The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology

Francesca E. Bignami*

Parliamentary democracy is the dominant paradigm in the European Community's democratic deficit debate. In contemporary parliamentary systems, legitimacy rests in, and government authority flows from, the directly elected chamber. It sits at the apex of the government: above the second chamber of regional representatives or unelected members (e.g., the Bundesrat and House of Lords, respectively), which do not have equal legislative powers, and above the executive, which depends on parliamentary votes. The directly elected chamber passes all legislation and holds the government accountable for executive acts.

This hierarchical model of democratic government has significantly influenced thought in both academic and policymaking circles on improving citizen participation and accountability in the Community.


2. In the federal states of Germany and Belgium, where the second chamber is formed of regional representatives, its powers are equal to those of the first chamber only in matters affecting the regions.

3. See Renaud Dehousse, European Institutional Architecture After Amsterdam: Parliamentary System or Regulatory Structure? 35 COMMON Mkt. L. Rev. 595 (1998) (identifying parliamentary government and functionalism as two principal models in Community institutional design and tracing these themes in the Amsterdam Treaty); Gráinne de Búrca, The Quest for Legitimacy in the European Union, 59 Mod. L. Rev. 349 (1996) (describing two main poles of the legitimacy debate as federalist and constitutionalist, the first envisioning a federal polity with a fully empowered European Parliament and the other advocating constitutional governance by national governments accountable to national parliaments); Raworth, supra note 1, at 16-17 (1994) (arguing that the Community is conceived within the parliamentary tradition, criticizing the E.C. Treaty for failing to respect this tradition, and suggesting reforms to bring Community government in line with parliamentary democracy).
The standard complaint is that the only directly elected body, the European Parliament, does not have sufficient legislative power and cannot adequately control the Community’s executive process. Prior to the mid-1980s, the European Commission and the Council were the system’s principal lawmakers: initiation of legislation was the Commission’s task, while passage of legislation was left almost exclusively to the Council. Further, when the Council and Commission acted in an executive capacity, the Parliament, aside from its power to vote a censure motion against, and put questions to, the Commission, had absolutely no means of holding them accountable. The reforms initiated in the Single European Act and continued in the Maastricht and Amsterdam Treaties have progressively expanded Parliament’s powers in both the legislative and executive domains. Thus co-decision, a legislative process in which passage of legislation is entrusted to the Council and Parliament acting as equals, now applies in a wide variety of areas, from public health to transport policy. And the choice of Commission President, as well as the Commission as a whole, is now subject to Parliament’s approval.

Exclusive reliance on the parliamentary democracy tradition is misplaced. Although direct elections and majority rule have become an important concern in the design of Community institutions, this aim must compete with others that originally inspired the Community’s constitutional framework and that will continue to do so. Most important among these is what I shall call supranational virtue. It is a theme that rings throughout the E.C. Treaty and in the thought of European statesmen as different as Monnet, Spinelli, and De Gaulle. According to this principle, the institutions and rules crafted by the signatory states and embedded in the E.C. Treaty are to transform the narrow, self-destructive national interests that generally motivate citizens and their governments into the pursuit of a higher, common good that achieves peace and prosperity. Thus Monnet wrote:

European unity is the most important event in the West since the war, not because it is a new great power, but because the new institutional method it introduces is permanently modifying relations between nations and men. Human nature does not change, but when nations and men accept the same rules and the same institutions to make sure that they are applied, their behavior towards each other changes. This is the process of civilization itself.

Although the goal of supranational virtue is widely shared, there has never been agreement on the best way to achieve it. Competing visions

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4. See Delhousse, supra note 3, at 607-11.
as to which actors were best-placed to formulate the supranational interest and push forward the common market project led the drafters of the Treaty of Rome to create a number of independent public institutions and to disperse authority among them.\textsuperscript{6} Over time and under the sway of the politics and personalities of the moment, the balance of power among the Commission, Council, Parliament, Court of Justice, and the Economic and Social Committee has varied considerably. Never, however, has any one institution been able to claim exclusive legitimacy in the pursuit of supranational virtue; rather, each institution possesses separate, independent grounds (some stronger, some weaker) upon which it rests its claim to act in the common, Community good. Consequently, government powers are shared among different institutions and a vision of democracy that rests on parliamentary supremacy defies the Community’s basic constitutional structure.

The U.S. experience can contribute to the debate on Community democracy because of a similar constitutional structure. The Founding Fathers sought to foster republican virtue by creating a system of independent branches, each deriving legitimacy from a separate source, and shared powers.\textsuperscript{7} They designed the federal government to temper what they perceived to be the vices of majority rule: narrow, self-interested passions and ambitions of electors and elected that, in a pure majoritarian system, would produce factionalism and government tyranny.\textsuperscript{8} The only directly elected institution, the House of Representatives, therefore, was to legislate together with a host of other institutions, each of which derived its legitimacy from a separate, and not particularly democratic, source: a law was to be passed by the House and the Senate (formed of men elected by state legislators), could be vetoed by the President (selected by local notables), and could be declared unconstitutional by judges (appointed to the federal bench by the President with the advice and consent of the Senate).\textsuperscript{9} Although some branches, for instance the Presidency, have become more powerful with time, none has ever succeeded in monopolizing public authority. Thus the U.S. remains a system of checks and balances without any one institution at the apex of government; the process of improving citizen participation and government accountability has occurred within a constitutional framework of shared powers. That expe-

\textsuperscript{6} See generally The European Union (Breck E. Nelson & Alexander C-G Stubb eds., 1994) (containing readings of different perspectives on European integration); EMINENT EUROPEANS (Martin Bond et al. eds., 1996) (a collection of essays on Europe’s statesmen).

\textsuperscript{7} See Charles O. Jones, The American Presidency, in PRESIDENTIAL INSTITUTIONS AND DEMOCRATIC POLITICS 19, 23–26 (Kurt Von Metersheim ed., 1997). Although the U.S. system is generally characterized as presidential, see Klaus von Beyme, America as a Model 59 (1987), that label tends to overemphasize the executive’s authority: “Independent branches and shared powers” is a more accurate description of the constitutional system.


rience, good and bad, can offer insights into the democratic deficit in the Community.

This Article undertakes a comparative exercise for one facet of Community government: rulemaking by government administration.\textsuperscript{10} Many believe that European Community law is made centrally in Brussels and then carried out locally by the member states.\textsuperscript{11} This schema has always been somewhat of an oversimplification. From the beginning, central institutions have been wholly responsible, in certain areas, for enforcement and formulation of the more detailed rules necessary to implement policy (administration communautaire directe). Today, Community administration is more extensive than ever as a result of the growing number of laws that must be put into effect and the establishment of European agencies with jurisdiction over new drug authorizations, trademarks, and other matters. The expert committees that bear a large part of the rulemaking workload number well over 400,\textsuperscript{12} not even counting European agencies, the standardization organizations used by the Community for harmonization, and the numerous internal working groups set up by the Council and Commission.

Following the Danish "No" to the Maastricht Treaty, this facet of Community government, like all others, has come under attack as being undemocratic, removed from the European peoples, and unaccountable to the ordinary citizen. The term that has been coined to refer to a vast subcategory of Community administrative action, "comi-


\textsuperscript{12} See General Budget on the European Union for the Financial Year 1997, 1997 O.J. (L 44) 1, 485.
tology," says a lot about the common perception of administration in Brussels. In some minds it might conjure images of apparachiks and in others an inaccessible and arid science. But it will certainly not evoke thoughts of cheerful civil servants happy to explain to the public-at-large what they are doing and, should the public not approve, change course.

Administrative rulemaking in a democratic polity of independent branches and shared powers runs into two unique problems (unique as compared to rulemaking in a parliamentary system). First, a divided lawmaking principle must hold the bureaucracy accountable. Second, the multiple interest groups that compete to influence lawmaking in a pluralist system of interest representation—to a large degree a result of the fragmented nature of government authority—must be guaranteed a voice in policy implementation. That is, administrators should not be permitted to shut out interest groups downstream in the policymaking process. These are problems with which the U.S. administrative state has considerable experience, good and bad, and which must be addressed in the reform of Community rulemaking. They are also the common problems that warrant looking to U.S. rulemaking for suggestions on improving accountability and fairness in Community rulemaking.

In Part I, after explaining the fundamentals of Community rulemaking, I discuss the democratic deficit critique and develop a set of criteria for the design of good Community administration. Then I present a brief overview of the major proposals already advanced to improve democracy in Community administration and argue that they are inadequate because they are based on the parliamentary model. Rather, I argue that because of their common systems of independent branches and shared powers, the United States and the Community face similar problems in designing their bureaucracies: accountability to a divided lawmaking principle and pluralist interest participation.

Next I turn to one of the tools that has been used in the United States to address these structural problems: the administrative law of notice and comment. In Parts II, III, and IV, I describe how notice and comment operates and what it would entail in the Community, primarily through a comparative case study of hazardous waste legislation and regulation, but also with a discussion of a European Parliament court challenge to a Council implementing directive on pesticides and water contamination.

In Part V, I assess the advantages and disadvantages of notice and comment by drawing on the considerable literature that has been generated by U.S. scholars over the past twenty years.

Finally, in Part VI, I put forward a rulemaking proposal for the Community which incorporates the basic features of U.S. notice and comment but also makes use of some of the reforms suggested by
scholars. I argue that the expected improvements in accountability and interest participation support the introduction of such a procedure but that it should be modified to reflect cross-cultural differences in attitudes toward experts and courts, and in the nature of interest organization.

I. THE DEMOCRATIC DEFICIT CRITIQUE OF COMMUNITY RULEMAKING

A. The Basics of Implementing Rules

In the Community, lawmaking power is vested in the Commission, Council and Parliament acting together under a formula that depends upon the policy area as set out in the E.C. Treaty. As in all modern governments, however, the Community legislature relies upon its bureaucracy to produce the more detailed rules that make the system work in practice. One of the principal classes of Community rules are so-called implementing rules. They can be found in many different policy areas (agriculture, environment, transportation) and generally fill in technical gaps, adapt legislation to changing circumstances, or bring it up-to-date with the newest science.

Implementing rules may be issued following one of three basic procedures. Some earlier Community legislation gives the Commission sole rulemaking power. Thus, the early directives setting up the common market in agricultural goods delegated extensive powers to the Commission, which has developed an elaborate framework of rules that farmers must comply with in order to qualify for Community subsidies. On the other extreme, the Council tends to retain decision-making power for itself when an issue is particularly sensitive, directly deciding the matter on a proposal from the Commission. An example is the agricultural policy directive on government authorization of pes-

13. Binding Community acts are divided into regulations (directly applicable in the member states), directives (which must be implemented by member states), and decisions (generally addressed to individuals). See E.C. TREATY art. 249 (as art. 189). No automatic hierarchy exists between these legal instruments, as between a statute and a regulation in the United States; rather, the hierarchy is established by reference to the procedure used for adoption. See generally Roland Bieber & Isabelle Salonom, Hierarchy of Norms in European Law, 33 COMMON Mkt. L. REV. 907 (1996) (describing absence of an established hierarchy and proposals for reform).

14. The other major form, technical standards drafted and issued by private standard-setting organizations, raises additional issues and falls outside of the scope of this Article.


16. Throughout this Article, Council is used to refer both to COREPER, which is staffed by senior national officials and does the preparatory work for Council meetings, as well as government ministers sitting together in the Council. COREPER is probably the most relevant for rulemaking because the national officials familiar with the technical issues are to be found there and government ministers can be expected, on the whole, to defer to their views.
ticides discussed at length below. The pesticides legislation did not specify the criteria that member states were to use in evaluating pesticide authorization applications—criteria that would have a significant impact on national chemical manufacturers—and instead delegated the task to the Council acting on a proposal from the Commission. The third and by far most common way in which implementing rules are adopted is by the Commission acting under the indirect control of the Council, so-called comitology, thus promoting the twin goals of expertise and speed on the one hand and accountability on the other. Control is indirect because a committee of member state experts is charged with day-to-day supervision of Commission rulemaking and the Council itself is called in only if the Commission and committee, after negotiation, are unable to agree.

In comitology, the extent of Commission discretion depends upon which of the three types of committees—advisory, management or regulatory—is established to monitor rulemaking.17 These are set out in the Comitology Decision,18 which serves as a framework that the Community legislature generally resorts to when it designs the administrative process to be used in implementing a particular piece of legislation. One or two representatives from each of the member states sit on the committees, a Commission representative serves as chair, and the representatives vote by qualified majority. In all cases, the Commission must submit its proposal for an opinion. When an advisory committee is involved, its opinion does not carry formal weight and the measure goes into effect regardless of the committee’s vote. If either a management or regulatory committee votes against the Commission proposal or, in the case of a regulatory committee, fails to issue an opinion because there does not exist a qualified majority in favor of the Commission proposal, the measure is sent to the Council.19

19. In the Commission’s current proposal, in the case of disagreement between a regulatory committee and the Commission, the draft measure would no longer go to the Council but would be submitted as a Commission proposal to the full legislative process. See Proposal for a Council Decision Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission, art. 7, COM (1998) 380 final.
There exist two essential differences between the management and regulatory procedures. First, management committees have a veto power while regulatory committees have the greater power of assent. Although the distinction might seem academic, the Commission in the first must simply get enough committee members on its side to escape a veto, while in the second it must obtain the votes necessary for a favorable opinion. Second, under the management procedures, the Commission proposal may take effect immediately after the committee delivers its opinion, even if it is negative, whereas under the regulatory procedures the Commission must wait and give the Council a chance to adopt a different decision.

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

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20. This has been changed to three months in the Commission's proposal. Id. art. 4.  
21. In the Commission's proposal, the contre-filet variant of the management committee procedure has been abolished. Id. art. 4.  
22. In the Commission's proposal, neither form of regulatory committee is contemplated because, as discussed above, in the event of disagreement between the Commission and committee the proposal would go to the full legislative process and not the Council. See supra note 19.
## COMITOGY CHART

<table>
<thead>
<tr>
<th>Advisory Committee</th>
<th>Committee</th>
<th>Commission</th>
<th>Council</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delivers opinion on Commission proposal.</td>
<td>Must take &quot;utmost account&quot; of Committee opinion, but is not bound by it.</td>
<td>No authority.</td>
<td></td>
</tr>
<tr>
<td>Management Committee</td>
<td>Delivers opinion on Commission proposal.</td>
<td>Adopts measures which apply immediately. If measures are not in accord with Committee opinion, they are communicated to Council.</td>
<td>May adopt a different decision (by q.m. if Commission agrees and by unanimity if Commission not in agreement).</td>
</tr>
<tr>
<td>Management Committee Filets</td>
<td>May defer application of measure for up to one month.</td>
<td></td>
<td>May adopt a different decision (by q.m. if Commission agrees by unanimity if Commission not in agreement).</td>
</tr>
<tr>
<td>Management Committee Centre-Filets</td>
<td>Must defer application for a period to be laid down in legislation, not to exceed three months from the date of communication to Council.</td>
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</tr>
<tr>
<td>Regulatory Committee</td>
<td>Delivers opinion on Commission proposal</td>
<td>If Committee opinion in accordance, adopts measures. If Committee opinion not in accordance or if no Committee opinion delivered, does not adopt measure. Proposal submitted to Council.</td>
<td>May adopt a different decision (by q.m. if Commission agrees and by unanimity if Commission not in agreement) within a period laid down in the basic measure, not to exceed three months.</td>
</tr>
<tr>
<td>Regulatory Committee Filets</td>
<td>If Council does not act, adopts the proposed measure.</td>
<td></td>
<td>May adopt a different decision (by q.m. if Commission agrees and by unanimity if Commission not in agreement) or reject the proposal by bare majority.</td>
</tr>
<tr>
<td>Regulatory Committee Centre-Filets</td>
<td>If Council does not act, adopts the proposed measure.</td>
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23. "Qualified majority."
B. Defining Good Administration

1. Accountability, Fairness, Expertise, and Speed

At first glance, the call for democratic administration is somewhat paradoxical. In our modern world, democracy cannot be understood simply as the Athenian *polis* or, less ambitiously, as citizens voting for representatives who in turn govern by majority vote. Powers are delegated to bureaucracies precisely because parliaments do not want to be in the business of legislating minutiae and deciding on the case-by-case application of the law. Speedy, expert and fair administration that is also accountable to democratic institutions is what liberal democracies strive for when designing their bureaucracies. This is not to say that these features of good administration are always in harmony. A legislature that exercises too much oversight might very well slow down administrative action, render it partial, or compromise the scientific character of decision-making. Similar consequences follow from an administrative process that is too swift, relies too heavily on expert opinion, or is overly concerned with fairness. The aim is to achieve a balance, one that is not simply a matter of technocratic virtuosity but also depends upon collective perceptions as to what that balance should be.

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

In rulemaking, the class of government action to which Community implementing rules belong, the administration is generally allowed to resort to different, less cumbersome procedures. When an agency establishes future rights and liabilities for a class of individuals or other

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25. As should be clear from the discussion that follows, whether administrative action is considered adjudication or rulemaking depends on the nature of the decision being made and not the label given by the agency.
regulated entities, the relevant facts are mostly scientific or social scientific. Consequently, scientific experiments and epidemiological and statistical studies are generally more useful fact-finding tools than witness cross-examination and other trial-type procedures. ²⁶ Further, since the decision does not implicate the use of state coercion at a single individual's expense but rather represents a trade off between different socioeconomic interests whose effects will be widely felt, participation cannot be conceived as a right to push the state to the wall and test fully enforcement of the law in that instance. Rather, it should be framed as the right of those who will be affected to give views and information that, together with a host of other considerations, aid government decision-making. Here, judicial review is generally narrow in scope because judges are neither trained to evaluate the scientific evidence nor institutionally suited to make the socioeconomic trade-offs entailed by rulemaking. To return to the list of values involved in the design of good bureaucracy, expertise ranks high, accountability and speed retain their importance, and fairness changes meaning, now defined as the right of interested parties to give views and information.

2. Accountability and Fairness Recast

To take the analysis one step further, accountability in administrative rulemaking can be conceived of as a classic principal-agent problem. ²⁷ Even though this is a term drawn from U.S. literature in law and economics, there is nothing very new about thinking of a legislature as a principal that uses the state bureaucracy as an agent. Speed, expertise, and fairness are among the advantages that lawmakers gain by giving bureaucracies decision-making power. As with all agents, however, the bureaucracy might not do its principal's bidding and might neglect to carry out statutes as lawmakers intended. The legislative principal, therefore, uses various techniques to monitor and control bureaucrats. This is not only a question of what legislatures typically do, but what they are constitutionally obliged to do. A legislature that controls execution too carefully might violate separation of powers principles, but one that does not control enough might very well be charged with an unconstitutional abdication of its legislative powers because of the ease with which execution can become lawmaking. Thus there are limits on delegation of powers enforced by national

²⁶. I do not wish to suggest, however, that cross-examination has no place in rulemaking. It can be used, for instance, to clarify positions taken by experts in the written record that are not fully explained or appear contradictory.

constitutional courts, the U.S. Supreme Court and the European Court of Justice.

Turning to a second important aspect of good administration, fairness in rulemaking can be slightly recast as interest group participation. Governments involve interest groups in policy implementation for a number of reasons, foremost among them being the fairness value. Those who will be expected to comply with rules as well as those who stand to benefit should have the opportunity to tell administrators how they believe they will be affected and express their views. Interest groups, however, also contribute valuable information to rulemaking. They and their members can be expected to have considerable experience in the field and therefore can inform administrators as to the nature and extent of the regulatory problem as well as the expected costs and benefits of various regulatory options.\textsuperscript{28} To return to another element of good administration, interest groups add to expertise in bureaucratic decision-making. Of course, some of the information that they make available is slanted, but administrators can handle the problem by taking the information with the necessary grain of salt and including as wide a spectrum of interests as possible. Further, through their relationship with members, access to the media, and legislative lobbying activities, interest groups contribute to public debate on regulatory issues and therefore render bureaucrats more accountable to the general public.\textsuperscript{29} Finally, interest group participation can improve compliance. To the extent that interest organizations command the loyalty of their members, their inclusion in the rulemaking process gives some assurance that their members will acquiesce in agency policy choices.

\textbf{C. Assessing Community Rulemaking}

Implementing rules score poorly on both accountability to democratic institutions and interest group participation. For lawmakers to hold the bureaucracy accountable they must know what it is doing. Yet the comitology process is shrouded in secrecy, preventing one of the Community's legislative principals, the European Parliament, from keeping an eye on national and Community officials.\textsuperscript{30} Although a

\textsuperscript{29} See id. at 580–83.
\textsuperscript{30} See infra Part III.A. Secrecy in Community government is generally defended on the grounds that it permits states to honerude and ultimately reach deals that improve the general welfare, a process that would be hampered by the interference of parochial national public interest. This rationale might apply to the high politics of intergovernmental conferences or Council meetings (although with the extension of Community power into areas traditionally left to national politics it has become less persuasive). But it is not convincing in the context of comimology committees. In such committees matters are supposedly of a purely scientific and technical
series of inter-institutional agreements require the Commission to communicate to Parliament proposals, draft comitology committee agendas, and committee voting results, these procedures have proven unsatisfactory.\textsuperscript{31} The Parliament claims that, contrary to the terms of the agreements, the Commission has failed to communicate all important proposals or has done so too late, thereby preventing Parliament from exerting any influence.\textsuperscript{32}

Even if Parliament were to have adequate information, it would not have the tools necessary to influence the course of rulemaking. Formally, Parliament’s institutional role in policy implementation is minimal. Under the Modus Vivendi signed by Parliament, the Council, and the Commission in 1994, Parliament’s views on proposals intended to implement co-decision legislation must be “[taken] into account to the greatest extent possible” by the Commission, and should Parliament give a negative opinion on an implementing measure being decided by the Council, an attempt must be made “in the appropriate framework” to find “a solution.”\textsuperscript{33} Informally, Parliament may pressure the Commission to modify implementing rules by putting oral questions to the Commission and voting resolutions in plenary sessions or by using its budgetary powers, for instance the right to put the Commission’s funding in reserve subject to the satisfaction of certain conditions. While the Modus Vivendi duty to take into account the Parliament’s views and parliamentary questions are weak means of influencing implementation, the budgetary power is a strong but blunt tool that can only be called upon in situations where Parliament and the Commission are truly at loggerheads. Once policymaking is turned over to administrators, therefore, Parliament has only limited powers to ensure that the same agenda that drove policy formation will also guide implementation.

\begin{itemize}
\item character; experts, in theory, do not cut deals in which national industries suffer and flourish according to the regulatory burden the committees decide to impose. Cf. Schäfer, supra note 10, at 23 (arguing that secrecy in comitology serves no purpose and that committee meetings should be open to the public). But see Christian Joeges & Jürgen Neyer, From Intergovernmental Bargaining to the Deliberative Political Process: The Constitutionalisation of Comitology, 5 Eur. L.J. 273, 295–98 (arguing for insulation of comitology from national economic considerations).
\item \textsuperscript{33} See Modus Vivendi, supra note 31.
\end{itemize}
Somewhat counter to popular perception, the Council is not much better situated than Parliament to hold Community administration accountable. Even though experts on comitology committees are supposed to represent their member states, national executives are hard-pressed to control the work of their civil servants in Brussels. Domestically, even if ministry employees were to favor, say, a tough environmental regulation that imposed considerable costs on industry, they could expect to face opposition from political appointees mindful of party politics (and industry's clout within the party). The very same civil servants, even though they might be sent with strict instructions, once in Brussels decide matters with other environmental policy experts collectively and, apart from the rare occasions upon which the Council is called upon to intervene, without any direct political supervision. They are, therefore, more likely to consider the environmental protection goal as paramount, at the expense of other, legitimate policy objectives. Member states are even less able to monitor and control rulemaking through the Council. Because comitology committees rarely issue negative opinions, implementing measures are generally not sent to the Council for a different decision or veto. The risk, therefore, is a cozy partnership between the Commission and national experts that is accountable to neither the Parliament nor the Council, or in other words, a Community agent that escapes the control of its lawmaking principals.

Implementing rules also do poorly on interest group participation. The public has notice only after a final rule is passed.\textsuperscript{34} The information provided on the scientific and policy issues decided in the rule is scanty. And even if interested parties were fully informed, they would have no right to participate in the administrative process; and only rarely, in enforcement proceedings, would they be able to challenge rules in court.

\textbf{D. The Reform Debate}

The attempts at rulemaking reform that have been made over the past decade focus for the most part on improving accountability to Parliament, without any attention to the Council or interest groups. Even on the issue of accountability the attempts do not go far enough. Information and a greater institutional role for Parliament in the rulemaking process have been the main thrust of these changes. Parliament has progressively received more information on implementing rules: in 1988, the Commission began forwarding all important comi-

\textsuperscript{34} For a complete discussion of public access to information and participation rights in administrative and judicial proceedings, see \textit{infra} Part III.
ology proposals in 1993 all proposals relating to the administration of structural funds in 1994 all draft implementing measures, and in 1996 draft committee agendas and aggregate results of votes taken in management and regulatory committees. Most recently, responding to a call made at the Amsterdam Intergovernmental Conference for comitology reform, the Commission issued a proposal providing that:

The European Parliament shall be informed of committee proceedings on a regular basis. To that end, it shall receive agendas for committee meetings, draft measures submitted to the committees for the implementation of instruments adopted by [co]decision, and the results of voting. It shall also be kept informed wherever the Commission transmits to the Council measures or proposals for measures to be taken.

Parliament has proposed an amendment that would further expand its right to information. The amendment would require the Commission to provide Parliament with summary records of committee meetings, attendance lists, and forward timetables and would require the Commission to provide Parliament with the information at the same time and under the same conditions as the committees. In the 1994 Modus Vivendi, Parliament obtained a rather weak commitment from the Commission and Council to consider and accommodate, insofar as possible, Parliament's views on implementing measures. A proposal put forward in 1995 recommended that the Commission and comitology committees pass implementing measures subject to a veto from either the Council or Parliament, a veto that would send the matter to the full legislative procedure. The Commission's current proposal includes an important role for Parliament in the regulatory committee

41. See Commission Powers Resolution, supra note 18, amend. 30.
42. Modus Vivendi, supra note 31.
procedure because it would eliminate the Council and instead, upon a negative committee opinion (or if no opinion is delivered), would require the Commission to follow the legislative procedure set out in the E.C. Treaty, thus respecting both the Parliament and the Council’s legislative prerogatives.\footnote{Proposal for a Council Decision Laying Down the Procedures for the Exercise of Implementing Powers Conferring on the Commission, art. 5, supra note 40.}

Not satisfied with the Commission proposal however, Parliament wishes to obtain an even bigger role in comitology. It seeks the right to challenge all implementing measures adopted under co-decision legislation, regardless of the opinions issued by comitology committees, positive or negative.\footnote{See Commission Powers Resolution, supra note 18, amended 23, 26, 32.}

Even if the Council accepts all of Parliament’s amendments, Parliament will still find it difficult to monitor and control the Community’s bureaucrats. First, the information communicated by the Commission must be processed to check for objectionable policy choices and questionable scientific decisions. Yet Parliament does not have the staff and resources necessary to undertake this considerable task, neither on its committees nor in the parliamentary secretariats that assist the committees. Second, although a veto power over implementing rules would give Parliament a greater voice in rulemaking than is currently the case, it still is a fairly weak control device. Legislative vetoes are time-consuming and drastic and would only be used in the case of highly publicized policy issues that parliamentarians and Council members feel they cannot ignore.

E. Shortcomings of the Parliamentary Model and the Relevance of the U.S. System of Independent Branches and Shared Powers

1. Accountability

The comitology reform debate has been driven by the parliamentary model of democratic government. The focus on Parliament to the almost complete exclusion of the Council in the accountability endeavor is a reflection of the central role that parliaments occupy in national systems. In constitutional theory, they constitute the primary source of legitimacy and authority and stand above national executives and their administrations. Paradoxically, the relatively weak control tools that have been proposed for the European Parliament also reflect the influence of the parliamentary model, albeit parliamentary government as it works in practice. Even though in theory parliament is supposed to guide the executive, in countries with strong parties, the government, once formed, wields the real power in the system by virtue of the majority it can command in the legislature. In the day-to-day op-
eration of government, the executive replaces parliament at the apex of the system.

In parliamentary systems, a single lawmakership principal—the party or coalition of parties that won the majority of seats in parliament and goes on to form the government—controls state administration. In what is known as party government, a relatively simple chain of command extends from voters to civil servants. The people elect representatives—normally more for the party they represent than for their personal politics—to sit in parliament. The party or coalition of parties that captures a majority of the seats in parliament then forms the government, which in turn commands the state bureaucracy. The same party or group of parties controls both parliament and the government, and therefore, even though separation of powers theory would have parliaments legislate and governments execute, in practice the two functions tend to merge. Parliamentary majorities not only pass laws, but also keep an eye on implementation through their relationship with the executive; conversely, the government is not only responsible for executing the law but also proposes legislation and pushes it through parliament.

Governments, not parliaments, are the key player in the bureaucratic control game because they are ideally located, by virtue of their central position in both legislative politics and the administration, to ensure that the same political agenda that drove lawmakership will also guide implementation.46 The civil servants who staff a ministry answer, through a hierarchical chain of command, to the minister, cabinet, prime minister, and majority party or coalition of parties. When it comes time to draft rules, therefore, bureaucrats are supervised by the same politicians who crafted the policy line laid down in the enabling statute. Accountability is achieved largely through the informal politics of government guidance, monitoring, and punishment.

Parliaments and courts take a backseat to governments in assuring accountability in parliamentary systems. Parliaments wield a number of institutional tools to keep the administration in check, all of which have an equivalent in comitology as it currently operates or as reformers wish to see it operate. Yet, albeit with significant national variations, these tools are weak and parliaments do not make heavy use of them. Questions to members of government are a feeble means of pushing government administration in one direction or another. Calls for resignation and the power to veto or amend executive rules issued

46. See generally JAMES Q. WILSON, BUREAUCRACY 295–312 (1989) (describing control of bureaucratic discretion in parliamentary regimes as primarily a matter for executives and majority parties and only incidentally for parliaments and courts); SUSAN ROSE-ACKERMANN, CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE UNITED STATES 8–9 (1995) (discussing accountability in Germany).
pursuant to statutory provisions are seldom used because they are drastic measures only appropriate for acts that clearly demonstrate mismanagement or disrespect for legislative mandates. Finally, the power to approve the budget, although a highly persuasive institutional stick, is rarely used in practice; as in most other policy areas, the government is charged with proposing the budget and ensuring that the necessary coalition for its passage exists in parliament.

Courts also play a secondary role in making sure bureaucracies do lawmakers’ bidding.\(^\text{47}\) When they review administrative rules, they guarantee that civil servants stick to the statutory terms they have been charged with implementing. They see their role as protecting parliament’s lawmaking powers and ensuring that bureaucrats respect statutory guidelines. But they are careful, once satisfied that bureaucrats have kept within those limits, to step back and permit the full exercise of discretion conferred upon the executive. When, as is generally the case, guidelines are vague and must be inferred from statutes’ broader objectives as well as models of rational administrative action, courts are reluctant to intervene. Here too national differences abound: while judicial review in France and Germany is considered to be quite strict, it is much less so in England. Generally speaking, however, courts in European parliamentary systems police only for departures from statutory commands, and flagrant ones at that, because they assume that administrators will be kept on a tight leash by governments.

Methods of holding administration accountable in parliamentary systems offer little guidance for the Community. In Brussels, unlike national systems, the legislative principal is divided. There, two independent branches, Council and Parliament, pass legislation and both must control implementation, entrusted to yet a third independent branch, the Commission. In the Community legislative process, the Commission proposes and the Parliament and the Council decide, the relative power of the Parliament and the Council depending upon the subject area and the governing E.C. Treaty provisions. The Commission is staffed by civil servants and led by Commissioners under a duty to pursue the Community’s supranational mission, members of Parliament are directly elected, and the national bureaucrats, ministers, and heads of government in the Council represent national interests.\(^\text{48}\)

\(^{47}\) See generally Fritz Stroink, Judicial Control of the Administration's Discretionary Powers \(\text{(le bilan exécutif—judice administratif)}, \text{ in JUDICIAL CONTROL 81 (Rob Baldex et al. eds., 1995)}\) (describing administrative law in England, the Netherlands, Germany, and France and characterizing English courts as the most deferential and German courts as the least); Paul F. Craig, Administrative Law 438 (1983) (describing English standard of review).

\(^{48}\) Although the Commission, as the only body that may propose legislation, has lawmaking powers, it cannot be considered a lawmaking principal because it has no power of decision.
Accountability, once policy implementation is delegated to the Commission acting together with comitology committees, must be to both the Council and the Parliament, not to a single lawmaking principal as in parliamentary systems (parliament in theory and the government in practice). Further, each institution needs control tools strong enough to compete on equal footing with the other for influence over administration, yet it is especially difficult because one of the three lawmakers—the Commission—is directly responsible for administration on a day-to-day basis. National control tools, designed for only one lawmaking principal and one that directly commands the state administration, do not suffice at the supranational level.

United States institutions can contribute to the Community administrative reform debate because in the United States as well a divided lawmaking principal must hold the administration accountable. Only acting together can the House of Representatives, the Senate, and the President claim to legislate in the name of the people. Under the Constitution a statute must be passed by both Houses and signed into law by the President. Each of these institutions answers to a different constituency, has different terms of office, and represents different interests. Accountability to two principals, Congress and the President, is a recurring theme in U.S. administrative law. In the Constitution, the power to execute the law is entrusted to the President. Yet Congress constantly seeks to control implementation or, at the very least, loosen the President's hold over the administration with oversight hearings, the Budget and Accounting Office, independent agencies, and a series of other techniques. When Congress delegates rulemaking power in a piece of legislation it nonetheless attempts to retain control by writing in statutory hammers and citizen suit provisions. And, most salient for this Article, some have argued that Congress, as well as the President, should use administrative procedure and judicial review to control agency rulemaking.

2. Interest Group Participation

The absence of a formal role for interest groups in comitology, both in the current system and in the proposed changes, is also a product of the parliamentary paradigm. Although the degree to which interests influence policy implementation, as well as the form that participation takes, vary greatly in Europe's parliamentary systems, everywhere interests play their part. In most countries, interests first must win

49. U.S. Const. § 7.
50. A hammer sends into effect undesirable provisions from the point of view of regulated industry, if the agency fails to act by a certain date; under citizen suit provisions members of the public are entitled to sue agencies to force them to promulgate rules.
51. The French government is generally characterized as closed to interest influence and ready
insider status within the policy community of party politicians and civil servants, after which they are informally consulted on everything from major legislative proposals to technical implementing rules.\(^5^2\) Note two features of this system of interest group participation. First, as a result of the strong and unitary nature of government in parliamentary systems, state actors can and do wield a heavy hand in selecting which interests will have a say in policymaking.\(^5^3\) For instance, in Germany, employers' associations and trade unions have historically had privileged access to the state in areas as diverse as industrial, energy, and health care policy.\(^5^4\) In France, central administration tends to rely upon individual firms, the major employers' organization, professional associations and well-respected local figures (notables) for information and consensus-building.\(^5^5\) In Britain, certain organizations such as the National Farmers' Union enjoy a monopoly of representation and close relations with the relevant government ministries.\(^5^6\) Second, again related to the structure of parliamentary systems, the same set of party politicians and civil servants are responsible for policy formulation and implementation, and therefore once an interest group is recognized as legitimate, it is relatively sure of access to policymaking from start to finish. Formal guarantees that interests will have a voice in policymaking downstream at the implementation phase, namely legal procedures, are unnecessary.

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52. Curiously, even though the political science literature on interest group involvement in policy implementation is extensive, most administrative law continues to operate on the assumption that there is a direct chain of command from statute to administrative act, and that administrative discretion is limited. See, e.g., Jürgen Schwarze, European Administrative Law 261–94 (1992) (surveying statutory constraints and administrative discretion in member states).


54. See Kenneth Dyson, West Germany: The Search for a Rationalist Consensus, in Policy Styles in Western Europe, supra note 51. Germany, Austria, Denmark, and Sweden are considered neo-corporatist states, meaning that government both privileges certain interests and relies heavily on those interests in policy formulation and implementation. Philippe Schmitter, the well-known political scientist credited as one of the first to analyze the return in Europe to corporatist forms of state-society relations in the 1970s, has developed a handy definition:

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


56. See Wilson, supra note 53, at 77.
The relationship between interest groups and government is far less orderly in the Community and tends towards the pluralist model.\textsuperscript{57} First, in a constitutional system of independent branches and shared powers, agreement as to which interests should be consulted is difficult to achieve and therefore more groups participate in policymaking. A Commission civil servant charged with protecting the supranational interest, a Council minister who sits as a representative of her country, and a member of Parliament with affiliations to a national party and electorate, are likely to have very different ideas as to which interests should count and to what degree. Consensus is especially difficult to achieve when policymakers come out of different national traditions of interest representation. To take a clear example, in Germany and Scandinavia trade unions participate regularly in policy formulation and implementation, while they are excluded for the most part in the United Kingdom and France. Second, without a system of strong parties and central administration, the interests that influence policy formulation are not assured access to policy implementation. The Commission alone, supervised only loosely by the Council and even less so by the Parliament, is charged with rulemaking and, therefore, the interests that had a say in the lawmaking process through a national minister or a European parliamentarian will not necessarily have one in implementation.

Here again the U.S. political system contains important parallels. Interest representation in the United States is considered the prototype of pluralism.\textsuperscript{58} A wide variety of interest groups can participate because in a system where political power is fragmented among a variety of government actors there exist many points of access: members of Congress, the President, political parties, and the federal administration. Interest groups compete among themselves for influence. They influence lawmaking by shaping public opinion, making contributions to powerful members of Congress, the President, and political parties,


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

Schmitter, supra note 54, at 96.

\textsuperscript{58} See Wilson, supra note 53, at 3.
and delivering votes. When it comes time for policy implementation, they use politics (legislators and the President lobby administrators on their behalf\textsuperscript{59}) as well as legal procedure to shape outcomes. The United States, therefore, serves as one example of a pluralist system that guarantees interest group participation when policymaking is turned over to regulators.

II. UNITED STATES RULEMAKING

A. Statutory Framework

The standards governing agency procedure and judicial review in a U.S. rulemaking proceeding are to be found in the Administrative Procedure Act of 1946 (APA), the specific statute being implemented, and administrative case law. The most important APA provisions for our purposes are the following two. The first provision:

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
(1) a statement of the time, place, and nature of public rule making proceedings;
(2) reference to the legal authority under which the rule is proposed; and
(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose\textsuperscript{60}.

And the second provision:

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

\textsuperscript{60} 5 U.S.C. § 553 (1998) ("Rule making").
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations or short of statutory right;
(D) without observance of procedure required by law; . . . .

These provisions contain a number of critical features. First, the public must be informed of the rule through publication in the official government journal, the Federal Register (notice). Second, interested individuals may submit comments in which they marshal data, opinions, and legal arguments in favor or against the proposed rule (comment). Third, the agency must briefly justify the rule, setting out the regulatory problem it is intended to address and the considerations that led to its adoption (statement of basis and purpose). Finally, courts are to catch administrators who transgress the outer limits of their statutory mandates and authority when executing regulations and are to strike unconstitutional or "arbitrary and capricious" rules.

Although the APA is the essential backdrop in any rulemaking proceeding, the starting point is the statute conferring regulatory authority upon an agency in that instance. Understanding the relationship between the APA and enabling legislation is easy if the statute is silent as to agency procedure or standard of review because the APA operates as a default rule. The intersection of the two is also straightforward where, as is more often the case, the legislation independently sets down agency procedure and the judicial review standard but the APA is repeated word for word or incorporated by reference. Only when the statute departs from the APA scheme does a difficulty arise. Many laws passed in the 1970s, at a time when the public had come to distrust administrative agencies, require agencies to go through additional procedural hoops such as oral, trial-type hearings and impose higher burdens of proof such as judicial review for "substantial evidence on the record as a whole" or review for "clear and convincing evidence." To come full circle, however, even when APA procedure is altered by statute, the APA conceptual framework (developed, as we shall see, in the

62. Rulemaking that must, by statute, satisfy these more demanding procedural and substantive standards is known as hybrid rulemaking.
case law) is so powerful that agencies and courts are reluctant to drop it and rulemaking generally follows the standard course.63

B. Administrative Case Law

The APA rulemaking provisions, as originally drafted, favored New Deal government activism.64 They trod lightly upon agency decision-making power. Notice of the proposed rule, an opportunity for comment, and the statement of basis and purpose accompanying the final rule were designed to guarantee openness in the policymaking process. The judiciary was to ensure that agency rules were constitutional (as with all government action) and that they did not fly in the face of reason. Courts were not to delve too deeply into a plausible agency explanation to check the facts and logic.

In the 1960s, agency rulemaking was transformed. The standard modus operandi of the prototype New Deal agencies, adjudication, fell out of favor for a number of reasons.65 Most important for our purposes was a change in public perception of administration and experts. Expertise at the service of public ends came to be perceived as more complicated than a statutory instruction to an agency to solve a given problem.66 In a number of cases, the experts seemed to act not in the public good but in the interests of the industry they were supposed to be regulating. It thus appeared that decades of agency interaction with industries, an unavoidable part of the regulatory task, had transformed a once adversarial relationship into a cozy partnership (“agency capture”). Furthermore, the legitimacy of the administrative state had fallen prey to a general decline in confidence in science and, more broadly speaking, the possibility of objective, impartial knowledge. It was no longer possible to believe that advances in technology were inevitably tied to progress when they had led to pollution, atomic weapons, and other problems. Thus, went the view, experts routinely made judgment calls with significant normative ramifications and society, not the experts, had to somehow control those decisions.

Public law reformers thought that rulemaking could go a long way in remedying these defects. Agency action would be more public-spirited because rulemaking, unlike adjudication, was a process open

to all, rendering administrators accountable to the entire community and not simply firms with a high financial stake in the outcome.\textsuperscript{67} They promoted rulemaking, over-optimistically as I shall discuss later, as the primary institutional means by which administrators were to solve contemporary social problems. This new mission for rulemaking led to dramatic changes in how it operated. Agencies had to solicit and incorporate the views of a variety of groups that previously had been excluded from the administrative process. Courts had to police rulemaking to protect against regulatory capture and ensure that proceedings were accessible and responsive to the public.

As courts took on their new role, the character of judicial review changed considerably and it is this framework, formally based on the APA text from 1946 but developed in the case law of the 1970s, that still stands today.\textsuperscript{68} As before, courts reviewed rules for constitutional violations, agency action that went beyond what was authorized in the statute, and misinterpretation of statutory text guiding agency action. Unlike the past, however, when courts were called upon to decide whether rules were arbitrary and capricious, they showed themselves far more willing to get into the technical merits of agency policy choices and carefully scrutinize the rationale offered for such decisions. Courts had to be satisfied that agencies had considered and adequately answered the challenges put forward by rulemaking participants. Patricia Wald, a judge on the federal court of appeals that handles the overwhelming majority of rulemaking cases, describes the variety of complaints that masquerade behind the deceptively simple claim that a rule is "arbitrary and capricious":

"Arbitrary and capricious" has turned out to be the catch-all label for attacks on the agency's rationale, its completeness or logic, in cases where no misinterpretation of the statute, constitutional issue or lack of evidence in the record to support key findings is alleged. Frequently the arbitrary and capricious charge is grounded on the complaint that the agency has departed from its prior rationale in other cases without admitting it or explaining why. Sometimes the agency is rebuffed because it did not give adequate consideration to an alternative solution. But most often the court simply finds the agency's explanation for what it is doing "inadequate." . . . In a surprising number of cases, the court is most frustrated about the agency's failure to communicate any reason for taking certain actions.\textsuperscript{69}


\textsuperscript{68} See generally MASSEY & HARFET, supra note 59, at 147–56.

\textsuperscript{69} Patricia M. Wald, Judicial Review in Midpassage, 32 Tulsa L.J. 221, 233–34 (1996).
Part of this willingness to roll up sleeves and get mired in policy debates was the need for an extensive agency record. Without a written record (and in the absence of independent fact-finding) courts could not evaluate whether attacks on agencies' scientific evidence and policy analysis had any merit. Agencies, therefore, were required to compile a contemporaneous record that included the scientific evidence and reasoning that served as the foundation for the agency rule and justified setting aside the other options advocated by notice and comment participants.

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

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

70. See Shapiro, supra note 64, at 45–46.
72. See Shapiro, supra note 64, at 45–46.
III. COMMUNITY RULEMAKING

A. Administrative Procedure

In comitology, only the bare essentials of the procedure to be followed in drafting and adopting rules are set down. The Comitology Decision laying down the three different formulae by which the Commission administers under Council supervision contains the basics of committee procedure. Advisory, management, and regulatory committees are composed of representatives from the member states and the Commission; the Commission representative serves as the committee president; time for debating a Commission proposal is set by the president; and voting is by qualified majority. The E.C. Treaty, as interpreted by the Court, requires that a final rule, like all other Community acts, be published in the Official Journal, contain a statement of legal basis (the basic measure pursuant to which it is issued), and explain, albeit summarily, the reasons for its adoption.

The public has very little formal access to rulemaking. In comitology, the first point at which the public has a right to information is when the rule is to take effect, at which time the Commission or Council is obliged to publish the rule in the Official Journal. Thus, even though interested firms and individuals are often given advance warning and are consulted by the Commission and national ministries that send representatives to sit on comitology committees, they have no legal guarantee of notice. This secrecy persists even after the fact. A rulemaking record exists in the form of the Commission proposal, other preparatory documents, and the minutes of comitology and Council meetings; but such records are not subject to mandatory public disclosure.

75. Under Article 253 (ex Article 190) of the E.C. Treaty, the Court requires the responsible Community institution to show a rationale but does not carefully scrutinize it. Martin Shapiro, however, has argued that the duty to give reasons could be used to introduce more extensive judicial review similar to U.S. arbitrary and capricious review. See Martin Shapiro, The Giving Reasons Requirement, 1992 U. Chi. Legal F. 179.
76. Indeed, prior to Maastricht, not even this was the case since not all measures were required to be published.
B. Locus Standi

The Court of Justice treads lightly upon the Community bureaucrat's powers. As a result of locus standi law, few may directly challenge implementing rules. Article 230 (ex Article 173), the E.C. Treaty provision that confers jurisdiction upon the Court to review Community acts, gives member states, the Council, and the Commission automatic standing. Parliament, however, may only bring suit if it can claim that its powers have somehow been violated, for instance if a Community act was passed without respecting the role set down for Parliament in the enabling E.C. Treaty provision. For individuals to gain access to the Court, the Community act must be of "direct and individual concern." 78 This has been interpreted narrowly by the Court as requiring that the act be intended to regulate a situation that specifically concerns the litigant. 79 Consequently, those affected by implementing rules will generally be denied locus standi because, by their very nature, rules are written to regulate entire industries and benefit the public at-large. Instead, a prospective litigant must wait for the rule to be enforced locally and then challenge enforcement in her domestic court on the grounds that the Community rule is invalid, at which point the court may refer the matter to the Court of Justice and obtain a preliminary ruling on the issue under Article 234 (ex Article 177). 80 (National courts are required to make preliminary references when they believe Community measures to be invalid.) Not only is this a lengthy procedure, but it is highly contingent on national locus standi law, which in some member states precludes challenges from public interest groups and others not directly involved in rule enforcement. 81

78. E.C. TREATY art. 173.
79. For a recent statement on standing, see Case C-321/95 P. Greenpeace v. Commission, 1998 E.C.R. I-1651, para. 28 ("whereas, as in the present case, the specific situation of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act").
80. A question of European Community law that arises in the course of national litigation may (and in some cases must) be referred to the Court of Justice. The Court gives the national court an answer on the legal issue but does not rule on the actual dispute.
81. The lack of uniform access to national courts is widely recognized as problematic. Generally, public interest litigants in national courts are thought to serve a useful policing function, forcing foot-dragging member states to implement Community law. See Eckhard Rehbinder, "Locus Standi, Community Law and the Case for Harmonisation, in PROTECTING THE EUROPEAN ENVIRONMENT: ENFORCING EC ENVIRONMENTAL LAW 151 (Hans Somsen ed., 1996). Although the Community has generally been wary of tampering with national procedures, a directive was recently passed giving public interest groups the right to enforce Community consumer protection law. See Directive 98/27 of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers' Interests, 1998 O.J. (L 166) 51.
C. Judicial Review

There are three basic grounds for challenging implementing rules in the European Court of Justice. First, a litigant may oppose a rule on procedural grounds, for instance claiming that it was adopted without an adequate statement of reasons or that the Commission failed to submit the measure to the appropriate comitology committee for an opinion. Second, a litigant may complain that the measure contravenes or rests upon a flawed interpretation of an E.C. Treaty or statutory term. Third, a challenge may be based upon the claim that the evidence or reasoning that led to the rule’s adoption was flawed. The latter set of arguments can be framed in a variety of ways.\(^{82}\) Most on point is the claim that the Community institution committed a “manifest error of appraisal” when assessing the data and policy considerations.\(^{83}\) The litigant may also complain that the measure violates the principle of proportionality, a means-ends test that finds its origins in German administrative law and may be invoked in any case involving a Community or member state act. In a recent restatement of the principle the Court explained:

1. In order to establish whether a provision of Community law complies with the principle of proportionality, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it.\(^{84}\)

Thus, the litigant would argue that a rule is technically flawed and therefore cannot solve the problem the legislator or administrator is attempting to address; or that a rule is unduly burdensome, given the existence of other, less onerous policy options, and consequently is not proportionate to the stated objective of the rule. Finally, the doctrine of misuse of powers may be invoked. Misuse of powers is defined in the Court’s case law as “the adoption by a Community institution of a

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84. Case C-233/94, Federal Republic of Germany v. European Parliament and Council of the European Union, 1997 E.C.R. I-2405, para. 54, at I-2461. At least two equivalents to the principle of proportionality exist in U.S. administrative law. An arbitrary and capricious reasonableness challenge to a regulation often includes the claim that the means chosen by the administration imposes an undue burden on litigants, which could be avoided through the choice of an equally effective but less burdensome policy option. Furthermore, agencies are required by Congressional statute and executive order to undertake a cost-benefit analysis for all significant regulations. See infra Part VC.1. In U.S. constitutional law, equal protection analysis bears some resemblance to the proportionality principle.
measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case. 85 Because the flawed analysis rendered achievement of the stated end an impossibility, it is argued, the measure had to have been adopted with another end in mind.

Judicial review in rulemaking cases is narrow in scope. 86 It is no great secret that the Court tends to be tough on national measures accused of violating the E.C. Treaty, Community legislation, or general principles of Community law and go easy on those issued by Community institutions. 87 Take the way that the principle of proportionality is applied. Because national laws run the risk of operating as barriers to trade, the Court tends to engage in an exhaustive inquiry, carefully weighing a measure’s burden against its supposed aims and considering alternative, less cumbersome policy options. Community measures, which do not pose a threat to free trade, rarely run afoul of the proportionality principle. 88 As between a Community legislative (“basic”) and administrative (“implementing”) measure, however, the Court does not draw much of a distinction even though one is passed pursuant to the E.C. Treaty and therefore undergoes the full legislative process and the other follows an abbreviated procedure. The failure to distinguish between legislation and administrative acts is tied to the idea that regardless of which Community institution issues a measure, it can be trusted to protect against national parochialism and make the right, pro-Community policy choice.

87. See Renaud Dehousse, The Legacy of Maastricht: Emerging Institutional Issues, in 3 Collective Course of the Academy of European Law 181, at 212 (describing Court’s leniency towards Community measures).
88. For instance, in Criminal Proceedings v. Bouchao, see Werner, & Norlains SA, Case 25/88, 1989 E.C.R. 1105, the Court found that a French law requiring importers to prove conformity of imported products with consumer protection rules would only be proportionate if it allowed importers to rely on means of proof normally available to them, e.g., certificates and attestations provided by the manufacturer as opposed to actual analysis of the product. In Süsselweber Mannheim/Obenfert AG v. Hauptzollamt Mannheim, Case C-161/96, 1998 E.C.R. I-281, by contrast, the Court upheld a Commission common sugar market regulation imposing an economic penalty on traders failing to produce a specific Community certificate. The Court reasoned that other certificates could not substitute for the Community one because of the excessive administrative work such alternative means of proof would cause for member state authorities. Similarly, in Criminal Proceedings against Kieffer & Thill, Case C-114/96, 1997 E.C.R. I-3629, the Court upheld a Community regulation imposing certain information-collection obligations on firms involved in trading goods between the member states. The litigants claimed that such duties were burdensome and costly, especially for small and medium-sized enterprises, but the Court found the duties to be reasonable and held that the measure was a legitimate exercise of the Community legislature’s discretionary powers.
This being said, the Court in one case showed itself to be more demanding when assessing whether the Community had successfully cleared all of the procedural hurdles for adoption of an act. In Angeleno Pharm GmbH v. Freie und Hansestadt Hamburg, the Court found that even though the basic legislation was ambiguously drafted and did not clearly obligate the Commission to consult the scientific committee in the area, consultation was indispensable because of the implementing rule’s technical nature. The Court said:

[It is clear that the Scientific Committee, which consists of individuals who are highly qualified in disciplines relevant to cosmetology, such as medicine, toxicology, biology and chemistry, was created in order to provide the Commission with the assistance necessary to examine the complex scientific and technical problems entailed by the drafting and adaptation of Community rules on cosmetic products.]

To compensate for the abbreviated procedure leading to the measure’s adoption, or in other words the administrative as opposed to legislative nature of the act, the Court required the Commission to consult scientific experts, a guarantee of sorts that the Commission was engaging in rational decision-making.

A challenge based on an alleged misinterpretation of an E.C. Treaty or legislative provision is also slightly easier to mount in the case of an implementing rule. The reason here is not that the Court is more wary of implementing as opposed to basic rules, but rather that the governing legal text is more detailed in the case of the former. To take the example of a case that will be discussed at length below, an agricultural policy legislative measure must comply with the fairly open-textured E.C. Treaty instruction to increase agricultural productivity, ensure a fair standard of living, stabilize markets, assure the availability of supplies, and ensure that supplies reach consumers at reasonable prices. Conversely, the “essential elements” of a piece of legislation, the basic guidelines that an implementing measure must follow under the Court’s jurisprudence, can be very detailed.

Finally, a more fact-based challenge to an implementing rule in which the litigant questions the Community’s scientific evidence or policy analysis has just as little chance of succeeding as with a basic measure. When the Court reviews legislation it allows the Community institutions ample room for discretion. In Federal Republic of Germany v.

90. Id. para. 35, at I-211.
91. E.C. TREATY art. 33 (ex art. 39).
European Parliament & Council of the European Union, a recent case involving a financial directive instituting consumer-protection, deposit-guarantee schemes, the Court noted that the regulated field was “economically complex.” It went on to state that:

…In such a situation the Court cannot substitute its own assessment for that of the Community legislature. It could, at most, find fault with its legislative choice only if its appeared manifestly incorrect or if the resultant disadvantages for certain economic operators were wholly disproportionate to the advantages otherwise offered.

This deference applies in implementing rule cases as well. For instance, in an earlier case involving a Commission agricultural policy regulation, I. Schroeder KG v. Federal Republic of Germany (Tomato concentrates), the Court adopted the very same approach. The issue was whether the regulation would indeed prevent cheap tomato concentrate imports from flooding the Community because of the many possibilities of circumventing the price floors set by the Commission. The Court refused to get into the merits of the policy choice, stating that:

Since in the present case it is a question of complex economic measures, which for the purpose of their efficacy necessarily require a wide discretion and moreover as regards their effects frequently present an uncertainty factor, the observation suffices that these measures do not appear on issue as obviously inappropriate for the realization of the desired object.

In light of the secrecy that attaches to Community decision-making, it is difficult to see the Court taking on a more active role in rulemaking cases even if it wished to do so. Practically speaking, without a record of what happened in the administrative proceeding, it is almost impossible for a court to seriously consider the merits of an argument challenging the reasonableness of a policy choice. Aside from the contents of the pleadings, the Court does not know what data was relied on and what reasons persuaded the Community institution to

93. Supra note 94.
94. Id. para. 53, at I-2461.
95. Id. para. 56, at I-2461.
97. Id. para. 14.
98. Although a system of court-appointed experts might offer a solution to this problem, it would be difficult to run. In the rulemaking area, where highly discretionary policy choices are made, the difference in opinion can be vast, making agreement on a set of impartial, neutral experts very difficult. Moreover, independent fact-finding powers would transform the Court into a Community super-agency, unnecessarily repeating the work of the Commission and national experts and turning it into an institution it was never designed to be.
adopt one regulatory approach over another. Thus, it cannot assess whether the decision, at the time it was made, was unsound (as claimed by the challenger). To the extent that the Court wishes to evaluate whether, in retrospect, the decision was a reasonable one, it must rely on the pleadings which are likely to contain unsubstantiated, ad hoc policy arguments.

IV. A CASE STUDY ON NOTICE AND COMMENT: WASTE REGULATION

To more concretely illustrate the differences between the U.S. and Community systems of rulemaking and the implications of adopting the U.S. model, I take an example from the environmental field. This regulatory area is ideal for my analysis due to the closeness of policy approaches. Where the substantive policy choices made by Congress and the Community legislature are similar, the differences in the implementation process should be more readily apparent.

The United States and the Community take similar approaches to the problem of how to safely dispose of the "mountains of garbage"99 generated by modern-day society. Both attempt to ensure that waste is handled safely, for the environment and human health, from cradle to grave through a system of rules and permits. Once waste is classified as hazardous it becomes subject to a series of rules on safe storage, transportation, treatment, and disposal. Non-hazardous waste is also regulated but less carefully. Three classes of individuals are caught by the regulatory net: generators, transporters, and owners or operators of treatment or disposal facilities. A government-run permit scheme is the primary means of ensuring that those who dispose, treat, and transport waste comply with the rules.

A. The Resource Conservation and Recovery Act100

The Resource Conservation and Recovery Act of 1976 (RCRA),101 significantly amended by the Hazardous and Solid Waste Amendments of 1984,102 is the environmental statute that governs the handling of waste in the United States. Under the RCRA, the Environmental Protection Agency (EPA) has primary responsibility for regulating haz-

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ardous waste while the states are delegated responsibility for non-
hazardous waste. 103

The RCRA gives primary responsibility for drawing up rules on
hazardous waste to the EPA. For instance, it is required to develop
criteria for identifying and listing hazardous waste, to identify, list,
and de-list hazardous waste. 104 A state may assume responsibility for
hazardous waste regulation but it must first satisfy the EPA that its
regulations are "substantially equivalent" to the federal ones. 105 The
states are given primary responsibility for developing solid (non-
 hazardous) waste disposal plans, but even so the EPA was charged with
issuing guidelines for such plans and reviewing and approving
them. 106

The RCRA provisions directing the EPA and the states to adopt
various types of rules all require that such regulations shall be promul-
gated "after notice and opportunity for public hearing." 107 The statute
also contains a catch-all provision on public participation in regulatory
action:

Public participation in the development, revision, implementa-
tion, and enforcement of any regulation, guideline, information,
or program under this chapter shall be provided for, encouraged,
and assisted by the Administrator and the States. The Adminis-
trator, in cooperation with the States, shall develop and publish
minimum guidelines for public participation in such processes. 108

Judicial review of EPA rules is expressly guaranteed under the
RCRA. Courts are directed to follow the standards set out in the Ad-
ministrative Procedure Act, namely arbitrary and capricious review,
subject to certain exceptions that are irrelevant here. 109 Before a plain-
tiff may challenge an EPA regulation, a number of conditions applicable
in administrative litigation generally must be satisfied. The liti-
gant must have exhausted her administrative remedies or else risk a
finding that she has waived her rights. Further, the party must demon-

103. The EPA is a federal executive agency, meaning among other things that the administra-
tor (agency head) is appointed and removed at will by the President. Most of the policymaking
occurs at its headquarters in Washington, D.C., whereas enforcement is carried out by its ten
regional offices, which work closely with the states.
104. See 42 U.S.C. § 6921 (1998) ("Identification and listing of hazardous waste."); HARRIS,
supra note 100, at 195–97; Michael M. Meloy, PK-4—New and Controversial Ammendments to Pa.'s
strate that she satisfies constitutional and prudential standing requirements. More specifically, to fulfill the constitutional part of the test she must show concrete injury, that such injury is traceable to the complained of event, and that it is redressable through judicial action;110 to satisfy the prudential requirement, she must show that she falls within the "zone of interests" that Congress intended to regulate or protect with the RCRA.111 Lastly, even though rules may be challenged prior to enforcement, the suit must still be "ripe," a two-part inquiry that takes into account the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."112 Whereas exhaustion, and to a lesser extent, standing, can operate as barriers to judicial review in rulemaking cases, ripeness very rarely is an obstacle.

B. Council Directives 91/156 and 91/689

1. Current State of the Law

On the other side of the Atlantic, the first Community waste legislation was adopted in the 1970s. Following the Basle Convention on the control of transboundary movements of hazardous wastes and their disposal, signed by the Community in 1989, the existing legislation was radically transformed with a series of new directives.113

Under these directives, the Commission is charged with drawing up and revising lists of (non–hazardous) waste114 and hazardous waste115 through a regulatory committee file procedure. In doing so, however, the Commission must follow the detailed criteria set out in the directives themselves. All other rules relating to waste (i.e., storage, transportation, treatment, disposal) are to be promulgated by the member states.116 They are under a duty to notify the Commission of the meas-

112. Abbott Laboratories v. Gardner, 387 U.S. 136, 148–49 (1967). Fitness for review includes consideration of whether the issues can be classified as legal or factual, the former lending themselves more readily to pre-enforcement review than the latter. See id. at 149.
115. See id. art. 1.4. It proved difficult to reach an accord among the experts on the committee and therefore the directive’s implementation date had to be pushed forward. See Council Directive 94/31, 1994 O.J. (L 168) 28. In the end of 1994, however, a list of hazardous substances was finally adopted. See Council Decision 94/904, 1994 O.J. (L 356) 14. It appears that the Commission and the regulatory committee were unable to reach an accord because the list was adopted as a Council decision (meaning the Commission had to submit its proposal to the Council because the regulatory committee had given a negative opinion).
ures taken pursuant to the directives, although they do not need to obtain Commission authorization as do the states (from the EPA) under the RCRA.

2. Possible Consequences of Reform

If the Community were to adopt notice and comment, the provisions delegating responsibility for waste and hazardous waste listing to a comitology procedure would include a condition obliging the Commission to publish its proposed measure in the Official Journal, solicit comments, and perhaps hold a public hearing. Thus, the Commission would have to take into account scientific evidence on, for example, waste toxicity submitted by businesses, environmental protection groups, and other interested parties, in addition to evidence and advice already solicited from the relevant Commission's expert group in the area (the Waste Committee) and the regulatory committee.\textsuperscript{117} Note that because comitology committees very rarely give unfavorable opinions, it is highly likely that the Commission consults with national representatives on the committees before submitting its proposed implementing rule for a formal vote.\textsuperscript{118} The same would be the case for the Council should the regulatory committee issue an unfavorable opinion and the Council be called upon to decide the matter.

The delegation of power and principles of federalism operate in the Community to significantly limit the reach of notice and comment and any impact it might have on administrative accountability, whether positive or negative. First, Community administration in no way retains powers comparable to U.S. agencies. Community legislation does not contain the far-reaching agency mandates that are characteristic of U.S. statutes, a consequence of member states' reluctance to relinquish too much power in favor of the Commission.\textsuperscript{119} A prime example in waste legislation is the criteria for classifying waste as hazardous: they are set down in legislation in the Community, but in EPA rules in the


\textsuperscript{118} Figures on favorable and unfavorable opinions in the environmental area are not available, but those for agricultural management and regulatory committees are. Between 1962 and 1995, out of a total of 48,316 opinions, only 13 were unfavorable. See Josef Falke, \textit{Comitology and Other Committees: A Preliminary Empirical Assessment, in Shaping European Law and Policy}, supra note 10, at 117, 142. For a success rate of this order, the Commission must regularly ensure that it has the support of a qualified majority of experts on the relevant comitology committee before submitting its measure for a formal vote.

\textsuperscript{119} Many U.S. regulatory statutes are more detailed than the RCRA and therefore the balance between legislative and agency influence is more decisively tipped toward the legislature. On the whole, however, U.S. administrative agencies have greater discretion in rulemaking than the Commission and comitology committees.
United States. Furthermore, national governments shoulder the bulk of the responsibility for developing and enforcing regulation. For instance, regulations on hazardous waste treatment are issued by member states in the Community, whereas they are issued by the EPA in the United States. Thus if comitology were reformed to include notice and comment, interest groups and the Court would still participate far less than in the United States for the simple reason that there is relatively little Community rulemaking.

Second, even though member states administer a Community regulatory scheme, their role is far more independent than that of U.S. states that administer federal programs. In the waste regulation example, states may develop and administer their own hazardous waste programs, but they must first be authorized by the EPA and they are obliged to proceed through notice and comment. Under the Community scheme, member states are obliged to inform the Commission of their national waste programs but need not obtain authorization from the Commission nor follow any particular procedure in developing such programs. Consequently, the Commission is poorly positioned to ensure uniform implementation of hazardous waste legislation and cannot require national governments to allow for public participation in rulemaking. In sum, due to narrow delegations of power to the Commission and member state autonomy in the Community’s federal system, the import of notice and comment would be limited.

C. United States Rulemaking and Judicial Review:

1. Notice and Comment before the EPA

In 1991, pursuant to its RCRA mandate, the EPA promulgated the Burning of Hazardous Waste in Boilers and Industrial Furnaces Rule (BIF Rule). Existing regulation had already placed controls on incinerators that burned hazardous waste for waste treatment and disposal. The BIF Rule added to the pre-existing framework by extending the regulatory net to industrial boilers and furnaces that used hazardous waste for fuel recovery purposes. Facilities treating hazardous waste in this fashion were among the last to be regulated because of the obvious benefits from using hazardous waste as fuel. Hazardous waste is cheap compared to fossil fuels. In addition, combustion can destroy the

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120. It is important to bear in mind that the Commission can enter into negotiations with and ultimately sue member states if it believes that national programs fail to guarantee Community standards. This, however, is an extraordinary measure, unlike program authorization.

waste's dangerous chemical compounds thus treating it and using it for its fuel value at one and the same time. Yet there exists a significant risk that dangerous chemical compounds will not be fully destroyed and that, when they react with other fuels used in the process, even more toxic substances will result. The rule eventually promulgated was an attempt to strike a balance between these two sets of competing considerations.

In May 1987, the EPA published notice of a proposed rule and a request for comment. 122 Although it is common to give warning with an advanced notice of proposed rulemaking, the EPA had already issued a regulation imposing notification requirements on hazardous waste burners 123 and had indicated almost two years earlier that it planned to introduce a permit system, 124 so the proposed rule came as no surprise to the regulated community.

The notice contained several parts. First it laid out the EPA's statutory authority to promulgate the rule and described the environmental and safety hazards caused by the burning of hazardous waste in boilers and industrial furnaces, making a case for the need for regulation. Then the notice discussed and justified a number of critical policy choices made by the Agency in drafting the rule, among which figured the decision to base controls on national performance standards rather than on case-by-case risk assessments. It also set out in detail the controls that the EPA proposed for emission of toxic organic compounds, toxic metals, and hydrogen chloride and the risk assessment methodology the Agency had used to calculate the controls, including the decision to set limits so as to ensure that the increased lifetime risk of developing cancer from direct inhalation of carcinogenic stack emissions would not exceed one in 100,000. Throughout this discussion and in a separate section at the end of the proposal, the EPA estimated what it thought would be the costs of compliance, the economic impact of such costs on the profitability of the industry as a whole and on individual plants, and the reduction in the risk of cancer to exposed individuals. Although this information was mandated by an executive order on regulatory impact statements 125 and a Congressional statute concerning small businesses, 126 it is safe to assume that even in their absence, agencies would need to develop some of the same information when explaining and justifying the regulatory approach chosen.

124. Id. at 49,192.
The public was given two months to submit comments. On top of soliciting comments generally, at various points during the discussion of the proposed rule the EPA asked for comments on specific issues such as the approach to take to toxic organic compound emissions standards. It also announced that three public hearings would be held in different spots around the country. Further, after notice was issued the EPA conducted negotiations with various industry representatives.

Two years later, in October 1989, the EPA published a supplement to the proposed rule. It contemplated several revisions to the proposed rule, many of which were provoked by comments. First, it had received numerous comments suggesting the need for a control on particulate emissions. This was based on the fear that toxic metals and organic compounds might be absorbed by particulate matter which might itself pose a health risk because of the ease with which it is inhaled and absorbed by the lungs. Therefore, even though the EPA thought that this risk was already covered by another regulatory scheme, it proposed to apply the particulate standard currently in use for hazardous waste incinerators to boilers and industrial furnaces. Second, the Agency responded to comments from boiler and cement kiln operators claiming that it would be impossible to comply with the control set for toxic organic compounds. It proposed an alternative standard to "avoid major economic impacts on the regulated community."

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

2. Judicial Review

In *Horseshoe Resource Development Co. v. Browner*, a number of firms, industry associations, and environmental groups challenged the rule. Among other things they claimed that the EPA had given inadequate notice of a portion of the rule, and had issued a rule that was arbitrary and capricious in parts.

Operators of wet process kilns (a type of cement kiln) brought a procedural challenge based on their right to notice under the APA. In the BIF Rule, carbon monoxide (CO) emission levels and total hydrocarbon (THC) emission levels are used to gauge how fully hazardous waste is destroyed in the combustion process. High CO and THC emissions indicate that the principal hazardous organic constituents in the waste fuel were only partially broken down in combustion. Left over are products of incomplete combustion, some of which are known carcinogens, others of which may be. In the rulemaking proceeding, wet kiln operators had complained that they could not comply, for reasons unrelated to environmental safety, with either the CO or the alternative THC standard, and in response the EPA added a third emissions standard that combined CO and THC limits and would be formulated on a case-by-case basis.

According to the wet kiln petitioners, they had not received adequate notice of and opportunity for comment on the third standard. The court agreed. It found that although the EPA had given notice that it was considering a site-specific standard for wet kilns, it had not suggested—neither in the proposed rule, the first supplement, or the second supplement—that it was contemplating a combined CO and THC baseline. The court explained that the adequacy of notice and opportunity for comment rests on the relationship between the proposed and the final rule: even though the "EPA undoubtedly has authority to promulgate a final rule that differs in some particulars from its proposed rule" the final rule must be "a logical outgrowth of the one proposed." This, it elaborated, entails a description of the subjects and issues that is sufficiently detailed to allow interested parties an opportunity for meaningful participation. Here the standards using CO and THC separately could be expected to operate differently from a standard that combined the two, and therefore without notice of the dual baseline, wet-kiln operators were not afforded an adequate opportunity for comment.

An arbitrary and capricious challenge to the substance of the third standard tailored specifically for wet kilns was also brought. Wet

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131. 16 E3d 1246 (D.C. Cir. 1994).
132. The THC emissions standard was added after the first round of comments.
134. *Id.* at 1263.
kilns had proven troublesome because of their design. A wet kiln is a slightly inclined cylinder that rotates on its own axis. The raw material (e.g., clay, shale, limestone) is poured into the top end, and as it slides down the kiln, is heated to very high temperatures. The kiln is powered by a furnace at the bottom end that can use powdered coal, other fossil fuel, or hazardous waste. Since carbon monoxide and hydrocarbons are generated by the raw materials poured into the top end and the furnace at the bottom end and since, due to wet kiln design, it is impossible to tell which of the emissions comes from the raw material and which from the furnace, wet kilns that burned negligible quantities of hazardous waste still ran the risk of exceeding the Rule's CO and THC controls. Recognizing this problem, the EPA added a sitespecific, combined CO/THC emissions standard that it maintained would not pose compliance difficulties for environmentally sound wet kilns.

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

The agency thus had no information on this issue and was relying on pure speculation when it decided that a standard of no increase of CO and THC over quantifiable CO and THC baselines was achievable. Such speculation is an inadequate replacement for the agency's duty to undertake an examination of the relevant data and reasoned analysis; thus the EPA's action in promulgating the . . . standard was arbitrary and capricious. 136

135. Id. at 1269.
136. Id.

It is impossible to undertake the same exercise for an implementing rule passed pursuant to the Community directives concerning waste and hazardous waste. Perhaps symptomatic of the differences between the Community and the United States, none of the implementing rules passed since the framework directives were adopted in 1991 were challenged in court. In the neighboring field of pesticide regulation, however, the Court has fairly recently reviewed and struck down a Council implementing rule.137 That rule is the subject of the following section and serves to illustrate how Community rulemaking operates currently and how it might change with notice and comment.

1. Pesticides Implementing Directive

In 1991, pesticides were regulated by the Community for the first time. The legislation recognized that pesticides are critical commercially for the agricultural and chemical industries but that they also pose a threat to human safety and the environment through the contamination of drinking water, direct human contact, and other mechanisms.138 Brussels was to set down the standards for pesticide authorization and national administrations were to carry out the case-by-case evaluation of pesticide applications. Under the directive, the Community executive (in this case the Council acting by qualified majority on a proposal from the Commission, not a comitology procedure) was to draw up an implementing rule containing the water contamination and other criteria to be used in making authorization decisions.139

The implementing rule eventually adopted contained a statement of legal basis (the E.C. Treaty and the portion of the basic measure delegating the authorization criteria task to the Council acting upon a proposal of the Commission), a statement of the procedure followed in adopting the rule (consideration of the Commission’s proposal), and a very brief description of the rule’s purpose and content.140 Otherwise, as is the rule in the Community, none of the process or deliberation that led to the adoption of the measure was published officially.

Some close observers in Brussels, however, have described the issues that divided policymakers and were decided in the rule. The story, albeit impressionistic and based in large part on educated guesses, goes as follows.141 A separate series of Community environmental directives

139. Id. at art. 18.
141. See Den Uil, supra note 117, at 14–17; See Pascal Cardonnel, The Annulment of the EU
regulating drinking water\textsuperscript{142} had been a long-standing source of dissatisfaction for several member states.\textsuperscript{143} The limits on permissible chemical concentrations in surface water and groundwater, especially those relating to pesticides, were considered too stringent because of their impact on the agriculture and chemical industries. Two member states, the UK and France, met secretly in 1993 to target a number of directives for repeal or amendment and, when the news of this became public, drew heavy criticism from Greenpeace and the Greens in Parliament. The Commission has been working on a proposal for a new water framework directive\textsuperscript{144} for over four years now, but as of yet it has not been passed; after many years of negotiations, a new drinking water directive was finally passed in December 1998.\textsuperscript{145} Thus, the effort to address the perceived over-regulation of pesticides in drinking water through Community legislation encountered many obstacles and has only been partly successful.

On this stage steps the implementing rule on pesticides. One of the most important criteria in authorizing a pesticide is that it not contaminate drinking water when absorbed into the water supply. One group of member states, led by Germany, Denmark, and the Netherlands wished to retain the water directive parameters, a move that according to some would have resulted in a ban on a large number of pesticides currently in use in the Community.\textsuperscript{146} Another group (and it does not take much to suspect that Britain and France were part of it) supported a different method for setting maximum groundwater concentrations, one based on the eco-toxicological properties of individual pesticides.\textsuperscript{147} The final result reached in 1994 was a compromise in which the more stringent standard was adopted but opt-outs were permitted if certain conditions were satisfied.\textsuperscript{148} This compromise was the object of the court challenge.

2. European Parliament v. Council

Parliament took the Council to court on three grounds. It claimed that the implementing rule unlawfully modified the obligations imposed on the member states by the basic directive, unlawfully modified the obligations imposed on the member states by one of the earlier


143. See Demmke, supra note 117, at 14–17 (narrating this series of events).

144. COM (97) 49 final; COM (97) 614 (amendments); COM (98) 76 (amendments).


146. See Cardonnal, supra note 141, at 272.

147. Id.

drinking water directives, and was inadequately or incorrectly rea-
soned, thus violating the duty to give reasons under Article 253 (ex
Article 190) of the E.C. Treaty. The Court held in favor of Parliament
on the basis of the first argument and annulled the implementing
measure. It found that the Community executive (Council acting upon
a proposal from the Commission) had failed to respect the terms of the
law it had been charged with implementing and thus exceeded its
powers, intruding upon those of the legislature.

The Court based its finding largely on the provision in the frame-
work directive specifically governing pesticide authorization by mem-
ber state authorities. It pointed out that under Article 4(1)(b), member
states were not to authorize pesticides unless "it is established that that
product has no harmful effect on human or animal health, either di-
rectly or indirectly, or on groundwater and has no unacceptable
influence on the environment, particularly in relation to the contami-
nation of water." Based on the language of Article 4(1)(b), it held
that effects on drinking water and groundwater had to be consid-
ered. Since the implementing directive only required national
authorities to take into account the effect on groundwater if it bore a
relationship to drinking water quality, it "specifically failed to observe
one of the essential elements of the matter expressly laid down in the
basic directive."

The Court held that the implementing rule violated the terms of the
governing legislation in yet another way. It found that "harmful effect"
(on human health) and "unacceptable influence" (on drinking water) in
Article 4(1)(b) had to be defined by reference to the Community leg-
ilislation on drinking water. That legislation, as has already been dis-
cussed, established upper limits on chemical residues in groundwater,
but because of a compromise reached in the Council, the pesticides
implementing rule did not adopt those limits fully. Instead it permit-
ted conditional authorizations for pesticides not meeting the ground-
water criteria provided that they were handled under certain condi-
tions. The Court found that this opt-out unlawfully changed the

149. Id. at para. 27.
150. See id. The relevant portions of Article 4(1)(b) read as follows:
Member States shall ensure that a plant protection product is not authorized unless . . . it is
established . . . that . . . (iv) it has no harmful effect on human or animal health, directly or
indirectly (e.g., through drinking water, food or feed) or on ground water; (v) it has no un-
acceptable influence on the environment, having particular regard to the following consid-
ervations: —its fate and distribution in the environment, particularly contamination of water
including drinking water and groundwater . . .
151. Id. at para. 31.
152. Id. at 1-2960, para. 20 (Advocate General's opinion), 1-2972, para. 32 (Court's opinion).
maximum concentration of various substances in water intended for human consumption is set
meaning of "harmful effect" and "unacceptable influence" in the basic directive.

3. Possible Consequences of Reform

If the Community were to adopt notice and comment, the pesticides case would be different in several respects. The Commission would be required to publish its proposal in the Official Journal a few months before submitting it to the Council to allow time for the comment procedure. Thus the regulated community together with Parliament would have notice of the implementing rule well before it was adopted. And not only would they know that a rule was in progress but they would be informed of the different regulatory approaches being considered. Here that entailed the intergovernmental dispute over groundwater concentration limits and thus Greenpeace and Parliament, as well as other interested parties, would have found out in advance of the backdoor route to revised drinking water standards. Instead of being presented with a fait accompli which could only be challenged, with very little chance of success, in a formal legal proceeding, they could have used the advance warning to shape public opinion and put informal political pressure on the Commission and national governments, making it more difficult to pass the lower standard. Further, the same parties would have had an opportunity to submit comments and therefore could have shaped the debate in the Commission and Council with their knowledge of national conditions and their views on the possible consequences for the drinking water supply, the chemical industry, and farmers.

Notice and comment would also significantly change the nature of judicial review. The Court would be called upon to enforce a wider array of procedural rights. Litigants could have the implementing rule annulled if the Commission failed to give adequate notice (remember Horsehead Resource Development Co. v. Brouwer) or had not given the public enough time to submit comments. Second, when reviewing the substance of the rule, the Court would be under more pressure to carefully consider the scientific and technical judgment calls made by the implementing body, e.g., the decision that groundwater contamination above drinking water directive levels was not necessarily harmful to the environment and human health. An administrative record of the type compiled in the hazardous waste case would give the parties stronger grounds for challenging the administration's science and would put the Court in a better position to evaluate such challenges. The litigants would be fully informed as to the policy calls made by the Commission and would already have had one shot, before the Commission, to develop their positions. The Court, with a record in hand, would know what the Commission's reasons were at the time
it formulated the rule and would not be swayed by *ex post, ad hoc* policy arguments that tend to be poorly substantiated and miss the point since the issue is not whether the Community administrator acted reasonably in retrospect, but how she acted at the time the rule was adopted.

Lastly, if *locus standi* rules were liberalized as part of notice and comment reform, more parties would have access to the Court of Justice. In the pesticides case, Parliament had standing to sue under Article 230 (ex Article 173) of the E.C. Treaty because it was seeking to protect its right to be consulted on agricultural policy matters.\(^{154}\) Other interested parties such as pesticides producers and environmental groups, however, would not have been permitted to go directly to the Court because they were not "directly and individually concerned" as required under Article 230. The only route available to them would have been their national courts, and there, in most cases, only after a national administration had approved or denied a pesticide registration application. Even then it is unclear whether, for example, a neighborhood association representing those who live in an area where the pesticide is used would have had *locus standi* in all the member states. Standing rules similar to U.S. ones would allow interest groups direct access to the Court of Justice.

V. ASSESSING NOTICE AND COMMENT

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

Second, a variety of interests had a say in rulemaking. The hydrocarbon standard was added (in the first supplement) as an alternative regulatory solution to the hazardous organic compound problem because firms in the cement kiln industry complained that, even though their emissions were not necessarily hazardous, it would be impossible for them to comply with the carbon monoxide standard. The EPA also

\(^{154}\) Under Article 37 (ex article 43), the E.C. Treaty provision that served as the legal basis for the basic directive, the Parliament has the right to be consulted.
listened to those concerned that the initial proposal was not protective enough of human health: it added a control on particulate emissions. In court, both industry representatives and environmental protection groups challenged the regulation.

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

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

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

A. Accountability

United States administrative procedure renders bureaucrats accountable to the system's divided lawmaking principal. Both Congress and the President use notice and comment to control rulemaking outcomes. Mathew McCubbins, Roger Noll, and Barry Weingast, a team of political scientists, have explored the full range of techniques that Congress and the President (lawmaking principals) use to control

155. Martin Shapiro argues that the only real masters in this principal-agent relationship are courts. See Shapiro, supra note 64, at 124. While there is some truth to this position, it neglects the limits that legal texts place on judicial interpretive options and the ability of political actors to influence rulemaking before courts appear on the scene.
the federal bureaucracy (the agent). They explain that control may be exercised through punishment and reward, which operate in the wake of administration policy choices, or through monitoring, a more direct and constant form of supervision. Congress may punish officials by impeaching them, cutting off their funding, shaming them through public hearings and investigations, or taking away their regulatory authority and giving it to other officials. Likewise, the President may remove officials or reorganize the administration, transferring power from one set of administrators to another. Monitoring occurs through permanent oversight activities (the Congressional Budget and General Accounting Offices and the Executive Office of Management and Budget) and ad hoc congressional hearings triggered by constituent complaints or other events.

Most important for our analysis, Congress and the President can also monitor bureaucrats with rulemaking procedure. First, the information generated in the course of rulemaking and judicial review enables lawmakers to keep tabs on agencies and react, if need be, before the rule goes into effect. Because a proposed rule is announced well in advance and the issues thoroughly fleshed out (by private actors with strong incentives to contest bureaucrats and courts that require explanation in language comprehensible to agency outsiders) in the lengthy process of comments, replies to comments, supplemental proposed rules, and judicial review, Congress and the President have ample time and information upon which to act. Second, McCubbins, Noll, and Weingast argue that interest groups and courts function as third-party monitors in the principal-agent relationship between Congress and the President on the one hand and agencies on the other. By allowing the public to participate in agency rulemaking and bring court challenges, Congress and the President ensure that the coalition of interests that originally backed a piece of legislation will control its implementation as well. Furthermore, by granting courts the power to strike rules that deviate from enabling legislation, Congress secures agency adherence to legislative policy choices. Although the authors acknowledge that interest groups and courts will sometimes do their own bidding—and themselves become a control problem—as long as this form of monitoring is less costly than more direct means of control, Congress and the President will continue to support notice and comment.

157. Many rules contain long lead times for compliance, and therefore they may be reviewed in court before coming into effect, allowing political actors to react to issues raised in the course of the judicial proceedings.
158. Id. at 272–73.
Congressional and Presidential control through administrative procedure is certainly not mathematic. Legislative aides are unlikely to read the Federal Register from cover to cover, time and circumstance may very well lead one coalition of interests to press for passage of a law and another one to support subsequent regulations, and courts tend to think independently, even though they work from statutory text and legislative history. An administrative process, however, that generates copious and intelligible public information about regulatory change, and is open to interest groups who themselves have access to politicians, is undoubtedly more accountable than a process in which information is scarce due to secrecy or hurdles, and in which debate is limited to bureaucrats.

B. Interest Group Participation

Notice and comment guarantees pluralist interest participation in rulemaking. In a pluralist system where lawmakers are open to a variety of interest groups, an administrative process that legally guarantees information and participation ensures that those same, diverse interests will be included in policymaking once it is turned over to regulators removed from Congressional politics. And as I argued earlier, it contributes to fairness, improves the substantive quality of rules, adds to public accountability, and smooths the road to compliance. Many U.S. scholars, however, do not take such a rosy view of public participation in notice and comment. In the following section I explore the two principal critiques, one based on the claim that participation only scratches the surface and fails to have a real impact on administrators’ policy choices, and the other which takes the view that interest group politics, far from being ineffective, is harmful to the public good.

1. Lack of Genuine Participation

Donald Elliott, former general counsel to the EPA, has forcefully argued that public participation in rulemaking is more formal than real. He claims that since the rulemaking record is compiled with an eye to withstanding judicial review, it tends to come relatively late in the process, once the essentials have already been decided and the agency has all the science and reasoning necessary to defend the rule. Real public participation, what Elliott describes as “the kind of back and

159. See generally Jesse L. Mashaw, Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development, 6 J.L. Econ. & Org. 267, 280–84 (Special Issue 1990) (criticizing principal-agent theory on grounds that it is logically flawed because the legislature does not necessarily have an interest in ensuring that the same coalition that supported legislation influences rulemaking and, more generally, that its empirical claims are non-falsifiable).
forth dialogue in which minds (and rules) are really changed” does not occur through notice and comment.\textsuperscript{161}

A variety of more informal techniques have been used by agencies to include interest groups from the very beginning of the policymaking process, including meetings with constituency groups, roundtables, and regulatory negotiation. While the first two are fairly self-explanatory, the last warrants a brief description. In regulatory negotiation, the agency appoints a neutral mediator responsible for identifying the interests likely to be affected by a prospective rule and chairing meetings attended by interest representatives and agency officials.\textsuperscript{162} The interest group and agency representatives collectively define the policy issues and options and together draft the text of the proposed rule (a task left entirely to the agency in routine rulemaking). Negotiated rulemaking is designed to foster consensus in the regulatory community, for none of the participants can be outvoted, but is also less open than notice and comment because interest representatives only participate upon invitation and meetings may be held privately.

Although there is much to be said for Elliott’s critique, informal participation, without a public record and judicial review or with a scantier record and less intrusive review, is not an alternative to the current system. In this model, interest participation depends very much on the good will of administrators and runs the risk of favoring well-established public interest groups and lobbies but excluding newer groups or those out of favor politically with the executive branch. Early, informal consultation and late, formal consultation bring different benefits to rulemaking and should be treated as complementary, not alternative, forms of interest participation.

2. The Public Choice Critique

The second critique of interest participation cuts the opposite direction, for it acknowledges that interest groups play an important role in rulemaking but points to the negative effects on policy outcomes. This claim is related to the vociferous opposition wet kiln operators mounted to the BIF Rule. Although both industry and environmental protection groups took part in the EPA proceeding, business interests proved most difficult to accommodate and occupied a disproportionate share of the Agency’s and court’s time. The first supplement to the proposed rule, in which the Agency answered the bulk of the comments, contained a little for everyone: particulate emissions standards

\textsuperscript{161} Id. at 1495.

for environmental interests and a new toxic organic emissions standard for business interests. The following four years, however, were spent dealing with complaints from cement kiln operators (especially the wet kiln subset) and other industry interests. Fewer than fifty-seven furnace operators—and within that set a particularly obstinate group of six to ten wet kiln operators—caused the bulk of the EPA's worries. And the extra time spent trying to find a regulatory solution that would placate wet kiln operators (i.e., the third toxic organic compound emissions standard) was very likely meant to fend off a successful challenge in court. In other words, where the costs of regulation were especially concentrated, interests mobilized against it.

Public choice scholars argue that interest groups such as the furnace operators appropriate public resources for private ends through their involvement in policymaking, and are thus ultimately destructive of public welfare. The public choice critique also came in response to the popular in the 1970s, that the rulemaking process embodies pluralist democracy. In this decidedly optimistic picture of interest participation, a rulemaking proceeding is a mini-legislature in which debate generates widely accepted and mutually beneficial public policy. But public choice thinkers, drawing on the work of Mancur Olson and other members of the rational choice school, maintain that pluralist interest politics fails to generate administrative rules in the general welfare. Special interest coalitions—called special because they speak for a small group of firms or individuals and not for larger constellations such as consumers—benefit at the expense of environmental protection, consumer welfare, and other public goals that, in theory, statutes and regulations are designed to further. In the rational choice model, lawmakers, whether they be legislators or agency officials, are passive vehicles for interest group preferences and lawmaking is a competitive process among interest groups. Groups with few members who stand to win or lose heavily from regulatory change are most likely to organize and put pressure on politicians and administrators because each single member has a significant stake in the outcome. By contrast, large groups are likely to be poorly organized because the same benefits and costs of regulatory change are spread thinly across a

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164. For an overview of public choice scholarship, see Mashaw, supra note 67.


large membership, and therefore individual members do not have the necessary incentive to contribute to the collective effort. Consequently, the argument goes, even though many of the great statutes of the 1960s and 1970s were designed for large and diffuse groups (e.g., consumers and environmentalists), when one looks closely at the statutory text and the regulatory schemes developed to implement them, they tend to work to the advantage of small groups of business and regional interests. A number of empirical studies on agency regulation bear out the rational choice hypothesis.  

Even though the literature has generated a series of reform ideas that would transfer policymaking power to institutions less susceptible to special interest pressure, none is particularly convincing. The defects public choice identifies are endemic to politics and no one has, as of yet, convincingly argued that either Congress or the executive branch is better at fend off private interest demands. Moreover, the exceedingly dark view public choice takes of interest participation is unwarranted. Norwithstanding its predictions, legislative politics and administrative procedure are used by public interest groups as well as “special” ones. Further, public choice theory rests on the assumption that the public welfare, which special interests tend to thwart, may be determined absent reference to politics by summing up individual preferences and utilities and arriving at an optimal policy outcome. Such preferences and utilities, however, are themselves the product of a political process in which interest groups are vital participants.


168. See Peter H. Arsenio, Ernest Gellhorn, & Glen O. Robinson, A Theory of Legislative Delegation, 68 CORNELL L. REV. 1 (1982). The authors argue that Congress should take responsibility for rulemaking because special interest deals would occur in the light of day and therefore legislators would be held publicly accountable. On the opposite end of the spectrum, Jerry Mashaw argues that administrators should retain rulemaking authority because they are responsible to the President and special interests wield less influence vis-à-vis the President’s nationwide constituency. See Mashaw, supra note 67, at 147–55.

169. In another reform suggestion, Cass Sunstein urges agencies and courts to limit the influence of special interest politics by engaging in “deliberative decision-making.” See Cass Sunstein, Factions, Self-Interest, and the APA: Four Lessons Since 1946, 72 Va. L. REV. 271, 284–85 (1986). Deliberative decision-making has four central features: the pluses and minuses of different regulatory approaches must be fully explored; possible conflicts between different values, e.g., between a cleaner environment and keeping open factories, must be resolved by reference to the enabling statute; to the extent that the statute does not resolve such conflicts, administrative discretion should proceed through identification of the relevant factors and solicitation of the public’s views; and the agency’s final decision must reflect a reasonable weighing of those factors. With this type of deliberation, agencies, under the supervision of courts, can bypass groups that seek to use rulemaking to their private advantage. The most obvious flaw in this proposal is the considerable trust it places in administrators and courts to understand science, interpret statutes, balance competing values, and arrive at a reasonable solution.

170. See Schuck, supra note 28, at 574–76.

171. See generally id. at 587–86. Schuck argues for a procedural conception of the public interest in which interest groups figure prominently.
represent their constituencies, which indeed may be broader than they appear and able to galvanize public opinion: firms and consumers interested in lower prices may strike unlikely coalitions with other, temporarily like-minded interest groups (e.g., firms that produce environmental technologies and the environmental lobby). Public life in a liberal democracy without interest groups is not only impossible, but also undesirable.

C. Speed

1. The Critique

The slowness of U.S. rulemaking is one of its main drawbacks. The four years it took the EPA to complete the BIF Rule (and that is not counting the time used to draft the initial proposed rule) and the additional two years it took the court to hand down its decision are not at all uncommon. In this area of administrative law, the labels of choice are “ossification” and “gridlock.” Fewer rules is not the only cost of slowness. To avoid rulemaking’s cumbersome record-building requirements and tough judicial review, agencies sometimes resort to adjudicatory regulatory techniques such as product recalls. Yet adjudication can be an efficient form of agency action and can cause uncertainty for the regulated community, violating rule of law principles. Rather than fostering openness and participation in administration, therefore, a sluggish rulemaking process may actually cause a return to unaccountable and arbitrary agency action.

By common agreement, courts and judicial review must take some of the blame for the snail’s pace at which rulemaking proceeds. Although the critical view has always been somewhat exaggerated and was probably truer of courts in the 1970s than at present, it nonetheless captures the relationship between tough judicial review and agency process. In response to each legal challenge, courts require that administrators point to a part of the rulemaking record where they entertained the objection but marshaled scientific evidence and policy arguments against it. Rulemaking, therefore, has turned into a protracted deliberation before agencies in which regulators must carefully document and explain rules so that, if challenged in court, they can mount a successful defense. Agencies bear an especially high burden of explanation because of the unpredictable quality of so-called “hard

173. MASHAW & HARFET, supra note 59, at 203.
174. See id. at 147–56 (describing the National Highway Traffic Safety Administration’s resort to automobile recalls after failed attempts at rulemaking).
look" judicial review. They cannot be certain which issues will appear salient to the group of three non-expert judges who review the rule and therefore the paper trail must cover the entire world of possible issues and non-issues, large and small. Consequently, rulemaking has become a long process of comments, agency answers, second-round comments, second-round agency answers, legal challenge, and, if the agency failed to do a thorough job, a court judgment remanding the rule to the agency for further explanation and development of the evidentiary record, or, albeit rarely, a judgment vacating the rule and forcing the agency to start from scratch.

2. Proposed Reforms

How can U.S. administrative law be changed to ensure control without gridlock? Much of the reform debate centers on reducing the role for judicial review. One option is to relax the standard of review employed by courts. One of the problems with this approach is that it is difficult to instruct courts to move to a less demanding standard of review. It is enough to recall that hard look review developed within the statutory framework of "arbitrary and capricious" to question whether a change in verbal formula will have a direct effect on judicial practice.

Richard Pierce, an administrative law scholar, has suggested that the judicial branch get out of the business of arbitrary and capricious review altogether and, by way of compensation, that the legislature exercise direct control over rules. Constitutionally, however, Pierce’s proposal is dubious because the Supreme Court has found a single-chamber legislative veto to be an unconstitutional breach of separation of power principles and the case’s reasoning suggests that it would also hold a Congressional veto unconstitutional.

Finally, Jerry Mashaw, a co-author of an influential case study on automobile regulation, suggests that the judicial burden can be lightened by changing the availability rather than the nature of review. He argues that if the timing of review is altered, litigants will resort to courts when they have meritorious claims and not, as is currently the case, because the odds are such that it pays to litigate rather than comply. Most rules are reviewed prior to enforcement. Because fines for non-compliance only start running once a rule comes into effect (and a

175. See Mashaw, supra note 67.
176. Pierce, supra note 172.
179. See Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967) (holding that pre-enforcement, agency action may be reviewed if the factual and legal issues are sufficiently clear and delaying court consideration would cause hardship to the parties).
regulation that requires large capital investments necessarily includes some lead time), a firm that challenges a rule will generally only incur the cost of legal fees. Moreover, should it make the opposite choice and begin investing in compliance, it risks losing market share because other firms that take the judicial review gamble and win will have avoided the compliance investment (generally more costly than legal fees). Assuming a realistic fifty percent chance that the rule will be vacated or remanded, Mashaw shows that a firm will always choose to pay the legal expenses and sue rather than comply.180 In other words, if a firm believes that its various grounds for challenging a rule give it at least a fifty percent chance of winning, then it will go to court, even though a fifty percent chance, especially in a world of tough judicial review, is hardly a deep-seated conviction that the agency behaved illegally. In sum, the litigation structure along with the lead time built into most regulations encourages those who stand to lose from changes in the status quo to fight all the way to the bitter end.

Mashaw suggests that review be delayed until after rules come into effect so that the choice to litigate carries with it the extra cost of non-compliance fines; therefore litigants will only go to court if they have a relatively high probability of winning (to offset the additional cost of non-compliance fines). In other words, they will only bring meritorious claims.

Delays, according to Mashaw, would also improve the quality of judicial fact-finding. Post-enforcement, courts can see how a rule operates in practice, and thus the limitless universe of ill-defined, possible defects is narrowed to a few concrete flaws. In other words, a number of the objections a litigant may have to a rule pre-enforcement will not be borne out by the operation of the rule in practice and therefore judicial review is more focused. By tinkering with the timing of review, the authors hope to solve the gridlock problem while preserving courts as guardians of the rule of law and the sound use of discretion in administrative decision-making.

This proposal too has its flaws. Most obvious is the hardship to parties, the concern that led to pre-enforcement review in the first place. Faced with a possibly illegal rule, they must choose between non-compliance fines and the risks of litigation on the one hand or capitulation on the other. Second, the social learning that supposedly occurs once a rule comes into effect requires considerable monitoring and information-gathering, and it is not at all clear that administrative agencies or other actors, such as trade associations, will in fact undertake this task.

180. Mashaw, supra note 67.
VI. A PROPOSAL FOR NOTICE AND COMMENT IN THE COMMUNITY

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

Notice and comment would improve public accountability and fairness in Community rulemaking. The combination of information, interest participation, and judicial review would guarantee greater accountability to Parliament, the lawmaking agent currently without control instruments, as well as the Council, which notwithstanding its comitology veto has very little effective power over the tightly knit network of national experts and Commission civil servants. Further, notice and comment would function as an effective institutional device for interest participation in rulemaking. In the Community’s pluralist order where multiple interest groups compete to influence the legislative process at the system’s many points of access, notice and comment would ensure that the wide spectrum of interests involved in policy formulation would also have a say in policy implementation. In other words, the Commission and national experts (and sometimes the Council when charged with passing implementing rules) would no longer have the power to shut out interests downstream in the policymaking process.

Moderation, however, should be a cornerstone of any eventual reform. Both Americans and Europeans may want public accountability, fairness, expertise, and speed in administration. Yet how to design bureaucracies to achieve these ends is a complicated task which requires large quantities of information about highly complicated interactions involving thousands of people. Because of the impossibility of perfect information under such conditions, decisions about institutional design tend to be largely based upon beliefs about human nature, group dynamics, and a series of other features of the social world, beliefs which in turn are heavily influenced by historical experience. And because institutions are run by individuals who subscribe to such beliefs, they can turn out to be, within limits, self-fulfilling. What is socially and politically acceptable in one community might not be in another; and when it is impossible to prove one right and the other wrong, there is no reason to uproot institutions and belief systems that enable communities to obtain underlying values.

One cost of reform will be a slower, more cumbersome rulemaking process. This flaw is to a certain extent unavoidable in a system that generates the information and contains the institutional mechanisms

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that multiple lawmakers need to monitor and control policy implementation. Americans, however, tolerate more than the inevitable because of their distrust of experts and respect for courts. Although it is even more difficult to generalize about “European” beliefs than about U.S. ones, experts appear to command more prestige in Europe. Regulators unfettered by politicians are perceived by many as the best means of enforcing antitrust law, deregulating telecommunications, protecting privacy, and achieving a host of other objectives. 182 As part of the market liberalization efforts of the past two decades, much of which has been prompted by the Community, a host of agencies (called independent agencies but very different from the U.S. variety) that escape the normal chain of command from party and prime minister to cabinet, minister, and bureaucrat have been set up in the member states. At least European politicians, therefore, seem to believe that expertise alone or with minimal room for politics can best solve regulatory problems. Furthermore, several academic works on legitimacy in Community government argue that regulation should be left almost entirely to the experts. Giandomenico Majone, a prominent scholar in the field, characterizes regulation as a purely technical question of correcting market failure and maximizing wealth and recommends that it be left to technocrats, with public involvement to occur only when it comes time to decide on wealth distribution. 183 Christian Joerges and Jürgen Neyer, who have conducted extensive research on comitology and standard-setting, argue that networks of national civil servants, free of direct political control, can accomplish the dual Community objectives of expertise and regulation sensitive to national concerns. 184 In light of these views, any eventual reform should be careful to retain a greater role for expertise than is the case in the United States.

Furthermore, courts in Europe are not perceived and accepted as quasi-political, policymaking institutions as in the United States. In the member states, judges other than constitutional judges are thought to be skilled professionals who scientifically apply codes and statutes and, to the extent they must engage in gap-filling, do so using accepted canons of construction that leave little room for discretion and value judgments. Constitutional review is mostly a post-World War II innovation and, with the exception of Scandinavia and Greece, it comes within the jurisdiction of special constitutional courts. 185 Con-

185. See Allan R. Brewer-Carías, Judicial Review in Comparative Law 168–72 (1989);
stitutional judges do not follow the civil service career track like the rest of the judiciary but rather have distinguished themselves in politics or academics and therefore are considered quite different from other judges. The European Court of Justice, the only directly relevant court for the purpose of our discussion because of its jurisdiction over Community acts, is recognized as a powerful constitutional court: it has transformed the E.C. Treaty into a constitution that directly confers rights upon individuals. The Court has its limits as policymaker, though. Its role rests on enforcement of the E.C. Treaty and Community law against non-complying member states and not so much against the Community institutions themselves. It is therefore unclear whether tough review by the Court of Justice of Community implementing measures of the sort that it applies to member state laws would be considered legitimate. In the absence of a strong tradition of quasi-political judicial action either in the member states or in the Community, institutional reform must take pains to carefully define a restrained role for courts. Otherwise, the Community bureaucracy might come to be perceived as accountable to fifteen unelected judges in Luxembourg, not the European public.

Another disadvantage of U.S. rulemaking, special interest influence, might also be a cost of reform. A secretive, closed process like the one currently in place in the Community allows a certain degree of freedom from interest group pressure for the simple reason that lobbying groups do not know when their national representatives fail to act in their interests. Once policymaking is opened to public participation, it becomes vulnerable to special interest influence.

On the whole, as already discussed, the public choice critique is not particularly forceful because of the inevitable power of interest groups in liberal democracies and the benefits, contrary to public choice's bleak outlook, that interest groups can bring to public life. In Brussels, however, special interests, principally multinational corporations, appear to overwhelm interest groups with more diffuse constituencies, such as small business associations and consumers. A number of studies have shown that even though public interest groups are becoming better organized, multinationals, acting in clusters of two or three, are the most skilled at influencing policymaking. This is linked to a number of features of the Community system. The organizational hurdles


186. See Alan Cawson, Big Firms as Political Actors: Corporate Power and the Governance of the European Consumer Electronics Industry, in Participation and Policy-Making in the European Union 185 (Helen Wallace & Alisdair R. Young eds., 1997) (arguing that small clusters of multinationals are more powerful than employers' associations); Alisdair R. Young, Consumer Without Representation? Consumer in the Single Market, in id. at 206 (describing organizational difficulties of the European consumer movement).
that large groups face grow in proportion to the number of people or firms they must represent. Running an employers' association in a country of eight million is very different from running a confederation of national organizations drawn from a geographic area of over 360 million people. Very possibly the difficulties may be overcome through experience, but not enough time has passed to build up such know-how. Moreover, one distinctive characteristic of Community policymaking is the plethora of political actors involved and the need for interest groups, at great cost, to put pressure on legislators at every stage in the adoption of a Community measure: they must lobby governments in national capitals, governments' permanent representations to the Community in Brussels, members of Parliament, and different divisions in the Commission. As a result, the threshold in financial and other resources for interest group success is higher and small groups' natural advantage over large ones is heightened. Until these imbalances in interest representation are remedied, therefore, a more modest version of notice and comment is in order. The combination of information, formal interest participation, and courts should be tempered to avoid excessive manipulation of the system by a few small but powerful interests.

B. The Reform Proposal

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

187. One technical difficulty would be the Community's many official languages. For the sake of expediency, a single working language would probably have to be selected.
justification set forth in the Commission's revised proposal. If the opinion were negative (or in the case of a regulatory committee, not forthcoming), the Commission's proposal would be sent on to the Council, which would be obliged to give a detailed statement of reasons only if it decided to modify the Commission's measure. Again, the final implementing rule published in the Official Journal would contain a statement of basis and purpose reproducing either the Commission's or the Council's rationale.

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

C. Dissecting the Proposal

This rulemaking proposal contains three basic elements: Commission (and very rarely Council) procedure, locus standi rules, and review in the Court of Justice. The first, administrative procedure, is a straightforward application of U.S. rulemaking. This part of the reform would require a Community legislative act, most likely a decision. The act could essentially replicate the notice and comment provisions in the Administrative Procedure Act although those provisions would have to be revised slightly to reflect current agency practice and the Community context. The evidence and justifications put forward by the rulemaking institutions and the comments submitted by members of the public would constitute the record susceptible to judicial review.

The part of the proposal concerning locus standi rules departs fairly radically from the U.S. system. Here I incorporate Mashaw's suggestion on limiting the availability of review by requiring parties to challenge rules post-enforcement: that is, after the lead time built into a rule has expired and litigation entails the costs of both lawyers and non-compliance penalties. Post-enforcement review would discourage
firms from turning to courts in the absence of strong claims against the Community bureaucrat, limiting the quantity of litigation and consequently judicial interference with bureaucratic expertise. To accomplish this part of the reform, nothing in the current system of locus standi and preliminary references would have to change. As explained earlier, Community implementing rules can only be challenged by individuals and firms through national court systems. Although national locus standi rules vary tremendously, a firm must generally wait until sued by its member state for non-compliance and then defend on the grounds that the Community act was illegal, requesting the domestic court to refer the question to the Court of Justice.\textsuperscript{188} To form an opinion on this issue, the Court could rely exclusively upon the arguments and evidence published with the proposed and final rules or could request that the entire record be sent.

Leaving locus standi as it currently stands would not only reduce incentives to resort to litigation but might also ameliorate the current imbalance in Community interest representation. National courts would serve as point of access to the judicial review component of rulemaking and therefore interest groups would not need to be well-organized in Brussels with the resources to employ expensive Brussels lawyers but could rely on local counsel in their national courts and even in the European Court.\textsuperscript{189}

Undoubtedly, there are drawbacks to preliminary references. The most serious is that groups not called upon to comply with rules but that nevertheless suffer their consequences might be denied access to national courts. Recently, locus standi rules have been harmonized for public interest groups that seek to enforce Community consumer protection legislation, an innovation that holds promise for equity in rulemaking review.\textsuperscript{190} A second problem with access to the Court through the preliminary reference system is the legal uncertainty that would very likely result. Unlike direct review, litigants are not bound by strict time limits when they challenge Community acts through preliminary references. They must raise the issue during national enforcement proceedings, which in some countries will be initiated much later than in others, thus creating the danger that a Court decision declaring an implementing rule illegal will be handed down after

\textsuperscript{188} National courts serve as gatekeepers to the Community legal system and are obliged to make preliminary references only if persuaded that the Community measure is illegal. See generally Paul Craig & Grainne de Burca, EU LAW: TEXTS, CASES AND MATERIALES (1998).

\textsuperscript{189} In a system that limits parties to the record developed before the agency, the success of such a challenge rests on the comments submitted during the rulemaking proceeding. Therefore, interests, to stand a chance in court, would nevertheless need the resources to track proposed rules, analyze them, and submit comments.

widespread application in other member states. One possible solution would be to write Community implementing rules to include a time limit applicable to legal challenges through the preliminary reference system. This would put pressure on groups that wish to exercise this legal right to coordinate Community-wide their opposition and litigate the issue when the rule is first enforced at the national level, wherever that happens to be. A last disadvantage to the preliminary reference system in this context is that conceptually it is slightly messy. On direct review, the Court is authorized to annul Community acts, whereas when ruling on a preliminary reference, it may only declare a Community act invalid and therefore inapplicable to the case at hand. This, however, is a minor obstacle since preliminary reference cases serve as precedent in the rest of the Community and therefore, in practice, the measure no longer has effect. Notwithstanding all the possible flaws, rulemaking review through national courts is still the best course because it would reduce the risk of unwieldy, cumbersome litigation of the sort that frustrates U.S. administrative action. And if access to the Court proves unsatisfactory, Community locus standi rules can always be liberalized, after the basics of a notice and comment system are already in place.

The last element of my reform proposal, judicial review, would involve a mix of old and new. First is the standard of review issue. The Court would analyze claims that an implementing rule rests upon a flawed interpretation of the E.C. Treaty or basic measure, as it always has, using text and canons of construction. It would also entertain more fact-based, policy-oriented challenges to implementing rules. In including a role for the Court on such issues, I reject Pierce's suggestion that arbitrary and capricious review be eliminated.191 This would cut down too drastically on the benefits of notice and comment, that is its ability to generate information and encourage interest participation. A rulemaking process without substantive judicial review risks being one in which agencies do not explain their decisions in terms comprehensible to the general public and interest group comments go unread in agency filing cabinets.192 The standard of review for fact-based claims, however, should be written (in the Community act setting down notice and comment) to suggest a deferential attitude toward Commission policy calls. This standard, quite simply, could be "manifest error of appraisal," one of the headings under which such

191. Pierce, supra note 172.
192. But see Dehousse, supra note 24, at 18–22 (arguing that Community notice and comment procedure with Court review exclusively for violation of procedural rights would create public debate and openness).
challenges may be brought currently and which suggests unintrusive judicial review.\footnote{193}

The second issue that arises is a procedural one concerning the arguments the parties are permitted to raise. In U.S. rulemaking review, under what is known as the Chenery rule,\footnote{194} the parties are normally only permitted to raise arguments and evidentiary claims that were raised in the course of the rulemaking proceeding. This makes the process more efficient by requiring litigants to express their views at the first opportunity possible and therefore, with any luck, settle the dispute without any need for a court. The Chenery rule also ensures that the agency, the institutional actor responsible for rulemaking and best suited to assess the scientific evidence and make the policy choices, has had an opportunity to consider all of the parties' objections and suggestions. Such a principle in the Community context would improve the quality of the debate before the Commission as well as lighten the Court's caseload.

The last issue that crops up in judicial review is remedies. The Court currently has two alternatives when it finds an implementing rule illegal: it may annul or declare invalid the rule, depending on whether the case involves a direct challenge under Article 230 (ex Article 173) or a preliminary reference under Article 234 (ex Article 177), or it may annul or declare invalid selected parts of the rule. My proposal would give it the third alternative, again taken from U.S. administrative law, of sending the implementing rule back to the responsible Community institution for further explanation or development of the evidentiary record. This is a question of expediency and good judicial practice more than anything else. A remand is far less time-consuming and disruptive for the agency than a judgment striking the rule and forcing the agency to start the proceeding from scratch. Ironically, this might be the most radical feature of my proposal, for the E.C. Treaty does not contemplate this form of judicial remedy and therefore might require an amendment.

CONCLUSION

Europe's statesmen, in seeking to foster supranational virtue, created a constitutional system of institutions that derive their legitimacy from independent sources and that share government powers. This is

\footnote{193. As was explained earlier, challenges to Community acts may be brought under two other headings, proportionality and misuse of powers. Proportionality, however, as spelled out, although not as applied in cases involving Community acts, is a fairly tough standard and would best be dropped. The doctrine of misuse of powers is ill-suited to reasonableness cases, for it is designed to catch administrators that act with one (impermissible) purpose in mind but state another (permissible) one, not to question the Community's policy choices.}

\footnote{194. SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).}
quite unlike anything to be found in the member states, which adhere, albeit with significant national differences, to the parliamentary model of government. Rather, the structure of government in the Community bears a certain resemblance to the U.S. Constitution, where republican virtue was to be encouraged through checks and balances exercised by independent branches of government. This basic similarity of independent branches and shared powers gives rise to common problems and possibly solutions in the search for more participatory and accountable government.

This Article has identified two such problems that arise in the design of good administration: accountability to a divided lawmaker and pluralist interest group participation. First, I argued that Community rulemaking is undemocratic because it fails to guarantee accountability and interest group participation and that the reforms proposed so far are inadequate because they are modeled on the administrative state in parliamentary democracies. I pointed out that accountability to a divided lawmakers principal and pluralist interest participation are problems common to both the Community and U.S. administrative states and that, consequently, a comparative study could contribute to the democratic deficit debate. Next, I described and evaluated one of the institutional mechanisms that has been used in the United States to ensure accountability and interest participation in rulemaking, the administrative law of notice and comment. Finally, I argued that the essentials of notice and comment should be adopted in the Community, although slightly tempered to reduce the role of courts and interest groups in light of cross-cultural differences in beliefs and interest organization.

In many respects this is a modest proposal for reform. The E.C. Treaty and case law on standing would remain untouched. Rulemaking review would be conducted through the conceptual lens of the Court's long-standing administrative law principles. Notice and record-building requirements could be set down in a Community decision and would not demand an E.C. Treaty amendment. At the same time, the tempered version of notice and comment that I have proposed would fundamentally alter several aspects of Community government. It would make public the scientific and intergovernmental debates that for the moment are known to government insiders and close followers of Community politics and only dimly perceived by the rest of the public. As a result, Parliament and a wide array of interest groups would be drawn into policy debates that are currently left to the Commission, comitology committees, and sometimes the Council. Furthermore, the Court would be called upon with greater frequency to mediate the policy disputes that arise in the administrative context, largely because a rulemaking record would enable litigants to chal-
lenge Community implementing rules more effectively and would permit the Court to carefully consider such claims.

The complex and constantly changing nature of Community government can sometimes obscure the basic issues of institutional design that must be settled. In the sphere of administrative action those design problems, tied to the Community's constitutional structure, are unmistakable. First, the public institutions charged under the E.C. Treaty with lawmaking, most notably Parliament and to a lesser extent the Council, lack the devices needed to ensure that the administration executes their policy choices as intended. Second, the full constellation of interests that influence policy formulation are not guaranteed a voice in policy implementation. The improvements that reform would bring are also plainly visible. First, by generating copious information and enlisting interest groups and courts in the accountability endeavor, notice and comment would put Parliament and the Council in a better position to monitor and control Community rulemaking. What was pure fortuity in the "Pesticides Case"—the press had caught on to national dissatisfaction with drinking water standards, thus alerting Greenpeace and the Greens in Parliament—might become routine. The seemingly intractable conflict between Parliament and the Council on the comitology issue, which reflects the deeper constitutional problem of a divided legislature, might finally find closure. Second, the formal procedure for public participation in rulemaking would carve out a place for interests that had taken part in the pluralist law-making process, not entirely automatic in a system where only one of three lawmakers, i.e., the Commission, shoulders most of the responsibility for rulemaking. Thus all the advantages that interest groups bring to administrative action—fairness, information, public debate, and compliance—would be assured. And the drawbacks of reform, i.e., stymied administrative action and special interest capture, can be contained by fine-tuning the place courts occupy in the rulemaking system. Even though improved democratic accountability and interest participation come at a price, they are worth it.