Administrative Procedure and the Decline of the Trial

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No account of the evolution of the trial in the United States would be complete without a discussion of the rise of administrative agencies.[1] Since their emergence in the latter part of the nineteenth century, administrative agencies have assumed an increasingly important role in the legal regulation of economic and social activity, supplanting many of the functions previously performed by other governmental institutions, particularly the courts. To be sure, legal causes of action providing the basis for judicial trials have proliferated and there are more judges, courts, and cases than ever before, but this growth has been dwarfed by the expansion of administrative agencies, which decide cases and issues that would otherwise have been within the province of the courts.

The expansion of the administrative state has been accompanied by an evolution in the administrative procedures through which agencies make legal decisions. Alternative and less formal procedures that bear little resemblance to traditional trials have emerged as a pragmatic response to the realities of the modern administrative state. A variety of factors influenced this evolution, including the nature of the issues that agencies resolve, the kinds of information and input necessary to make those decisions, and the sheer quantity of decisions that need to be made. The judiciary has accommodated, if not encouraged, this procedural evolution by according agencies broad discretion over the choice of procedures and declining to impose significant constitutional or statutory constraints on that choice.

This essay examines the evolution of administrative procedures with an eye toward the implications of this evolution for legal procedures generally. In Part I, we discuss the growth of the administrative state and the factors fueling the evolution of administrative procedure. In Parts II and III, respectively, we discuss two basic trends that have shaped this evolution, the rise of rulemaking as a means of establishing policy without individualized adjudications and the emergence of informal, nonad-

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1. *See* ELLEN E. SWARD, THE DECLINE OF THE CIVIL JURY 130–35 (2001) (discussing the reasons for agency adjudication).

versarial procedures in adjudications. Finally, Part IV concludes with an assessment of the implications of these trends. The use of rulemaking and other informal procedures have many practical advantages that appear to justify the movement away from the more formal procedures associated with trials. Still, this movement has not been without its costs. The fact that administrative procedures no longer promote some of the values associated with trials—particularly educational and participatory values—may contribute to the unease with which Americans view the administrative state. Nevertheless, the answer is not to reverse the trend towards more informal procedures in administrative law. Rather, it is to find ways to promote values such as education and participation without sacrificing the efficiency of the administrative process.

I. THE RISE OF ADMINISTRATIVE PROCEDURE

While its roots lie in the Progressive Movement of the late nineteenth century,[2] the modern administrative state is largely a twentieth century phenomenon. With increasing industrialization, the Great Depression, and the social movements of the 1960s, the laissez faire regime of the common law gave way to extensive government regulation to protect public health and safety, regulate labor and employment, preserve the environment, and address various social problems.[3] Similarly, government benefit programs for the aged, disabled, and the poor, as well as government support for various segments of the business community, expanded throughout the twentieth century.[4] Administrative agencies were the tool of choice to implement these regulatory and benefit programs, and thus to make many decisions that would otherwise have fallen to the judiciary.[5] As a result, in many cases administrative procedures have displaced judicial trials.

2. *See* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 392–94 (discussing the link between the rise of the administrative state and Progressivism).

3. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) (discussing the history of federal regulation).

4. *See id.* at 1243–95 (discussing twentieth-century regulation from the depression through the 1970s).

5. This is not to say that all administrative decisions would otherwise have fallen to the judiciary. Agencies also make decisions that traditionally fall within the executive branch and some decisions that would otherwise be resolved legislatively.

A. Displacement of Judicial Trials

Broadly speaking, agencies engage in three types of activities that overlap with the domain of judicial trials. First, many of the earliest agencies, such as the Interstate Commerce Commission (ICC) and Federal Trade Commission (FTC), engaged in economic regulation addressing the problem of natural monopolies and anti-competitive activity, which typically involved ratemaking, licensure, and enforcement actions. Second, agencies such as Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), or National Highway Traffic Administration (NHTSA) engage in regulation designed to protect health, safety, and the environment or address social problems, which typically involves comprehensive standard-setting and enforcement. Third, agencies such as the Social Security Administration (SSA) oversee large-scale government benefit programs requiring both policy-making and claims-processing activities by the agency. If not for administrative agencies, a significant component of all three types of these activities would be handled through judicial trials.

Consider, for example, the field of environmental law. Before the emergence of comprehensive environmental regulation, the legality of chemical emissions would have been handled by the courts through the traditional law of nuisance.[6] While the common law of nuisance remains intact and is sometimes invoked to address environmental issues, it has largely been supplanted by a complex web of environmental laws and regulations administered by the EPA and other agencies.[7] These agencies make decisions respecting legal rights and duties under a regulatory regime that overlaps with traditional nuisance and tort law, but extends to a host of new standards. Although courts continue to play an important oversight role, this role is largely an appellate one, which means that these matters are resolved without a judicial trial.[8] Traditional common law fields regulated through judicial decisions are now dominated by statutes, regulations, and administrative decisions in many other areas of the law, such as labor laws administered by the National Labor Relations Board (NLRB) and securities and commodities laws administered by the

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6. FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 14 (3d ed. 1999).

7. *See id.* at 411–45 (describing laws designed to control air pollution).

8. To the extent that an agency performs an essentially prosecutorial function—citing a party for violating regulatory provisions and bringing an enforcement action—there may be a judicial trial. But this approach is often replaced by one in which the agency makes the decision and is subject to deferential judicial review. *See id.* at 1075–82 (discussing government enforcement of statutory violations).

Securities and Exchange Commission (SEC) and the Commodities Futures Trading Commission (CFTC). Likewise, Congress vested individual benefit claims that might have been adjudicated by courts in administrative agencies, such as the SSA.

Administrative agencies emerged as the tool of choice to implement regulatory and benefit programs for several reasons. First, reliance on traditional modes of government action—statutory enactments and judicial enforcement—was unworkable because legislative and judicial procedures are too cumbersome and because Congress and the courts lack the capacity to handle the influx of new legal rights and duties and their enforcement. Congress has neither the time nor the expertise to develop detailed technical standards to govern complex fields, such as environmental protection, workplace safety, or disability benefits. Similarly, courts would be overwhelmed by the number of lawsuits enforcing new rights and duties without administrative adjudication to take over much of the caseload. Thus, not only could administrative agencies absorb the new workload that would otherwise inundate these institutions, but they also could use streamlined procedures to dispose of these matters more efficiently than Congress or the courts.

Second, administrative agencies have technical expertise in the areas they administer. Because the agencies specialize, they can be staffed with knowledgeable personnel with the relevant expertise to evaluate complex technical issues. Similarly, agencies and their staff gain practical experience through ongoing involvement in the field, which means agencies can make more informed policy decisions concerning technical standards for their areas. By contrast, both Congress and the courts must address a wide array of issues and cannot develop the same kind of expertise in particular technical fields.

Third, proponents of administrative agencies believed the administrative setting was more conducive to bureaucratic and scientific neutrality.[9] They thought that agencies would be somewhat removed from politics and thus capable of exercising their expert judgment as to the best policy, rather than being forced to respond to political pressures. Conversely, in some areas at least, Congress did not entirely trust the judiciary to support legislative policy.[10] While this ideal of neutral expert judgment may not have been entirely realized in practice, the environ-

9. *See* Shapiro & Levy, *supra* note 2, at 393–94 (describing the Progressive's belief in neutral scientific expertise).

10. *See, e.g.*, KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 226, 230–31 (1989) (discussing opposition of state court judges to legislation protecting workers and the role of judicial review).

ment for administrative decisionmaking is generally less politicized than the legislative arena.

B. Evolution of Administrative Procedure

With the growth of the administrative state came the diversification and evolution of administrative procedures. A mixture of provisions in organic statutes (i.e., statutes creating an agency and vesting it with authority to enforce legislative standards) and judge-made common law governed early administrative processes. These processes typically resembled the formal adversarial hearings characteristic of traditional court trials, incorporating oral testimony, cross-examination, and many of the accouterments of trials (although without a jury).[11] Indeed, some judicial decisions suggested that these kinds of procedures were constitutionally required, at least in some cases.[12]

The New Deal, however, ushered in an era of experimentation, including rejection of the older conceptions of government:

> As "Progressives," [the New Dealers] believed that science and expertise, and ultimately bureaucracy, was necessary to address the country's economic woes. They argued that traditional procedures would not only slow the government's capacity to act, but that such limitations were less necessary if government was composed of "administratively organized 'communities' of highly trained professionals."[13]

Thus, it came to pass that New Deal agencies arguably violated several cherished constitutional concepts, including due process, because administrative adjudication was more informal than its judicial counterparts.[14] Opponents of the New Deal, particularly the business community, railed against the lack of procedural protections, but their protests had little im-

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11. The Interstate Commerce Commission, for example, was the first federal independent agency. Its primary function was rate setting for railroads, which it performed through trial-like adjudicatory procedures. Another early agency, the Federal Trade Commission, conducted formal adjudications culminating in "case and desist orders," the administrative equivalent of the injunctive relief, against unfair trade practices. For detailed early accounts of these agencies, see GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION (1924); I. L. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (Vol. 1, 1931; Vol. 2, 1931; Vol. 3A, 1935; Vol. 3B, 1936; Vol. 4, 1937).

12. *See* Interstate Commerce Comm'n v. Louisville & Nashville R.R., 227 U.S. 88, 91–94 (1913) (finding that administrative proceedings are quasi-judicial in nature). *But see* Londoner v. City & County of Denver, 210 U.S. 373, 386 (1908) ("Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal.").

13. Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. 89, 97 (1996) (quoting Joel D. Schwartz, Book Review, 97 HARV. L. REV. 815, 820 (1984)).

14. *Id.*

pact at a time when the country was in the midst of the worst depression in its history. As economic conditions improved and the public saw President Roosevelt's court-packing plan as an attack on the "rule of law," however, the movement for procedural reform gained momentum.[15] In 1939, Congress passed the Walter-Logan Act to establish a code of administrative procedure, but it was vetoed by President Roosevelt, who justified his veto on the grounds that the bill was "'so rigid, so needlessly interfering, as to bring about a crippling of the administrative process.'"[16]

In 1947, however, Congress did pass the current Administrative Procedure Act (APA), which represented a compromise between the contending forces of effectiveness and legal accountability, as one of the authors has noted previously:

> The ultimate adoption of the APA stilled the crisis over the legitimacy of the administrative state. It signaled that broad delegations of power and combined functions would be tolerated as long as they were checked by more extensive procedures. At the same time, the APA also constituted a compromise of the policy and political conflicts that proceeded its adoption. Congress rejected both the procedural straight-jacket favored by the New Deal's critics and the level of procedural informality favored by its supporters.[17]

Although specific provisions in organic statutes and some additional procedural requirements for important rules supplement the APA, it continues to provide the basic framework for most federal administrative procedures. Most states have analogous statutes governing state and local administrative procedures.[18] Two key features of the APA drove the subsequent evolution of administrative procedures. First, the APA established rulemaking as an alternative to adjudication for many administrative decisions, particularly those involving important policy questions.[19] Second, within both the adjudicatory and rulemaking models, the APA contemplated varying degrees of procedural formality.[20]

The flexibility of the APA permitted agencies to develop and utilize a variety of procedural forms adapted to the particular issues to be resolved. Thus, in addition to formal adversarial hearings, which are still

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15. *Id.*
16. *Id.* at 97–98.
17. *Id.* at 98.
18. *See* MICHAEL ASIMOW ET AL., STATE AND FEDERAL ADMINISTRATIVE LAW (2d ed. 1998) (discussing enactment of state APAs).
19. 5 U.S.C. § 553 (2000).
20. *See infra* notes 41–42 and accompanying text.

used for some important agency actions, current administrative procedures include nonadversarial rulemaking procedures ranging from relatively formal "paper hearings" for binding regulations[21] to highly informal procedures for nonbinding interpretive rules and policy statements, which may be issued with little or no input from affected parties.[22] Similarly, a wide array of adjudicatory decisions are made without formal hearings using a variety of alternative procedures. Two key forces fueled these developments.

A primary factor is efficiency. Formal, trial-like procedures are resource intensive. Given the sheer number of administrative decisions, it is not feasible to use formal procedures in every case, especially since many of the decisions may involve relatively minor matters or matters that can be disposed of fairly easily. Moreover, alternative modes of administrative action such as rulemaking, can produce further efficiencies by reducing the number of individualized decisions that are needed. Given the limited resources available to agencies charged with developing and enforcing comprehensive regulatory and benefit programs, there is constant pressure on agencies to streamline their procedures.

Another important consideration is the diverse nature and character of administrative decisions. While some administrative decisions involve contested legal and factual issues well suited for trial-like, adversarial procedures, many do not. Agency decisions also include across-the-board standard setting and policy judgments, interstitial interpretive advice, and a range of other kinds of decisions. Most famously, many agency decisions rely on "legislative" rather than "judicial" facts; that is, they turn on policy-related factual questions unlikely to be illuminated by witness testimony and cross-examination as opposed to disputed facts regarding specific events for which witness testimony and credibility may be crucial.[23] Conversely, these sorts of issues may require broad input from diverse parties, which is unlikely to be generated by adversarial trials.

As will be developed more fully in Parts II and III, the courts facilitated this evolution of administrative procedure. First, although the use of alternative administrative procedures raise potentially serious constitutional problems under the Due Process Clause and other constitutional provisions, the Supreme Court developed a flexible due process analysis that freely accommodated both rulemaking procedures and informal

21. *See infra* notes 68–96 and accompanying text.

22. *See infra* notes 97–110 and accompanying text.

23. Kenneth Culp Davis, *An Approach to the Problems in Evidence in the Administrative Procedure Process*, 55 HARV. L. REV. 364, 402–16 (1942).

modes of adjudication. Second, the Court accorded agencies broad discretion in the form of administrative action, both as a matter of the APA and the underlying organic statutes. Thus, notwithstanding periods of significant judicial involvement in the shaping of administrative procedures,[24] agencies are generally free to select the mode of procedure through which they act.

II. THE RISE OF RULEMAKING

One essential characteristic of judicial trials is that they are case specific; that is, they address a particular dispute between individual parties. To the extent that such decisions create broader legal rules, precedent is (at least in theory) incidental to the individualized dispute resolution function. The common law rules that result from such adjudication are notoriously flexible and difficult to ascertain. In addition, such rules are reactive—they develop after the events and seek to sort out the respective rights and responsibilities of the parties rather than establish a prospective regime to govern economic and social behavior.[25] Whatever the advantages of such an approach from the dispute resolution perspective, this sort of legal regime is unsuited for the regulatory state.

A. The Advantages of Rulemaking

From a regulatory perspective, rulemaking has certain key advantages over trial-type adjudication. Clearly articulated, across-the-board rules are a more effective, efficient, and comprehensive means of regulating behavior than common law rules that result from traditional adjudication. Given its advantages, Congress has increasingly delegated to agencies rulemaking authority, and agencies have made extensive use of that authority to carry out their regulatory responsibilities. Emphasizing the advantages of rulemaking, courts accommodated and even encouraged agency reliance on rulemaking as a means of formulating policy.

Rulemaking is generally more effective than common law adjudication because affected parties are more likely to comply with the resulting

24. In particular, judges played a critical role in the development of the "paper hearing" requirements of legislative rulemaking under § 553 of the APA. *See infra* notes 52–61 and accompanying text.

25. Of course, even common law rules may come to have such an effect; that is the premise of the deterrence rationale for tort law, for example. *See* John C.P. Goldberg, *Twentieth Century Tort Theory*, 91 GEORGETOWN L.J. (forthcoming 2003) (discussing the deterrence theory of tort law). While business and other sophisticated legal actors may respond to common law rules, one may question the extent to which such effects are real for the prototypical "reasonable" person. *See id.* (discussing the actual efficacy of the deterrence theory).

legal rules without specific enforcement action. Agency rules are prospective, easy to identify, and generally create clear requirements, which makes it much easier for regulated entities to know and understand their obligations.[26] In contrast, judicial trials are reactive, apply to conduct that has already occurred, and are seldom entirely clear until after a case has been resolved. To the extent that agency rules are binding, most people will voluntarily comply out of respect for the rule of law. Likewise, it is much more difficult to defend against the violation of a clear rule, with a resulting increase in the likelihood that adverse consequences will attach.[27]

Because rulemaking is more effective, it is also a more efficient means of regulation. A single rulemaking establishes across-the-board rules that would require multiple adjudications to develop and articulate. Moreover, by adopting rules to govern recurrent issues, agencies can limit the scope of adjudications[28] or avoid them altogether by means of a kind of administrative summary judgment.[29] Finally, as noted above, rulemaking increases voluntary compliance and thereby reduces the need for enforcement. Thus, while each rulemaking is resource intensive, in the long run a rulemaking conserves scarce agency resources.[30]

A final advantage of rulemaking is its comprehensive character. Adjudications are by definition case specific, addressing a particular issue in the context of a specific dispute. The process produces case-specific information and the decision produces case-specific rules. It is easy for the larger picture to be lost. Rulemaking, by contrast, provides the opportunity for broad participation by a wide array of affected interests, providing the agency with more comprehensive information about a given

26. Of course, agency rules may also be ambiguous or difficult to comprehend (just try reading the Code of Federal Regulations); but by comparison to the open-ended and malleable doctrines of the common law, they are relatively clear.

27. The relative certainty of consequences, of course, affects the overall deterrent effect of legal rules. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 243 (3d ed. 1986) ("the economic theory of law is a theory of law as a deterrence").

28. *See* Heckler v. Campbell, 461 U.S. 458, 470 (1983) (upholding use of regulations to eliminate individualized determination of availability of jobs for certain categories of disability claimants).

29. *See* United States v. Storer Broad. Co., 351 U.S. 192, 205 (1956) (upholding denial of a broadcast license without a formal hearing based on regulation limiting the total number of stations that could be owned by any one applicant).

30. To the extent that additional procedural requirements or more extensive judicial review increases the cost of agency rulemaking, however, use of rulemaking would be cost-effective in a smaller number of cases. *See infra* notes 62–64 and accompanying text (discussing ossification of rulemaking and increased reliance on nonlegislative rules).

problem.[31] The agency is then in a position to articulate more comprehensive rules to govern an entire field of activity.

Given these advantages, it is hardly surprising that rulemaking came to play an increasingly important role in the administrative state. Two additional factors fueled this trend. First, agencies began to take on more functions for which rulemaking was especially well suited. Early agencies, such as the ICC and FTC, engaged primarily in adjudicatory functions such as enforcement, rate setting, and licensing.[32] In contrast, the more recent wave of agencies created in the 1960s and 70s, such as the EPA or OSHA, are engaged primarily in functions that are well suited to rulemaking, such as standard setting and other direct regulation of conduct. Second, even agencies whose functions are primarily adjudicatory in character began to use rulemaking extensively as a means of simplifying or avoiding adjudications altogether. The Social Security Administration is an excellent illustration of this phenomenon. While disability determinations were handled initially on a more or less case-by-case basis, the SSA developed an increasingly precise and detailed regulatory framework for evaluating disabilities, and used rules to resolve a number of recurrent factual issues concerning the severity of impairments and the availability of jobs.[33]

The courts facilitated the shift to rulemaking by according agencies broad discretion to choose rulemaking and by giving maximum effect to the resulting rules. The APA defines rulemaking and adjudication,[34] but these definitions are sufficiently open-ended to impose few constraints

31. This is most clearly true with respect to notice and comment rulemaking under § 553 of the APA. Other forms of rulemaking may involve more limited public participation. *See infra* notes 62–64 and accompanying text.

32. *See* Rabin, *supra* note 3, at 1224–25 (describing the origins of the FTC's authority to prohibit certain types of trade practices), *see also id.* at 1227–28 (describing the origins of the ICC's authority to set railroad rates). Thus, it is not surprising that these agencies were expected to follow formal adjudicatory hearing procedures.

33. *See* Richard E. Levy, *Social Security Disability Determinations: Recommendations for Reform*, 1990 BYU L. REV. 461, 465–67 (1989) (describing a five-step sequential evaluation process for disability, the listing of numerous impairments that are considered per se disabling, and the use of "grids" to determine the availability of jobs for claimants with standard exertional impairments and vocational factors).

34. Section 551(5) defines rulemaking as the process for formulating a rule, and § 551(4) defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect . . . ." Conversely, adjudication is the agency process for formulating an order, § 551(7), and an order is "the whole or part of a final disposition . . . in a matter other than rule making but including licensing." § 551(6). Note that these definitions do not track the traditional distinction between rulemaking and adjudication, because rulemaking can include a statement of *particular* applicability and is not limited to broad across-the-board decisions. *See infra* note 119 and accompanying text (discussing the *Londoner* and *Bi-Metallic* decisions).

on the agency's choice between rulemaking and adjudication.[35] Thus, the principal APA constraint on the agency choice of procedures is the generally applicable "arbitrary and capricious" standard of review.[36] Likewise, courts tended to read agency rulemaking authority under organic statutes broadly.[37] Once agencies completed a rulemaking, courts also generally accorded great deference to them.[38] More fundamentally, courts approved the use of rules to limit and even foreclose adjudications,[39] and this interaction has been critical for the growth and usefulness of rulemaking. While some judicial doctrines have hindered rule-

35. Indeed, the only requirements imposed by these definitions appear to be temporal—an agency adjudication must apply immediately to the parties before it, *see* Nat'l Labor Relation Bd. v. Wyman-Gordon Co., 394 U.S. 759, 769 (1969) (holding that the NLRB's decision was valid), while an agency rule must be prospective (i.e., have "future" effect). *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 215 (1988) (stating that retroactive promulgation of agency rules was not allowed).

36. *See* Nat'l Labor Relations Bd. v. Bell Aerospace Co., 416 U.S. 267, 295 (1974) (stating that the agency's judgment is entitled to great weight), for a pre-APA case, *see also* Sec. & Exc. Comm'n v. Chenery, 332 U.S. 194, 209 (1947) (upholding broad discretion to use adjudication). Ironically, these leading cases involved challenges to an agency's use of adjudication rather than rulemaking. In both cases, the Court stressed the advantages of rulemaking but upheld the agency's discretion to use adjudication anyway. *Bell Aerospace*, 416 U.S. at 294; *Chenery*, 332 U.S. at 203. Challenges to agency use of rulemaking have been relatively rare and generally unsuccessful. For a rare successful challenge, see *Shell Oil Co. v. Fed. Energy Regulatory Comm'n*, 707 F.2d 230, 236 (5th Cir. 1983) (reversing a FERC order based on the resolution of a factual dispute during a prior adjudication on the ground the defendant had not had an opportunity to contest the factual grounds of the order as it would have if the agency had used rulemaking to resolve the factual dispute).

37. The leading example of this phenomenon is *Nat'l Petroleum Refiners v. Fed. Trade Comm'n*, 482 F.2d 672, 698 (D.C. Cir. 1973), in which the District of Columbia Circuit upheld the FTC's authority to promulgate substantive as well as procedural rules, notwithstanding strong textual and historical arguments to the contrary. Congress responded to *Petroleum Refiners* by amending the statute to confirm substantive rulemaking authority but imposed additional procedural requirements in the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 57a(b)–(d) (2000).

38. Substantive review of agency rules has not been consistently deferential, however. *See generally* Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995) (developing a theoretical model of judicial incentives to explain why substantive review of agency decisions has not been consistently deferential). Nonetheless, review of agency rules has at times been exceedingly deferential. *See, e.g.*, Chevron, U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984) (holding with regard to judicial review of a agency's construction of a statute that if Congress has not directly spoken to the precise question at issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute); Balt. Gas & Elec. v. Natural Res. Def. Council, 462 U.S. 87 (1983) (holding that the agency's decision was not arbitrary or capricious within the APA). Although more aggressive approaches to review of rules occasionally result in the high profile invalidation of rules, *e.g.*, Motor Vehicle Mfr. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983), most aspects of most rulemakings are eventually upheld. Judicial review has, however, forced agencies to develop a more elaborate record in support of their rules, adding to the procedural costs of rulemaking. *See infra* notes 76–77 and accompanying text.

39. *See supra* note 28.

making,[40] on the whole administrative law doctrines have favored the use of rulemaking and encouraged its growth.

B. Rulemaking Procedures

A second trend that has contributed to the rise of rulemaking is the availability of increasingly informal procedures for adopting rules. The APA contemplates three basic categories of rules with accompanying categories of procedures.[41] First, formal rulemaking follows trial-type adversarial procedures and results in a binding rule.[42] Second, "notice and comment" procedures require public notice and an opportunity for written comments, and also result in a binding rule.[43] Third, "nonlegislative rules" have no prescribed procedures, but are not directly binding.[44] Over the years, more and more agency rulemaking has shifted toward less formal procedures. Formal rulemaking is virtually nonexistent, notice and comment procedures are still followed for major rules, and agencies increasingly employ nonlegislative rules to resolve important policy questions.

1. The Demise of Formal Rulemaking

Agency rulemaking prior to the adoption of the APA typically followed trial-type adjudicatory processes.[45] Although the APA clearly contemplated that rulemaking procedures would often be formal,[46] in

40. *See infra* notes 68–77 and accompanying text (discussing development of "paper hearings" and their impact on rulemaking).

41. Although rulemaking predated the APA, *see* SEC v. Chenery Corp., 318 U.S. 80 (1943) (holding that the SEC had mistakenly reasoned that a common law fiduciary duty had been imposed on participants in a reorganization but indicating that the SEC could adopt a rule to that effect), SEC v. Chenery Corp., 332 U.S. 194 (1947) (upholding the adoption of such a policy by adjudication), the rise of rulemaking was greatly facilitated by its adoption, in large measure by offering workable alternatives to formal rulemaking, and we may safely focus on the APA procedures to highlight the key developments.

42. 5 U.S.C. § 553(c) (2000).

43. *Id.* § 553(b).

44. *Id.* § 553(b)(3)(A). They may, however, be indirectly binding or become binding through adoption in adjudications. *See infra* notes 87–96 and accompanying text.

45. Such procedures were often thought necessary, for example, in agency ratemaking procedures. *See, e.g.*, Interstate Commerce Comm'n v. Louisville & Nashville R.R. Co., 227 U.S. 88, 93–94 (1913).

46. Indeed, as one leading administrative law text put it, "[u]ntil 1972, most observers of administrative law believed that an agency was required to use formal rulemaking if its organic act specified that it could take a particular type of action only after a 'hearing'. . . . " RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 317 (3d ed. 1999).

practice they almost never are,[47] because trial-type procedures are time consuming, resource intensive, and poorly suited to rulemaking in the regulatory setting:

> Each of scores, or even hundreds, of parties to the proceeding presents witnesses, each of whom addresses several issues. Each witness is subject to cross-examination on each issue by each of the lawyers representing parties with differing interests. The complicated sequence of direct testimony, cross-examination, redirect, recross, and cross-on-cross is repeated for each one of one hundred or more witnesses. Agencies that choose to, or are forced to, use this procedure for rulemaking typically discover that they do not have an evidentiary record sufficient to permit issuance of a rule even after spending a decade or more in the rulemaking process.[48]

Given these difficulties, it is to be expected that agencies would avoid formal rulemaking whenever possible. The United States Supreme Court facilitated the avoidance of formal rulemaking procedures through a series of decisions that made clear that formal rulemaking procedures are seldom required by due process, the APA, or an agency's organic statute.[49]

The first step in these legal developments was the Supreme Court's early decision in *Bi-Metallic Investment Co. v. State Board of Equalization*,[50] which effectively held that procedural due process does not apply in rulemaking. The *Bi-Metallic* opinion, authored by no less a figure than Justice Holmes, held that no hearing was required for an across-the-board increase in the assessed value of property in the City of Denver.[51] The Court reasoned that it would be impractical and unnecessary to hold hearings in such cases—impractical because there were simply too many people involved and unnecessary because the affected parties had recourse to the political process to correct errors and abuse.[52] The Court distinguished an earlier decision, *Londoner v. Denver*,[53] which had required a hearing before a special property tax assessment for street improvements could take effect, on the ground that in *Londoner* a few peo-

47. A notable exception is the Food and Drug Administration (FDA). *See* 21 U.S.C §§ 348(f), 355(c)(1)(b) (2000) (discussing formal hearing procedures).

48. PIERCE ET AL., *supra* note 46, at 316. For further discussion of the problems of formal rulemaking, see Robert Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132, 1157–89 (1972).

49. Some agencies, however, must apply "hybrid" rulemaking with some of the elements of trial-type procedures. *See infra* note 78 and accompanying text.

50. 239 U.S. 441 (1915).

51. *Id.* at 445.

52. *Id.* at 445–46.

53. 210 U.S. 373 (1908).

ple were especially affected on individual grounds.[54] These cases now represent the classic statement of the distinction between rulemaking and adjudication in administrative law.

In addition to the practical considerations emphasized by the Court in *Bi-Metallic*, Professor Kenneth Culp Davis has articulated a second critical rationale for the distinction, the nature of the factual issue to be resolved.[55] As Professor Davis explained, adjudications involve determination of "adjudicatory" facts, which are historical events and concern who did what to whom, where, when and why.[56] Because persons involved in such matters have particular knowledge about the events, trial-type procedures, with oral testimony and cross-examination, make sense as a means of determining adjudicatory facts. By way of contrast, rulemaking decisions typically involve "legislative" facts, which concern broad issues of general policy that are not within the peculiar knowledge of particular parties. Such facts are the province of technical expertise and scientific knowledge, research, and statistical data, and other sources of information. Trial-like procedures are not particularly well suited to ascertain legislative facts.

In any event, *Londoner* and *Bi-Metallic* not only removed any due process constraints from the use of informal rulemaking procedures, they also set the tone for a broader judicial aversion to trial-like procedures in the rulemaking context. The critical decisions in this respect are *United States v. Allegheny-Ludlum Steel Corp.*[57] and *United States v. Florida East Coast Ry. Co.*,[58] which made clear that an agency's organic statute will almost never trigger the formal rulemaking requirements of the APA or be interpreted to impose formal rulemaking requirements independently.[59] Under the APA, if an agency's organic statute requires that a rule be made "on the record after opportunity for agency hearing,"[60] the agency must follow the same trial-type procedures that apply to formal adjudications.[61] The Court held in *Allegheny-Ludlum* and confirmed in *Florida East Coast* that language in an organic statute requiring that

54. *Bi-Metallic*, 239 U.S. at 446.

55. Davis, *supra* note 23, at 402–16.

56. *Id.* at 402.

57. 406 U.S. 742 (1972).

58. 410 U.S. 224 (1973).

59. The APA's procedural provisions are gap-fillers; they are superseded by specific procedural requirements in an agency's organic statute, whether the organic statute provides for greater or lesser procedural formality than would otherwise be required by the APA. *See* 5 U.S.C. § 559 (2000) (explaining effects and requirements of the APA).

60. *Id.* § 553(c).

61. In such cases, § 553(c) specifies that §§ 556 and 557 apply. These provisions also apply to formal adjudications. *See id.* § 554(a).

rules be made "after a hearing" was not sufficient to trigger formal hearing requirements in the absence of some requirement that the hearing be on the record.[62] Because few organic statutes incorporate the explicit "on the record" language required by *Allegheny-Ludlum* and *Florida East Coast*, formal APA rulemaking procedures are almost never required.[63]

Florida East Coast also addressed, and rejected, the argument that the organic statute itself required something more than the notice and comment procedures of the APA.[64] In other words, even if the statutory language did not trigger formal APA procedures, if Congress intended the term "hearing" to mean a formal, trial-type procedure, the organic statute itself would require the agency to provide one. There was a strong argument based on the history of the statute suggesting that this was the case,[65] but the Supreme Court reached a contrary conclusion. Relying on *Londoner* and *Bi-Metallic* and endorsing the legislative-judicial fact distinction, the Court held that the statute did not require trial-like adjudicatory procedures and that the notice and comment procedures of § 553 of the APA satisfied the statutory requirement of a hearing.[66]

Thus, in both the due process and statutory context, the Court has recognized that trial-type procedures are inappropriate for rulemaking and declined to impose them on agencies. As a result, agencies are free to use notice and comment procedures (or less) to promulgate rules and thereby avoid the difficulties associated with formal rulemaking.

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62. *See* 406 U.S. at 756–57, (reasoning that the ESCH Act provision authorizing the Commission "'after hearing, . . . [to] establish reasonable rules,' . . . does not require that such rules 'be made on the record'") (citations omitted); 410 U.S. at 234–35 ("[t]o act 'after hearing was not the equivalent of a requirement that a rule be made on the record after opportunity for an agency hearing'"). Both cases involved the interpretation of the same statutory provisions concerning certain rate setting procedures by the ICC.

63. To the extent that an organic statute is adopted after the APA (and particularly after *Allegheny-Ludlum* and *Florida East Coast*), Congress may easily trigger formal rulemaking if it wants to by incorporating the precise language of § 553 as a term of art. For statutes adopted before the APA (such as the statutes at issue in *Allegheny-Ludlum* and *Florida East Coast*), such precision is impossible.

64. *See* 410 U.S. at 235 (rejecting the argument that the amendment to the Interstate Commerce Act added to the hearing requirement).

65. In a lower court opinion in another case involving the same statute, Judge Henry Friendly advanced a persuasive argument that the requirement of a hearing in the statute, which was adopted in 1917, was intended to incorporate the trial-type procedures described in *ICC v. Louisville & Nashville R.R.*, 227 U.S. 88 (1913). *See* Long Island R.R. Co. v. United States, 318 F. Supp. 490, 497–98 (E.D.N.Y. 1970) (three-judge district court) (stating that trial-type procedures were to be included in such an "on the record" hearing).

66. 410 U.S. at 237.

2. The "Ossification" of Notice and Comment Procedures

Because formal rulemaking procedures seldom apply, most agency regulations are adopted through the "notice and comment" procedures of § 553 of the APA.[67] These procedures contain three basic components:

(1) Notice of the proposed rule (and supporting explanation and data) published in the Federal Register;[68]
(2) An opportunity for interested parties to submit written comments and information concerning the proposed rule;[69] and
(3) A "concise general statement of their basis and purpose" accompanying rules finally adopted.[70]

These three requirements contemplate a process that is more akin to legislation than to traditional judicial trials. The proceedings are not concentrated in a single adversarial event, but rather spread out over a period of time. They are primarily written, rather than oral, and do not typically involve testimony and cross-examination. And they are not "on the record proceedings" in which contact with decisionmakers outside of the trial process is forbidden, but rather open proceedings in which ex parte communications are permitted.[71]

While courts and Congress generally supported the rise of rulemaking and facilitated agency avoidance of formal procedures, there were also concerns that notice and comment procedures might not provide sufficient protection against agency error or abuse. At one level, courts were concerned that regulated parties be given full opportunity to oppose agency regulations that might have a significant adverse impact on their

67. Section 553 contains two groups of exceptions to its requirements. First, § 553(a) exempts rules involving "military or foreign affairs" functions and "matters relating to agency management or personnel or public property, loans, grants, benefits, or contracts." For some rules involving benefits, such as Social Security, the organic statute explicitly provides for the application of § 553, thus overriding the exemption. 42 U.S.C. § 902(a)(5) (2000). Other agencies administering benefits have voluntarily applied notice and comment procedures. *See* 24 C.F.R. pt. 10 (2002) (explaining notice of proposed rulemaking procedures and hearings). The second group of exemptions is in § 3(b), and includes (1) interpretive rules, general, statements of policy, or rules of agency organization, procedure, or practice; and (2) a good cause exception. Interpretive rules and general statements of policy, which are often referred to as "nonlegislative rules" because they are not binding, have become increasingly important as an alternative to binding regulations that must comply with § 3. *See infra* notes 87–96 and accompanying text.

68. 5 U.S.C. § 553(b) (2000).

69. *Id.* § 553(c).

70. *Id.*

71. *See* Sierra Club v. Costle, 657 F.2d 298, 400–01 (D.C. Cir. 1981) (observing that oral communications during rulemaking are not prohibited in the APA).

interests. Conversely, they were also concerned that concentrated interests opposing regulation might have disproportionate influence, and also sought to ensure that the broad public interest received sufficient attention. As a result of these concerns, both the courts and Congress took steps to compensate for the perceived limitations of notice and comment rulemaking, increasing the level of procedural formality and imposing additional requirements on agencies. As a result, rulemaking under § 553 has become so much more time consuming and costly that it is generally regarded as "ossified" in the context of controversial and significant regulations.[72]

The first development of § 553 procedures came at the hands of the judiciary—primarily the lower courts—which essentially converted the notice and comment procedures into what are commonly known oxymoronically as a "paper hearing." Courts required agencies to incorporate data and information that they relied on in formulating a rule into the notice of proposed rulemaking so that affected parties could comment on it.[73] In addition, both as a matter of the "concise statement of basis and purpose" and substantive review of the rule under the "arbitrary and capricious" standard of review, courts have required agencies to provide detailed explanations of the final rule that respond to major comments and arguments submitted by parties.[74] Finally, although the courts have not prohibited off-the-record communications with agencies during rulemaking, in practice agencies must docket any communications of central relevance to the proceeding, especially data or information they receive (if they intend to rely on it).

These "paper hearing" procedures expand the requirements of § 553 beyond the more rudimentary procedures originally contemplated, but they are at least arguably an interpretation of its provisions. Some courts, particularly the D.C. Circuit,[75] however, went further, imposing

72. *See* Thomas O. McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

73. United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 250–52 (2d Cir. 1977). Another elaboration of the notice requirement prevents agencies from adopting rules that are not a "logical outgrowth" of the initial notice of proposed rulemaking without issuing a new notice and providing a new opportunity for comment. Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098 (4th Cir. 1985).

74. *See, e.g.*, Action on Smoking & Health v. Civil Aeronautics Bd., 699 F.2d 1209, 1217–19 (D.C. Cir. 1983) (setting aside an agency rule in part because the agency failed to provide an adequate answer as to why it did not adopt several regulations suggested by the public); *id.* at 1217 (noting the opportunity to comment is meaningless unless the agency responds to specific points raised in public comments); Auto. Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) (obligating the agency to respond to significant issues raised in the rulemaking comments).

75. This circuit is often regarded as the leading administrative law circuit because so many agencies are located in Washington, D.C. and may be sued there.

additional procedural requirements as a matter of judge-made doctrine rather than the APA. These courts reasoned that for particularly important regulations, additional procedures were necessary to ensure that the agency took a "hard look" at the problem and that affected parties (particularly the general public that would benefit from regulation) would be heard.[76] Whatever the merits of this view, it was not shared by the Supreme Court. In *Vermont Yankee Nuclear Power Corp. v. NRDC*,[77] the Court flatly rejected any judicial authority to order procedures beyond those required by either the APA or the organic statute, emphasizing that the choice of procedures belonged to the agency and discounting the notion that more procedures would necessarily produce a better decision.[78] More broadly, the Court expressed concern that agencies would be forced to follow extensive procedures in every case so as to head off potential problems on judicial review.[79]

While *Vermont Yankee* cut off judicially imposed procedures beyond those required by § 553 and reflected more broadly an unfavorable attitude toward additional rulemaking procedures, it did not prevent (or cure) the ossification of rulemaking. First, the reasoning of *Vermont Yankee* did not preclude paper hearing requirements imposed as an interpretation of § 553, so that those requirements remained in place.[80] Equally important, *Vermont Yankee* did not preclude aggressive substantive review of agency rules under the arbitrary and capricious standard, under which courts tended to review carefully the rulemaking record to ensure that it supported the agency decision, forcing agencies to take great care to create a record that would sustain a final rule and to explain their decisions in a way that responded to adverse comments.[81] Even exercising such care, however, agencies could assume that there would

76. *See, e.g.*, Mobil Oil Corp. v. Federal Power Comm'n, 483 F.2d 1238, 1262–64 (D.C. Cir. 1973) (compelling the FPC to use some type of adjudicative-trial-type procedures to explicate significant issues in a rulemaking).

77. 435 U.S. 519 (1978). The case involved Atomic Energy Commission's adoption by rule of certain generic risk values for use in the licensing of nuclear power plants. The challenge to the agency's rule focused on its conclusion that the risk associated with long-term storage of nuclear waste (for which no solution has yet been found) was zero. *Id.* at 538. This controversial conclusion produced considerable further administrative proceedings and litigation, but was eventually upheld by the Supreme Court in *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87 (1983).

78. 435 U.S. at 539–49.

79. *Id.* at 546–47.

80. The shift in attitude toward procedures may have discouraged the lower courts from the most aggressive application of some paper hearing requirements. *See* Shapiro & Levy, *supra* note 2, at 407 & n.86.

81. *See* McGarity, *supra* note 72, at 1410–26 (explaining judicial decisions that impose time-consuming and elaborate requirements on agencies to justify and explain the basis for promulgating rules).

be a significant challenge to the resulting rules on judicial review and that the courts might remand for reconsideration and additional proceedings, at least as to some aspects of the rules. Thus, notwithstanding *Vermont Yankee*, rulemaking under § 553 has become an elaborate production often taking years to complete and consuming significant agency resources.[82]

Congress has also added to the procedures of § 553 in ways that increase the costs of rulemaking. First, echoing some contemporaneous judicial developments, Congress in the 1970s imposed on some agencies "hybrid" rulemaking requirements.[83] These hybrids combined the basic notice and comment requirements with some, but not all, of the components of a formal hearing, such as oral hearings or a closed record. Hybrid procedures did not fare well in practice, however. Agencies were reluctant to use them because of their cost, and Congress has not required hybrid rulemaking since a few experiments in the 1970s.

A second, more recent development that has had a more significant impact on agency rulemaking is the proliferation of "impact statements" that agencies must make before promulgating rules. The earliest example of this kind of requirement is found in the National Environmental Policy Act (NEPA),[84] which required agencies to assess the environmental impact of their actions. The idea is that such requirements ensure that agencies consider and evaluate particular aspects or effects of their rules (e.g., an adverse environmental impact) that might otherwise be undervalued without imposing additional substantive requirements.[85] Of course such requirements may make it more difficult for agencies to act, but this is often the unspoken agenda of proponents of impact assessments.

More recently, this device has been adapted to address other concerns, particularly on behalf of regulated businesses or other entities. By executive order, President Reagan imposed a requirement that all agencies within the executive branch evaluate the costs and benefits of major rules.[86] The trend accelerated in the 1990s, when Congress adopted such

82. *See id.* at 1387–96 (documenting ossification of rulemaking).

83. *See, e.g.*, Magnuson-Moss Warranty-FTC Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended at 15 U.S.C. §§ 57a, 57b, and other scattered sections of 15 U.S.C.) (requiring the FTC to use hybrid rulemaking).

84. 42 U.S.C. §§ 4321–4335 (2000).

85. Thus, under NEPA, an agency is not bound to follow the most environmentally friendly path. Calvert Cliffs' Coordinating Comm'n, Inc. v. United States Atomic Energy Comm'n., 449 F.2d 1109, 1115 (D.C. Cir. 1971).

86. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981). This order was revised and extended later in the Reagan Administration, by Exec. Order No. 12,498, 50 Fed. Reg. 1036 (June 4,

statutes as the Paperwork Reduction Act,[87] Regulatory Flexibility Act,[88] Unfunded Mandates Reform Act,[89] and the Assessment of Federal Regulations and Policies on Families Act.[90] Each of these statutes requires the agency to assess the impact of at least some proposed regulations on the economy, businesses, state and local governments, families, or some other interests, and to consider ways to minimize that impact.[91] Individually and in the abstract, such requirements may seem like a relatively innocuous way to promote particular values in the context of agency rulemaking. But collectively, this array of overlapping and yet distinct requirements, which operates on top of existing paper hearing requirements, has further contributed to the ossification of rulemaking.

Whatever the expectations of the APA's drafters, notice and comment rulemaking under § 553 has become a long-term undertaking that requires a major commitment of agency personnel and resources for any rule that is important and controversial. Thus, although agencies typically follow § 553 for major regulatory initiatives, it is hardly surprising that they have sought other means of accomplishing their regulatory objectives that are faster and consume fewer agency resources. As will be discussed in the following section, one response to the ossification of notice and comment rulemaking is agencies' increasing reliance on even less formal kinds of rules for which the APA imposes few, if any procedural requirements. Ironically, judicial and legislative efforts to enhance the procedures of notice and comment rulemaking have actually led to fewer procedures for many agency decisions.

3. The Emergence of Nonlegislative Rules

As noted previously, § 553 incorporates a number of exceptions to the requirements of notice and comment rulemaking.[92] When one of the exceptions applies, the APA does not impose any significant procedural

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1985), and continued in subsequent administrations, including the Clinton Administration. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

87. 44 U.S.C. §§ 3501–3519 (2000).

88. 5 U.S.C. §§ 601–612 (2000).

89. 2 U.S.C. §§ 1501–1503, 1531–1536 (2000).

90. Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified as Note to 5 U.S.C. § 601).

91. The most recent example of such legislation is the Consolidated Appropriations Act-FY 2001, Pub. L. No. 106-554, § 515(a) 114 Stat. 2763 (2000), which actually targets a broad range of agency action including arguably rulemaking. *See* James T. O'Reilly, *The 411 on 515: How OIRA's Expanded Information Roles in 2002 Will Impact Rulemaking and Agency Publicity Actions*, 54 ADMIN. L. REV. 835 (2002) (discussing the impact new § 515 will have on agencies).

92. *See supra* note 62.

requirements on the agency,[93] although the agency's organic statute may impose some procedures and the agency may voluntarily adopt some procedural safeguards. Two exceptions to notice and comment procedures—"interpretive rules" and "general statements of policy"[94]—have emerged as particularly important because they may be used in many circumstances as substitutes for regulations that otherwise would be subject to § 553. The critical difference, however, is that interpretive rules and general statements of policy, unlike regulations promulgated under § 553, are not binding of their own force, and for this reason they are often referred to collectively as "nonlegislative rules."[95]

Nevertheless, although nonlegislative rules are not technically binding, they are effectively binding in practice in many instances. Consider first an interpretive rule, which sets forth an agency's interpretation of the statute it administers. Although the interpretation is not binding, the statute is. Thus, if the agency interpretation is upheld, as it typically will be if it is not plainly inconsistent with the statute, then the interpretive rule becomes binding through the statute and has much the same practical effect as a regulation. Although general statements of policy cannot become binding in this way, regulated parties pay close attention to such statements and will generally comply, especially after the policy has been applied and upheld in an agency adjudication. Thus, for example, if an agency indicates that it will generally prosecute regulated parties who engage in particular conduct, those parties are apt to refrain from the conduct.[96] This is true even though the agency is not bound by its policy statements and cannot generally be estopped by them.[97]

While courts have not embraced the use of nonlegislative rules as warmly and consistently as they did the use of notice and comment rule-

93. Under 5 U.S.C. § 552(a)(1) (2000), an agency must publish all rules in the Federal Register and may not rely on a rule to adversely affect a party unless the rule has been published or the party has actual and timely notice.

94. *Id.* § 553(b)(A).

95. Other § 553 exceptions may produce binding regulations (e.g., procedural rules), but are of limited utility as substitutes for notice an comment rulemaking because they apply only to specified subject matters, *see id.* § 553(a)(1) & (2), or because reliance on the exception is difficult to defend. *See id.* § 553(b)(3)(B) (establishing "good cause" exception, which agencies seldom use because it is difficult to sustain).

96. Conversely, an agency may indicate that it will not take action against parties who engage in certain conduct, which may effectively create a "safe harbor" (and coincidently encourage parties to avoid conduct which does not fall within the safe harbor).

97. *See* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 423–25 (1990) (indicating that estoppel is not available against the government); Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 383–84 (1947) (same). In some cases, however, there may be due process concerns. *See* United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 675 (1973).

making,[98] agencies still have considerable discretion to adopt nonlegislative rules as long as they are careful to use them in circumstances permitted by the APA. For interpretive rules, this means that the rule must purport to interpret an ambiguous statutory provision and it must be defended in terms of interpretive arguments.[99] For general statements of policy, this means that the agency must not phrase the rule in binding terms or treat it as binding in practice.[100] This does not mean, of course, that others will not follow the policy statement anyway.

In sum, nonlegislative rules have become an increasingly attractive alternative when following notice and comment procedures would take too long and/or be too costly. They are subject to few, if any, procedural requirements and can be promulgated quickly and at low cost. The agency can gain many of the same advantages provided by legislative rules, although these rules do not have the same immediate binding effect and may be nominally subject to somewhat less deferential review.[101] Thus, just as use of notice and comment rulemaking expanded as an alternative to formal rulemaking, so too has use of nonlegislative rules expanded as an alternative to notice and comment rulemaking.

III. THE IMPORTANCE OF INFORMAL ADJUDICATION

Notwithstanding the rise of rulemaking, adjudication remains a critical administrative function. Regulations must be enforced, licenses and permits must be granted or denied, and benefit eligibility must be determined. The range of agency adjudicatory actions is immense, both in terms of the subject matters addressed and in terms of the kinds of interests and policies at stake. Indeed, adjudication in the broadest sense includes virtually any individualized application of law to fact.[102] Thus,

98. *See, e.g.*, Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030, 1034–36 (D.C. Cir. 1999) (refusing to enforce a second interpretative rule that replaced a prior interpretive rule).

99. *See, e.g.*, Am. Mining Cong. v. Mine, Safety & Health Admin., 995 F.2d 1106, 1110 (D.C. Cir. 1993) (discussing interpretation as an agency's declaration of statutory requirements); Metro. School Dist. v. Davila, 969 F.2d 485, 489–91 (7th Cir. 1992) (finding announcement of construction to be an interpretative rule).

100. *See, e.g.*, Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1053–55 (D.C. Cir. 1987) (stating that nonbinding policy statements are exempt from legislative notice and comment requirements)

101. *See* Christianson v. Harris County, 529 U.S. 576, 587–88 (2000) (applying a less deferential standard of review to an interpretive rule).

102. The Court recognized this overlap between administration and adjudication long ago. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 280 (1855) (comparing a judicial act with "all of those administrative duties the performance of which involves inquiry into the existence of facts and the application to them of rules of law"). The APA definition of adjudication likewise includes virtually any agency decision that is not a rule. *See supra* notes 35–40 and accompanying text (discussing definitions of rulemaking and adjudication).

just as the diversity of agency functions fueled the development of rulemaking alternatives to adjudication, so too it has fueled the evolution of diverse forms of adjudication. While early agencies typically followed formal adjudicatory procedures that closely resembled judicial trials for most important decisions, informal action has always been the "lifeblood of the administrative process."[103] Just as rulemaking has evolved toward increasingly informal procedures, so too have agencies responded to increasing demands on scarce adjudicatory resources by shifting over time toward increasingly informal procedures.[104] As was the case with rulemaking, moreover, the courts have generally accommodated the shift toward informal procedures, both as a matter of due process and statutory interpretation.

A. The Early "Trial" Model

In the early days of administrative law, formal adjudication was the dominant means of administrative decisionmaking, in the sense that important agency actions were taken predominantly through formal adjucatory procedures. As noted previously, reliance on formal adjudication derived in part from the kinds of decisions made by early administrative agencies, such as ratemaking, licensing, or civil enforcement actions.[105] Such decisions involve individualized considerations well suited for adjudication (as opposed to rulemaking) and important individual interests for which trial-type procedural safeguards were required as a matter of due process. Indeed, early Supreme Court precedents suggested that formal procedures were constitutionally required for administrative adjudications.[106]

Formal administrative adjudications are clearly modeled on judicial trials and incorporate many of their key components and characteristics. Adjudications are concentrated oral procedures at which evidence is presented and arguments are made before a neutral and more or less independent administrative law judge.[107] Formal adjudications incorporate

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103. *See* Kenneth Culp Davis, *Administrative Powers of Supervising, Prosecuting, Advising, Declaring, and Informally Adjudicating*, 63 HARV. L. REV. 193, 194 (1949) ("Informal adjudication, of course, is still the 'lifeblood of the administrative process.'").

104. *See supra* notes 14–20 and accompanying text (describing due process and statutory interpretation doctrines that facilitated the shift to informal rulemaking and nonlegislative rules).

105. *See supra* notes 6–7 and accompanying text.

106. *See supra* notes 43–45 and accompanying text.

107. The degree of independence is a critical question in many respects. Early agency adjudicators were often agency employees who lacked independence. The APA and related reforms have created a corps of independent administrative law judges who have significant statutory independ-

testimony and cross-examination and legal representation is common, if not a matter of practical necessity. Formal adjudications are also "on the record" in the sense that the decision is made entirely on the basis of the evidence adduced at trial and ex parte communications are prohibited. One critical difference, however, is the extent to which the general public is involved. Most importantly, there is no "jury" involved in administrative adjudications.[108] More broadly, although most administrative adjudications are open to the public, they typically generate less public interest.[109]

While formal adjudication typically applies to agency ratemaking, licensing, and enforcement actions, there is a wide range of agency business of other kinds that did not follow such procedures.[110] This dichotomy is reflected in the APA, which defines adjudication broadly to include virtually any agency decision that is not a rulemaking,[111] but requires formal procedures only when specified by statute.[112] In contrast to rulemaking, moreover, the APA does not specify the procedures that apply when formal adjudication is not required.[113] Section 555(e) requires that an agency provide prompt written notice of the denial of any written petition application, or request, including a brief explanation of the reasons for the denial, but that is all.[114] As a result, agency proce-

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ence—but not the life tenure and salary protections required for judges under Article III. WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 211–14 (2d ed. 2001).

108. This is true in practice, although in theory agencies might be able to conduct jury trials if Congress chose to delegate to them such authority. *See* CFTC v. Schor, 478 U.S. 833, 853 (1986) (treating the authority to conduct jury trials as a factor, but not a dispositive one, in determining whether Congress had impermissibly delegated judicial power to a non-Article III court). Some "Article I" courts, such as the bankruptcy courts, may conduct jury trials. 28 U.S.C. § 157(e) (2000). The precise status of such courts, which are staffed by judges who do not enjoy life tenure and salary protection as required by Article III, remains unclear. They are frequently treated as "courts" rather than administrative agencies, but the difference between the two may be essentially in name only.

109. Of course, some administrative adjudications, such as licensing for nuclear power plants or (to use a local example) determining the best route for a new highway, are apt to generate significant public interest.

110. *See* ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8, at 35 (1st Sess. 1991) ("[E]ven where formal proceedings are fully available, informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process.").

111. *See supra* note 19 and accompanying text.

112. 5 U.S.C. § 554(a) (2000). When § 554 applies, §§ 556 and 557 also apply. For further discussion of § 554(a)'s triggering requirement, see *infra* notes 128–35 and accompanying text.

113. If the formal rulemaking provisions do not apply, then notice and comment procedures do. *See* 5 U.S.C. § 553(c) (defining such procedures). The comparable category of rulemaking would be nonlegislative rules, for which the APA does not prescribe procedures either. *See supra* notes 92–95 and accompanying text.

114. *See* Camp v. Pitts, 411 U.S. 138, 143 (1973) (per curiam) (indicating that this explanation, when it is given contemporaneously with the decision, can be very brief). *But see* Citizens to Pre-

dures in informal adjudications such cases are limited to those adopted by the agency, required by the organic statute, or required by due process, if due process applies. While it is difficult to assess the volume of early agency decisions of this type, it is clear that many "adjudications" within the broadest sense of that term did not follow formal procedures.

This kind of informal adjudication is well illustrated by *Citizens to Preserve Overton Park v. Volpe*,[115] in which the Supreme Court struggled with the problem of how to conduct judicial review of informal adjudications.[116] The case involved the Department of Transportation's decision concerning the routing of a highway through Memphis, Tennessee. This decision was an adjudication in the sense that it made a final administrative determination in an individualized case based on the application of law to fact. The applicable statute did not require a formal adjudicatory hearing, however, and the agency did not have any particular procedural mechanism in place.[117] The Supreme Court declined to impose any procedural requirements on the agency, but indicated that a reviewing court must still engage in meaningful substantive review based on the administrative record, consisting of whatever documents the agency considered in the decision and any statement by the agency of its reasons.[118]

B. Avoiding Formal Adjudication

With the growth of the administrative state, the scope and quantity of agency decisionmaking placed increasing pressures on formal adjudication by agencies. While early agencies that engaged in economic regulation typically performed a relatively small number of adjudications involving a few key players in the regulated field, more recent agencies enforcing complex regulatory regimes and implementing benefit programs must adjudicate a much larger number of cases and a wider variety of issues. As a practical matter, formal adjudication is too costly and time consuming to handle all these cases, so agencies increasingly have turned to informal alternatives.

The most dramatic influx of adjudications came from benefit programs, such as Social Security, Veteran's Benefits, Welfare, Medicare,

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serve Overton Park v. Volpe, 401 U.S. 402, 420 (1971) (indicating that judicial review of informal agency adjudication is to be meaningful and based on the administrative record).

115. 401 U.S. 402 (1971).

116. *See id.* at 409 (agreeing that formal findings are not required, but concluding that judicial review in these circumstances was inadequate).

117. *See id.* at 408–09 (outlining arguments of the parties).

118. *Id.* at 420.

and Medicaid. These programs present the problem of "mass adjudication" because there are a vast number of individual claims involving relatively small amounts.[119] In these programs, formal adjudicatory procedures are often constitutionally or statutorily required,[120] but holding a full trial-like hearing in every one of these cases would soon overwhelm the agency and consume too great a share of the resources devoted to these systems. The typical agency response to this problem is to develop mechanisms to prescreen cases and limit their scope. We have already mentioned one important example of this technique, the use of rulemaking to resolve particular issues, thereby eliminating the need for a hearing or narrowing the scope of issues that remain open. Another mechanism of great importance is the use of paper hearings to pre-screen and resolve as many cases as possible, a technique that has proven particularly useful in the area of mass adjudications.

The Social Security Administration provides an excellent example of how agencies handle the problem of mass adjudication. In the year 2001, the SSA received approximately 1.5 million disability insurance applications.[121] Although each of these applicants is entitled to a formal adjudicatory hearing, this hearing comes only after an initial decision and reconsideration by a state agency under contract with the SSA.[122] The state agency makes the determination based entirely on a paper record and applies comprehensive regulations and other guidance from the SSA designed to focus and limit the issues to be resolved.[123] As a result, a substantial number of applicants receive benefits at these preliminary stages and others who are denied benefits do not seek a formal adjudicatory hearing. Thus, although the SSA received roughly 1.5 million initial applications in 2001, it received just over 180,000 requests for formal adjudicatory hearings (including both initial applications and continuing dis-

119. The amounts are, of course, typically very significant for the recipients, but they are relatively small in terms of the costs of legal proceedings.

120. *See, e.g.*, 42 U.S.C. § 423(b) (2000) (outlining application procedures).

121. Office of the Actuary, Social Security Administration, Applications for Social Security Disability Benefits and Benefit Awards, *at* http://www.ssa.gov/OACT/STATS/table6c7.html (last visited Feb. 21, 2003). In additional to disability insurance applications, similar determinations must be made for Supplemental Security Income, a need-based federal program that is smaller than the disability insurance program but nonetheless substantial. For both programs, the agency must also adjudicate continuing disability for current beneficiaries as well as the adjudication of initial applications. *See generally* Levy, *supra* note 33.

122. Levy, *supra* note 33, at 471.

123. *Id.* at 468–71.

ability reviews),[124] which means that roughly ninety percent of the cases were screened out.

A second factor contributing to rapid increases in the number of agency adjudications and the increasing need for agencies to avoid formal procedures is the expanded forms and subject matters of agency regulation. Agencies implementing comprehensive regulatory regimes are involved in a wide array of adjudicatory actions, such as granting permits or waivers, locating highways and other projects, and awarding grants and contracts.[125] Where possible, agencies typically seek to apply informal adjudicatory procedures to such actions. An example of this trend can be found in the area of environmental enforcement, where the EPA has turned increasingly to informal adjudication for the imposition of administrative penalties. While the use of informal procedures for enforcement of civil penalties was initially a matter of agency policy in the face of ambiguous statutes, at times producing litigation over the legality of the procedures, more recently EPA has sought and obtained express statutory authorization for informal procedures.[126] Likewise, agencies use informal adjudicatory procedures for a wide array of other kinds of decisions.[127]

C. *Judicial Accommodation*

Just as the courts accommodated the shift to rulemaking and the shift within rulemaking to less formal procedures, so too have they accommodated agency reliance on screening devices and informal adjudication. First, although due process applies to adjudications (assuming that there is a liberty or property interest at stake), the Supreme Court has developed a flexible approach to what process is due that permits relatively informal procedures in many cases. Second, after some doubt, lower courts have generally confirmed that ambiguous statutes will seldom trigger the APA's formal adjudication provisions.

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124. SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY BULLETIN: ANNUAL STATISTICAL SUPP. 133 (2001) (tbl.2 fig.9).

125. While some of these matters may be handled in some cases through formal adjudication, many are not.

126. An excellent summary and critical account of these developments can be found in William Funk, *Close Enough for Government Work?—Using Informal Procedures for Imposing Administrative Penalties*, 24 SETON HALL L. REV. 1 (1993).

127. *See, e.g.*, 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 8.2, at 539 (4th ed. 2002) (collecting cases approving informal adjudicatory procedures).

Due process attaches to many agency adjudications[128] because the scope of liberty and property interests it protects has been interpreted broadly.[129] Under traditional assumptions, once due process attached, a formal trial-like adjudicatory proceeding was required. This assumption is reflected, for example, in *Goldberg v. Kelly*,[130] in which the Supreme Court held that a full adjudicatory hearing must be held prior to the termination of welfare benefits.[131] The Court's analysis focused on the *timing* of the hearing (i.e., on whether a post-termination hearing was sufficient), but it assumed that the hearing would be a formal one.[132] Soon after *Goldberg*, however, the Court adopted a different approach.

In *Matthews v. Eldridge*,[133] the Court indicated that the "process due" in connection with the deprivation of a protected interest depended on a three-part balancing test. Under this test, a court weighs the importance of the interest at stake, discounted by the likelihood that additional procedures would correct errors, against the cost to the government of providing those additional procedures.[134] Applying this test, the Court held that pre-termination hearings were unnecessary for disability insurance benefits.[135]

In practice, this approach focuses on the instrumental value of procedures and the outcome typically turns on a court's perception of whether additional procedures would improve the accuracy of decisions. Indeed, the Court has since *Matthews* often rejected procedural due process claims on the ground that additional procedures would not improve the accuracy of decisions.[136] These due process cases, along with the

128. Recall that the *Londoner* and *Bi-Metallic* cases distinguished between rulemaking and adjudication in this regard. *See supra* note 42–55 and accompanying text.

129. The imposition of monetary sanctions clearly trigger due process. The so-called "due process revolution" confirmed that other interests affected by adverse agency action would also constitute, including welfare benefits, Goldberg v. Kelly, 397 U.S. 254 (1970), government jobs, Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), and many licenses and permits, Bell v. Burson, 402 U.S. 535 (1971).

130. 397 U.S. 254 (1970).

131. *Id.* at 264.

132. *See id.* at 267–71 (discussing how welfare recipients must "be given an opportunity to confront and cross-examine" witnesses.).

133. 424 U.S. 319 (1976).

134. *Id.* at 335.

135. The court reasoned that (1) the interest at stake was less important because it was insurance based rather than need based, (2) that an oral hearing would not increase accuracy because the issues turned on expert medical testimony rather than credibility issues for which the opportunity to observe and cross examine witnesses is critical, and (3) that the cost to the government of providing these hearings in all cases would be prohibitive. *Id.* at 347–49.

136. *See* Walters v. Nat'l Ass'n of Radiation Victims, 473 U.S. 305 (1985) (holding that limiting to ten dollars the fees lawyers in VA claims could charge did not violate due process because representation would not increase the likelihood of gaining benefits); Schweiker v. McClure, 456 U.S. 188 (1982) (holding that private determination of relatively small Medicare claims did not violate

Court's decisions in the rulemaking arena,[137] appear to reflect a broader disenchantment with procedures on the part of the Court.

Although the Supreme Court has not definitely resolved the issue, a similar trend is reflected in lower court decisions concerning statutory hearing requirements and the APA. Section 554 of the APA incorporates the identical triggering language found in § 553(c): formal adjudicatory procedures apply when statutes require the decision to be made "on the record after opportunity for agency hearing."[138] Nonetheless, the interpretation of this language in the context of adjudication did not follow the same path as in rulemaking. In light of the traditional *Londoner* and *Bi-Metallic* distinction between rulemaking and adjudication, it was long assumed that statutory language providing for a "hearing" was sufficient to trigger formal adjudication.[139] Thus, for example, in *Seacoast Anti-Pollution League v. Costle*,[140] the First Circuit applied a presumption that "unless a statute otherwise specifies, an adjudicatory hearing subject to judicial review must be on the record [i.e., follow formal procedures]."[141] The *Seacoast* approach reflected the prevailing view at the time, even though it was not universally accepted.

More recently, however, there has been a "dramatic change in judicial attitudes toward the necessity or desirability of requiring agencies to use formal adjudicatory procedures."[142] In case after case, lower courts have declined to require formal adjudication under statutes that require a hearing.[143] A dramatic illustration of this change in attitudes is *Railroad Commission of Texas v. United States*,[144] in which the D.C. Circuit held

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due process because there was no reason to doubt the independence of the decisionmakers); *see also* Codd v. Velger, 429 U.S. 624 (1977) (holding that an essential element of a due process claim is an allegation that additional procedures could have changed the outcome).

137. *See supra* notes 57–66 (discussing cases construing the scope of formal rulemaking requirements narrowly); 80–82 (discussing *Vermont Yankee*).

138. *Compare* 5 U.S.C. § 554(a) (2000) (quoted in text) *with* 5 U.S.C. § 553(c) (2000) (requiring rulemaking "to be determined on the record after opportunity for an agency hearing").

139. In *Florida East Coast*, the Court had emphasized the rulemaking–adjudication distinction in explaining why formal procedures did not apply when statutes provide for rulemaking after a "hearing." *See supra* notes 53–61 and accompanying text. This emphasis can be read to imply the converse—that when adjudication is involved, references to a "hearing" are intended to trigger formal, trial-type procedures.

140. 572 F.2d 872 (1st Cir. 1978), *cert. denied*, 439 U.S. 824 (1978).

141. *Id.* at 877. The court expressly distinguished *Florida East Coast* on the ground that it had involved rulemaking rather than adjudication. *Id.* at 876.

142. PIERCE, *supra* note 127, § 8.2, at 537 (referring to *Chemical Waste Management v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989), as the "best single illustration" of this shift).

143. *See id.* § 8.2, at 538–39 (citations omitted). Professor Pierce concludes that contrary decisions have been "rare and poorly reasoned." *Id.* § 8.2, at 539 (citing Money Station v. Bd. of Governors of the Fed. Reserve Sys., 81 F.3d 1128 (D.C. Cir. 1996), and Cajun Elec. Power Corp. v. FERC, 28 F.3d 173 (D.C. Cir., 1994)).

144. 765 F.2d 221 (D.C. Cir. 1985).

that a statutory provision authorizing agency action "only after a *full* hearing" was insufficient to trigger formal adjudication requirements because it did not specify that the hearing was to be on the record.[145]

Although the Supreme Court has yet to address the issue, both the trend in the lower courts and the Supreme Court's apparent disenchantment with procedural requirements in other contexts suggest that it would require formal adjudications under the APA only when the statutes in question specify that the hearing must be on the record. As a result, agencies are generally free to use informal procedures unless formal adjudication is clearly required by statute. Even if due process attaches, moreover, it is unlikely to require oral hearings, testimony, and cross examination if—as many of the lower court decisions seem to suggest—a written exchange of data and views would be sufficient to permit an accurate resolution of the issues.

IV. ADMINISTRATIVE PROCEDURE AND THE "OTHER" VALUES OF TRIALS

The foregoing overview of the evolution of administrative procedures has highlighted three key developments of significance for the broader history of the trial. First, administrative agencies now conduct a great deal of legal business that would otherwise have been the province of judicial trials. Second, because agency decisions concern a wide array of subjects, parties, and consequences, administrative procedures take a variety of forms ranging from formal adjudications that closely resemble judicial trials, to quasi-legislative rulemaking processes, to highly informal decisions with little or no procedure. Third, within both general categories of agency decisionmaking—rulemaking and adjudication—the trend has been toward increasingly informal procedures. In this concluding section we consider the implications of these developments for the history of the trial generally.

One set of implications for the history of the trial involves the interrelationship between the evolution of administrative procedures and changes in the traditional judicial trial that have been highlighted by other participants in this symposium. Two developments, in particular, come to mind: the evolution of civil procedure and changes in the styles of oratory.

Ellen Sward has done an excellent job of highlighting how the civil procedure has evolved over the years from a trial-dominated process into

145. *Id.* at 227 (emphasis added).

"civil litigation," so that the trial itself has become only one part of a larger procedure, with discovery and other pretrial litigation activities occupying increasingly important and time-consuming roles.[146] It seems likely that the growth of administrative activity has facilitated this development by relieving the courts of a significant component of the business they would otherwise have to conduct and freeing them to engage in the labor-intensive task of supervising ongoing pretrial litigation.[147] In short, courts are able to manage their additional role as supervisors of litigation (as opposed to merely conducting trials) in part because administrative agencies made it possible for them to do so.

The connection between the development of administrative procedures and the evolution of forensic rhetoric is less direct, but nonetheless potentially significant. As Mike Hoeflich and Larry Jenab's contribution to this symposium observes, the emotive rhetoric epitomized by Daniel Webster's argument in the *Dartmouth College Case*[148] has declined, as law schools and lawyers increasingly emphasize and idealize dispassionate analytical rhetoric.[149] While the authors attribute this development largely to the rise of the university law school and the associated case method, the growth of administrative law may also have contributed to the decline of rhetoric. As we noted earlier, one feature of the rise of the administrative agency was the Progressives' belief in scientific and bureaucratic neutrality—i.e., the belief that there were "correct" public policy outcomes that could be determined by the neutral application of technical expertise.[150] In such a decisionmaking model, there is little room for emotive rhetoric. Thus, lawyers who practice before administrative agencies must use analytical rhetoric designed to persuade agencies of the correctness of their position on "scientific" grounds.[151] Likewise, this is the language of judicial review of administrative agencies.

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146. *See* Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347 (2003).

147. Of course, the bulk of pretrial activity and practice is conducted by the parties and their attorneys, often with little direct judicial supervision. Nonetheless, one need only examine the docket of a fairly recent civil case to recognize that courts are frequently required to rule on various pretrial motions and issues that, in the aggregate, consume a significant amount of judicial resources. These activities in turn have contributed as well to the bureaucratization of the courts, as judicial administrators, clerks, and other judicial support personnel have proliferated.

148. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1817).

149. Lawrence Jenab & M.H. Hoeflich, *Forensic Oratory in Antebellum America*, 51 U. KAN. L. REV. 449 (2003).

150. *See supra* notes 8–9 and accompanying text.

151. Currently, this rhetoric is dominated by the language of law and economics and cost-benefit analysis. *See* ROBERT L. GLICKSMAN & SIDNEY A. SHAPIRO, RISK REGULATION AT RISK: RESTORING A PRAGMATIC BALANCE (2002) (criticizing dominance of cost-benefit analysis and offering pragmatism as an alternative).

Another set of implications derives from the recognition that administrative procedures often serve as substitutes for trials. The evolution of administrative procedures reflects a broad sense that they are far less costly than trials and that varied and informal procedures can be followed without sacrificing the accuracy of agency decisions. While we might reach different conclusions as to how this calculus plays out in specific contexts, we agree generally that this is a necessary and pragmatic response to the realities of the modern administrative state. Nonetheless, this is a heavily functional calculus, by which we mean that it seeks to maximize accuracy while minimizing costs. It does not, however, consider any other values that might be lost by substituting administrative procedures for trials.

While trials clearly are intended to serve instrumental values as devices for determining the "truth" regarding legal disputes and resolving them correctly under the law, they also serve other, interrelated values, including participatory, dignitary, educational, and legitimating values. Participatory values include not only participation by affected parties as advocates but also by the general public as observers and members of the jury.[152] Dignitary values relate especially to treatment of those adversely affected by legal action, with procedures that reflect the legal system's recognition of the human consequences of its actions.[153] Educational values reflect the trial as a morality play from which participants and observers draw lessons from the legal consequences of human imperfection.[154]

Finally, and perhaps as a result of the participatory, dignitary, and educational value of trials, trials serve to legitimize government action. Participation serves as a check on improper government action and ensures its legality. In the case of jury trials, the decisional authority of a group of citizens representing a cross-section of the community obviously serves this function. Even without a jury, the public character of a trial promotes accountability and the participation of the judiciary within

152. Participation instills a sense of connectedness with the legal process and its outcome, and converts those who participate from subjects of the legal system to stakeholders in the legal system.

153. These days, one may doubt whether those involved in most judicial trials consider them to be dignity-reinforcing procedures. Nonetheless, most observers would agree that there is a loss of dignitary values when government adversely affects people without following procedures that provide the opportunity for the adversely affected party to offer his or her side of the issue.

154. David Gottlieb's treatment of the Jesse James trial may be an excellent illustration of this phenomenon. David J. Gottlieb, *Criminal Trials as Culture Wars: Southern Honor and the Acquittal of Frank James*, 51 U. KAN. L. REV. 409 (2003). Of course, trials are not carefully constructed like Aesop's fables or Shakespeare's tragedies, so that the lessons learned may not always be clear or constructive, but on the whole trials have historically played a significant role in refining and defining the community's sense of morality and justice.

its constitutionally assigned role further serves to legitimize the outcome. Dignitary values reflect the government's recognition of and respect for the basic humanity of those affected by government actions, including their basic constitutional rights. And the educational components of the trial remind the public that adverse decisions are the legal consequences of misconduct.

The loss of participatory, dignitary, and educational values of trials may contribute to ongoing concerns about the legitimacy of the administrative process. As Jim Freedman has observed:

> The enduring sense of crisis historically associated with the administrative agencies seems to suggest that something more serious than merely routine criticism is at work. As one examines this history, one begins to believe that the dominant concern of any given period is in fact only the manifestation of a deeper uneasiness over the place and function of the administrative process in American government, and that each generation—however earnestly and plausibly it has formulated its uneasiness—has in fact been speaking to this same underlying problem. This may explain why, despite the fact that each generation has fashioned solutions responsive to the problems it has perceived, the nation's sense of uneasiness with the administrative process has persisted.[155]

While a variety of factors, such as separation of powers questions, contribute to these legitimacy questions, we suspect that the loss of the other values served by trials is one important factor. Americans may not trust the trial completely, but we believe it is fair to say that they trust it more than the administrative process.

The question then becomes how to promote these other values without sacrificing the practical advantages of administrative procedures. As history has shown, adding procedures may ossify the administrative process and sacrifice the ability of agencies to take effective action. At the same time, it is far from clear that adding layers of procedural complexity will actually promote participatory, dignitary, or education values, especially insofar as they may prompt agencies to seek other, even less formal procedures, as evidenced by the rise of nonlegislative rulemaking in response to the increasingly burdensome procedures for notice and comment rulemaking. Thus, the challenge for the administrative process is to find ways to promote participatory, dignitary and educational values and thereby enhance the legitimacy of the administrative process without compromising that process.

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155. JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRAIVE PROCESS AND AMERICAN GOVERNMENT 9 (1978).

One important factor is "transparency," which can be increased without imposing significant additional burdens on administrative agencies. One hallmark of a trial is that it is a public event in which all of the information which the decisionmaker (the judge or jury) uses in reaching a decision is presented in public (with a few exceptions to promote highly confidential information). Moreover, it is located in the community where the controversy arose—which gives persons affected by the trial the opportunity to attend. And even if few people take advantage of these opportunities, the trial still makes a strong symbolic statement of openness and accountability. The administrative process, by comparison, is often hidden behind closed doors and, even if it is public, it usually occurs in Washington, D.C., making it in effect nonpublic for most people. Thus, the administrative process makes a different symbolic statement, and one that would appear not to enhance the legitimacy of the process.

Congress has already made a substantial commitment to transparency by enacting the Freedom of Information Act[156] and other open government legislation.[157] Nevertheless, the current administration is seeking ways to withhold information from the public, either as a matter of national security[158] or executive privilege.[159] Likewise, the administration's implementation of the Data Quality Act is likely to adversely affect agency efforts to disclose scientific and statistical information relating to government regulation on agency web sites.[160] While there are valid arguments for restricting some information, it is by no means apparent that these efforts to withhold information are valid.[161]

Another approach is to inject more citizen participation in areas where little or none currently exists. For example, one of the authors has called for citizen input before domestic regulatory agencies meet with their foreign counterparts to attempt to draft harmonized regulations that

156. 5 U.S.C. § 552 (2000).

157. *See also* Sunshine Act, *id.* § 552(b) (requiring any agency headed by a multi-member commission to meet in public); Federal Advisory Committee Act, *id.* app. §§ 1–16 (2000) (requiring federal advisory committees to meet in open session).

158. *See* Patrice McDermott, *Withhold and Control: Information in the Bush Administration*, 12 KAN. J. LAW & PUB. POL'Y __ (forthcoming 2003) (describing the Bush administration's security justifications for withholding information).

159. *See, e.g.*, Sidney A. Shapiro, *Two Cheers For HBO: The Problem of the Nonpublic Record*, 52 ADMIN. L. REV. 853, 853–54 (2002) (describing refusal by the Bush administration to disclose the identities of private individuals who met with the administration's energy task force).

160. *See* O'Reilly, *supra* note 91, at 845–46 (discussing possible ramifications for heightened accuracy).

161. *See* McDermott, *supra* note 158, at __ (criticizing security justifications for withholding information); Shapiro, *supra* note 159, at 867–70 (arguing for greater accountability of meetings between public officials and private lobbyists).

would apply under international trade agreements.[162] Similarly, the Administrative Conference of the United States[163] and the Administrative Law and Regulatory Practice Section of ABA[164] have recommended that agencies seek input before they adopt nonlegislative rules. Although this may slow the regulatory process somewhat, the cost should not overwhelm the benefits as long as the process remains highly informal. Of course, if the process remains highly informal, it may not substantially promote the values associated with a trial. Still, having some citizen participation where none currently exists should have some positive impact concerning the legitimacy of the agency actions affected.

In the final analysis, neither transparency nor alternative forms of participation presents a complete substitute for the other values served by trials. Accommodations between the functional requirements of the administrative state and these other values will emerge as part of the further evolution of administrative procedure. These concerns, moreover, are not unique to the administrative arena, but rather are part of a larger evolution of legal procedures in which the traditional trial—long the dominant image of the Anglo-American legal system—has come to occupy a less central role in the administration of justice and the nature and form of the trial itself has undergone significant change. We are pleased, as part of this symposium, to place the evolution of administrative procedure into this broader context.

162. Sidney A. Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, 54 ADMIN. L. REV. 435, 440–46 (2002) (discussing the public's stake in harmonization).

163. Administrative Conference of the United States, Interpretive Rules of General Applicability and Statements of General Policy (Recommendation 76–5), 41 Fed. Reg. 56,769 (Dec. 9–10, 1976).

164. *See* ABA, Section of Administrative Law and Regulatory Practice, Section Policies, *available at* http://www.abanet.org/adminlaw/policy.html (last visited Feb. 6, 2003) (recommending that an opportunity be given to the public to comment on non-legislative rules that an agency plans to adopt and that, if an agency proposes to apply a non-legislative rule in a proceeding, the parties must have an opportunity to challenge the rule).