliver Wendell

Holmes: A “rule is the skin of a living policy . . . it hardens an inchoate normative judgment into the frozen form of words. . . . Its issuance marks the transformation of policy from the private wish to public expectation. . . . The framing of a rule is the climactic act of the policy making process.”<sup>3</sup> This definition underscores the pivotal role that rules play in our system of government, but more light must be shed on their key characteristics.

More than sixty years after its enactment into law, the Administrative Procedure Act of 1946 (referred to henceforth as the APA) still contains the best definition of *rule*. Congress wrote the act to bring regularity and predictability to the decision-making processes of government agencies, which by the mid-1940s were having a profound influence on life in this country. Rules and rulemaking were already important parts of the administrative process in 1946. Both, however, required careful definition so that the procedural requirements established in the act would be applied to the types of actions Congress intended to affect.

The APA states, “Rule means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”<sup>4</sup> At first reading this statement does not appear to reveal much. On closer examination, however, it surrenders several elements crucial to understanding contemporary rulemaking. Not the first element mentioned but a good place to start is a single word—*agency*—because it identifies the source of rules.

## The Source of Rules: Agencies

We learn first from this definition that rules do not come from the major institutions created by the Constitution. They are not products of Congress or some other legislature. Rules are by-products of the deliberations and votes of our elected representatives, but they are not themselves legislation. Congress does have its own institutional rules, but they apply only to its members and committees. Under the APA definition, rules do not originate with the president or some other chief executive. As we will see, the actions of the president of the United States and chief executives at the various levels of government have a profound effect on the rulemaking process. These officials employ executive orders and directives in the course of their management responsibilities, but rarely, if ever, do they write rules of the type considered in this book. The importance of rulemaking in policymaking belies the clear intent of the Founders that the legislative power of the national government will be vested in the Congress. Very recent scholarship argues that the long-standing principle that this legislative power cannot be delegated is simply a “fiction.” Reinforcing the earlier analysis of Diver, Professor Kathryn Watts notes, “the premise . . . prohibiting the delegation of legislative power has little connection to the real world. . . . Rules create legally binding norms and carry the force of law just as statutes do.”<sup>5</sup> The implications of this apparent contradiction of what some would argue is the most important principle of governance in the Constitution will be discussed in several sections that follow.

In fact, President Obama received substantial criticism from those who believe he routinely abused the use of such instruments of executive power when he should

have sought a legislative solution. However, rarely do chief executives or their direct staff write the types of rules considered in this book.<sup>6</sup>

Various and sundry courts may have reason to consider rules. Their actions may result in rules being changed or eliminated. But judges do not write rules in the first instance either, except, like Congress, to establish procedures for their colleagues and the operation of the courts over which they preside.

Rules are produced by bureaucratic institutions entrusted with the implementation, management, and administration of our law and public policy. Bureaucracies are inferior in status to the constitutional branches of government—Congress, the president, and the judiciary. Yet the authority of these agencies is derived and patterned after and drawn from the three main branches. In one important respect, however, agencies are the equal of these institutions. The rules issued by departments, agencies, or commissions are law; they carry weight comparable with congressional legislation, presidential executive orders, and judicial decisions. An important and controversial feature of our system of government is that bureaucratic institutions are vested with all three government powers established in the Constitution. Through a device called delegation of authority, government agencies perform legislative, executive, and judicial functions. Rulemaking occurs when agencies use the legislative authority granted them by Congress.

It is significant that agencies are the sources of rules, because it means that rulemaking is subjected to the external and internal influences that have been found to affect decision making in our public bureaucracies. Agencies behave differently from the constitutional branches of government. Their decisions cannot be explained simply by reference to the admittedly strong pressures they continually feel from Congress, the White House, the courts, interest groups, and the public at large. As one group of scholars put it, “Public agencies are major political actors in all phases of the policy process.”<sup>7</sup>

The organization, division of labor, culture, professional orientation, and work routines of bureaucracies affect the way they make decisions. So too do the motives of individual bureaucrats. These themes will be developed further in the book’s final chapter. We must expect the law and policy embodied in rules written by agencies to be different from what would be developed by Congress, the president, or the courts. So the very source of rules makes them immediately distinctive from other instruments of law and public policy.

*Agency* can mean any one of a number of organizational arrangements used to carry out law and policy. Public bureaucracies have many names. There are departments, such as the Department of Transportation; commissions, such as the Federal Trade Commission (FTC); administrations, such as the Federal Aviation Administration (FAA); and agencies, such as the Environmental Protection Agency (EPA). However organized or named, these bodies issue rules using a rulemaking process to carry out statutory authority provided them by Congress.

## The Subject Matter of Rules: Law and Policy

Having specifically identified the source of rules, the APA definition, interestingly, does not refer to subject matter other than “law” and “policy.” In this respect, the

definition could not be written more broadly. No area of public policy is excluded. The drafters of the APA did not intend this as an invitation or authorization to engage in rulemaking in any area that a given agency found interesting or attractive. On the contrary, authority to issue rules can derive only from the statutes that establish the mission of agencies and set their goals and objectives. The APA definition simply acknowledges that rules can be developed in any area in which Congress adopts a valid statute that is signed by the president.<sup>8</sup> Our experience since the time this definition was framed makes it plain that the decision to put no substantive limits on the potential reach of rules was wise. Rules covered a large range of topics in 1946; in the early twenty-first century, the scope is virtually limitless.

### The Range of Influence of Rules over Law and Policy: Implement, Interpret, Prescribe

The definition clearly establishes an expansive relationship between rules, law, and public policy. The terms *implement*, *interpret*, and *prescribe* describe the fullest range of influence that a rule could have. Rules merely *implement* when law or policy has been fully developed in a statute enacted by Congress, an executive order of the president, or a judicial decision. Hence, rules need provide no additional substantive elaboration. In these cases rules give instructions to administering officials and the public in the form of procedures but add nothing else of substance to the direction already provided by Congress.

Rules *interpret* when law and policy are well established but confront unanticipated or changing circumstances. Statutory terms, clear and precise when written, may require adaptation when new business practices, technologies, or damaging effects appear. Legislation implemented by the FTC, for example, seeks to eliminate improper restraints on competition. This creates tasks in the present time that are very different from those created in the era of the robber barons and the trusts. Similarly, the intent of many environmental statutes to protect air and water quality or limit harmful exposures to toxic chemicals can only be realized if the EPA's rulemaking effort keeps pace with innovations that may threaten the health and well-being of the public. Rapid financial innovation resulting in exotic investment and hedging products such as collateralized debt obligations challenged the reach and grasp of regulators, contributing in part to the financial crisis of 2008, the reverberations from which are still being felt a decade later.

Rules *prescribe* when Congress establishes the goals of law or policy in statutes but provides few details as to how they are to be put into operation or how they are actually to be achieved. The Occupational Safety and Health Act stated its ambitious goals in this way: "to assure so far as possible every working man and woman in the Nation safe and healthy work conditions."<sup>9</sup> Although it provided some additional guidance, it left to the administering agency, the Occupational Safety and Health Administration (OSHA), the job of defining through rules key legal terms such as *so far as possible*, *safe*, and *healthy*. And once these terms were given an authoritative, legal meaning, the huge task of finding ways health and safety could be protected was left to the agency as well. Similarly, it was not uncommon for statutes dealing

with economic regulation to set agencies off in search of “the public interest” as the criterion for their actions.<sup>10</sup> The APA definition allows agency rulemaking to fill whatever vacuum has been left by Congress, the president, and the courts in the formation of public policy or law. The greater the demands on these institutions, the more likely that the role of rules will expand.

## The Range of Circumstances Affected by Rules: General and Particular Applicability

Rules affect persons or activities in the widest possible range of circumstances. The phrase “general or particular applicability” in the APA allows rules to range from those that affect large segments of the population and economy to those that produce changes in a single individual, group, firm, or government unit. Some may find this element of the definition confusing, even troubling. We tend to think of legislative action as being concerned with general issues and problems that affect groups of people and activities. The judicial process is generally thought to be better designed for dealing with individual circumstances.<sup>11</sup>

So, should not a reduction in number of activities or persons affected by a government action cause an agency to shift from a quasi-legislative process to a quasi-judicial mode of decision making? Should not an agency use other delegated authority to act in a judicial capacity? The short answer is that although the number of persons affected might influence the specific procedures used to make a decision, this characteristic alone does not determine whether an action that is contemplated is best classified as a rule. The underlying purpose of the action is a key element in this regard, and it is addressed directly in the APA definition.

## The Importance of Future Effect

Rules, like legislation, attempt to structure the future. By creating new conditions, eliminating existing ones, or preventing others from coming into being, rules implement legislation that seeks to improve the quality of life. The term *future effect* is thus a crucial element in the definition of rules because it allows a clear contrast to situations in which agencies issue decisions, acting in their judicial capacity.<sup>12</sup>

Agencies are often concerned with determining the legal implications of current or past events and conditions. This occurs when an individual challenges an adverse regulatory decision, such as a denial of his or her petition for a benefit provided by some government program, or applies for a license. In these instances the government is being asked to issue an *order*, the term used when agencies are acting in a judicial capacity. An order applies existing rules to past or existing circumstances. Although an order may have a future effect, such as granting benefits to an individual or permission to operate a particular type of business, its primary purpose is not the creation of policy or law to establish new conditions. Again, although the type of *procedures* an agency uses to issue rules may at times resemble those used by courts, the *purpose* of rules is clearly distinct from that of other forms of administrative actions.

The key features of rules, then, are that they originate in agencies, articulate law and policy limited only by authorizing legislation, and have either a broad or a narrow scope but are always concerned with shaping future conditions. This tells us what rules are. Now we must examine the growth of rulemaking through time to determine why it has come to play so central a role in our system of government.

## THE HISTORY OF RULEMAKING

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Rulemaking is a direct consequence of the demands the American people make on government. By persuading elected officials to improve health care, clean the environment, or protect them from deceptive or dangerous business practices, the American people inexorably set in motion the rulemaking process. But it would be hard to agree that there is enthusiastic, explicit, or even conscious public support for rulemaking. The support for rulemaking is implicit in the public's seemingly insatiable appetite for new public initiatives and programs. Virtually all new laws enacted by Congress to deal with real or perceived problems bring with them the need for additional rulemaking. It has been this way since the dawn of the Republic, so the American people have had ample time to learn about this unavoidable relationship.<sup>13</sup>

The evolution of rulemaking is best understood in parallel with the historical development of American statute law. The symbiotic relationship between legislation and rulemaking was established in the earliest days of the very first Congress. Put simply, statutes and rules depend on one another. Statutes provide the legal authority for rules and the various processes by which they are made. Rules provide the technical detail so often missing in statutes, and rulemaking brings a capacity for adaptation to changing circumstances that the letter of the law alone would lack. These two vital elements of American public policy and law have been growing and diversifying throughout our history.

### The Early Sessions of Congress

In its very first sessions, Congress enacted laws that delegated to the president of the United States the authority to issue rules that would govern those who traded with Indian tribes.<sup>14</sup> The law had scant content, relying instead on the president's rules to provide the substance.<sup>15</sup> Subsequent Congresses continued to delegate the power to write rules to officials of the executive branch. For the most part, these powers were confined to matters of trade and commerce.<sup>16</sup> In 1796, for example, the president was given the authority to develop regulations that set duties on foreign goods. Twenty years later, these powers were expanded considerably when Congress granted sweeping rulemaking powers to the secretary of the Treasury to regulate the importation of goods into the United States. This particular statute is notable because it recognizes a subordinate official of the executive branch—a cabinet officer—as the authority to whom rulemaking power is delegated. This is the norm in contemporary legislation. The vague and sweeping language used in the legislation—“to establish regulations suitable and necessary for carrying

this law into effect; which regulations shall be binding” —became common in the many statutes that followed.<sup>17</sup>

## The Late Nineteenth and Early Twentieth Centuries: An Expanding National Government

During the twentieth century, the government of the United States experienced two periods of extraordinary growth. Each was a response to crisis, real or perceived. The New Deal was an attempt to plan and regulate the economy out of depression during the 1930s; the 1960s and early 1970s saw much broader and deeper efforts to eliminate poverty, pollution, injury, and inequity. These were, indeed, pivotal periods in our political and legal history. Their legacies with regard to rulemaking are extremely important. But a careful examination of legislative activity demonstrates that although these were extraordinary periods of expansion, government and rulemaking have been growing steadily since the late nineteenth century.

In the earliest days of the Republic, rulemaking was limited. The reach of federal government powers for much of the nineteenth century was comparatively modest. This began to change in the late nineteenth century, however, when Congress turned its attention to domestic issues and problems and sought solutions. The 1880s, for example, saw the creation of the Interstate Commerce Commission (ICC), which would serve as a model for serial interventions by the federal government into many other sectors of the economy.<sup>18</sup> Programs to protect American agriculture and livestock production from contamination were authorized by legislation. Statutes designed to protect wildlife were passed in this same decade as well. These laws required varying numbers of rules to be issued by the responsible agencies to implement important provisions. By the beginning of the second decade of the twentieth century, rulemaking had become prominent enough to attract serious academic attention. Legal scholars began to study what one termed “delegated legislation.”<sup>19</sup> These early works did not suffer any illusions about what rulemaking was: It was, and is, lawmaking by unelected administrative officials.

From roughly 1900 to the onset of the Great Depression in 1929, Congress created public programs that affected a wide variety of previously private activities.<sup>20</sup> Many were designed to protect consumers from dangerous or unfair practices. The creation of the FTC, the passage of the Clayton Act to extend its jurisdiction, enactment of legislation to ensure the quality of food and the efficacy of drugs, the creation of a federal program to inspect meat, and the establishment of the Federal Reserve System all occurred during this period. Agriculture was also a frequent target for new legislation during this time. Included among the many statutes were laws designed to ensure the purity of milk and the quality of grain, to extend existing powers of quarantine, and to regulate the operation of stockyards and packing houses. Congress ventured into the energy arena by passing the Federal Water Power Act and increased the powers of the ICC with the Hepburn Act. The nation’s natural resources got considerable legislative attention as well through statutes that emphasized the importance of conserving and protecting wildlife and migratory birds and managing public lands effectively. The congressional actions undertaken during these thirty years resulted in a broader and deeper federal role in the affairs

of the American people. The authority of existing laws was amended and usually extended into new areas, and wholly new types of commitments were made.

## The New Deal: New Roles for Government and New Repositories for Rulemaking

The most casual student of this country's political history knows that the election of Franklin Delano Roosevelt and the coming of the New Deal brought an outpouring of legislation unprecedented in its volume and implications for the role of government. In response to an economic crisis and an aggressive presidential agenda, Congress enacted laws that greatly increased the powers and responsibilities of the federal government. The centerpiece of the New Deal was the National Industrial Recovery Act (NIRA), enacted in 1933. The act authorized the president to create bodies of rules, called "codes," that would establish fair competition in many sectors of the economy.<sup>21</sup> The legislation was breathtaking in its scope—very few significant industries or economic activities were unaffected. The reliance the NIRA placed on rulemaking and other forms of administrative action was near total. Although it fell to a constitutional challenge in 1935 and was subsequently amended extensively by later Congresses, the act stands as an important milestone in the history of rulemaking.

The New Deal is properly thought of as a period of intense economic regulation, but many other public policies appeared during this time. Agriculture, labor relations and employment conditions, assistance for the aged and disadvantaged, housing and home ownership, transportation, banking, securities, consumer protection, rural electrification, natural resources, wildlife, energy, and transportation were all profoundly affected by the statutes of the New Deal.<sup>22</sup>

If we assume a direct relation between statutes and the rules needed to implement them, rulemaking had become a major government function by the height of the New Deal. But there was no way accurately to assess the volume and significance of rulemaking done by agencies. For example, until 1934 there was no single authoritative way to publish and make available the rules and related decisions made by federal agencies. The creation of the *Federal Register* corrected this situation. With the *Register* came the *Code of Federal Regulations* (CFR), which was organized functionally by agency and program and will be considered in more detail later. A remarkable study by a committee appointed by the attorney general at that time, Robert Jackson, inventoried rulemaking by the federal government. Completed during the closing days of the New Deal, the study revealed that all agencies were actively engaged in rulemaking but that there was considerable variation in both substance and volume.

## The State of Rulemaking at the Close of the New Deal

The magnitude of delegated authority granted to agencies during the New Deal and the manner in which certain agencies used these new powers caused a great deal of concern. It was perceived that these administrative processes were not only growing at an alarming rate but were operating in violation of basic legal principles. As described by the Brownlow Committee, a group President Roosevelt

empowered to examine government management, they were a “headless fourth branch of government.”<sup>23</sup> In response to mounting criticisms and calls for change, President Roosevelt created a committee to study administrative practices in force in the main agencies of the federal government. It was intended to be FDR’s answer to the Brownlow Committee.<sup>24</sup> Called the Attorney General’s Committee on Administrative Procedure, it conducted a series of case studies that today provides us an invaluable historical record on the status of rulemaking almost eighty years ago. It demonstrates conclusively that frequent and highly significant rulemaking was occurring in most agencies and that it was often the result of legislation that predated the New Deal. The following examples from the committee’s research, published in 1941, will help put contemporary rulemaking into the proper historical perspective.

The committee found that nearly thirty administrative entities were empowered to issue rules that had significant effects on the public. Some of these agencies were delegated rulemaking authority under multiple statutes. Of all the agencies the committee studied, the one with the greatest accumulation and annual production of rules was the Department of the Interior. The committee wrote that other agency functions were “obscured” by the “momentousness” of rulemaking at the department. It was estimated that at the time of the study, several thousand rules were in effect, and several hundred new rules were issued each year. The rules dealt largely with the department’s responsibilities for the protection of fish, wildlife, and birds and its stewardship of the many uses of public lands. But wildlife and public lands were not the sole concern of the rulemakers. The program that regulated the coal industry had a rulemaking task that was described as “monumental.” The making of one rule alone involved the participation of 387 people, including more than 200 lawyers, and generated more than 700 supporting documents.<sup>25</sup>

The volume of rules the Department of the Interior issued was rivaled by the various agencies that at different times were responsible for veterans’ affairs. The program had been in operation in some form since the late 1700s, so it is not surprising that a large body of rules had accumulated. In fact, rules affecting veterans filled several thousand pages, and the matters they covered ranged from minor administrative details to policies of considerable substance. The study group found them so comprehensive and specific that they left little discretion for agency administrators.<sup>26</sup>

The ICC was also heavily engaged in rulemaking under the Motor Carrier Act. It prepared “a dozen sets” of rules from one five-year period following passage of the act. In another area of its statutory responsibilities, the ICC was involved in constant rulemaking from 1908 to 1940, issuing seven full revisions of rules governing the transport of explosive materials.<sup>27</sup>

Rulemaking, although clearly established as a crucial government function in the late 1930s, was not undertaken uniformly in all major policy areas. In some instances rulemaking was avoided; in others the agencies wrote rules but added little to what Congress had provided in legislation. Notable among the agencies that did not undertake large programs of rulemaking were the FTC and the National Labor Relations Board (NLRB). Both agencies chose to proceed largely in a quasi-judicial manner, dealing with individual cases brought to them by individuals or groups with complaints. Their policies and law evolved through the accumulation of individual decisions.

The Social Security Administration, then called the Social Security Board, undertook a considerable amount of rulemaking after passage of amendments to the

Social Security Act in 1939, but little of it was legislative, or substantive, in nature.<sup>28</sup> In this instance, the agency adopted rulemaking but chose to exercise little or no discretion in the process. This would change as the programs administered by the agency grew and diversified.

The legislative history of the statutes of the FTC indicates that Congress intended it to be a vigorous rulemaker. But it was not until the 1970s that political forces and significant reforms forced the FTC to undertake rulemaking.<sup>29</sup> The NLRB continued to eschew rulemaking. The NLRB was long criticized for its perceived failure to use its rulemaking powers when circumstances appeared to merit. The Board recently attempted to reverse this course, writing two very significant rules. However, the Board may have regretted finally taking decades of advice, because both encountered significant problems. One was overturned by judicial decision, and the other encountered fierce opposition and an attempted veto by Congress.<sup>30</sup>

By the time the CFR began publication in 1938, the legislative phase of the New Deal was winding down. Organized in fifty titles, which correspond to different areas of law and public policy, the CFR of 1938 provides a summary, albeit incomplete, of the results of rulemaking up to that time. Several titles were reserved for Congress, the judiciary, the president, the *Federal Register*, and “government accounts.” A substantial portion of the CFR was devoted to national defense and the conduct of foreign relations. Other elements of the 1938 CFR contain material that has since been superseded or subsumed by more recent legislative activity. Some programs are notable by their absence. The “Public Welfare” title contained chapters devoted to an office of education in the Department of the Interior, the Civilian Conservation Corps, the Works Progress Administration, and the National Youth Administration. There was no mention of Social Security; in 1938 the regulations mentioned earlier were still being developed. As one would expect from the previous discussion of statutory developments, there were titles devoted to agriculture and meat production, labor, banking, commerce, transportation, housing, public health, pure food and drugs, telecommunications, public lands, public resources, and wildlife. Some constituted larger bodies of rules; others were small. The rules pertaining to agriculture filled eight chapters and nearly 1,200 pages, whereas those devoted to labor could be contained in just 39 pages.

## From the End of World War II to the Mid-1960s

From the end of World War II to the mid-1960s, combined effects of legislation and rulemaking continued to expand the reach of the federal government. As in the past, we see here the amendment of existing statutes as well as the creation of new programs. The CFR grew and was periodically reorganized to reflect these changes. The count of fifty titles in the *Code* has remained relatively constant. Chapters and volumes rapidly expanded in numbers, reflecting the growing reach of the government. For example, what began as a publication of fifteen volumes in 1938 filled forty-seven volumes in 1949.

In the 1950s and 1960s, legislative attention focused heavily on ways to provide basic rights, benefits, and services to the American people.<sup>31</sup> Statutes established national standards for unemployment insurance, aid to veterans, health care for the elderly and indigent, food stamps, and support for urban mass transit systems; they

also established programs to protect consumers from dangerous products, ineffective vaccines, food additives, and unscrupulous lenders. Laws were passed to prevent or punish discrimination based on age, race, or sex. Existing statutes to protect fisheries were extended, and new programs to preserve wilderness areas, scenic trails, and wild rivers were created. The 1950s saw the federal government's first tentative incursions into the areas of air and water quality; and the close of the 1960s brought the landmark National Environmental Policy Act, which required rulemaking in every agency whose actions directly or indirectly disturbed the ecology.

## The Decade of the 1970s: Rulemaking Ascendant

By 1969 the crucial importance of rulemaking in our system of government was unmistakable. Rulemaking had developed into a major force in our legal, political, and economic lives. The volume of rules was formidable, and the range of areas the rules covered was enormous. Why, then, is it the decade of the 1970s that is frequently characterized as the “era of rulemaking”?<sup>32</sup> Although such characterizations tend to underestimate the importance of earlier periods, there are good reasons why the 1970s deserve their special reputation.

In the 1970s the content of congressional delegations of authority, and the general political environment in which they occurred, brought fundamental changes to rulemaking. The number of statutes that established major programs requiring extensive rulemaking was unprecedented. By one count, 130 laws establishing new programs of social regulation were enacted during this one decade.<sup>33</sup> Proposals dealing with virtually all types of environmental problems, health and safety hazards in most workplaces, and comprehensive consumer protection became law. Congress also enacted broad-ranging reforms in worker pensions. The rulemaking tasks legislation like this created differed from those that accompanied earlier statutes in many ways.

To be sure, agencies operating under earlier statutes often faced formidable obstacles when writing rules. After the invalidated New Deal legislation, however, rarely did their delegations of rulemaking authority sweep so broadly across the economy in the manner that became commonplace in the regulatory legislation of the 1970s. Environmental legislation, taken as a whole, required rulemakers to identify, locate, prevent, control, or mitigate virtually every form of harmful pollutant or dangerous substance in the air, water, and ground. The health and safety of the majority of American workers, regardless of industry or occupation, and the safety of most consumer products were similarly entrusted to newly created programs and agencies.

For the most part, the rulemaking authority granted to agencies prior to the 1970s was more narrowly confined, affecting specific industries and activities.<sup>34</sup> Those agencies actually granted broadly based powers, such as the NLRB and the FTC, used their rulemaking authority quite parsimoniously. Furthermore, industry-specific programs of regulation had grown incrementally, giving the agencies an extended period of time to develop working relationships with those they regulated or served. Even when dealing with multiple constituencies, as in the areas of natural resources and employment conditions, the agencies could trade on long-term relationships and work at a pace that they largely dictated. These conditions would change, however.

The authorizing legislation of the 1970s represented sudden and radical shifts in the federal role, creating agencies from whole cloth or through the consolidation

of programs from numerous departments. These new agencies could neither avoid nor delay rulemaking; the authorizing statutes frequently mandated that rules be developed in specified areas.<sup>35</sup> The same laws often contained mandatory deadlines by which rules were to be completed. The relationships between the rulemakers and affected parties were given no time to mature. Instead, the rulemaking agencies were immediately positioned between well-organized, aggressive environmental, labor, and consumer groups on one side and threatened, equally aggressive business interests with plentiful resources on the other.

These pressures produced a period of extraordinary rule production. From 1976 to 1980, a time when we would expect to see the cumulative effect of the statutory explosion, 36,789 rules were added to the CFR, and agencies of government proposed 23,784 rules, averaging roughly 9,200 and 6,000 per year, respectively.<sup>36</sup> As the decade of the 1980s began, the government's rulemaking engines were well stoked; to reverse them would require extraordinary action.

To the volume of work, accelerated pace, and inevitable conflict contained in their delegations of rulemaking authority, the statutes of the 1970s added several layers of substantive and procedural complexity. Environmental and workplace safety programs are good examples of statutes that sent rulemaking routinely to the edge of human knowledge and technical capabilities and beyond. Agencies were expected to create information (for example, information on "safe" levels of various chemicals and substances, like benzene and asbestos, in the workplace) while simultaneously incorporating that information into a rule that could be implemented, complied with, and enforced. Furthermore, Congress became increasingly concerned with the process by which rules were being written by agencies. As we will see in the next chapter, the rulemaking provisions of new statutes created more complex and difficult processes for rulemakers to use.

The breadth of the new legislation brought about the potential for conflict between new rules and those of more established programs. The responsibilities of OSHA with regard to all American workers appeared to overlap considerably with those of agencies having jurisdiction over specific industries, such as transportation, food and drug production, and even nuclear power plants. Conflict could occur within a single agency as well. Actions taken as a result of the rules put forth by one office of the EPA to protect the air could result in pollution of the water, which was the responsibility of another office. Recent research has noted the importance, if still relative infrequency, of coordinated rulemaking involving multiple agencies. Freeman and Rossi offer several examples of joint rulemaking. They estimate that joint rulemaking still constitutes only a small portion of rules (approximately 4 percent in 2010) but suggest it may be on the rise because of increased recognition of the need for coordinated efforts in setting requirements for single industries affected by legislation entrusted to multiple agencies.<sup>37</sup>

The need for coordination between agencies of the federal government was dwarfed by intergovernmental issues these new statutes created. Many laws created partnerships between federal and state governments in which standards were set in Washington but supplemented and enforced in the fifty states.<sup>38</sup> The federal legislation of the 1970s set off considerable rulemaking activity in the states as well.<sup>39</sup>

The rulemaking of the 1970s was also more important than that which had come before. If we assume that Congress had properly identified real threats in the wave of protective legislation it passed in the 1970s, then to a remarkable extent the health, safety, financial well-being, and general quality of life of Americans would hinge on the success of rulemaking by agencies. These rules would also impose unprecedented costs, transfer huge amounts of wealth across our society, and affect our capacity to vie in increasingly competitive world markets.

## The Reagan and Bush I Administrations: A Modest Retreat

As a period in the history of rulemaking, the 1980s are more difficult to characterize. On one hand, much of the massive agenda for rulemaking established in legislation of the 1970s remained to be completed in the 1980s. Exacerbating this backlog of work were important amendments to existing environmental, workplace safety and health, and consumer statutes that added even more responsibilities and caused the revision of rules already in existence. In the face of these formidable pressures, however, powerful political forces were at work to eliminate some rules, to prevent others from being made, and to impose new decision-making criteria on those that remained.

During his presidential campaign Ronald Reagan was aggressive in his opposition to government regulation. His administration introduced the most significant changes since the basic process for rulemaking was established in the APA. These changes will be considered at length in two subsequent chapters.

The years of the Reagan presidency were generally ones of reductions in rulemaking activity, beginning with a sixty-day moratorium at the outset of his first term. Table 1.1 contains information on the numbers of rulemaking documents published in the *Federal Register* during the Reagan presidency. As one would expect, given the stated objectives of the administration, the number of final rules declined steadily until 1987, when it increased modestly. Proposed rules followed a mildly erratic course but were not significantly changed over the eight years. There were 28 percent fewer new final rules in 1988 than at the outset of Reagan's presidency. The numbers of rules alone do not tell the entire story. The volume and complexity of requirements of new rules are better captured, albeit imperfectly, in the page count in the *Federal Register* and CFR. For both final and proposed rules, annual page counts were larger at the end of the Reagan presidency than at the beginning, although there was much volatility in this metric as well.

During his presidency, George H. W. Bush was stung by critiques that he was soft on regulation, and he instituted several moratoriums on rulemaking. The number and volume of rules issued during the first Bush administration are reflected in Table 1.2. Here we see a decline in the number of final rules over the term. Little change, however, is seen in proposed rules and page counts, which generally exceed the numbers in the Reagan years, particularly for proposed rules.

It is interesting to note that the page count for final rules during the Reagan years is similar to that of the first two years of the Carter administration. With regard to proposed rules for these blocks of years, the Reagan administration page counts are actually larger. However, the data also confirm the remarkable volume of activity in the last two years of the Carter administration and the jolt of the emergency brake Reagan pulled in 1981.

**TABLE 1.1 ■ Reagan Administration Final and Proposed Rules, Number and *Federal Register* Page Count, 1981–1988**

Year	Final rules		Proposed rules	
	Number of rules	Number of pages	Number of rules	Number of pages
1981	n.d.		n.d.	
1982	6,329	15,300	3,745	10,433
1983	6,056	16,196	3,897	12,772
1984	5,290	15,473	3,459	11,972
1985	5,182	15,460	3,670	13,772
1986	4,991	13,904	3,455	11,186
1987	4,935	13,625	3,653	14,179
1988	5,141	16,033	3,606	13,892
Average	5,417	15,151	3,640	12,620

Source: Office of the Federal Register; Regulatory Information Center, U.S. General Services Administration.

n.d. = data not available.

**TABLE 1.2 ■ Bush I Administration Final and Proposed Rules, Number and *Federal Register* Page Count, 1989–1992**

Year	Final rules		Proposed rules	
	Number of rules	Number of pages	Number of rules	Number of pages
1989	5,157	16,489	3,451	13,219
1990	4,765	14,179	3,258	12,694
1991	4,852	16,793	3,351	16,759
1992	4,525	15,921	3,351	15,174
Average	4,824	15,845	3,352	14,461

Source: Office of the Federal Register; Regulatory Information Center, U.S. General Services Administration.

Characterizing the Reagan/Bush years as a “modest retreat” is, on balance, fair. There were significant reductions early in the Reagan administration in both final and proposed rules, as well as in pages in the *Federal Register*. Indeed, in the latter category the reduction in pages from 1980 to 1981 was the greatest percentage decrease in terms of pages in any single year. The frequency of rulemaking was lowered, but the new levels that emerged were hardly insubstantial. During the full twelve years of this era agencies produced, on average, eight thousand proposed and final rules per year. The momentum coming out of the Carter administration was slowed, not arrested, and despite the small government intentions and rhetoric of these two Republican leaders, the reality of government, as measured by rulemaking activity, remained prominent.

## The Clinton Years

The statistics related to rulemaking during the Clinton presidency are mixed. Annual averages for the numbers of both final and proposed rules were slightly less than the first Bush administration—surprising, given what one might reasonably expect from a Democratic president following more than a decade of conservative Republican rule. Page counts in the *Federal Register* devoted to final and proposed rules are quite a different matter, however, and these dramatically increased from the previous administrations, as shown in Table 1.3. Any conclusions drawn from the

**TABLE 1.3 ■ Clinton Administration Final and Proposed Rules, Number and *Federal Register* Page Count, 1993–2000**

Year	Final rules		Proposed rules	
	Number of rules	Number of pages	Number of rules	Number of pages
1993	4,614	18,016	3,330	15,410
1994	4,868	20,385	3,628	18,184
1995	4,828	18,047	3,339	15,982
1996	4,963	21,639	3,266	15,352
1997	4,615	18,992	3,035	15,289
1998	4,898	20,029	3,169	18,258
1999	4,660	20,201	3,414	19,447
2000	4,477	24,482	2,850	17,943
Average	4,740	20,223	3,253	16,982

Source: Office of the Federal Register; Regulatory Information Center, U.S. General Services Administration.

appearance of a comparatively modest number of rules issued during the Clinton administration compared with its predecessors must be approached with care. First, Bush did not leave an inactive rulemaking process for Clinton to resurrect from the dead. Indeed, Bush was roundly criticized by members of his own party for failing to slow the pace of new rules. Second, when we look beyond the gross numbers of rules we find that the Clinton administration was much more active in areas of regulation identified with an activist Democratic agenda. For example, during the years of his presidency, rules related broadly to environmental protection and safety increased very substantially, with rules issued by the EPA increasing nearly 40 percent per year.

## The Bush II Presidency

The presidency of George W. Bush will always be framed by the war on terror, and its dominating presence is evident in the rulemaking record. As Table 1.4 demonstrates, there is no question that the Bush II administration can be characterized as a time of fewer final and proposed rules, but it was more active when measured by pages in the *Federal Register* and the numbers added to the CFR. But more important to note is the changing composition of rulemaking activity during these Bush years. When compared with the Clinton presidency and measured by

**TABLE 1.4 ■ Bush II Administration Final and Proposed Rules, Number and *Federal Register* Page Count, 2001–2008**

Year	Final rules		Proposed rules	
	Number of rules	Number of pages	Number of rules	Number of pages
2001	4,100	19,643	2,635	14,166
2002	4,147	19,233	2,758	18,640
2003	4,225	22,670	2,732	17,357
2004	4,074	22,546	2,552	19,332
2005	3,956	23,041	2,631	18,260
2006	3,713	22,347	2,461	19,794
2007	3,569	22,771	2,391	18,611
2008	3,775	26,320	2,449	18,648
Average	3,944	22,308	2,576	18,163

Source: Office of the Federal Register; Regulatory Information Center, U.S. General Services Administration.

the activities of two of the traditionally most active rulemaking agencies—the EPA and the Department of Transportation—rulemaking declined significantly. The Bush II presidency, however, also saw the rise of the Department of Homeland Security as a major rulemaking force; indeed, it became the third most active rulemaking agency in the entire federal government. This underscores an important point learned eventually by all presidents: Rulemaking is a versatile tool; it has no inherent political tilt. It can serve both liberal and conservative agendas.

The overall assessment of the Bush II period is that rulemaking in many areas declined in frequency but in others remained essentially unchanged. In one area important to the safety and quality of our lives it was very prominent: homeland security.

## The Obama Presidency

The Obama presidency was marked by divided government (except during the first two years) and marked partisanship, perhaps typified by the oft-quoted statement by Senator Mitch McConnell that the primary goal of congressional republicans was to ensure that Barack Obama was a one-term president. Although the divisions did not entirely foreclose landmark legislation, this is an administration that was widely viewed as relying on rulemaking to an unprecedented degree in pursuit of its policy goals. President Obama himself appeared to promote this view of his approach to accomplishing goals when at the first meeting of his Cabinet in 2014 he famously stated, “I have a pen and I have a phone.” He seemed to be unmistakably signaling executive powers, including rulemaking, were the counterweight to legislative resistance.

However, the overall data on rulemaking activity, taken alone, could cause one to question this widely held belief.

These data demonstrate that Obama administration was considerably less active in rulemaking than any of its predecessors, Democratic or Republican.

Averages are well below those of Reagan and both presidents Bush, as well as Clinton. We know that raw counts of almost anything in government are usually of limited value in the search for significance, and rulemaking is no exception. In this case, as others have noted, these data do not reveal the relative impact of the rules of the various administrations. For this measure, we rely on the number of economically significant rules issued during these various administrations. The term “significant” is not used loosely. It is defined in law and executive order and widely used in analyses of the topic as any rule whose annual costs of compliance meet or exceed \$100 million. The following data put the Obama legacy of major rules into context.

These data led the *New York Times* to correctly conclude that President Obama would leave the White House “as one of the most prolific authors of major regulations in presidential history.”<sup>40</sup> When compared with previous administrations it is evident that the Obama presidency came to rely most heavily on rulemaking for matters of greatest economic import. His total output of major rules exceeds that of his immediate predecessor, also a two-term president, by 130 rules, or some 36 percent. His final year in office saw the largest number of new major rules since

**TABLE 1.5 ■ Obama Administration Final and Proposed Rules, 2009–2016**

Year	Final rules	Proposed rules
2009	3,388	2,035
2010	3,511	2,431
2011	3,736	2,994
2012	3,602	1,971
2013	3,585	2,577
2014	3,491	2,399
2015	3,289	2,329
2016	3,784	2,409
Average	3,548	2,393

Source: Office of the Federal Register; Regulatory Information Center, U.S. General Services Administration.

data have been collected and nearly 30 percent larger than any that preceded it. During this presidency, landmark legislation such as the Affordable Care Act and Dodd-Frank drove some of this extraordinary activity but, as the *New York Times* noted, his legacy also included a variety of other initiatives, including environmental actions addressing air quality and global warming, relief for airline passengers stuck on planes awaiting takeoff, and hospital visitation rights for same-sex partners.

**TABLE 1.6 ■ Major Regulations by Presidential Administrations**

Presidential administration	Number of economically significant rules
Reagan	159
Bush I	181
Clinton	361
Bush II	358
Obama	488

Source: George Washington University, Regulatory Studies Center (<http://www.regulatorystudies.gwu.edu>).

## The Trump Presidency

We write this edition with about one year of the Trump administration elapsed. Ordinarily a new administration would be still taking shape, and any definitive analysis of the president's stewardship of rulemaking would be impossible. The Trump presidency is no exception in that regard. That said, the actions taken in the first year of this presidency leave little doubt that rulemaking, as the prime mechanism for the regulatory state candidate Trump promised to dismantle, is a major target. In subsequent chapters we will explore in greater detail the actions taken to directly influence the use of rulemaking and to hold those writing rules accountable. There is, however, little doubt that the Trump administration has reversed the course of the Obama administration, reducing rulemaking to what may be historically low levels.

At this writing, the number of rules, overall, is on pace to be the lowest for both proposed and final rules since data have been systematically assembled. The same is the case for new major regulations. Without reflecting on the wisdom or impact of these early actions, there is no question that the results are impressive. President Trump appears to have slowed the development of rules to a greater extent than his immediate Republican predecessors. Only time will tell whether he is able to sustain this unprecedented blockage of the rulemaking process or, as has happened in previous administrations, the demand for public policy, the limitations of other governmental processes, and the limited attention span of any administration cause the floodgates to reopen.

It remains to be seen whether the aggressive use of rulemaking powers to further his agenda is judged by history as one of the most significant features of Trump's presidency. However, what is clear is that this president, like others before him, has resorted to rulemaking as his preferred instrument of law and policy when the others available proved inadequate for his purposes.

Even after the arrival of the current administration, some argued that rulemaking is actually in decline as a method for making law and policy. In the next chapter we will explore the process of rulemaking and how it has developed through time. For some rules, especially those with the greatest potential effects on the economy and society, the rulemaking process can be complex, expensive, time-consuming, and risky. Several prominent scholars have concluded that these and other factors have led agencies away from rulemaking to other mechanisms for implementing programs.<sup>41</sup> Rulemaking will certainly not disappear, but its avoidance or mutation by agencies is a serious issue that will be covered at length in subsequent sections of this book.

**TABLE 1.7 ■ Trump Administration Final and Proposed Rules, 2017**

Year	Final rules	Proposed rules
2017	3,247	1,826

Source: Office of the Federal Register; Regulatory Information Center, U.S. General Services Administration.

Rulemaking is a direct, if not always desired, consequence of legislation. More to the point, rulemaking, as a mechanism for refining law and policy, has been essential to the government's efforts to assume responsibility for the range of activities demanded by the voters. It was and remains an inevitable and indispensable extension of any significant legislative activity. As long as the American people demand new or altered public policies, as long as Congress responds to these demands, and as long as changing circumstances require adjustments to implement statutory mandates, rulemaking will remain a basic and determining element of our political and legal systems.

## CATEGORIES OF RULES

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If nothing else is evident from this brief history of rulemaking, it should be apparent that defining or categorizing the substance of rulemaking is very difficult. All topics, issues, and activities touched by public policy are or will be the subject of a rule. Still, there are ways to categorize rules that capture certain key characteristics, if not their full richness.

### Policy Area and Agency of Origin

The CFR organizes rules in fifty distinct categories called titles and chapters, which correspond to distinct public programs, policies, or agencies. For example, the rules for banks and banking can be found in Title 12, those for protection of the environment in Title 40, and those governing the acquisition of goods and services by the federal government in several dozen chapters of Title 48. The subject matter of rules contained in the fifty titles of the CFR is vast; any attempt at classification on the basis of substance is not likely to improve on the categories found in it. The current index of the CFR's titles and chapters is included in the appendix. Table 1.8 charts the growth of the CFR during each presidency from Carter through Obama, providing more evidence that rulemaking was and remains a potent source of law and policy.

### Functions Performed by Rules

There are alternative ways to look at the total body of rules that convey other important dimensions of their status, purpose, and effect on our society. The oldest method for classifying rules is suggested in the definition cited earlier from the APA. The first and most important category consists of "legislative" or "substantive" rules. These are instances when, by congressional mandate or authorization, agencies write what amounts to new law. In the terms of the APA definition, legislative rules "prescribe" law and policy.

A second category consists of "interpretive" rules. As suggested earlier, these occur when agencies are compelled to explain to the public how they interpret existing law and policy. Interpretive rules may stretch law or rules to fit new or unanticipated

**TABLE 1.8 ■ Code of Federal Regulations Page Count by Selected Presidencies**

President	Average annual number of pages in the Code of Federal Regulations			
	At start of presidency	At end of presidency	Difference in number	% change
Carter	72,308	102,195	29,887	41.3
Reagan	102,195	117,480	15,285	14.9
Bush I	117,285	128,344	11,059	9.4
Clinton	128,344	138,049	9,705	7.5
Bush II	138,049	157,974	19,925	14.4
Obama	157,974	185,053	27,079	17.1

Source: Office of the Federal Register and *Code of Federal Regulations*.

circumstances. They are not supposed to impose new legal obligations.<sup>42</sup> A good example of this type of rule is the “Uniform Guidelines on Employee Selection,” issued by the Equal Employment Opportunity Commission in conjunction with other agencies that have responsibilities for enforcing Title VII of the 1972 Civil Rights Act.<sup>43</sup> Like all interpretive rules, these guidelines were intended to advise the public how the agencies interpreted their legal obligations under the act and assorted court cases that it had stimulated. The agencies issued interpretive rules in this case because civil rights was one of the few areas of statutory development in the 1960s and 1970s in which Congress failed to grant authority to write legislative rules. Because they are advisory in nature, interpretive rules can be developed in any way the agency sees fit. Again, this area of agency activity has been the source of considerable controversy, both in the scholarly literature and among those affected by rule-like devices that the critics argue have de facto effects undistinguishable from legislative rules. We will return to this increasingly important issue in subsequent chapters.

The third category consists of “procedural” rules that define the organization and processes of agencies. Although they are often regarded as little more than bureaucratic housekeeping, they do deal with matters of importance to the public. Among other things, they inform the public how they can participate in a range of agency decision making, including rulemaking. As we will see in the next chapter, external forces have taken much of the initiative in the rulemaking process away from agencies. Nevertheless, procedural rules provide essential road maps for those attempting to find their way around the decision-making pathways of our massive and complex bureaucracies.

This way of classifying rules actually predates the APA by many years. Studies of administrative processes in federal agencies conducted in the 1930s refer repeatedly to these different types of rules and suggest that the distinctions had been commonly understood for some time.<sup>44</sup> The distinctions are still important. Many agencies, for example, still use variations on interpretive rules to supplement legislative rules. These come in a variety of forms—guidelines, policy statements, technical manuals—and some suspect that agencies use them to avoid the procedural rigors of legislative rulemaking.<sup>45</sup>

## What and Whom Rules Affect

Another way to consider the body of rules is to classify them by the segment of our society they influence and direct. Some rules deal with private behavior. Others guide those individuals, groups, or firms that are approaching the government to obtain a payment, a service, or permission to engage in some activity. Finally, there are rules that deal with the way the government conducts its business. Most if not all rules can be placed in one of these three categories.

*Rules for Private Behavior.* One good way to appreciate the scope of rules directed at the private sector is to consider how they might affect a business.<sup>46</sup> Quite literally, rules govern American businesses from their very beginning to beyond their demise. Virtually every business decision of any substance is affected by rules written in government agencies. Rules can have a determining effect on the decision to go into business in the first place. Before one enters certain businesses or occupations, a license is required. The granting of a license, the qualifications needed to obtain one, and the conditions that are attached to it are determined by rules. Money is needed to start most businesses, and banks are often the providers. Banking rules determine in large part the availability of funds and the manner in which financial institutions make business loans. Assuming the owners of the business are prudent, they will want to protect their business from claims of damage arising from negligence or faulty products. Insurance regulations will determine whether they can get coverage and what it will cost.

Where a business is located is not a decision that can be made without reference to rules. Environmental and zoning rules have a significant influence on where businesses are established. Companies whose operations substantially pollute the air and water may find it difficult to locate in areas where rules set tight limits on new sources of pollution. The zoning authorities of local areas use rules to implement land-use plans that restrict, sometimes severely, where new businesses can locate.

Once the decision to go into business is made and a location is selected, rules may affect who is employed and how they are treated by the new concern. If the firm expects to do business with the federal government, it will be required, under a variety of rules, to have an affirmative action program and obey recent wage and hour rules. Those doing no government business must still take care not to discriminate in hiring. The “Uniform Guidelines on Employee Selection,” mentioned earlier, provide direction to employers in this area. These guidelines affect virtually all employment decisions, from initial interviewing of candidates

to termination of those who fail to meet expectations. There are also federal wage and hour laws, including recent rules altering categories of employees eligible for overtime compensation.

What a new business produces and how that product is made are governed by a multiplicity of rules, some designed to protect workers, others to protect consumers, and still others to protect the environment. Industrial operations are constrained by rules that are designed to ensure safety in the workplace and to prevent or minimize pollution of the air, water, and land. These rules frequently specify the types of equipment that can and cannot be used and how the machinery is to be designed or operated. The service sector is similarly affected by rules that govern how it will operate. The energy, banking, insurance, securities, transportation, and even education sectors are governed by industry-specific rules that dictate finances, employee qualifications, service quality, and even internal management.

Once the business has a product to sell, rules may determine how it will be sold, how it will get to consumers, the price that is charged for the good or service, and the company's obligations after it has been bought. The potential consumers of goods and services are protected by rules intended to prevent deceptive advertising. Other rules require that information be provided, on labels or packaging inserts, informing the public about the content, purpose, and potential hazards of consumer products. Rules written to regulate airlines, railroads, trucks, telecommunications, pipelines, and electricity transmission facilities profoundly affect how and at what cost goods and services get in the hands of consumers. Some commodities and services are still affected by rate making done by agencies. Agricultural commodities and energy transmission are two major areas of the economy where rules directly or indirectly set the price that consumers will pay. Once a good is sold, rules establish the producer's obligations. Rules can require that products, such as automobiles, be recalled by the manufacturer if defects are found that threaten safety or environmental quality. Similarly, rules outline the types of information consumers should have regarding warranties provided by the manufacturer or vendor of products should the product or service they purchase fail to provide what was promised.

Rules determine the conditions under which a firm can go out of business. Here two types of rules are notable. One governs the ongoing obligations that firms and businesses have to their retirees. Under the Employee Retirement Income Security Act, rules have been developed to secure the pension rights of retirees even when a firm decides to go out of business. We need not belabor the importance of these protections in light of the devastating effects of corporate failures and corruption. The rules written under laws governing the disposal of hazardous waste also carry obligations for companies to clean up the mess they might otherwise leave behind, and try to forget, after they cease operations.

*How Rules Affect Private Behavior.* When considering rules that affect private parties it is also useful to think of the kinds of requirements they contain. Although the scope of government activity is virtually limitless, the instruments at the disposal of agencies to accomplish these varied tasks are not. We can observe many common instruments in rules of agencies with profoundly different missions, clienteles, and resources.

A relatively infrequent but nonetheless significant instrument is outright prohibition of certain substances, products, or activities. The number of rules that include unconditional prohibitions is comparatively small, but these rules attract considerable attention because of the consequences to affected parties and society at large. For example, there was a large cry that accompanied the 1970 ban on cyclamates, which had been used to sweeten soft drinks, and other actions that took suspected carcinogens off the market. Agencies with responsibilities to protect the traveling public impose prohibitions on key personnel working for airlines, railroads, and interstate buses. Frightening reminders of the need for these types of rules occurred in 2016 by the arrest of pilots accused of violating the FAA's ban on alcohol consumption during the twenty-four-hour period prior to takeoff.<sup>47</sup> Another troubling example involved two distracted pilots who, in 2009, flew over their intended destination and were out of contact with air traffic controllers while they discussed their airline's corporate policies. Each lost his license to fly.<sup>48</sup> There are rules prohibiting certain types of advertising, such as the ban on television ads for cigarettes. Other rules proscribe activities on wild and scenic rivers, national parks, and wilderness areas. Rules governing benefit programs prohibit recipients from engaging in certain types of activities. Various types of political action are off limits to the recipients of some federal grants and contracts.

More common than outright prohibitions are rules that place limitations on substances, products, and activities. Most of us have heard of, and have probably been revolted by, the rather disgusting forms of foreign matter that can find their way into processed foods. Hundreds of environmental regulations impose limits on the production of and exposures to toxic substances of various kinds and uses. The OSHA has struggled since its creation to set limits on the amounts of certain types of chemicals that are potentially harmful to workers. The ordeal of setting standards for occupational exposure to the chemical benzene spanned more than a decade. The financial crisis of 2008 may be a fading memory for some, but the echoes of it can still be detected in the ongoing development of regulations related to the Dodd-Frank legislation of 2010 and related efforts to blunt the effects of future meltdowns in credit markets, risky investments, and exotic financial instruments and to ensure banks maintain sufficient liquidity, or readily available cash reserves, to survive large losses or "runs" by depositors or others to whom they are indebted. The FAA places limits on the number of hours airplane pilots and attendants can work. Perhaps the most common form of rule is the one that sets standards for products and activities. Colleges and universities are required to determine the need of students according to standards found in the Department of Education rules before awarding various forms of financial aid. Limits and standards are different versions of the same instrument of government control. They restrict the actions and decision making of private and nonprofit organizations by taking some options off the table altogether and channeling the choice of others through defined boundaries.

The importance of these boundaries was brought home by the serial revelations of massive misrepresentations of corporate earnings and profits. Enron, WorldCom, Global Crossing, and other such companies may be fading from memory. But the activities of banks and financial institutions and their products that brought our

and other economies to the verge of depression are not. Rulemaking related to these dangers has just begun.

A common form of rule that serves as an adjunct to regulations that prohibit, impose limits, or set standards is the one that establishes information requirements. It is increasingly common for rules to contain requirements that private individuals, groups, and firms collect, analyze, retain, and report information about their activities. Information rules provide agencies an unparalleled mechanism for monitoring the behavior of persons who fall under their programs. In some instances, programs could not be managed and requirements could not be enforced if agencies were required to develop these data on their own. Labels, package inserts, requirements to conduct tests and report the results, and rules requiring recipients of government assistance or licensees to report periodically are all forms of information rules on which the integrity and success of many government programs depend. The “vaping rule” discussed at the opening of this chapter, for example, requires those who would manufacture or sell such nicotine delivery products to both submit information for required licensure and to label their products with appropriate warnings.

*Rules for Those Who Approach the Government.* Private individuals, groups, or firms approach the government for many reasons, but usually to obtain a payment or service or to gain permission to conduct an activity that requires official sanctioning of some sort. The types of rules that apply in such circumstances establish the criteria for eligibility to receive the assistance or benefit offered under a government program. Social security programs of various sorts, welfare, medical care, educational assistance, housing benefits, and a host of other public programs operate on the basis of these eligibility rules.

A substantial number of activities conducted by private individuals, groups, or firms require various forms of permission from the government. Licenses and permits are required for a wide variety of activities, ranging from operating nuclear power plants to flying airplanes. When requesting licenses or permits, individuals must meet the standards set in rules. For example, the applicant for a license to operate a hydroelectric power plant must demonstrate that he or she can meet financial, engineering, and environmental standards established by the responsible agency, in this case the Federal Energy Regulatory Commission.<sup>49</sup>

*Rules for Government.* Purely governmental activities are guided by rules as well. These are—broadly defined—the procedural rules mentioned earlier. The CFR has titles devoted to the management of government accounts, administrative personnel, administration of the judicial branch, public contracts and property management, and the acquisition of goods and services. In addition, the other titles of the CFR contain procedural rules that apply to the operation of individual programs. These detail, among other things, how the agency intends to comply with laws governing public and private information, how agency hearings and other proceedings involving the public will be conducted, and who within the agency has authority to make various types of decisions.

Two statutes, the Freedom of Information Act and the Privacy Act, require agencies to issue regulations about how and why information is being used. Under

the Freedom of Information Act, the agency must explain to members of the public how they can obtain information. The Privacy Act requires the agency to describe personal information it has collected and is holding, how people can get access to records that agencies maintain on them, and how personal information is being protected from unwarranted disclosure.

We see, then, that the targets of rules include the private and public sectors. Whether regulated entities or potential beneficiaries of the federal government's largesse, individuals, groups, firms, states, and local governments must look to rules for refinements of their rights and obligations and for procedures by which the programs with which they are concerned will operate. The vast range and diversity of subject matter that rules now touch have been mentioned. It is also important to note the remarkable variations in the complexity of rules, the numbers of persons or activities they affect, and the duration of their effects.

*Differences in Scope and Importance.* Most rules published in the *Federal Register* are brief and deal with a very narrow range of activities. They may be based on complex technical or scientific information, such as regulations issued by the Federal Communications Commission to allocate radio frequency bands to individual stations and the FAA rules dealing with flight paths at airports. Other rules, fewer in number, are enormously long and complex and cover vast areas. But the length of a rule is not always an accurate indicator of the rule's effects. An "airworthiness directive," the type of rule the FAA issues to correct potential safety problems on aircraft, will affect every person who flies on the affected planes. Similarly, an "agricultural marketing order" that limits the amount of a commodity that can be shipped to sellers will affect every consumer who buys the affected vegetable or fruit. Both types of rules usually take up no more than a single page in the *Federal Register*.

Rules, then, vary greatly in their purpose and significance. But a central question remains: why do we rely on them for so much law and policy?

## THE REASONS FOR RULEMAKING: WHAT IT HAS TO OFFER

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However they are categorized and classified, rules accomplish most of the ambitious goals we set for ourselves as a society. Up to now we have discussed rulemaking as a constant force in our political and legal history and as an inescapable contemporary reality. But this history inevitably requires further explanation. Rulemaking has the place it does in our system of government for many reasons.

The number and diversity of rules written in this country are evidence that rulemaking is, at least, a common form of government decision making. We have not yet fully explored why rulemaking has attained so central a position in the policy process. In general, it has achieved its prominence because of the contributions it makes to the conduct of government and the benefits it provides, as described in the next sections. But it also has disadvantages.

## The Capacity of Bureaucracy and the Limits of the Legislature

If we examine the body of laws enacted by Congress, it is immediately apparent that those laws touch virtually every aspect of human life. Consequently, every known professional discipline must be drawn upon for the knowledge needed to achieve its ambitious goals. This range and depth of expertise have never been present among members of Congress or the staff that supports legislative operations. Congressional staffs are large and diverse but still limited. Many staffers are concerned with matters other than crafting new legislation, such as the constituency-related work that is so close to the hearts of elected officials. Committee staffs and those in the Government Accountability Office are preoccupied with oversight, the importance of which is magnified by the way Congress writes law. More about this in a moment.

In the Progressive Era, there was faith in the neutral competence of a professionalized bureaucracy. The public had confidently expected bureaucrats to carry out the will of the people efficiently and effectively. However diminished, this confidence, combined with the principle of separation of powers, has provided considerable justification for Congress to rely on rulemaking to supplement legislation rather than attempt to enact laws that answer all questions and anticipate all circumstances associated with a new program. In one view, because it is the task of the executive branch in our constitutional system to see that the law is carried out, bureaucracies, as instrumentalities of the executive branch, can be expected to clarify what the law means and take the steps necessary to ensure that its goals are achieved. Our laws require the constant application of knowledge and expertise to varied conditions and circumstances, so it makes sense to concentrate specialists in the administrative agencies that execute them rather than in the legislature.

This view begs the fundamental constitutional question of who writes the law. We saw that under the APA definition, the term *rule* can have many different meanings. Each has different implications for lawmaking. When a rule merely “implements” a law, there is no constitutional dilemma, because it will restate, perhaps in more functional language, what Congress has already enacted. When a rule “interprets” legislation, the rulemaking activity may be more substantial, bordering on lawmaking. But here there is no pretension of making new law. Rather, the agency is answering questions that have arisen about the law’s reach and meaning in particular instances. It is when a rule “prescribes” law that conflict between the constitutional roles of the executive and the legislature is most evident.

The depth of concern about rulemaking hinges to a considerable extent on whether agencies are agents of the legislature or the executive branch. If bureaucracies are merely extensions of Congress, then we should be no more alarmed by rulemaking than we are by reports that congressional staff members play a vital role in drafting statutes. If, however, these agencies are properly viewed as extensions of the president, then their exercise of substantial rulemaking powers threatens the constitutional design. But the question of who runs the bureaucracy is by no means settled; Congress and the president have long struggled to gain the hearts and minds of bureaucrats.<sup>50</sup> Both have formidable powers at their disposal to influence the course

of bureaucratic decision making. The president prepares budgets, appoints senior officials, and issues executive orders that profoundly affect how agencies manage their work. Congress is the ultimate decision maker on budgets and appointments, conducts oversight and investigations, and engages in casework on behalf of constituents. In the battle for influence over the bureaucracy, congressional powers are at least as substantial as those of the president. Congressional power to define an agency's mission and fix its budget is more determinative than the transitory and fragmented sources of presidential influence. Therefore, when delegating the power to interpret and prescribe law, Congress does it in the secure knowledge that it retains sufficient power and opportunity to redirect rulemakings that go astray. We will examine control of rulemaking through oversight in Chapter 6.

Expertise situated in a constitutionally acceptable relationship to Congress is not the sole reason why rulemaking by agencies is beneficial. One of the great advantages of rulemaking by agencies is their ability to respond in a timely manner to unanticipated and changed conditions, most especially emergencies. Agency officials who administer and enforce programs may be the first to learn that an existing program is flawed in some way, or that conditions affecting the program, or conditions that programs are intended to affect, have changed significantly. As James Landis wrote in 1938, "The Administrative [process] is always in session."<sup>51</sup>

A good illustration of this capacity is evident in the rulemaking of the FAA. Through its inspection and regulatory enforcement programs, the FAA regularly discovers problems in the design, operation, or maintenance of airplanes. Some of these problems are trivial; others pose serious threats to the flying public. The organization of the FAA allows swift communication from the field staff to those in the Washington headquarters that a new rule is required. For example, should a review of maintenance records or a series of inspections reveal excessive corrosion in the fan blades of a particular type of jet engine, the FAA technical staff can decide how serious the problem is, the steps that must be taken to correct the problem without endangering passengers and crew, and how quickly these actions should be taken. The rule in this case is the "airworthiness directive," mentioned earlier, hundreds of which the FAA issues each year.

Consider the same situation without rulemaking. To establish the new obligations borne by manufacturers or carriers for their jet engines, an amendment to the existing statute would be required. For such an amendment to come to pass, the information would have to work its way up the FAA organization and be communicated to the appropriate House and Senate subcommittees; legislation would have to be drafted; hearings would have to be held; votes would have to be taken in subcommittee, full committee, and the floors of both houses; possibly conference committee deliberations and another round of votes would be required; and then the president would have to sign the legislation. If real danger existed, a tragedy could occur long before action of this sort was completed. Those of us who are averse to risk are especially so when we step through the doors of an aircraft being readied for takeoff. Rulemaking to those flyers is a godsend.

Rulemaking supplements the legislative process in another significant way. Subsequent chapters will demonstrate that the waves of interest in public participation that swept through public administration since the 1960s affected rulemaking. It is

not surprising that the proponents of increased public involvement in the decisions of agencies would focus on a function as crucial as the development of rules. Rulemaking adds opportunities for and dimensions to public participation that are rarely present in the deliberations of Congress or other legislatures. It is often difficult for interested parties to determine exactly what a bill under consideration means to them. The more vague the proposed provisions, the more difficult it is for the public to decide whether participation is worth the effort and, if so, what position to take.

In rulemaking the decisions regarding participation become much clearer because the issues are better defined, the actions the government is contemplating are more specific, and the implications for affected parties are much easier to predict. Positions are thus easier to formulate and articulate. There are many ways for the public to get involved in rulemaking and to influence the content of rules. The cost of effective participation in rulemaking may be lower, and the chances of success in rulemaking greater than those that confront the public during legislative deliberations.

### **A Means of Containing Administrative Discretion**

Rulemaking is an important tool in limiting the power and discretion of bureaucrats. Since the mid-twentieth century, the growing power of the bureaucracy has been viewed by many with considerable alarm. Armed with vast but poorly defined authority delegated to them by Congress, bureaucrats are seen as able to exercise discretionary powers that threaten the rights and security of individuals.<sup>52</sup> Many critics have claimed that administrative officials with the power to deny or rescind benefits and licenses, impose regulatory requirements and sanctions, and force the reporting of all types of information do so without adequate standards to guide them and to protect the public. But rulemaking is a potential remedy for the unchecked abusive bureaucratic discretion.

Some discretion is essential if the administrative process is to operate effectively, efficiently, and fairly. In his highly influential book *Discretionary Justice*, Kenneth Culp Davis acknowledged this but concluded that “our . . . systems are saturated with excessive discretionary power which needs to be confined, structured and checked.” The problem, he argued, was not the then common prescription that Congress and other legislative bodies work harder to specify limits in legislation. “Legislative bodies do about as much as they reasonably can do in specifying the limits on delegated power,” he stated. And he was quite specific about the tool in which he placed the most faith: “Altogether, the chief hope for confining discretionary power does not lie in statutory enactments but in much more extensive administrative rulemaking, and legislative bodies need to do more than they have been doing to prod the administrators.”<sup>53</sup>

Whether Congress heard this plea is unclear, but it certainly acted as if it had. Professor Davis was writing at the threshold of the 1970s, the so-called era of rulemaking.<sup>54</sup> The statutes since expressed a clear preference for rulemaking as a device for administering the programs they created. Many mandated rulemaking and added deadlines on agencies for completing this work. Although they are often viewed from the perspective of the private citizen or firm whose behavior is constrained, rules control agencies and bureaucrats as well. Rules set limits on the

authority of public officials in all areas of their work, identifying what they can know, how they can learn it, when they must act, what they must do, when they must do it, and actions they can take against those who fail to comply. A violation of rules puts the bureaucrat no less at risk than the private scofflaw. Fears of unfettered discretion in the hands of willful or ignorant bureaucrats are often unfounded and can be mitigated in a system in which citizens can trust that rulemaking will occur subsequent to any legislative enactment and set effective and reasonable limits on the use of discretionary power. Again, this is not to say that rulemaking is the font of wisdom and uniform success for public programs. Like most human activities, it is beset with problems. But rulemaking clearly provides advantages over the legislative process, which is overloaded with demands for action but impeded by shortages of time and expertise. There are reasons other than these institutional considerations why rulemaking has assumed a position of such importance in our government system: It serves the interests of the most powerful players in our public policy process.

## Rulemaking and Self-Interest

In all matters determined by politics, the self-interest of the major participants is a major determinant. Rulemaking is certainly no exception. Its other advantages notwithstanding, rulemaking delivers clear benefits to the main actors in our political system. Consider what rulemaking provides Congress, the president, the judiciary, interest groups, state and local governments, and the bureaucracy itself.

*Congress.* By resorting to widespread delegation of legislative power to the rule-making process, Congress both frees and indemnifies itself. Rather than spending all their available time in drafting, debating, and refining statutes, members of Congress are free to engage in other activities, like getting reelected. Of course, rule-making promotes reelection in more ways than just generating free time. If we examine contemporary statutes, it is clear that members of Congress are routinely faced with the legislative equivalent of a catch-22. Squeezed by powerful and contending interests—environmentalists and industry, workers and management, program beneficiaries and taxpayers—members of Congress realize that their votes on very specific legislative proposals that clearly identify winners and losers can erode support or foster outright opposition. As others have noted, this provides powerful incentives for Congress to remain vague, leaving the specific, painful, and politically dangerous decisions to the agencies.

Congressional self-interest is served by rulemaking for reasons other than the “responsibility avoidance” that accompanies the delegation of authority.<sup>55</sup> Congress remains free to intervene in ongoing rulemakings and to review completed rules using a variety of devices that will be discussed presently. Some of these devices allow members to perform services to individual constituents, an always popular reelection activity.

*Presidents.* It took a long time for presidents to learn how to make the most of it, but rulemaking provides extraordinary opportunities to influence the direction and content of American public policy. President Reagan instituted changes that gave the White House the power to review and influence all rules written by federal agencies. Viewed from one perspective, this reform gave the president a new weapon

in the ongoing struggle with Congress to define public policy. In a period of divided government, presidential management of the rulemaking process is especially significant. Because it is based in the White House, it avoids some of the perennial problems presidents have had in gaining control of their own executive machinery in departments and agencies. With the power of review, even presidents who take a dim view of big government and regulation will favor controlled use of rulemaking, because it allows them to influence the full range of public policy in a manner that does not directly entail negotiations with Congress.

*Judges.* Although it is less common to think of the judiciary as dominated by self-interest, there is no question that at least some judges relish an active role in the public policy process and that most hold strong views on the proper scope and channels for government action. As an opportunity for the exercise of authority and power by the courts, rulemaking makes it much easier for judges to supervise and impose their will on the operations of bureaucracies. This is true whether judges seek to impose their personal beliefs about law and policy or the more common situation when attempting to meet the obligations of the judicial branch in the political system.

Clearly articulated rules offer judges an efficient way to review and determine agencies' stewardship of the law and public policy. When lawsuits challenge the results of rulemaking, judges are able to evaluate the content of a rule to determine whether it is consistent with the statutes from which they derive their sole claim to authority and legitimacy. Furthermore, judges can review the process by which rules were developed to determine if the obligations to allow meaningful participation and to conduct required analyses were met. Judges have developed numerous devices to correct deficiencies in the substance or development process of the rules they review. Many of these vest in the judges themselves the equivalent of supervisory power over rulemaking, giving them the potential for great influence over the ultimate content of laws and policies. Other forms of administrative action, notably case-by-case decision making, are theoretically as susceptible to judicial review but are labor intensive in the extreme. Given the limited resources of the judiciary, review of rules is by far the more cost-effective path for judges to pursue personal power and institutional influence or merely to fulfill their constitutional responsibilities.

*Interest Groups.* Interest groups could find few modes of government decision making better suited to their particular strengths than rulemaking. Here and throughout the book, *interest group* will refer to organizations of any sort, including individual companies that attempt to influence the decisions of government. Their size, longevity, and issues of interest are not important. Because rulemaking is specialized, it allows these groups to focus their attention and use their resources to influence decisions they know will affect their members. As we have already noted, rulemaking often requires a considerable amount of substantive (often technical) information. Agencies are rarely in possession of all the information or insights they require to write sound, defensible rules. Frequently, interest groups and the individuals or firms they represent have ready access to the information that agencies need. This gives such groups a considerable amount of leverage in the development of rules. Unlike legislative deliberations, in which political considerations frequently overwhelm or obscure operational issues and technical details, the outcome of rule-

making often hinges on the amount and quality of information available, which is a stock-in-trade for interest groups.

*State and Local Governments.* The explosion of rulemaking that began in the late 1960s and has continued ever since is of great consequence to state and local governments. Not only are they affected directly—becoming, in effect, regulated parties under environmental, workplace safety, equal employment, and other programs—they also have become more active rulemakers in their own right. Many statutes allow states to be the primary rulemaker as long as their rules are at least as strict as those developed by the federal agency with primary jurisdiction for the program. Thus, state and local governments cannot avoid federal rulemaking, and they must await its results before exercising their own rulemaking powers. Because of these powers, state and local governments can have considerable influence over the federal rulemaking process simply by virtue of what they might do subsequently. For example, if state agencies are selected to enforce or otherwise implement rules, federal rulemakers must be attentive to their needs and preferences. Even when states and localities do not write rules, they are often responsible for enforcing the federal ones. By successfully influencing the content of federal rules, state and local governments can ease the burdens of subsequent implementation.

*Bureaucrats.* An equivocal position on rulemaking by bureaucrats would not be surprising. For many agencies, rulemaking represents a daunting workload that curtails their discretion and exposes them to scrutiny and pressure from Congress, the president, courts, and interest groups. Such a situation would seem sufficiently unattractive to put off even the most mildly self-interested bureaucrat. Although some may consider it nothing more than an unavoidable chore, rulemaking does bring certain benefits to at least some bureaucrats. Those “zealots” identified over five decades ago by Anthony Downs, a scholar of bureaucratic behavior, have in rulemaking the possibility of putting their indelible mark on public policy and law. His “climbers” find rulemaking presents an excellent opportunity to advance careers in and out of the agency. The author of a major rule gets considerable visibility in an agency and may become marketable on the outside. Even Downs’s “conserver,” who avoids risk in favor of a more predictable existence, sees in rules the opportunity to stabilize and regularize the working environment.<sup>56</sup>

In short, rulemaking has something for every key institution and actor in our political system. For this reason alone we should expect it to be a permanent feature of the way we govern ourselves.

The objective of this first chapter was to convince the reader that rulemaking is a significant government function that has, since the start of the Republic, played an increasingly pivotal role in the definition of American public policy and law. In the hope that this case has been made, the next task is to explain how rules are written. The process of rulemaking has been evolving since the enactment of the first statute that delegated the authority to develop rules to the first president. Today it can be highly complex. The way it is conducted has important implications for the nation’s well-being and the functioning of our democracy. It is to the process of rulemaking that we turn next.

## Notes

1. 81 Federal Register 28973.
2. See, for example, Andrew Taylor, "House Panel Seeks to Block FDA 'Vaping' Rule," *The Detroit News*, July 12, 2017 (<http://www.detroitnews.com/story/news/politics/2017/7/12/house-panel-seeks-block-fda-vaping-rules/103647720/>).
3. Colin Diver, "Regulatory Precision," in *Making Regulatory Policy*, ed. Keith Hawkins and John Thomas (Pittsburgh: University of Pittsburgh Press, 1989), p. 199.
4. United States Code 551 (4) (hereafter cited as U.S.C.).
5. Kathryn Watts, "Rulemaking as Legislating," *Georgetown Law Journal* 103 (2015), 1003–1060.
6. For discussion of these instruments of presidential power, see Phillip J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (Lawrence: University Press of Kansas, 2002).
7. Charles Levine, B. Guy Peters, and Frank Thompson, *Public Administration: Challenges, Choices, Consequences* (Glenview, Ill.: Scott Foresman/Little, Brown, 1990), p. 99.
8. One scholar would argue that this broad definition is just an example of the APA's rulemaking provisions in which "Congress' delegation of vast lawmaking power was acknowledged and legitimated." See Martin Shapiro, "APA: Past, Present, Future," *Virginia Law Review* 72 (1986): 453.
9. 29 U.S.C. 553, 651–678.
10. Florence Heffron and Neil McFeeley, *The Administrative Regulatory Process* (New York: Longman, 1983), p. 152.
11. Stephen Breyer and Richard Stewart, *Administrative Law and Regulatory Policy*, 2nd ed. (Boston: Little, Brown, 1985), pp. 466–467.
12. *Ibid.* The relation between rules and future effects has been accepted in the literature for a long time. See Ralph Fuchs, "Procedures in Administrative Rulemaking," *Harvard Law Review* 52 (1938): 261.
13. As James O'Reilly puts it, "Rules are as old as the republic." See O'Reilly, *Administrative Rulemaking* (Colorado Springs, Colo.: Shepard's/McGraw-Hill, 1983), p. 4.
14. Gary Bryner, *Bureaucratic Discretion: Law and Policy in Federal Regulatory Agencies* (New York: Pergamon, 1987), p. 10.
15. Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. 8, 77th Cong., 1st sess., 1941, p. 97. Hereafter cited as Attorney General's Committee.

16. Ibid.
17. Ibid.
18. David Rosenbloom, "Public Law and Regulation," in *Handbook of Public Administration*, ed. Jack Rubin, Bartley Hildreth, and Gerald Miller (New York: Marcel Dekker, 1989), pp. 544–545.
19. See Attorney General's Committee, p. 98, at n. 17.
20. Many sources cover the historical development of public policy in the areas mentioned in the text. Various authors consider successive "eras" of growth and diversification in public policy, regulation, and rulemaking. An accessible list of major statutes that established programs and authorities for a wide variety of agencies that issue rules can be found in the *Federal Regulatory Directory*, 14th ed. (Washington, D.C.: CQ Press, 2010).
21. Ernest Gellhorn and Barry Boyer, *Administrative Law and Process in a Nutshell*, 2nd ed. (St. Paul, Minn.: West Publishing, 1982), p. 17.
22. Rosenbloom, "Public Law and Regulation," pp. 553–555.
23. Phillip J. Cooper, *Public Law and Public Administration* (Palo Alto, Calif.: Mayfield, 1983), p. 75. In a subsequent chapter we will review Supreme Court decisions that invalidated much of the legislative basis for the New Deal. Although these cases hinged on perceived defects in the NIRA, the way agencies conducted rulemaking and other program functions was prominent in the Court's opinions.
24. Ibid.
25. Attorney General's Committee, part 7, Department of the Interior, p. 57, and part 10, Bituminous Coal Division, Department of the Interior, pp. 12–13.
26. Ibid., part 19, Veterans Affairs.
27. Ibid., part 11, Interstate Commerce Commission, p. 67.
28. Attorney General's Committee, part 3, Social Security Board, p. 23.
29. William F. West, "The Politics of Administrative Rulemaking," *Public Administration Review*, September/October 1982, pp. 421–423.
30. Susan Estreicher, "Policy Oscillation at the Labor Board: A Plea for Rulemaking," *Administrative Law Review* 37 (1985): 163; Charlotte Garden, "Toward Politically Stable NLRB Lawmaking: Rulemaking v. Adjudication," *Emory Law Review* 64 (2015): 1470–1494.
31. This summary of legislation draws on material found in Rosenbloom, "Evolution of the Administrative State," in *Handbook of Public Administration*, pp. 563–564, and the *Federal Regulatory Directory*.

32. Antonin Scalia, "Making Law without Making Rules," *Regulation*, July/August 1982, p. 25.
33. Theodore Lowi, "Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power," *American University Law Review* 36 (1987): 298.
34. A. Lee Fritschler, "The Changing Face of Government Regulation," in *Federal Administrative Agencies*, ed. Howard Ball (Englewood Cliffs, N.J.: Prentice Hall, 1984); Bryner, *Bureaucratic Discretion*, p. 13.
35. Bryner, *Bureaucratic Discretion*, p. 13.
36. These data were provided by the Office of Federal Register.
37. Jody Freeman and Jim Rossi, "Agency Coordination in Shared Regulatory Space," *Harvard Law Review* 125 (2011): 1131.
38. See, for example, Harvey Lieber, *Federalism and Clean Waters* (Boston: Lexington, 1974).
39. Arthur Bonfield, *State Administrative Rule Making* (Boston: Little, Brown, 1986), pp. 19–20.
40. Binyamin Applebaum and Michael Shear, "Once Skeptical of Executive Power, Obama Came to Embrace It," *New York Times*, August 13, 2016.
41. Jerry Mashaw, "Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Legal and Political Accountability," report to the Administrative Conference of the United States, August 1992; Thomas McGarrity, "Some Thoughts on Deossifying the Rulemaking Process," *Duke Law Journal* 41 (1992): 1385–1462; Robert Anthony, "Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Agencies Use Them to Bind the Public?" *Duke Law Journal* 41 (1992): 1311–1384.
42. Anthony, "Interpretative Rules," p. 1312.
43. 29 CFR, part 1607.
44. Attorney General's Committee, p. 100.
45. Anthony, "Interpretive Rules."
46. The effects of government rules and regulations on American businesses are summarized in a large number of texts and reports. See, for example, Murray Weidenbaum, *Business, Government, and the Public*, 4th ed. (New York: Prentice Hall, 1990).
47. "Northwest Pilots Are Found Guilty of Drunken Flying," *New York Times*, August 21, 1990; "America West Fires Pilots Accused of Drinking," July 3, 2002, [www.cnn.com](http://www.cnn.com); Mike Ahrens, "Pilots of Wayward Jet Lose Licenses," October 27, 2009, [www.cnn.com](http://www.cnn.com).

48. Mike Ahlers, "Pilots Flying Wayward Jets Lose Licenses," CNN, October 27, 2009 (<http://www.cnn.com/us/10/27/09/airliner.flyby>).
49. Cornelius M. Kerwin, "Transforming Regulation," *Public Administration Review* 50 (January/February 1990): 91–100.
50. There are many treatments of the struggle between the White House and Capitol Hill for control of the bureaucracy. See, for example, Louis Fisher, *The Politics of Shared Power*, 3rd ed. (Washington, D.C.: CQ Press, 1993), chap. 4, and James A. Thurber, *Rivals for Power* (Washington, D.C.: CQ Press, 1996).
51. James Landis, *The Administrative Process* (New Haven, Conn.: Yale University Press, 1938), p. 69.
52. Lowi, "Two Roads to Serfdom," *op. cit.*
53. Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Urbana: University of Illinois Press, 1969), p. 27.
54. *Ibid.*, p. 55.
55. Morris Fiorina, "Legislative Choice of Regulatory Forms: Legal Process or Administrative Process," *Public Choice* 39 (1982): 46–47.
56. Anthony Downs, *Inside Bureaucracy* (Boston: Little, Brown, 1967), chap. 9.