
Back to Basics: Making Law without Making Rules

Antonin Scalia

THE 1970s HAVE BEEN aptly described by expert observers of the federal administrative process as the “era of rulemaking.” To an astounding degree, a system which previously had established law and policy through case-by-case adjudication involving individual parties—whether in licensing, rate-making, or enforcement proceedings—began setting forth its general prescriptions in rules, leaving little to be decided in subsequent adjudications beyond the factual issue of compliance or noncompliance with the rules. In the 1950s, for example, one would have expected the Federal Trade Commission (FTC) to make the determination that a particular category of trade practice was “unfair or deceptive” in the course of a cease-and-desist proceeding against a business employing the practice. That case would establish the “rule” (speaking loosely) that the practice was unlawful. Today agency pronouncement of major new prohibitions in that fashion would be unusual. The oft-noted swelling of the *Federal Register* in recent years has been attributable in part, no doubt, to an increased level of federal agency activity; but it has also been caused by an altered *mode* of activity—since rules (in the technical sense), unlike case adjudications, need to be published.

The change from adjudication to rulemaking as the principal vehicle for the establishment of agency policy has been achieved partly

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through the agencies’ use of previously latent rulemaking authority, helped along by the courts’ increasing willingness to discern the existence of such authority with respect to issues that could have been held to require adjudicatory treatment. It has also been achieved through congressional conferral of new rulemaking authority upon both old agencies and newly created ones. FTC Magnuson-Moss rules, Occupational Safety and Health Administration standards, and Consumer Product Safety Commission (CPSC) rules are examples.

Rulemaking’s Advantages

Rulemaking was seen to have a number of advantages. When prescriptions were changed by rule, the change was only prospective, so that affected persons had an opportunity to conform their conduct to the government’s known desires; agency adjudication, by contrast (like the courts’ making of “new law” under their common-law powers), held the citizen accountable for failure to observe a requirement that was not clearly known when he acted. The procedures applicable to rulemaking gave everyone an opportunity to participate; with adjudication, prescriptions governing A could be established in a suit between B (or agency B) and C, in which A had no right to be heard. Moreover, the substance of the prescriptions established by rulemaking was set forth in the *Federal Register* and (if of general and continuing applicability) in the *Code of Federal*

Regulations, whereas the totality of prescriptions established by adjudication had to be gleaned from hundreds of decided cases.

Rulemaking was also thought to foster better government. It enabled an agency to set its own policy-making agenda, addressing particular issues when it wished instead of waiting for them to be presented in the course of its case-by-case licensing, or ratemaking, or enforcement business. And it could decide a number of related policy issues together, instead of in the piecemeal fashion that adjudication tends to produce. But undoubtedly the greatest attraction for the agencies themselves was the fact that the procedures applicable to rulemaking under the Administrative Procedure Act (APA) were infinitely less demanding (public notice and receipt of written comment, instead of the court-like procedures, including cross-examination, applicable to most significant adjudication); and the requirements for passing judicial review were much less restrictive (the "arbitrary and capricious" standard, instead of the "substantial evidence" requirement applicable to adjudication).

The Advantages Reconsidered

Some of these advantages have been found to have their darker side: If the prospective nature of rulemaking renders agency action fairer, it also encourages expansive interpretation of statutory commands. The public might protest, and the courts balk at, the determination that a long-standing and generally accepted business practice has always been "unfair or deceptive" under the Federal Trade Commission Act, so that persons employing the practice are subject to the liabilities or at least the obloquy that violation of the law entails. The case seems different, however (though the same solipsistic assessment of unfairness and deception is involved), when the agency merely says the practice will be unlawful in the future. The ability of everyone to participate means that organizations with substantial public constituencies (such as the Sierra Club or the Chamber of Commerce) can more readily and directly inject political calculations into even those agency decisions that should be made on a technical basis. And if rulemaking helps the agency to set its own

agenda and permits joint consideration of related issues, by the same token it fosters decision making in the abstract, outside the context of a concrete, detailed situation that may serve to clarify both the facts and the equities relevant to decision.

In addition, some of the comparative advantages of rulemaking have eroded in recent years. The modern practice of the courts has taught us that it is quite possible to announce prospective prescription in adjudication, and to allow liberal intervention and *amicus* briefing by nonparties. The *Federal Register* and the *Code of Federal Regulations* are not the concise reference books they were once thought to be; and commercial services increasingly render agency case law and summaries of agency case law more accessible. But most important of all, the procedural advantages of rulemaking for the agency itself are headed for extinction:

- The courts have attached many procedural requirements not explicit in the APA. These include the requirements that the agency publish and permit the public to comment on all data and studies on which it intends significantly to rely, and that the agency justify the rule in detail and respond to all substantial objections raised by the public comments. The "arbitrary and capricious" standard for judicial review has evolved from a lick-and-a-promise to a "hard look" by appellate courts.

- Congress has also roughened the procedural road, by requiring certain agencies to use adjudication-type procedures (including cross-examination), by prescribing for many rules the more rigorous "substantial evidence" test of judicial review, and by imposing on some rules a procedural burden beyond anything applicable to adjudication—the requirement that they be submitted to Congress for possible legislative veto. In the regulatory reform act that is sure to be enacted this year, Congress will almost certainly extend the first two of these innovations to all major rulemaking.

- Even the White House has helped to take the bloom off the rulemaking rose, by establishing a demanding and time-consuming process of regulatory analysis and Office of Management and Budget (OMB) clearance, applicable not only to new rules but, through a periodic review process, to old rules as well. (Regulatory analysis and periodic review of rules are

also certain to be part of the 1981 regulatory reform act.) From the agencies' standpoint, the other advantages of rulemaking over adjudication would have to be considerable to outweigh the drawbacks of OMB clearance and mandatory periodic reevaluation.

The Ease of Returning to Adjudication

It is almost inconceivable that all these changes will not induce the wily (or even moderately intelligent) bureaucrat to do more of his thing through adjudication instead of rulemaking, if he is free to do so. And generally speaking, he is. Few agencies are compelled to act by rule.

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The Securities and Exchange Commission (SEC), for example, may conduct a rulemaking to declare a particular type of statement by brokers unlawful under the Securities Exchange Act; or it may achieve the same result by conducting an adjudicatory proceeding to revoke the registration of a particular broker on the basis that his making of such a statement was "false or misleading." Even the relatively few agencies that must act by rule often have room to shift meaningful prescription of law and policy into adjudication. The CPSC, for example, must establish product safety standards by rule; but if it phrases a standard at a level of sufficient generality ("Children's toys shall be designed to minimize risk of electrical shock"), then it effectively reserves the really significant decisions for the adjudicatory proceedings imposing sanctions for violation of the rule (establishing precisely what sort of electrical designs will pass commission muster).

It seems inevitable, therefore, that the recent encumberment of rulemaking will produce a renaissance of the previously favored mode of making law and policy—a movement back to basics, to adjudication. How simple that can be is demonstrated by the National Labor Relations Board, which will not have to

undergo the transition because it has never stopped operating the old way. It has been a notable holdout in the trend to rulemaking, and has achieved that distinction by the simple expedient of nonaction—declining to issue rules, so that it is left free and, indeed, compelled to establish the content of the statutory prohibition of "unfair labor practices" in the individual grievance proceedings brought before it. That is all it will take for many other agencies as well.

It will be hard, at first, to observe the trend back to lawmaking by adjudication—but a recent example comes to mind. The "In Brief" section of *Regulation's* March/April issue noted that the Department of Education's much-ballyhooed withdrawal of the Carter administration's proposed rule requiring bilingual education in public schools would not mean very much unless the policies which that rule embodied were repudiated—that is, the same results could be achieved without the rule by applying the same requirements to each of the adjudications concerning individual school districts' entitlement to federal funds. And that, it appears, is precisely what the Department of Education is about. According to Stewart Baker in the *Washington Post* (July 19, 1981), the department continues to force local school districts to sign agreements pledging to institute bilingual education, just as before.

Preventing the Return

By and large, the trend back to lawmaking by adjudication will be regarded as unfortunate. If one considers not *what* agencies do, but only *how* they do it, those who are regulated generally prefer the participation and certainty provided by rulemaking. (This may well be a short-sighted preference, in that it disregards the fact that the *what* and the *how* are connected—that is, the very nature of rulemaking encourages broader social planning.) But how to arrest the trend is by no means clear. One might think that the logical solution is to require agencies to adopt their general policies by rulemaking. That, however, is simply not practicable. To begin with, there is an irreparable ambiguity in the prescription. How "general" must a "general policy" be in order to qualify? If the Federal Communications

Commission has a rule to the effect that "bad character" constitutes disqualification for a station license, must it further have a rule that "mob affiliations" constitute "bad character" before it can deny a license on that ground? Even if that problem could be overcome, the result of the new system would be to give every malefactor two bites at the apple, or at least a lengthy period in which to continue chewing. For example, the perpetrator of a new and imaginative type of stock fraud could not be stopped until a rule against that particular practice was first adopted and he was then found to have engaged in the practice after the adoption of the rule. No, the fact is that in many fields we want the agencies' determinations of law and policy to be applied retroactively.

An optional provision in the proposed Model State Administrative Procedure Act, now under consideration by the National Conference of Commissioners on Uniform State Laws, would solve this latter problem by permitting general policies to be adopted initially in adjudication, but requiring that the agency shall, "as soon as feasible and to the extent practicable, adopt rules to codify principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases." However, apart from the sheer magnitude of the task of such codification, there would remain the problem of vagueness: how generally applicable must an adjudicatory determination be in order to constitute a "principle of law or policy"? Suppose the agency says: "Speaking only to the circumstances of this particular case, we find that the acts alleged and proved by the agency staff constituted a violation of law." That establishes at least, does it not, a "principle" that whenever those circumstances are repeated there is a violation of law? If the subsequent rulemaking requirement does not apply to such a determination, then evasion of the requirement by merely particularizing the expression of decisions is easy enough. Or is it really evasion? The whole advantage of adjudication as a form of lawmaking is that it avoids the highest generality, proceeding gradually in an inductive fashion from one specific to another, in the context of concrete circumstances and on the basis of accumulated experience, so that a more and more general "principle of law or policy" is gradually formed. At what point

along this spectrum does there come into being a "principle" within the meaning of the Model Act? And if that question can be answered, when is codification "feasible," and to what extent is it "practicable"? Finally, does not the

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whole process establish an inescapable dilemma as far as the perceived fairness of agency lawmaking is concerned? If the subsequent rulemakings regularly endorse the holdings of earlier adjudications, they will rightly be regarded as charades. But if, on the other hand, they often reverse (for the future) those holdings—which have been the basis for particularized commands or even penalties in the past—then the adjudicatory process is bound to fall into deserved disrepute. There is, in short, no satisfactory way either to abolish lawmaking through adjudication or to subject such lawmaking to subsequent rulemaking procedures.

WHAT ALL THIS SUGGESTS, of course, is that the jubilation of regulatory reformers at having finally brought rulemaking under control should be somewhat restrained. The assumption that control of rulemaking constitutes control of lawmaking is simply not correct. To be sure, an evasion as blatant as the Department of Education's continued imposition of bilingualism, despite the withdrawal of the bilingualism rule, may well be caught and corrected. Ordinarily, however, such follow-up by the White House or OMB can hardly be expected. Indeed, in the future there will be nothing *to* follow up, since agencies will not be so foolish as to embody policies disfavored by the administration in rules in the first place! In restricting rulemaking, we may find that we have been squeezing the balloon of bureaucratic arbitrariness at one point, only to have it pop out somewhere else. The only sure way to reduce the thing is to let out some air—which is to say, to make the directives given the agencies in their substantive statutes less expansive and more precise. ■