ADMINISTRATIVE LAW AS BLOOD SPORT: POLICY EROSION IN A HIGHLY PARTISAN AGE

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ABSTRACT

Students of the policymaking process are familiar with the fashion in which the policies underlying crisis-driven legislation are gradually eroded during the implementation process. A substantial body of administrative-law scholarship stands for the proposition that policymaking in administrative agencies is not confined to the formal structures of administrative law as envisioned by the drafters of the Administrative Procedure Act. This Article suggests that in this era of deep divisions over the proper role of government in society, high-stakes rulemaking has become a "blood sport" in which regulated industries, and occasionally beneficiary groups, are willing to spend millions of dollars to shape public opinion and influence powerful political actors to exert political pressure on agencies. In addition, the implementation game has attracted a wider variety of players and has spread to arenas that are far less structured and far more overtly political than the agency hearing rooms and appellate courtrooms of the past. Employing as an illustration the Federal Reserve Board's attempt to implement the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act, this Article suggests some general characteristics of this new model of high-stakes rulemaking, provides some tentative thoughts on the implications of this model for administrative law, and offers some possible responses to the phenomenon aimed at taming some of its least attractive characteristics and at ensuring that it does not further erode public trust in the administrative process.

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INTRODUCTION

Congress often enacts new regulatory programs and major expansions of existing regulatory programs following a crisis or a series of crises that focuses public attention on the failure of existing laws to protect the public or the environment from abuses of economic power by companies pursuing private gain in the marketplace.[1] As the media report stories about innocent victims of irresponsible corporate conduct, the public demands greater protection from the powerful economic actors who created the conditions that precipitated the crises. Investigative journalists, congressional committees, and presidential commissions spotlight longstanding abuses that went unnoticed by policymakers and the public before the crises. Members of Congress debate the causes of the crises and consider legislation designed to bring about a rapid end to the suffering, help the victims put their lives back in order, and prevent similar crises from occurring in the future.

Most of the protective regulatory programs of the Progressive Era, the New Deal, and the Public Interest Era[2] were established after

1. *Cf.* STEPHEN J. CECCOLI, PILL POLITICS 15 (2004) ("[T]he occurrences of drug-related tragedies throughout the twentieth century in the United States . . . have provided important catalysts for drug regulation."); COMM. TO ENSURE SAFE FOOD FROM PROD. TO CONSUMPTION, INST. OF MED. & NAT'L RESEARCH COUNCIL, ENSURING SAFE FOOD FROM PRODUCTION TO CONSUMPTION 8 (1998) ("The federal government response to food safety issues is too often crisis-driven."); JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 94–96 (updated 2d ed. 2011) (noting that "a focusing event like a crisis or disaster" may provide the "push" needed for a problem "to get the attention of people in and around government").

2. I refer to the period of active government extending roughly from the mid-1960s through the mid-1970s as the "Public Interest Era." *See* THOMAS O. MCGARITY, FREEDOM TO HARM (forthcoming 2012) (manuscript ch. 2).

widely publicized tragedies or abuses had stirred public opinion to levels sufficient to overcome the inertial forces that otherwise overwhelm Congress and the regulatory agencies.[3] Students of the policymaking process have long understood that the protective purposes of regulatory programs established over the opposition of regulated industries during times of crisis are often undermined through a slow process of erosion, drift, or slippage, as the industries, agencies, and beneficiary groups engage in what Professor Eugene Bardach calls "the implementation game."[4] As the crises that gave

3. *See id.*; *cf.* Richard J. Lazarus, *Climate Change Law in and over Time*, 2 SAN DIEGO J. CLIMATE & ENERGY L. 29, 33–34 (2010) ("I fully expect that, buoyed by a new wave of scientific reports and the backing of the White House, climate change's lawmaking moment will, Lazarus-like, soon be resurrected. . . . [T]he inherent problem with such lawmaking moments is just that—they are moments."). This crisis-driven pattern is well known to students of the policymaking process as a typical governmental response to the collective-action problem. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 1–2 (1965) ("[U]nless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational, self-interested individuals will not act to achieve their common or group interests*."). The costs of complying with consumer- and environmental-protection regulations are borne directly by the companies subject to the requirements or restrictions, but the benefits of the protections they provide are spread across a diffuse and unorganized public that is no match for the organized opposition of the prospective regulatees. Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1409 (2005); *see also* JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 113–14 (2010) (asserting that "influenc[ing] the exercise of government authority in a modern democracy generally requires a range of formidable capabilities" and observing that those capabilities "are the attributes of organizations, not discrete, atomized voters"). Therefore, it often takes a consciousness-raising crisis to move Congress or an agency to create a new regulatory program. *See* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 29–52 (2008) (noting that "catalysts [for collective action] may operate with special force during times of actual or perceived 'crisis'" and that "one very important way citizens respond to the predicament implied by the logic of collective action is by delegating regulatory authority to political representatives").

4. *See* EUGENE BARDACH, THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES LAW 85 (1977) ("The goals embodied in a policy mandate typically undergo some change during the implementation phase. . . . The politics of renegotiating goals can lead in several directions: trimming them back, distorting or preventing them, and even adding to them in a manner that eventually leads to an unsupportable political burden."); *see also* JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND, at xvii–xxiii, 187 (1979) (discussing the problem of divergence between policy and implementation); David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 957 (1999) ("[T]he basic problem that Congress faces when delegating authority is one of *bureaucratic drift*, or the ability of an agency to enact policies different from those preferred by the enacting coalition."); Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297 (1999) (discussing the importance of "slippage" in environmental law);

rise to public demand for a government program fade from memory and the beneficiary groups that fought for it move on to other pressing matters, the agency charged with implementing the new program struggles to promulgate and enforce the required regulations over the continued opposition of the regulated industry. The industry, meanwhile, carefully monitors and frequently interacts with the agency as the agency sets its regulatory agenda, collects and analyzes scientific and economic information, and prepares the various support documents that accompany modern rulemaking.[5]

Under the conventional model of administrative rulemaking, the agency initiates a rulemaking by assembling and analyzing the relevant technical studies and then drafting a notice of proposed rulemaking—the preamble of which highlights the issues; discusses the relevant scientific, technical, and economic studies; and explains the agency's proposal. The agency then presents the draft to the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). OIRA elicits comments from other interested departments and agencies and provides comments on the agency's lengthy regulatory-impact analysis. Having cleared OIRA review, the agency then publishes the notice in the *Federal Register* and invites public comment. The affected industries and the general public then provide comments and technical information to the agency during the comment period. The agency analyzes the comments and drafts a notice of final rulemaking setting out the terms and conditions of the final rule, the rationale for the rule, and the agency's response to the public comments that have crossed a threshold of materiality. Affected parties may then seek judicial review of the agency's rule.[6]

Lazarus, *supra* note 3, at 33–34 ("Subsequent legislative amendments, limited budgets, appropriations riders, interpretive agency rulings, massive delays in rule-making, and simple nonenforcement are more than capable of converting a seemingly uncompromising legal mandate into nothing more than a symbolic aspirational statement. . . . The same powerful short-term impulses that seek to prevent a law's enactment in the first instance . . . . typically remain to seek the law's ultimate undoing over time.").

5. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1380–83 (2010) ("What develops from the administrative process during the development of the actual rule . . . is a form of information symbiosis between the agencies and the most knowledgeable and resourceful groups."); Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 110–13 (2011) (describing the "opportunity for imbalanced interest group input into rulemakings . . . during the formative development of a proposed rule").

6. *See generally* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 476 (2011) (outlining the rulemaking process).

The regulated industry actively participates in this process by offering information and analysis to the agency staff, meeting with high-level agency officials, and participating in reviews of proposed rules and regulatory-analysis documents before OIRA.[7] When the agency publishes a notice of proposed rulemaking, the regulated companies typically dominate the public-comment process.[8] They submit reams of material and lengthy briefs explaining why disfavored regulatory alternatives are unlawful, unduly burdensome, unsupported by the available technical studies, or unlikely to achieve the agency's desired goal.[9] When the agency publishes the final rule, the regulated industry often challenges the action in court as arbitrary and capricious, ultra vires, or both.[10] If the industry persuades the court to set aside the rule, the agency must either terminate the action or attempt to correct the infirmity that the court has identified. If the agency prevails in court, some companies will demand variances and exemptions, whereas others will probe the edges of legality as their lawyers come up with plausible interpretations of the relevant

7. *See, e.g.*, THOMAS O. MCGARITY, REINVENTING RATIONALITY 271–91 (1991) (describing OIRA review, including incidents of industry involvement with the review process); RENA I. STEINZOR, MOTHER EARTH AND UNCLE SAM 54–56 (2008) ("EPA is beleaguered by business interests trying to forestall implementation of . . . regulations [and] inundating the Agency with technical materials regarding the scientific, legal, and economic implications of its proposals."); David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 365–66 (2006) ("A review of [twenty-five rules that were significantly affected by the OMB] showed that OMB never supported changes that would make environmental, health, or safety regulations more stringent. . . . In every single case, OMB favored changes that would reduce the burdens of regulation on regulated parties."); *see also* Wagner, *supra* note 5, at 1379–80 ("In most complex rulemakings, the agency appears to be quite dependant on knowledgeable stakeholders to educate it about critical issues peculiarly within their grasp. Such communications can be quite a bonus for these select groups, too, providing them with the opportunity to shape or even frame the agency's regulatory project in the course of their tutorials and informal discussions.").

8. *See* Wagner et al., *supra* note 5, at 117 ("The formal comments lodged on a complex rule will come predominantly from regulated industry, and the changes made to the proposed rule in the final rule will mirror this imbalance and generally favor industry.").

9. *Cf.* Wagner, *supra* note 5 (discussing the problems of "filter failure" and information overload in administrative law).

10. *See generally* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1295–1315 (1986) (describing how the evolution of judicial review of agency rulemaking opened the door to industry challenges); Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 206 (1974) ("It has been widely assumed that [the arbitrary-and-capricious standard of judicial review] is applicable to informal rulemaking.").

definitions and requirements that will mitigate the potential constraints on the companies' activities.[11]

Under the pressure of constant opposition from the regulated industries and sporadic countervailing pressure from beneficiaries of the regulated programs, statutory deadlines are missed, ambitious policy goals remain unachieved, and the protections envisioned by the authors of the agency's organic statute gradually erode.[12] As the agency ages and settles into routines, its policies gradually become more industry friendly.[13] The industry adapts to the regulatory program, and life becomes easier for everyone,[14] except perhaps for some of the intended beneficiaries.[15] After the program has been in effect for a number of years, Congress may revisit the organic statute to reauthorize it or to make midcourse corrections.[16] Alternatively, a new crisis may force the program back onto the legislative agenda,

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11. *See generally* Train v. Natural Res. Def. Council, Inc., 421 U.S. 60 (1975) (evaluating the permissibility of individual variances from federally approved state implementation plans); Kristin E. Hickman & Claire A. Hill, *Concepts, Categories, and Compliance in the Regulatory State*, 94 MINN. L. REV. 1151, 1162–65 (2010) (describing "minimal compliers" with administrative regulations); *NAM Coalition Petitions CPSC for Interim Final Rule on Exclusions to New Lead Limits*, 36 PRODUCT SAFETY AND LIABILITY REP. 1271 (2008) (discussing a request by the National Association of Manufacturers for certain exemptions from lower lead limits set by the Consumer Product Safety Commission in 2008).

12. *Cf.* MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 74–102 (1955) (describing the life cycle of an administrative agency); William H. Clune III, *A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Roles of Law and Lawyers*, 69 IOWA L. REV. 47, 65 (1983) (describing the negotiations between the regulated and regulating organizations that "construct[] the meaning of compliance over a period of time" (internal quotation marks omitted)).

13. BERNSTEIN, *supra* note 12, at 86–87.

14. *Id.* at 87.

15. *Cf. id.* at 91 ("Because the ICC is unable to deal effectively with the regulatory demands of transportation media other than railroads, there are signs of growing agitation by nonrailroad interests for regulatory changes.").

16. For example, Congress provided "mid-course corrections," Gershon Eliezer Cohen, *Mixing Zones: Diluting Pollution Under the Clean Water Act*, 14 TUL. ENVTL. L.J. 1, 15 (2000) (internal quotation marks omitted), to the 1972 Clean Water Act, Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387 (2006 & Supp. IV 2010)), in 1977, when it changed the "best available control technology" requirement for existing sources of conventional pollutants to "best conventional control technology" and modified the "best available technology" requirement to apply exclusively to toxic and nonconventional pollutants, Clean Water Act of 1977, Pub. L. No. 95-217, sec. 42(a), §§ 301(b)(1)(A), 301(b)(2)(A)–(E), 91 Stat. 1566, 1582–83 (codified as amended at 33 U.S.C. § 1311); *see also* Cohen, *supra*, at 15 (summarizing these changes).

causing the industry and beneficiary groups to rejoin the battle in the legislative arena.[17]

In this depiction of the regulatory process, the implementation game is simply "politics by other means."[18] By passing the Administrative Procedure Act (APA),[19] Congress attempted to cabin these "other means" through lawyer-dominated procedures. In addition, Congress, presidents, and the courts have added to the modest procedural protections of Section 553 of the APA[20] requirements that agencies must provide support for scientific and technical conclusions in a "rulemaking record," respond to public comments that pass a threshold of materiality, and prepare various analyses of the impact of proposed regulations on the economy and on small businesses—in an effort to make agency rulemaking more transparent and less arbitrary.[21] As a result of these requirements, however, the rulemaking process is also far more burdensome and more expensive for all of the participants in the policymaking process.

Despite these procedural and analytical requirements, a substantial body of administrative-law scholarship demonstrates that agency policymaking has not been limited to the formal structures of administrative law as articulated in the APA. Administrative lawyers, and therefore administrative-law scholars, must also concern themselves with decisions made in interactions between high-level agency personnel and desk officers in OIRA, between high-level agency officials and their counterparts in other regulatory agencies, and between high-level agency officials and the staffs of the agency's authorizing and appropriations committees in Congress.[22] One

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17. *See* BERNSTEIN, *supra* note 12, at 95 ("The period of old age is unlikely to terminate until some scandal or emergency calls attention dramatically to the failure of the regulation and the need to redefine regulatory objectives and public policies.").

18. Thomas O. McGarity, *Politics by Other Means: Law, Science, and Policy in EPA's Implementation of the Food Quality Protection Act*, 53 ADMIN. L. REV. 103, 103 (2001) (quoting BARDACH, *supra* note 4, at 85) (internal quotation mark omitted).

19. Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 701–706 (2006).

20. *See* APA § 4, 5 U.S.C. § 553 (listing the basic procedural requirements for agency rulemaking, including publishing a notice in the *Federal Register* and requesting and considering public comments).

21. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1400–13 (1992) (listing additional congressionally, judicially, and presidentially imposed requirements on the agency rulemaking process).

22. *Cf., e.g.*, MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 45–47 (2d ed. 1989) ("[L]egislation is drafted in very general terms, so some agency . . . must translate a vague policy mandate into a functioning program, a process that . . . incidentally, [involves] the trampling of numerous toes. At the next

primary conclusion of this literature is that the "other means" employed in influencing the exercise of delegated policymaking power are not necessarily limited to the practices and procedures of administrative law as traditionally understood.

In this Article, I raise the possibility that the nation has entered a period in which the population is so deeply divided about the proper role of government, regulated industries are so willing to spend millions of dollars to vindicate their interests, and political discourse is so unrestrained that an even more expansive model of implementation may be warranted, at least in the context of high-stakes rulemaking initiatives.[23] First, the implementation game has spread to arenas that are far less structured and far more political than the agency hearing rooms and appellate courtrooms of the past. Second, the roster of players has expanded beyond agency and OIRA staffs, advocates for the regulated industry and beneficiary groups, and congressional aides to include individuals and organizations with broad policy agendas, such as the U.S. Chamber of Commerce, think tanks, grassroots organizations, media pundits, and Internet bloggers. Third, because many parties play the implementation game in multiple arenas, the game has become far more strategic and the range of allowable tactics has widened rather dramatically. Finally, in this deeply divided political economy, the players in the implementation game no longer make a pretense of separation

stage, . . . constituents petition their congressman to intervene in the . . . decision processes of the bureaucracy. The cycle closes when the congressman lends a sympathetic ear, piously denounces the evils of bureaucracy, intervenes in the latter's decisions, and rides a grateful electorate to ever more impressive electoral showings."); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (proposing a theory of congressional oversight of agency action that distinguishes between "police-patrol oversight," in which Congress itself directly monitors agencies, and "fire-alarm oversight," in which "Congress establishes a system . . . enabl[ing] individual citizens and organized interest groups to examine administrative decisions, to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts, and Congress"); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 766 (1983) (developing "a model of agency decision making based on the premise that agencies are controlled by the legislature" and "argu[ing], therefore, that to understand the genesis of agencies, as well as the stability and change in agency policy, we must understand the underlying legislative politics").

23. I will use the term "high-stakes rulemaking initiatives" to refer to major rulemaking exercises in which the stakes are especially high, such as when an agency is attempting to implement a new regulatory program or a major expansion of an existing program, or when a proceeding has the potential to establish an important precedent with large economic consequences for a regulated industry or the beneficiaries of a regulatory program.

between the domains of politics and administrative law, and they are far less restrained in the rhetoric they employ to influence agency policymaking.[24]

In this new milieu, "winning" can mean more than compelling unreasonable delays in agency action, invoking APA procedures to impede the policymaking process, or persuading the agency to accept a particular position on the relevant law and facts. Winning can consist of extracting promises from nominees during the confirmation process, preventing the confirmation of disfavored nominees, or preventing the confirmation of any agency leaders until the administration has agreed to change the agency's decisionmaking structure. Winning can also mean incapacitating the agency by reducing its annual appropriation, repealing the agency's organic act, or whittling away its regulatory authority through rifle-shot riders attached to must-pass legislation.[25] The players are less reluctant to attack agencies and the statutes those agencies administer head on. The players launch their attacks much earlier in the evolution of regulatory programs, and they feel free to go beyond attacks on the agencies as institutions to launch ad hominem attacks on agency decisionmakers.

In short, I raise the possibility that, for some high-stakes rulemaking initiatives in some areas of regulation, implementation is not so much "politics by other means"[26] as it is "politics as usual." And because politics is so very different from the deliberative, lawyer-dominated domain of traditional administrative law, the word "law" may no longer be an accurate descriptor. Former U.S.

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24. *See generally* Neal Devins, *Tom DeLay: Popular Constitutionalist?*, 81 CHI.-KENT L. REV. 1055, 1059 (2006) (arguing that politics in the United States has become increasingly polarized in recent years and predicting that the "increasing ideological divide" is likely to widen in the future).

25. *See, e.g.*, Thomas O. McGarity, *Deregulatory Riders Redux*, 1 MICH. J. ENVTL. & ADMIN. L. (forthcoming 2012); *see also* Donovan Slack, *Republicans Seek Repeal of Financial Rules*, BOS. GLOBE, Jan. 7, 2011, at A1 (discussing components of the Republican plan to "rein in regulation of businesses"); Jessica Holzer, *House Panel Targets Consumer Bureau, SEC Budgets*, WALL ST. J. (June 23, 2011, 6:01 PM ET), http://online.wsj.com/article/SB10001424052702303339904576404102094921400.html (noting that Rep. Jo Ann Emerson "acknowledged that some Republicans want[ed] to hobble the agency created by the Dodd-Frank financial law by depriving it of funds"); Kate Sheppard, *House Votes To Block EPA Climate Regs*, MOTHER JONES (Feb. 18, 2011), http://motherjones.com/blue-marble/2011/02/house-votes-block-epa-climate-regs (noting that the House of Representatives passed a continuing resolution that "include[d] a massive cut to the EPA's budget" in connection with barring the Environmental Protection Agency (EPA) from regulating greenhouse-gas emissions).

26. *See supra* note 18.

Securities and Exchange Commission (SEC) Chairman Arthur Levitt referred in 2010 to federal regulation as a "kind of a blood sport" in which the regulated industries attempt "to make the particular agency" promulgating an unwelcome regulation "look stupid or inept or venal."[27] If the implementation of regulatory statutes has become a blood sport in important contexts, and if the goal of administrative law extends beyond ensuring procedural regularity to a concern about the effective implementation of legislation, then it would behoove administrative-law scholars to pay attention to the larger setting in which informal rulemaking now takes place and to begin thinking about the implications of these developments for the field.

The conventional model still governs most run-of-the-mill rulemaking. The regulations that make up the vast bulk of the rulemaking output of the federal agencies are not of such importance that they are likely to warrant the considerable expense of an all-out war, nor are they likely to attract the attention of the powerful political actors who are capable of transforming technical disputes into fierce ideological battles. In high-impact rulemaking exercises that have the potential for both high political visibility and large costs or benefits, however, many regulatees and beneficiary groups have dramatically intensified their efforts to influence the conventional rulemaking process, while at the same time broadening the focus of their strategies beyond the confines of that process to include members of Congress, the media, political pundits, and the general public. During times of divided government, the battles are waged both in the agency and in Congress, where sympathetic committees schedule hearings on proposed regulations even as the agencies are receiving and analyzing public comments on the same proposed regulations pursuant to the conventional rulemaking model.

The fact that regulated industries do not pursue blood-sport strategies for most rules does not mean that the new model is irrelevant to most rulemaking exercises. One of the important benefits of the blood-sport strategy for a regulated industry is the in terrorem effect that it has on regulatory agencies as they go about their day-to-day business, knowing that any rulemaking of any importance could escalate into a blood-sport battle. Part I of this Article provides a detailed examination of the blood-sport model in action in the context of the Federal Reserve Board's (the Fed's)

27. FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT 53 (2011) (quoting Interview with Arthur Levitt (Oct. 1, 2010)) (internal quotation marks omitted).

attempt to implement the Durbin Amendment[28] to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[29] Drawing on this example and other recent high-stakes rulemaking efforts by other agencies, Part II suggests some general characteristics of the blood-sport model. Part III provides some rather tentative thoughts on the implications of the blood-sport model for administrative law, and Part IV offers some possible responses to the phenomenon that are aimed at eliminating, or at least taming, some of its least attractive characteristics and at ensuring that it does not further erode public trust in the administrative process.

I. BLOOD-SPORT STRATEGIES IN IMPLEMENTING THE DURBIN AMENDMENT

A. Introduction

In the wake of the financial meltdown of 2008, Congress enacted the Dodd-Frank Act, a comprehensive financial-reform statute that empowered several existing banking agencies and a new agency called the Consumer Financial Protection Bureau (CFPB) to promulgate regulations to protect consumers from predatory lending practices and the financial system from another meltdown.[30] Somewhat surprisingly, the first rulemaking action under the Act to generate a blood-sport battle was the Fed's attempt to implement a last-minute amendment to the statute that required it to regulate the

28. 111 CONG. REC. S3651–52 (daily ed. May 12, 2010).

29. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code).

30. *Id.*; *see also* SIMON JOHNSON & JAMES KWAK, 13 BANKERS 177, 181–85, 192 (2010) (chronicling the events following the 2008 crisis, including the "enormous" "damage to the real economy" and to government finances, the surprising recovery of investment banking, the fact that "when the banks faced off with the government, they held all the cards" because the government could not afford to let them fail, and the financial industry's attempts to influence proposed financial regulations); DAVID SKEEL, NEW FINANCIAL DEAL 3–4 (2011) (summarizing the "[p]ath to [e]nactment" of the Dodd-Frank Act); Brady Dennis, *Obama Ushers in New Financial Era*, WASH. POST, July 22, 2010, at A13 (describing the hopes and concerns expressed in response to President Obama's signing of the Dodd-Frank Act); Donovan Slack, *Republicans Seek Repeal of Financial Rules*, BOS. GLOBE, Jan. 7, 2011, at A1 (citing a fall 2010 Gallup poll in which 61 percent of the respondents said they approved of the Dodd-Frank Act, making it one of the most popular pieces of legislation passed during the Obama administration).

"interchange fees" that banks issuing debit cards charge to retailers each time a consumer uses a debit card to make a purchase.[31]

Introduced in the late 1960s and early 1970s, debit cards allow consumers to access funds in their accounts electronically in a way that many consumers find more convenient than using checks or cash.[32] Depository institutions, such as national banks and credit unions, typically issue debit cards to their account holders.[33] Debit cards employ two different types of authentication methods: a physical signature that can often be accomplished electronically and a personal identification number (PIN).[34] The debit-card infrastructure varies depending on the identification method the consumer selects.[35] Most debit-card transactions are processed over a four-party system in which a network, such as Visa or MasterCard, receives transaction information from a merchant and either electronically transfers the payment from the bank that issued the card to the merchant's bank or declines to make the transfer.[36]

The interchange fee is established by the network and is automatically paid out of the merchant's account by the merchant's bank to the card issuer.[37] The purpose of the fee is to compensate the issuing bank for processing the transaction and to offset the additional losses that issuing banks inevitably incur due to fraudulent transactions.[38] The two networks that dominate the market—Visa and MasterCard—compete with one another to win banks' business by, among other things, setting high interchange fees on transactions.[39] As debit cards gained increasing consumer acceptance during the 2000s,

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31. 111 CONG. REC. S3651–52 (daily ed. May 12, 2010).

32. Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43,394, 43,395 (July 20, 2011) (to be codified at 12 C.F.R. pt. 235).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 43,396.

38. *See id.* at 43,394 n.2 (defining "interchange fee" as "any fee established, charged, or received by a payment card network for the purpose of compensating an issuer for its involvement in an electronic debit transaction" (internal quotation marks omitted)); *id.* at 43,401 ("[D]epending on the facts and circumstances, . . . the [electronic] transaction [may be] guaranteed and the amount of the transaction must be absorbed as a fraud loss by the issuer . . . .").

39. James C. Miller III, Op-Ed., *Debit Card Market Is Broken and Needs Fixing*, ATLANTA J.-CONST., Apr. 7, 2011, at A17.

interchange fees increased fairly rapidly.[40] The networks established operating rules, including rules that established interchange fees, on a take-it-or-leave-it basis. Under this system, if a merchant did not comply with a network's terms and conditions, it would lose access to the network and, presumably, much of the business derived from debit-card purchases.[41]

By 2009, debit-card interchange fees totaled $16.2 billion.[42] The average interchange fee was 56 cents—1.53 percent of the average transaction amount—for signature debit transactions and 23 cents—0.58 percent of the average transaction amount—for PIN transactions.[43] By contrast, the median per-transaction cost incurred by issuing banks across all debit-card issuers was 11 cents per transaction.[44] Of this cost, the median amount attributable to fraud-prevention activities was 1.7 cents per transaction.[45]

The large difference between the average interchange fee and the average per-transaction cost translated into large profits for the issuing banks. Depending on the elasticity of the demand for the purchased items, merchants either absorbed the loss or passed it on to consumers in the form of higher prices. To the extent that the fees were passed along, though, all consumers paid the extra premium, not just those who purchased goods with debit cards. Consequently, very few consumers were aware of the fact that they were indirectly paying interchange fees through higher prices.[46]

Interchange fees were, however, quite apparent to merchants. By 2010, interchange fees in the United States were the highest in the

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40. *See* Debit Card Interchange Fees and Routing, 76 Fed. Reg. at 43,395 (stating that over the past decade, "[d]ebit card payments have grown more than any other form of electronic payment"); *id.* at 43,396 (noting that "most PIN debit networks raised the levels of the fixed and *ad valorem* components of fees, in addition to raising the caps on overall fees"); Miller, *supra* note 39 (asserting that interchange fees have increased rapidly).

41. *See* Debit Card Interchange Fees and Routing, 76 Fed. Reg. at 43,396 ("[E]ach card network specifies operating rules that govern the relationships between network participants. . . . [M]erchants . . . may be required to comply with a network's rules or risk losing access to that network.").

42. *Id.* at 43,397.

43. *Id.*

44. *Id.*

45. *Id.*

46. *See Understanding the Federal Reserve's Proposed Rule on Interchange Fees: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 112th Cong. 2 (2011) (statement of Sarah Bloom Raskin, Governor, Board of Governors of the Federal Reserve System) (pointing out that interchange fees are "[g]enerally unnoticed by the customer").

world.[47] In fact, interchange fees constituted the largest expense after payroll for some retailers such as 7-Eleven convenience stores.[48] Because the networks usually moved in tandem and had every incentive to please the issuers by keeping fees high, even large big-box stores such as Wal-Mart seemed powerless to exert downward pressure on interchange fees.[49] The merchants strongly supported legislation that would cap the fees at an amount that was reasonably related to costs and that would require issuers to accept at least two networks to ensure greater competition among the networks.[50] Relying on assurances from the retail industry that much of the savings resulting from governmental intervention would be passed along to consumers in the form of lower prices, consumer advocates supported the merchants' efforts to place limits on interchange fees.[51]

Debit-card issuers, a diverse group that includes large national banks, credit unions, and small community banks, strongly opposed

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47. *Id.* at 30 (statement of Rep. Peter Welch).

48. *Id.* at 45 (statement of David Seltzer, Vice President and Treasurer, 7-Eleven Inc., on behalf of the Retail Industry Leaders Association).

49. *See id.* at 31 (statement of Rep. Peter Welch) ("Merchants have literally no power individually to be able to negotiate a price. So, we got to this point where the charges to our merchants, . . . mom-and-pop stores as well as the Wal-Marts and Home Depots, became the highest in the world.").

50. *See id.* at 31 (statement of Sean P. Duffy, Member, Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.) (observing that merchants "seem to advocate for Congress stepping in and advocating for price fixing in regard to Visa, banks, and their fees"); *id.* at 36 (statement of Constantino (Gus) Prentzas, Owner, Pavilion Florals and Life & Health Fitness) (noting that interchange "fees . . . have doubled in the last 2 to 3 years alone" and "fully support[ing] the debit card rules proposed by the Federal Reserve and any other efforts to help cur[b] swipe fees"); *id.* at 41–42 (statement of Doug Kantor, Partner, Steptoe & Johnson, on behalf of the Merchants Payments Coalition) (arguing that interchange fees are "tremendously unfair to merchants"); *id.* at 45 (statement of David Seltzer, Vice President and Treasurer, 7-Eleven Inc., on behalf of the Retail Industry Leaders Association) (stating that interchange fees for 7-Eleven franchisees quadrupled from 2002 to 2010); Edward Wyatt, *Lowering of Fees for Debit Cards Is Lobby Battle*, N.Y. TIMES, Mar. 8, 2011, at A1 (quoting Douglas Kantor, a lobbyist for the Merchants Payments Coalition, complaining that interchange fees are stifling businesses).

51. *See Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 9 (statement of Sarah Bloom Raskin, Governor, Board of Governors of the Federal Reserve System) ("The idea is that lower interchange fees . . . would lower cost to merchants who possibly in competitive environments, could lower their cost to consumers."); *Oversight of Federal Payment of Interchange Fees: How To Save Taxpayer Dollars: Hearing Before a Subcomm. of the S. Comm. on Appropriations*, 111th Cong. 44–46 (2010) (statement of Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group) (noting the impact of interchange fees on consumers and stating that "[t]he Durbin interchange amendment . . . takes important steps to end unfair and anti-competitive practices in the credit and debit card marketplace").

any regulation of interchange fees.[52] They worried that the caps would not take into account all of the risk factors that card issuers had built into the interchange fees.[53] In particular, the banks believed that the merchant and consumer groups had greatly underestimated the costs of preventing and adjusting for fraud.[54] According to the banks, in addition to forcing card issuers to lay off workers to reduce costs, capping interchange fees would discourage investment in new fraud-prevention technologies.[55]

Debit-card issuers argued that merchants would not necessarily pass the savings from lowered interchange fees on to consumers in the form of reduced prices because there would be no requirement that they do so.[56] Moreover, the issuers contended, if issuing banks were unable to recoup their costs, they would have to tighten their standards for issuing debit cards, thereby making debit cards less available to low- and moderate-income consumers.[57] Issuers also claimed that they would be forced to eliminate various rewards

52. *See Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 37 (statement of Frank Michael, President and CEO, Allied Credit Union, on behalf of the Credit Union National Association) (opposing the rules implementing the Durbin Amendment); *id.* at 40 (statement of David W. Kemper, Chairman, President, and CEO, Commerce Bank, on behalf of the American Bankers Association and the Consumer Bankers Association) (urging Congress "to take immediate action to stop the proposed [interchange-fee] rule from being implemented").

53. *Cf. id.* at 43 (statement of Joshua R. Floum, General Counsel, Visa Inc.) (noting that the price controls would "make[] it virtually impossible for issuers to recover the cost of the infrastructure and operations required to build and manage a world-class debit system and [would] discourage[] future investment in fraud protection").

54. *Cf. id.* at 44–45 ("The [Fed] admits that its interchange proposal will permit issuers to recover only a small fraction of their costs . . . . Investment in data security and fraud prevention can only be made if there [is an] . . . opportunity to recover the cost of these investments.").

55. *See id.* at 43 (asserting that interchange-fee caps "discourage[] future investment in fraud protection"); Chris Serres, *Bankers Push Back on Fee Limits*, STAR TRIB. (Minneapolis), Mar. 9, 2011, at 1A (relaying concerns that interchange-fee caps would lead banks to discharge employees and citing one bank's claim that it would have to lay off more than seventeen hundred workers).

56. *Cf. Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 2 (statement of Sarah Bloom Raskin, Governor, Board of Governors of the Federal Reserve System) (stating that interchange fees are "[g]enerally unnoticed by the customer"); *id.* at 44 (statement of Joshua R. Floum, General Counsel, Visa Inc.) ("[T]here is no requirement or evidence that merchants will pass on th[e] windfall to consumers.").

57. *See id.* at 29 (statement of Rep. Stevan Pearce, Member, Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.) (reasoning that the inability to offset the risk of debit-card overdrafts would lead banks "to start shutting off customers from access"); *id.* at 40 (statement of David W. Kemper, Chairman, President, and CEO, Commerce Bank, on behalf of the American Bankers Association and the Consumer Bankers Association) ("[T]he Fed's proposed rule will . . . push[] low-income customers out of the banking system.").

programs that they had established to encourage consumers to use their debit cards.[58] Finally, issuers argued that they would have to make up for losses in their debit-card operations by raising fees in other areas, such as checking accounts.[59]

B. The Durbin Amendment

Toward the end of the Senate's consideration of the massive Dodd-Frank Act, Senator Richard Durbin offered an amendment that would authorize the Fed to regulate interchange fees.[60] When it was eventually enacted, the Durbin Amendment required the Fed to prescribe regulations within nine months requiring interchange fees to be "reasonable and proportional to the cost incurred by the issuer with respect to the transaction."[61] The agency was, however, empowered to "allow for an adjustment to the fee" as "reasonably necessary to make allowance for costs incurred by the issuer in preventing fraud."[62] In addition, the Fed was required to promulgate

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58. *See id.* at 9 (statement of Sarah Bloom Raskin, Governor, Board of Governors of the Federal Reserve System) (observing that debit-card "rewards are often made possible through higher interchange fees").

59. *See id.* at 38 (statement of Frank Michael, President and CEO, Allied Credit Union, on behalf of the Credit Union National Association) (listing higher debit-card fees and elimination of free checking accounts as some of the changes that credit unions would need to make to replace the lost revenue); *id.* at 40 (statement of David W. Kemper, Chairman, President, and CEO, Commerce Bank, on behalf of the American Bankers Association and the Consumer Bankers Association) ("[B]anks will have to find other ways to recover revenue and this will ultimately lead to new fees for the consumer."); *id.* at 43–44 (statement of Joshua R. Floum, General Counsel, Visa Inc.) (citing a study by the Independent Community Bankers of America in which "[m]ore than 90 percent of [the member banks] reported that they will be forced to increase other fees to consumer[s] to compensate for the interchange regulation").

60. *See* 111 CONG. REC. S3651–52 (daily ed. May 12, 2010); Todd Zywicki, *Durbin's Innovation Killer*, THE AM. (June 11, 2011), http://www.american.com/archive/2011/june/durbin2019s-innovation-killer (noting that the Durbin Amendment was "[a]ttached as a floor amendment . . . to the Senate version of the Dodd-Frank legislation" "at the very last moment").

61. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) § 1075(a)(2), 15 U.S.C. § 1693o-2(a)(2)–(3)(A) (Supp. IV 2010). To determine "reasonable and proportional" interchange fees, the statute required the Fed to "consider the functional similarity between" debit-card transactions and checks, which clear without interchange fees. *Id.* § 1075(a)(2), 15 U.S.C. § 1936o-2(a)(4)(A). Under the statute, the Fed must also distinguish between the incremental cost incurred by the issuer for a particular transaction and other costs that are not specific to a particular transaction. *Id.* § 1075(a)(2), 15 U.S.C. § 1693o-2(a)(4)(B).

62. *Id.* § 1075(a)(2), 15 U.S.C. § 1693o-2(5)(A)(i); *see also Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 4 (statement of Sarah Bloom Raskin, Governor, Board of Governors of the Federal Reserve System) (noting that the Fed "requested comment on different conceptual approaches for implementing a fraud prevention

regulations prohibiting network "exclusivity arrangements" and requiring issuers to provide merchants with at least two unaffiliated network options for each debit-card transaction.[63] Finally, the statute exempted small issuers with assets of less than $10 billion from the interchange-fee standard, although not from the exclusivity restrictions.[64]

On the one hand, merchant and consumer groups were thrilled with these developments.[65] The banking industry, on the other hand, stunned by this unanticipated last-minute amendment to the statute, made it known that it was unwilling to live with the new regulatory program.[66] Outspoken JPMorgan Chase & Co. Chief Executive Officer Jamie Dimon told the Council of Institutional Investors that the Durbin Amendment was "idiotic" and should not have been passed because it "had nothing to do with the crisis" that had inspired the Dodd-Frank Act.[67] The industry was thus determined to fight the Durbin Amendment at every step of its implementation.

C. The Notice of Proposed Rulemaking

The Fed proceeded expeditiously with the rulemaking. Among other things, the agency commissioned a survey of sixteen payment-card networks and 131 financial institutions that had assets of $10

adjustment to the interchange fee standard" and that its members "[were] reserving judgment on the terms of the final rule until [they had] the opportunity to consider these comments").

63. *See* Dodd-Frank Act § 1075(a)(2), 15 U.S.C. § 1693o-2(b)(1)(A) ("The Board shall . . . prescribe regulations providing that an issuer or payment card network shall not . . . restrict the number of payment card networks on which an electronic debit transaction may be processed to (i) 1 such network; or (ii) 2 or more such networks which are owned, controlled, or otherwise operated by [affiliated entities]."); *see also Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 3 (statement of Sarah Bloom Raskin, Governor, Board of Governors of the Federal Reserve System) ("[N]etwork exclusivity and routing provisions . . . could promote competition among networks and place downward pressure on interchange fees.").

64. *See* Dodd-Frank Act § 1075(a)(2), 15 U.S.C. § 1693o-2(a)(6)(A) ("[T]he Board shall exempt such issuers from [interchange-fee] regulations prescribed under paragraph (3)(A)."); *Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 2–3 (statement of Sarah Bloom Raskin, Governor, Board of Governors of the Federal Reserve System) ("The statute exempts small issuers . . . from this interchange fee standard but it does not exempt them from the exclusivity and routing restrictions.").

65. T.W. Farnam, *Simmons Wins Swipe Fee Deal for His Prepaid Card*, WASH. POST, June 24, 2010, at A19; Edward Wyatt, *Lowering of Fees for Debit Cards Is Lobby Battle*, N.Y. TIMES, Mar. 8, 2011, at A1.

66. *See* Wyatt, *supra* note 65 (describing the banking industry's opposition to the law).

67. Cheyenne Hopkins, *JPMorgan: Delay Durbin, Save Perks?*, AM. BANKER, Apr. 6, 2011, at 1 (quoting Dimon) (internal quotation mark omitted).

billion or more.[68] In its notice of proposed rulemaking,[69] published on December 28, 2010, the Fed requested comments on two alternative approaches to implementing the interchange-fee standard.[70] The first approach would allow the issuer to comply with the standard either by calculating its allowable costs and ensuring that it did not receive any interchange fee in excess of those costs or by adhering to a "safe-harbor" cap of seven cents per transaction.[71] If the issuer did not elect to use the safe harbor, a cap of twelve cents per transaction would still apply.[72] The second approach would adopt a flat twelve-cents-per-transaction cap for all covered issuers and would require the networks to ensure that issuers did not receive amounts in excess of the cap.[73] Either approach would reduce fees substantially below the 2010 average of forty-four cents per transaction.[74] As required by statute, the proposal would exempt from the interchange-fee restrictions any issuer that, together with its affiliates, had assets of less than $10 billion.[75]

The proposal also offered two alternatives for implementing the statute's network-exclusivity prohibition. The first alternative would allow a debit-card transaction to be routed over at least two unaffiliated debit-card networks—for example, one signature-based network and one unaffiliated PIN-based network.[76] The second alternative would require a debit card to have at least two unaffiliated

68. Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43,478, 43,479 (interim final rule July 20, 2011) (to be codified at 12 C.F.R. pt. 235).

69. Debit Card Interchange Fees and Routing, 75 Fed. Reg. 81,722 (proposed Dec. 28, 2010) (to be codified at 12 C.F.R. pt. 235).

70. *Id.* at 81,726.

71. *Id.*

72. *Id.*

73. *Id.* at 81,737. The agency based the twelve-cents-per-transaction cap on the average variable costs revealed in its industry survey. The median bank's average variable cost was seven cents per transaction, but the twelve-cent number was based on the eightieth percentile of issuing banks that responded. *Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 7–8 (statement of Sarah Bloom Raskin, Governor, Board of Governors of the Federal Reserve System).

74. *Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 3 (statement of Kenny Marchant, Member, H. Comm. on Fin. Servs.)

75. Debit Card Interchange Fees and Routing, 75 Fed. Reg. at 81,756; *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act § 1075(a)(2), 15 U.S.C. § 1693o-2(a)(6)(a) (Supp. IV 2010) (exempting issuers with assets of less than $10 billion).

76. Debit Card Interchange Fees and Routing, 75 Fed. Reg. at 81,726; *see also* *Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 3 (statement of Sarah Bloom Raskin, Governor, Board of Governors of the Federal Reserve System) (summarizing the two alternatives in the proposed rule).

networks for each method of authorization that could be used with that card.[77] The latter approach would provide more merchants with a routing choice but would entail much higher operational costs.[78]

Finally, the proposal requested comments on two approaches to implementing the fraud-prevention adjustment to the interchange fee.[79] The first approach would focus on the likelihood that major innovations would result in substantial reductions in industry-wide fraud.[80] The second approach, without focusing on specific technologies, would focus on the steps that would be reasonably necessary for an issuer to take to maintain an effective fraud-prevention program.[81] Because the agency's survey showed a substantially lower incidence of fraud for PIN-based debit transactions than for signature-based debit transactions,[82] the Fed also requested comment on whether fraud adjustments should distinguish between PIN and signature transactions.[83]

D. Judicial Challenge to the Durbin Amendment

Unwilling to wait for the Fed to promulgate a final rule, TCF National Bank filed a lawsuit in federal district court in South Dakota challenging the constitutionality of the Durbin Amendment.[84] The district court refused to grant TCF's request for a temporary injunction,[85] and the U.S. Court of Appeals for the Eighth Circuit affirmed, holding that TCF was unlikely to prevail on its claim that

77. Debit Card Interchange Fees and Routing, 75 Fed. Reg. at 81,726–27.

78. *Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 3 (statement of Sarah Bloom Raskin, Governor, Board of Governors of the Federal Reserve System).

79. Debit Card Interchange Fees and Routing, 75 Fed. Reg. at 81,740.

80. *Id.*

81. *Id.*

82. *Id.* at 81,741.

83. *Id.* at 81,742–43.

84. TCF Nat'l Bank v. Bernanke, No. CIV 10-4149, 2011 WL 1578535 (D.S.D. Apr. 25, 2011), *aff'd*, 643 F.3d 1158 (8th Cir. 2011). *Compare* Complaint at 1, *TCF Nat'l Bank*, No. 10-4149, 2010 WL 3960576, at *1 (stating that the complaint was filed on October 12, 2010), *with* Debit Card Interchange Fees and Routing, 76 Fed. Reg. at 43,394 (appearing in the July 20, 2011, issue of the *Federal Register*). For background information on the TCF lawsuit, see Chris Serres, *Limits on Debit Card Fees on Trial*, STAR TRIB. (Minneapolis), Apr. 4, 2011, at 1A.

85. *TCF Nat'l Bank*, 2011 WL 1578535, at *5 (denying TCF's motion for a preliminary injunction).

the Fed's threatened action would deprive it of substantive due process.[86]

E. Reactions to the Proposal

The Fed "received thousands of comments raising a variety of issues."[87] Merchant groups and some consumer groups supported the interchange-fee proposal.[88] They preferred the first alternative for the interchange fee-standard, but they wanted to lower the cap from twelve cents per transaction to as low as four cents per transaction.[89] On the network-exclusivity issue, the merchants preferred the second alternative because it would provide more routing choices and because it would allow for more market discipline on interchange and network fees.[90] With respect to the fraud-related proposals, they generally favored the first option, which focused on the likelihood that major innovations would result in substantial reductions in industry-wide fraud.[91]

Issuers generally opposed the proposal entirely, arguing that both fee-limiting alternatives would result in increased fees for cardholders and other bank customers, would decrease the availability of debit cards to low-income consumers, and would stifle innovation.[92] They preferred a single, stand-alone cap, but they urged the Fed to substantially increase the cap to reflect a number of additional costs.[93] With respect to the network-exclusivity

86. *See* TCF Nat'l Bank v. Bernanke, 643 F.3d 1158, 1161, 1164–65 (8th Cir. 2011) ("[E]ven assuming that TCF possesses a sufficient property interest to raise a due-process challenge, we do not believe that TCF is likely to prevail. . . . [W]e affirm the district court's denial of TCF's motion for a preliminary injunction.").

87. *Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 4 (statement of Sarah Bloom Raskin, Governor, Board of Governors of the Federal Reserve System).

88. Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43,394, 43,402 (July 20, 2011) (to be codified at 12 C.F.R. pt. 235) ("Merchants, their trade groups, and some consumers supported the Board's proposal . . . ."); Edward Wyatt, *9 Senators Seek To Delay Debit Card Fee Changes*, N.Y. TIMES, Mar. 16, 2011, at B3 (stating that retailers and consumer groups were generally in favor of the proposal).

89. Debit Card Interchange Fees and Routing, 76 Fed. Reg. at 43,402.

90. *Id.* at 43,403.

91. *Id.* at 43,402; Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43,478, 43,479 (interim final rule July 20, 2011) (to be codified as 12 C.F.R. pt. 235).

92. Debit Card Interchange Fees and Routing, 76 Fed. Reg. at 43,402.

93. *Id.* Interestingly, the Office of the Comptroller of the Currency in the Treasury Department weighed in on the proposal and sided with the banks. *See* Donna Borak, *OCC Joins Fight Against 'Narrow' Interchange Rule*, AM. BANKER, Mar. 9, 2011, at 3 (reporting that the

requirements, the issuers preferred the first alternative but argued that even that alternative "would impose significant operational burdens" on networks and issuers with very "little [offsetting] consumer benefit."[94] Card issuers maintained that requiring them to allow access to at least two networks would precipitate a "race to the bottom" that would drive rates down as retailers sought the lowest-price option "regardless of quality or value delivered to the consumer."[95] Finally, they favored the second fraud alternative because it would provide flexibility to issuers to "tailor their fraud-prevention activities to address most effectively the risks they faced and changing fraud patterns."[96]

Although the proposal included the exemption for small issuers, small banks, and credit unions, these entities predicted that competition would force them to adhere to the lower caps that the Fed had established for the big banks.[97] They suspected that few merchants would be willing to pay higher fees to small issuers when most of their customers procured their debit cards from large issuers.[98] Several small banks argued that the Fed should provide an administrative exemption from the network-exclusivity requirements to match the statutory exemption from the interchange-fee requirements.[99]

Comptroller of the Currency warned that the proposal could hurt banks); Serres, *supra* note 55 (stating that the Comptroller of the Currency wrote to the Fed arguing that the proposal was too narrow).

94. Debit Card Interchange Fees and Routing, 76 Fed. Reg. at 43,403.

95. *Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 44 (statement of Joshua R. Floum, General Counsel, Visa Inc.).

96. Debit Card Interchange Fees and Routing, 76 Fed. Reg. at 43,402; Debit Card Interchange Fees and Routing, 76 Fed. Reg. at 43,479.

97. Debit Card Interchange Fees and Routing, 76 Fed. Reg. at 43,402.

98. *See Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 38 (statement of Frank Michael, President and CEO, Allied Credit Union, on behalf of the Credit Union National Association) ("If the [small-issuer] carve out is entirely ineffective and credit union interchange fees converge on the rate set for very large institutions, credit unions will find their net income reduced by $1.6 billion."); *id.* at 41 (statement of David W. Kemper, Chairman, President, and CEO, Commerce Bank, on behalf of the American Bankers Association and the Consumer Bankers Association) ("[T]he exemption for small banks will ultimately be ineffective. Every community banker . . . with whom I speak strongly believes his or her bank will be severely affected by the interchange price controls imposed on larger banks. . . . Market share will flow to the lower-priced product of big banks, forcing small banks to lose customers if they don't follow suit.").

99. Debit Card Interchange Fees and Routing, 76 Fed. Reg. at 43,403.

F. Lobbying, Campaign Contributions, and Public Relations

Issuers launched a massive lobbying campaign to persuade agency personnel to adopt the issuers' preferred approaches to the regulations and to persuade Congress to repeal or modify the Durbin Amendment—or at least to delay its implementation date until after the 2012 elections.[100] One less apparent purpose of the congressional-lobbying campaign was to persuade individual members of Congress to put pressure on the Fed to make the final rule friendlier to the banking industry. The Independent Community Bankers of America spent around $1.2 million lobbying banking regulators and Congress during the first quarter of 2011.[101] The Credit Union National Association (CUNA), which spent approximately $750,000 on lobbying, also generated an estimated 144,000 contacts with lawmakers during the first three months of 2011.[102] The two major networks, Visa and MasterCard, hired eighteen lobbying firms to influence the agency and Congress on the interchange-fee rule.[103] The retail merchants followed suit with an intense lobbying campaign of their own.[104] The Sunlight Foundation reported that the various interest groups advancing the merchants' cause had hired 124 lobbying firms to influence agency and congressional action with respect to the interchange-fee rule.[105]

The affected industries backed up their lobbying activities with hefty campaign contributions to key senators and representatives.[106] According to the Sunlight Foundation, banking interests funneled

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100. *See* Wyatt, *supra* note 65 (describing an "all-out assault on Capitol Hill" and the card issuers' tactic of "enlisting a growing cadre of lawmakers and lobbyists to push for changes, delay or outright repeal").

101. Ben Protess, *Community Banks Lobby To Limit New Regulations*, N.Y. TIMES DEALBOOK BLOG (May 23, 2011, 8:37 AM), http://dealbook.nytimes.com/2011/05/23/community-banks-lobby-to-limit-new-regulations.

102. Victoria McGrane, *Wall Street, Banks Press To Shape Dodd-Frank Rules*, WALL ST. J., Apr. 22, 2011, at A5.

103. Edward Wyatt, *Senate Votes Down a Delay in Rules on Debit Card Fees*, N.Y. TIMES, June 9, 2011, at B1. The Sunlight Foundation reported that sixty-eight of the seventy-nine lobbyists hired by Visa and MasterCard had previously worked in the federal government. *Id.*

104. *See* Wyatt, *supra* note 65 (naming the lobbying representatives of retailers and noting the intensity of the lobbying effort).

105. Paul Blumenthal, *Merchants, Retailers Employ Revolving Door Lobbyists in Regulatory Fight*, SUNLIGHT FOUND. (Apr. 19, 2011, 12:16 PM), http://sunlightfoundation.com/blog/2011/04/19/merchants-retailers-employ-revolving-door-lobbyists-in-regulatory-fight.

106. *See* Gary Rivlin, *The Billion-Dollar Bank Heist*, NEWSWEEK, July 18, 2011, at 9, 10 (reporting that banks and trade associations contributed millions of dollars to the campaigns of representatives who could influence the Dodd-Frank Act).

$662,000 to selected committee members through the Electronic Payments Coalition during the first few months of 2011.[107] CUNA's political action committee sent more than $400,000 to federal candidates during the first four months of 2011.[108] The 2010 elections presented a unique opportunity for Republican politicians to redirect the industry's generous campaign contributions into Republican coffers. In September 2010, the financial-services industry sent 71 percent of its campaign contributions to Republicans, compared to 44 percent for the same month in 2009.[109] The Sunlight Foundation found that 70 percent of the campaign contributions that House Committee on Financial Services Chairman Spencer Bachus received during the first quarter of 2011 came from the financial-services industry.[110] During the first quarter of 2011, seven of the ten Republican freshmen on the committee received about 40 percent of their campaign contributions from the financial-services industry.[111]

The banking industry supported its lobbying campaign with an expensive public-relations campaign aimed at generating public pressure on the agency and Congress.[112] A coalition of banks and networks placed advertisements in newspapers warning that "[b]ureaucrats want to take away your debit card!"[113] Network-television advertisements complained that "'community banks and credit unions will be squeezed'" by '"bad' regulation" if Congress did not stop the Fed.[114] Banking-industry representatives told the media that the Fed's proposed "price controls" would provide windfalls to big-box stores like Wal-Mart and would force banks to charge higher fees for debit cards and to do away with free checking.[115] Several large banks announced that they were planning to reduce or eliminate

107. *See* Ylan Q. Mui & Cezary Podkul, *Banks Lose Fight over Swipe Fees*, WASH. POST, June 9, 2011, at A13 (citing figures reported by the Sunlight Foundation).

108. *Trades Continue To Gear Up for Election*, CREDIT UNION TIMES, June 1, 2011, at 28, 28.

109. Nelson D. Schwartz, *Power Shift Is Expected by C.E.O.'s*, N.Y. TIMES, Nov. 2, 2010, at B1.

110. Rivlin, *supra* note 106, at 11.

111. *Id.*

112. *Cf.* Mui & Podkul, *supra* note 107 (describing the industry's campaign efforts).

113. Wyatt, *supra* note 65 (internal quotation marks omitted).

114. Protess, *supra* note 101.

115. Serres, *supra* note 55 (internal quotation mark omitted) (predicting that banks would impose higher fees on consumers in response to the interchange-fee rule); Wyatt, *supra* note 65 (reporting that the change in interchange fees would likely create windfalls for large retailers).

debit-card rewards programs but that they would not implement the changes if Congress delayed the Fed regulations.[116]

The efforts to sway public opinion were not confined to the mainstream media. Metro cars in Washington, D.C.'s mass-transit system, in which many Fed employees presumably traveled, featured ads opposing the Fed's proposal.[117] A bankers' group created a website called "Don't Make Us Pay" to provide the banking industry's take on the dispute and to urge consumers to send a form email to their congresspersons.[118] CUNA posted a YouTube video in which the association's president alluded to a massive security breach at Michaels arts-and-crafts stores as an example of the security risks that consumers would face if banks and credit unions did not receive sufficiently high interchange fees to support innovative fraud-prevention technologies.[119]

A group of retailers called the Merchants Payments Coalition responded to the banking-industry initiative with advertisements that depicted overweight bankers smoking cigars and rifling through one-hundred-dollar bills, and criticized banks for accepting federal bailout money at the same time that they were "looking for another handout."[120] A public-relations firm hired by the merchants coined the term "swipe fee" as a substitute for the term "interchange fee" in the debates.[121] In May 2011, the National Retail Federation (NRF) launched a "major nationwide 60-day lobbying, grassroots and media campaign" aimed at ensuring that the Fed promulgated an

116. *See* Hopkins, *supra* note 67 (quoting a JPMorgan Chase official as saying that the bank would not change its debit-card program if Congress delayed the regulation); E. Scott Reckard, *Debit Cards Poised To Get Much Costlier*, L.A. TIMES, June 25, 2011, at B1 (reporting that JP Morgan, Wells Fargo, and other banks were phasing out or reducing debit-card rewards programs in response to the interchange-fee regulations); Bill Hardekopf, *Debit-Card Rewards: Beginning of the End?*, CHRISTIAN SCI. MONITOR (Apr. 1, 2011), http://www.csmonitor.com/Business/2011/0401/Debit-card-rewards-beginning-of-the-end (announcing that Chase debit-card holders would no longer receive rewards for using the card).

117. *See* Mui & Podkul, *supra* note 107 (reporting that financial firms covered Metro cars in advertisements).

118. DON'T MAKE US PAY, http://dontmakeuspay.org (last visited Apr. 11, 2012).

119. *Cheney YouTube Video Urges Interchange Delay Action*, CREDIT UNION NAT'L ASS'N (June 6, 2011), http://www.cuna.org/newsnow/11/wash060311-3.html.

120. Serres, *supra* note 84 (quoting the advertisement) (internal quotation marks omitted).

121. *See* Marc Hochstein, *The PR Whiz Who Coined 'Swipe Fees*,*'* AM. BANKER, June 30, 2011, at 8 (reporting that Taylor West, an employee of a Washington public-relations firm, coined the term swipe fee).

interchange-fee rule that was acceptable to retailers.[122] Targeted advertisements aired across the country. For example, advertisements airing on television stations across Alaska warned that "[t]wo out of every one hundred dollars we spend in stores or online go to the credit card industry" and urged viewers to call the state's two senators to "tell them to stop the big bank credit card industry from swiping our money."[123]

Consumer groups lacked the resources to launch a public-relations campaign, but they did complain to the press that high interchange fees were wholly unwarranted. They noted that banks had saved billions in operating costs as consumers moved away from personal checks to debit cards and that the banks had failed to pass on the savings to consumers.[124] Having coaxed consumers into using debit cards, banks were "diabolical" to begin raising debit-card fees.[125]

G. Industry Allies

Conservative think tanks and grassroots organizations also entered the fray. The probusiness Competitive Enterprise Institute (CEI) circulated a letter signed by many other groups, including Grover Norquist's Americans for Tax Reform and the Christian Coalition of America, urging Congress to delay the implementation of the rule pending further study and analysis.[126] One Tea Party

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122. *National Retail Federation Launches Major 60-Day Advocacy Campaign To Preserve Swipe Fee Reform*, BUS. WIRE (May 18, 2011, 12:15 PM EST), http://www.businesswire.com/news/home/20110518006516/en/National-Retail-Federation-Launches-Major-60-Day-Advocacy. Among other things, the campaign included an "intensive grassroots campaign mobilizing retailers from across the country"; a "fly-in with hundreds of business owners . . . to meet with members of Congress and urge that the reforms go through as planned"; an "aggressive media relations campaign including . . . interviews with national and local news outlets, and nationwide placement of op-eds"; a "nationwide print and radio advertising campaign including . . . hundreds of thousands of dollars in radio ads in key markets nationwide"; and the use of "social media and viral video to educate legislators and the public." *Id.*

123. *National Retail Federation Airs Radio Ads Urging Murkowski and Begich To Support Swipe Fee Reform*, ENHANCED ONLINE NEWS (May 31, 2011, 5:33 PM EDT), http://eon.businesswire.com/news/eon/20110531007077/en.

124. *See* Reckard, *supra* note 116 (reporting that consumer advocates were angry at banks for raising interchange fees because the cost savings of debit cards was not being passed on to consumers).

125. *See id.* (quoting Ed Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group) (internal quotation mark omitted).

126. Letter from Grover Norquist, President, Ams. for Tax Reform, et al., to Members of Congress (Apr. 1, 2011), *available at* http://s3.amazonaws.com/atrfiles/files/files/040111lt_Interchange%281%29.pdf. John Berlau of the CEI warned that "we must stop the . . . oncoming train wreck that threatens the savings of consumers as well as the safety and soundness of the

organization featured the Fed's interchange-fee rule on a webpage that prominently featured the slogan "Don't Make Us Pay" and warned that the rule would result in fewer rewards, more debit-card restrictions, and higher debit-card fees.[127] When Bank of America announced that it would introduce a five-dollar monthly debit-card fee, Rush Limbaugh rushed to the bank's defense, telling his listeners that the fee was the bank's proper response to the Durbin Amendment, "which was tacked on to the already despicable Dodd-Frank bill at the last minute."[128]

H. Congressional Hearings

Two hearings on the interchange-fee rule before the House Subcommittee on Financial Institutions and Consumer Credit provided a forum for opponents of the proposed rule to criticize it outside of the Fed's ongoing rulemaking process.[129] The first witness at the first hearing on February 17, 2011, was Sarah Bloom Raskin, a member of the Board of Governors of the Federal Reserve System.[130] Although Raskin was reluctant to promise any particular outcome from the pending rulemaking, she was quite forthcoming about the studies underlying the proposal and the possibility that the small-bank exclusion from the interchange-fee cap could prove illusory.[131] Nevertheless, she was subjected to browbeating exchanges by two subcommittee members. Representative Blaine Luetkemeyer peppered Raskin with questions, cut her off before she could respond,

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financial system with price controls that don't even cover the cost of services to retailers." Press Release, Ams. for Tax Reform, Competitive Enter. Inst. & 60 Plus Ass'n, Free-Market Groups Support Halting Dodd-Frank Price Controls (Apr. 5, 2011), *available at* http://s3.amazonaws .com/atrfiles/files/files/040511pr_interchangefees.pdf (quoting Berlau).

127. *Debit Card Rule; Take Action To Stop It*, S. TIER TEA PARTY PATRIOTS, http://sttpp. wordpress.com/action-alerts/take-action-stop-the-debit-card-rule (last visited Apr. 11, 2012).

128. *The Rush Limbaugh Show* (Premiere Networks radio broadcast Oct. 4, 2011) (transcript available at http://www.rushlimbaugh.com/daily/2011/10/04/dick_durbin_calls_for_ run_on_bank).

129. *Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46; *The Effect of Dodd-Frank on Small Financial Institutions and Small Businesses: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 112th Cong. (2011).

130. *Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 2 (statement of Raskin, Governor, Board of Governors of the Federal Reserve System).

131. *See id.* at 32 (discussing the survey conducted evaluating the impact of the Durbin Amendment and acknowledging that the impact on "small community banks" was not "included in the survey").

and then chastised her for failing to be responsive.[132] Representative Donald Manzullo insisted that the Fed was rushing to judgment and demanded that Raskin admit that "[her] survey and [her] studies [were] flawed."[133] When Raskin said that she was "not ready to admit that,"[134] Representative Manzullo interrupted her and accused her of being disingenuous.[135]

The banking industry's witnesses focused on the adverse consequences that they predicted would flow from the Fed's proposal.[136] They urged Congress to call an immediate halt to the rulemaking process. If, after additional study and hearings, Congress should decide that further action was still needed, it could allow the Fed to reinitiate the rulemaking process.[137] And if Congress was not prepared to pretermit the proceeding, it should at least delay the rulemaking process to give the banking agencies an opportunity to study the matter further.[138] Representative David Scott told Raskin

132. *See id.* at 25 (statements of Raskin, Governor, Board of Governors, and Rep. Luetkemeyer, Member, Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.) ("MR. LUETKEMEYER: Yet in your written testimony, your written testimony says the proposed rule interprets the incremental cost to be an exclusion of fixed costs would be required. Which one is it? . . . MS. RASKIN: It is actually both. MR. LUETKEMEYER: No, no, no. Yes or no? Which—we are not going there—take up my 5 minutes—very quickly. Which one is? MS. RASKIN: I am afraid I don't see a conflict and I could— MR. LUETKEMEYER: I am sorry. I see a tremendous conflict . . . .").

133. *Id.* at 33 (statement of Rep. Manzullo, Member, Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.).

134. *Id.* (statement of Raskin, Governor, Board of Governors of the Federal Reserve System).

135. *Id.* at 33–34 (statement of Rep. Manzullo, Member, Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.).

136. *See The Effect of Dodd-Frank on Small Financial Institutions and Small Businesses*, *supra* note 129, at 9 (statement of John P. Buckley, Jr., President and Chief Executive Officer, Gerber Federal Credit Union, on behalf of the National Association of Federal Credit Unions) (arguing that the proposed rule would be "disastrous for credit unions and the 19 million members [they] serve" because "the exemption for financial institutions under $10 billion in assets [would] not work"); *id.* at 14 (statement of James D. MacPhee, Chairman, Independent Community Bankers of America) (testifying that the proposal's "[r]egulatory and paperwork requirements [would] impose a disproportionate burden on community banks, thereby diminishing their profitability and ability to attract capital and support their customers, including small businesses").

137. *Id.* at 10 (statement of John P. Buckley, Jr., President and Chief Executive Officer, Gerber Federal Credit Union, on behalf of the National Association of Federal Credit Unions).

138. *See Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 43 (statement of Joshua R. Floum, General Counsel, Visa Inc.) (arguing that "Congress should consider extending the implementation date and requesting an impact study on unintended consequences"); Donna Borak & Stacy Kaper, *Durbin Rules Revisited: Cold Feet on*

that he hoped that she would take away from the hearing the message "that a delay in the implementation of this rule [was] definitely in order."[139]

Subcommittee Chairman Shelley Moore Capito questioned whether the small-bank exemption from the interchange-fee cap would be of any real benefit to small banks and credit unions in light of the possibility that the merchants might shift their business away from banks claiming the exemption to the big banks that were charging the lower regulated fees.[140] Proponents of small banks argued that one way to ensure that the exemption was meaningful would be to require networks to impose a "two-tier" system on merchants that would prevent merchants from refusing to accept cards issued by small banks with their associated higher interchange fees.[141] Raskin agreed that there were "legitimate questions regarding how in fact small issuers [were] going to in essence have this exemption work in their favor" because the agency had concluded that it lacked the authority to require the merchants to employ a two-tier system.[142]

I. Senator Tester's Rider

The intense lobbying efforts by the banking industry had a noticeable impact. By early 2011, several members who had voted for the Durbin Amendment in 2010 expressed reservations about the law and urged the Fed to err on the side of allowing issuers to charge higher interchange fees to account for fraud-prevention expenses.[143] In March 2011, Senator Jon Tester introduced a bill[144] that would have

Interchange Reg Proposal, AM. BANKER, Feb. 18, 2011, at 1 (stating that both political parties urged the Fed to delay the implementation of the interchange-fee regulation).

139. *Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 15 (statement of Rep. Scott, Member, Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.).

140. *Cf. id.* at 4–5 (statement of Rep. Capito, Chairman, Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.) ("[T]he question [is] that if you are an issuer from a community bank or a credit union, [and] your interchange fee [can] remain higher, will there be, as you [Raskin] said, dollar pressure to move customers towards the lower cost interchange issuers?").

141. Borak & Kaper, *supra* note 138 (quoting former Federal Deposit Insurance Corporation (FDIC) Chairperson Sheila Bair).

142. *Understanding the Federal Reserve's Proposed Rule on Interchange Fees*, *supra* note 46, at 4–5 (statement of Sarah Bloom Raskin, Governor, Board of Governors of the Federal Reserve System).

143. Wyatt, *supra* note 65.

144. Debit Interchange Fee Study Act, S. 575, 112th Cong. §§ 3–4 (2011).

delayed the implementation of the interchange-fee regulation for two years and required the Fed to repropose the rule after further study.[145] Within seventeen days, Tester received campaign donations from a number of banking interests totaling at least $60,000.[146] To the delight of Tester's opponent in the 2012 campaign, retailers then reacted by filling the Montana airwaves and newspapers with attack ads characterizing Tester as a handmaiden of the big Wall Street banks.[147] The Montana Bankers Association and credit-union groups responded with a barrage of advertisements defending Tester.[148] In the end, the retailers prevailed after supporters of an appropriations rider containing the Tester Amendment failed to garner the sixty votes necessary to override a promised filibuster.[149]

J. The Notice of Final Rulemaking

After the Tester Amendment's defeat, the banking industry and its allies in the think tanks shifted their attention once again to the Fed, which had missed its April 2011 deadline for promulgating a final rule because it had to process more than 11,000 comments.[150] The final rule, which came out on July 20, 2011,[151] adopted a modified version of the stand-alone cap—the option favored by the banks.[152] Rather than forcing issuers to justify interchange fees up to a twelve-cents-per-transaction cap,[153] the final rule provided that an issuer could not receive a per-transaction interchange fee in excess of the

145. Cheyenne Hopkins, *Interchange Limits Play Key Role in Tester Race*, AM. BANKER, May 4, 2011, at 1.

146. Alexander Bolton, *Swipe-Fee Opponents Direct Campaign Money to Tester*, THE HILL, Apr. 20, 2011, at 9.

147. *See* Hopkins, *supra* note 145 ("Groups including the Montana Petroleum Marketers and Convenience Store Association, Montana Retail Association and several national merchant advocacy groups are portraying Tester as a friend of Wall Street banks.").

148. *See id*. ("[Retailer ads supporting Tester] are being countered by ads from the Montana Bankers Association as well as community bank and credit union groups, who have launched their own TV, radio and print ads on the issue.").

149. Mui & Podkul, *supra* note 107; Wyatt, *supra* note 103.

150. Joe Adler, *Banks' Swipe Fee Fight Shifts to Fed*, AM. BANKER, June 9, 2011, at 1 (stating that bankers focused on persuading the Fed to change the interchange-fee policy); Ylan Q. Mui, *Retailers Fight Back over Debit-Card Swipe Fees*, WASH. POST, May 19, 2011, at A13 (reporting that the Fed said it had missed its deadline because over eleven thousand comments had been submitted).

151. Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43,394 (July 20, 2011) (to be codified at 12 C.F.R. pt. 235).

152. *Id.* at 43,402.

153. *See id.* at 43,401 (discussing the proposed twelve-cents cap).

sum of twenty-one cents plus an "*ad valorem*" component of five basis points of the transaction's value.[154] With respect to network exclusivity, the Fed again adopted the alternative favored by the banks, thereby requiring issuers to provide access to two unaffiliated networks for each transaction.[155] The final rule exempted small banks from the interchange-fee standard but not from the network-exclusivity requirements.[156]

The Fed published a separate interim final rule to address the fraud-prevention adjustment.[157] It adopted the "more general, less prescriptive approach" regarding the eligibility of an issuer to receive the adjustment, and it set the adjustment at one cent per transaction.[158] To avail itself of the fraud-prevention adjustment, an issuer would be required to develop and implement policies and procedures designed to identify and prevent fraudulent transactions, to monitor the incidence of losses and reimbursements attributable to fraud, respond to suspicious electronic transactions, and to ensure that debit-card data remained secure.[159] In explaining why it had selected the option preferred by the banks, the Fed observed that "[t]he dynamic nature of the debit card fraud environment requires standards that permit issuers to determine themselves the best methods to detect, prevent, and mitigate fraud losses."[160]

K. Reactions to the Final Rule

Retailers were greatly disappointed by the new rule.[161] In November, three retailer trade associations sought judicial review of

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154. *Id.* at 43,472. For the average debit-card transaction of thirty-eight dollars, the ad valorem component was two cents. Edward Wyatt, *Fed Halves Debit Card Bank Fees*, N.Y. TIMES, June 30, 2011, at B1.

155. Debit Card Interchange Fees and Routing, 76 Fed. Reg. at 43,403, 43,468.

156. *Id.* at 43,467 (exempting small issuers from interchange-fee provisions but not mentioning exclusivity provisions).

157. Debit Card Interchange Fees and Routing, 76 Fed. Reg. 43,478 (interim final rule July 20, 2011) (to be codified at 12 C.F.R. pt. 235).

158. Debit Card Interchange Fees and Routing, 76 Fed. Reg. at 43,404.

159. Debit Card Interchange Fees and Routing, 76 Fed. Reg. at 43,480.

160. *Id.* at 43,484.

161. *See* Donna Borak & Rob Blackwell, *Fed Raises Swipe Fee Limit, but Banks, Retailers Cry Foul*, AM. BANKER, June 30, 2001, at 1 (stating that retailers were unhappy with the final rule); Wyatt, *supra* note 154 (relaying the characterization by Mallory Duncan, chairman of the Merchants Payments Coalition, of the rule as "unacceptable to Main Street merchants" (internal quotation marks omitted)).

the rule in the U.S. District Court for the District of Columbia.[162] Consumer groups agreed that the Fed had "capitulated to intense lobbying by bankers,"[163] but they nevertheless hoped that consumers would receive "a small break" in lower prices for consumer goods.[164] The banking industry also expressed some dismay that the rule had effectively reduced interchange fees by almost one-half, but it recognized that the Fed had taken "a significant step in reducing the harm that could have resulted from the proposed rule."[165] Outside observers predicted that, although consumers would not experience a direct impact in lower prices, they might expect to see prices rising less rapidly for a time.[166]

The networks immediately responded to the rule by assessing a new "network-participation" fee to all merchants using any of their cards, debit or otherwise.[167] In response to the new fees, banks began to announce new cardholder fees. Two months before the rule went into effect, Wells Fargo announced that it would be charging a three-dollar fee to its debit cardholders in five states for every month during which they used their cards.[168] When the rule finally became effective in early October 2011, Bank of America announced that it would begin charging customers a fee of five dollars for every month during which they used their cards.[169] Consumer reaction to the fees was extremely negative, and the reaction was compounded by the Occupy Wall Street movement, which at that moment was focusing public

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162. *See* Complaint for Declaratory Relief at 1–6, NACS v. Bd. of Governors of the Fed. Reserve Sys., No. 1:11-cv-02075 (D.D.C. Nov. 22, 2011); *see also* Edward Wyatt, *Retailers Push Fed for Yet Lower Debit Fees*, N.Y. TIMES, Nov. 24, 2011, at B1 (describing the background of the lawsuit); Maya Jackson Randall, *Retailers Sue Fed over Debit-Card Fee Rule*, WALL ST. J. (Nov. 22, 2011, 3:25 PM EST), http://online.wsj.com/article/SB10001424052970204531404577054433584869976.html (same).

163. Press Release, Pub. Citizen, Public Citizen Critiques Federal Reserve Surrender to Bank Lobbyists (June 29, 2011), *available at* http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3372.

164. *See id.* (pointing out that the new twenty-six-cents cap was still lower than the average prerule interchange fee of forty-four cents).

165. Wyatt, *supra* note 154 (internal quotation marks omitted).

166. *Cf. id.* (predicting that consumers are more likely to see a slower increase in prices).

167. Andrew Johnson, *Visa Revamps Its Pricing To Defend Debit Market Share*, AM. BANKER, July 29, 2011, at 1 (internal quotation marks omitted).

168. Will Hernandez, *Wells Tests $3 Monthly Debit Fee in Five States*, AM. BANKER, Aug. 18, 2011, at 2. JPMorgan Chase tested a similar fee on checking accounts in a small market. *Id.*

169. Ylan Q. Mui, *Bank of America Scraps Debit Card Fee amid Uproar*, WASH. POST, Nov. 2, 2011, at A1.

attention on the misbehavior of large banks.[170] More than 300,000 people signed an online petition to stop the cardholder fee, and 21,000 people pledged to close their accounts with Bank of America.[171] A month later, Bank of America and the other banks rescinded the fees.[172]

II. SOME CHARACTERISTICS OF BLOOD-SPORT RULEMAKING

The interchange-fee rulemaking experience illustrates how stakeholders in high-stakes rulemakings have begun going beyond the conventional responses to rulemaking initiatives by adopting a new toolbox of strategies better suited to the deeply divided political economy. If the players on one side of the policy debate perceive that they are unlikely to prevail in the administrative arena, they will move the implementation game to another arena—the White House, a congressional hearing, a political fundraising dinner, a think-tank white paper, talk-radio programs, attack advertising, telephone solicitation and "push polls," or Internet blogs. Many of these new venues were amply used in the battle that accompanied the interchange-fee rulemaking. In addition, although lawyers for the stakeholders employ the careful language of administrative law in arenas in which that language is expected, spokespersons and allies also employ the heated rhetoric of modern political discourse in arenas in which that language is more likely to succeed. This Part probes these, among other, contours of blood-sport rulemaking.

A. Thoroughgoing Participation

The stakeholders that employ blood-sport strategies continue to play vigorously on the traditional fields of notice-and-comment rulemaking. They submit extensive filings during the comment period, testify at hearings, and participate in related exercises such as negotiated rulemaking.[173] Affected entities with the financial resources to do so submit lengthy briefs containing hundreds and

170. *Id.*

171. *Id.*

172. Tara Siegel Bernard, *Bank of America Drops Plan for Debit Card Fee*, N.Y. TIMES, Nov. 2, 2011, at A1.

173. *See* Wagner, *supra* note 5, at 1371 ("The rulemaking review game, for example, produces incentives for stakeholders to fill the record with intricate details, raise every conceivable argument, err on the side of including attachments that may not be terribly helpful, engage in negotiations outside of formal notice-and-comment parameters, and raise every litigation threat within their grasp.").

even thousands of pages of information, analysis, and argumentation that can quickly lead to what Professor Wendy Wagner characterizes as "information excess."[174] These submissions also constitute the factual basis for subsequent judicial challenges to the substance of the agency's final rule.[175] Empirical analyses of public comments in informal rulemakings generally reach the unremarkable conclusion that regulated industries typically dominate the public-comment process.[176] Moreover, regulatee participation has a discernible impact on rulemaking outcomes. The result can be "information capture"—the "excessive use of information and related information costs as a means of gaining control over regulatory decisionmaking in informal rulemakings."[177] A 2011 study of the Environmental Protection Agency (EPA) rules regulating hazardous air pollutants concluded that substantive changes to the rules in response to public comments favored industry over public-interest groups by a five-to-one margin.[178] Information capture is by no means a new phenomenon, but the incentive to overwhelm an agency with information will generally be higher in the context of high-impact rules that are likely to give rise to blood-sport battles.

B. Vigorous Lobbying

Companies and trade associations with an interest in major rulemakings sometimes hire in-house or outside lobbyists to assist their efforts to affect rulemaking outcomes long before the publication of notices of proposed rulemaking in the *Federal*

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174. *Id.* at 1355; *cf. id.* at 1331 (noting that "parties have little reason to economize on the information they submit to agencies" because they "are not held to any limits on the information they file, nor must they assume any of the costs the agency incurs in processing their voluminous filings").

175. *Cf. id.* at 1381 ("Given the high level of deference that typically occurs during judicial review, regulated parties will perceive major advantages to getting in at the ground floor, before the proposed rule is published.").

176. *See, e.g.*, Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Votes Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 252–53 (1998) (finding that "business commenters" dominate the rulemaking process at the EPA and the National Highway Traffic Safety Administration, submitting between 66.7 and 100 percent of the comments); Wagner et al., *supra* note 5, at 128 ("[I]ndustry comments . . . comprised over 81% of the comments submitted on [hazardous air pollutants] rules during the notice-and-comment period . . . .").

177. Wagner, *supra* note 5, at 1325.

178. *See* Wagner et al., *supra* note 5, at 131 n.2 ("Industry enjoyed more affirmative changes relative to the public interest for 87% of the rules.").

Register.[179] The lobbyists are generally familiar with the agency, often because they are former employees, and they maintain close personal contacts with agency personnel to gain information on the likely content of proposed and final regulations.[180] Knowing that their rulemaking activities are being carefully watched by companies and interest groups that have the power to influence the White House or Congress, agency staffers may "attempt to placate these monitors by formulating rules that are more palatable to them than the rules that otherwise would be sent to the agency head."[181]

The agency's technical staff and economists are usually heavily dependent on others for the information needed to prepare agency analyses and craft agency proposals.[182] Consequently, those entities with access to the needed information—often the regulated companies—may "enjoy special advantages in the [rulemaking] process."[183] Both before and after the formal comment period on a rule, during which time the agencies often place the content of communications with outsiders in the public record, "informationally endowed stakeholders and agency staff can negotiate regulatory policies in the shadows, where they are typically free of mandatory docket and recordkeeping requirements."[184]

Shadow conversations are not limited to technical staff and economists. High- and mid-level officials at most agencies are also generally willing to meet with lobbyists from beneficiary groups and affected industries both before and after the publication of the notice of proposed rulemaking to receive information, hear legal and policy arguments, and entertain suggestions for change.[185] As the banking

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179. *See* William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 69–70 (2004) (describing prenotice participation in rulemaking and highlighting concerns among agency officials about ex parte contacts); *see also supra* Part I.F.

180. *See* Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1079 (2001) ("[R]epresentatives of interest groups directly affected by an agency program are likely to be repeat players who maintain stable channels of communications with agency staff members.").

181. *Id.* at 1079–80.

182. *See* Wagner, *supra* note 5, at 1380 ("In most complex rulemakings, the agency appears to be quite dependant on knowledgeable stakeholders to educate it about critical issues peculiarly within their grasp.").

183. *Id.* at 1365.

184. *Id.* at 1366.

185. *Cf.* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492–93 (1992) ("No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. . . . To secure the genuine

agencies began to implement the requirements of the Dodd-Frank Act, the president of the Financial Services Forum, an industry trade association, stressed that it was "critical to have a seat at the table and participate in a dialogue."[186] Representatives of financial-services companies met with officials implementing the Dodd-Frank Act's controversial Volcker Rule on more than 350 occasions before the agencies had even issued a notice of proposed rulemaking.[187] Officials at OIRA are likewise willing to meet with affected groups both before and during the time that OIRA is reviewing a rule.[188] A study of 1,056 rules about which OIRA met with outside groups found that 43 percent of those meetings took place before the rule had been released to the public.[189] These sorts of meetings undoubtedly influence the content of at least some of the rules that the agencies

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reality, rather than a formal show, of public participation, a variety of techniques is available—from informal meetings with trade associations and other constituency groups, to roundtables, to floating 'trial balloons' in speeches or leaks to the trade press . . . ."); Seidenfeld, *supra* note 180, at 1078 ("One suspects that agency staff also maintains contacts with representatives from affected interest groups . . . .").

186. Schwartz, *supra* note 109 (quoting Rob Nichols) (internal quotation mark omitted); *see also* Robert Kuttner, *Too Big To Be Governed?*, AM. PROSPECT, Dec. 2010, at 28, 28 (quoting former FDIC chairman Sheila Bair, who observed that "[e]very lawyer in town [was] on the payroll of one bank or another").

187. Jean Eaglesham & Victoria McGrane, *Behind Scenes, Battle for Face Time as Regulators Craft Rule's Wording*, WALL ST. J., Oct. 12, 2011, at C2. Executives from the U.S. Chamber of Commerce met on an almost daily basis with officials in the banking agencies and in the new CFPB during its formative stages. Eric Lichtblau & Robert Pear, *Rule Makers Emerge from the Shadows*, N.Y. TIMES, Dec. 9, 2010, at A32. Goldman Sachs representatives met with the staff of the Commodity Futures Trading Commission fifty-five times during the last half of 2010 as the agency worked on the derivatives regulations that would be crucial to Goldman's bottom line. Jim Puzzanghera, *Goldman Sachs Flexes Its Lobbying Muscle*, L.A. TIMES, July 5, 2011, at B1.

188. *See* RENA STEINZOR, MICHAEL PATOKA & JAMES GOODWIN, CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE (2011) (discussing OIRA's meetings with outside parties while conducting formal and informal reviews of proposed agency rules); U.S. GEN. ACCOUNTING OFFICE, GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 69 (2003) ("There was evidence that outside parties had contacted OIRA before or during OIRA's formal review period regarding about half of the significantly changed rules . . . ."); *see also* Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 852–65 (2003) (providing an empirical analysis of OIRA's meetings with outside parties during the rulemaking process); *OMB Meets with Environmental Groups, Industry To Discuss Interstate Transport Rule*, 42 ENV'T REP. 1374 (2011). Another example of the intense lobbying of agencies and the White House is the "lobbying blitz" that for-profit colleges aimed at the Department of Education in response to the Department's efforts to promulgate regulations protecting prospective students from false and misleading solicitations. Eric Lichtblau, *With Lobbying Blitz, Profit-Making Colleges Diluted New Rules*, N.Y. TIMES, Dec. 10, 2011, at A1.

189. STEINZOR ET AL., *supra* note 188, at 10.

ultimately propose, or the participants would not spend their time and money setting them up.[190]

In high-stakes rulemakings, lobbyists and the industries that employ them can sometimes exert sufficient pressure on agencies, either directly or indirectly through the intervention of important members of Congress, to take the additional step of meeting with the ultimate agency decisionmakers. For example, lobbyists for the Luminant Corporation were sufficiently influential to secure a meeting between company executives and EPA Administrator Lisa Jackson to discuss easing Luminant's transition into compliance with the agency's cross-state rule limiting the interstate transport of air pollutants.[191] As a result of this meeting, the EPA increased Luminant's share of the initial allowances to emit two pollutants.[192] Influential lobbyists can also prevail upon political operatives in the White House to persuade the head of OIRA or even the president to intervene in the decisionmaking process. For example, President Obama ordered EPA Administrator Jackson to withdraw a relatively stringent potential standard for ground-level ozone after a lobbyist

190. *See* Croley, *supra* note 188, at 876–77 ("While the type of interest groups represented at meetings do not predict a greater likelihood that a rule will be changed among the set of rules that are the subject of meetings, clearly rules that are the subject of meetings are more likely to be changed among the set of all rules under review. Thus, even if an OIRA meeting itself is not the cause of a change in a rule, a meeting reflects some underlying dynamic that leads to a change in a rule."); Seidenfeld, *supra* note 180, at 1073 (concluding that industry has better access to OIRA and the White House than public-interest groups do); Wagner, *supra* note 5, at 1366 ("Although proposed rules, on the surface, appear to be drafted by agency staff based on internal technical analyses, most of them are likely the result of extensive negotiations with interested parties that remain unrecorded and perhaps even unacknowledged.").

191. Jessica Coomes, *Jackson Among Top EPA Officials Working with Luminant on Compliance with Air Rule*, 42 ENV'T REP. 2119 (2011).

192. *EPA, Activists Reject Luminant Blaming Transport Rule for Plant Closures*, INSIDE EPA, Sept. 16, 2011, *available at* Factiva, Doc. No. EPAW000020110915e79g0000a; *see also Out of Thin Air: EPA's Cross-State Air Pollution Rule: Hearing Before the H. Comm. on Sci., Space & Tech.*, 112th Cong. (2011) *available at* http://science.house.gov/hearing/full-committee-hearing-epas-cross-state-air-pollution-rule (prepared statement of Regina McCarthy, Assistant Administrator for Air and Radiation, U.S. Environmental Protection Agency) ("Based on technical information companies have recently provided, we are initiating a process to increase the emissions 'budget' for Texas by tens of thousands of additional tons . . . ."); Jessica Coomes, *EPA Official Signals Agency's Flexibility in Cross-State Air Rule Implementation*, 42 ENV'T REP. 2118 (summarizing the EPA's effort to increase Texas's emissions budget); Coomes, *supra* note 191 (noting Administrator Jackson's personal involvement in the compliance-assistance effort); Elizabeth Souder & Randy Lee Loftis, *EFH Shutdown Plan Draws Skepticism*, DALL. MORNING NEWS, Sept. 16, 2011, at A1 (describing Luminant's complaints about the proposed rule and the EPA's efforts to assist the company with compliance, including giving away emissions allowances).

for the American Petroleum Institute showed the White House chief of staff a map highlighting in red and blue the possible implications of that ozone standard for the president's ongoing reelection campaign.[193]

Additionally, companies and trade associations are well aware of the tendency of agency staff to tailor rules to fit the preferences of chairpersons of congressional committees.[194] Therefore, these organizations also employ lobbyists to generate pressure on the agency from key members of Congress through telephone calls and letters demanding information and explanations during the pendency of the rulemaking.[195] Occasionally, the efforts of the lobbyists are persuasive enough to generate a legislative response such as an amendment to the relevant statute or a limitation rider attached to must-pass legislation prohibiting the agency from spending any money on the rulemaking initiative.[196] When the industry elects to pursue a legislative response, lobbying efforts can increase dramatically, as demonstrated by the use of the Tester rider to delay the implementation of the Fed's interchange-fee rule.[197]

C. Public-Relations Campaigns and Attack Advertising

A rulemaking initiative can be so important to affected interests that those affected organizations are willing to spend considerable

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193. John M. Broder, *Re-election Strategy Is Tied to a Shift on Smog*, N.Y. TIMES, Nov. 17, 2011, at A1. Industry groups also launched a public-relations offensive against the rule that included letter-writing campaigns and advertisements in periodicals read by Washington, D.C., policymakers. *Id.*

194. *Cf.* Seidenfeld, *supra* note 180, at 1082 ("[T]raditional congressional oversight of agency rulemaking may induce the agency to tailor the rule to the preferences of members of the oversight committee, especially the chairpersons of such committees.").

195. The American Bankers Association and the Independent Community Bankers Association, both of which were very active in the interchange-fee rulemaking and related congressional oversight, spent $2.2 million and $1 million respectively on lobbying during the first quarter of 2011. Richard Newman, *Wall St. Reform Battle Escalates*, STAR-LEDGER (Newark), June 26, 2011, at 1. Goldman Sachs alone spent $1.3 million lobbying during the first four months of 2011. Puzzanghera, *supra* note 187. All told, the banks and their trade associations spent more on lobbying the banking agencies and Congress during the first quarter of 2011—$27 million—than they did during the same period in 2010 when the debate over the Dodd-Frank Act was at its most intense—$26.3 million. McGrane, *supra* note 102; *see also* Ben Protess, *Wall Street Lobbyist Aims To 'Reform the Reform*,' N.Y. TIMES DEALBOOK BLOG (July 14, 2011, 11:06 AM), http://dealbook.nytimes.com/2011/07/14/wall-street-lobbyists-try-to-reform-the-reform (reporting that the banking industry spent an estimated $52 million on lobbying during the first quarter of 2011).

196. *See* McGarity, *supra* note 25.

197. *See supra* Part I.I.

sums on public-relations campaigns and advertising to influence the rulemaking outcome.[198] One goal of these campaigns is to sway agency decisionmakers, who, like everyone else, watch television, read the newspaper, and travel on the local trains and buses. Another goal of these campaigns is to generate letters, emails, and phone calls from ordinary citizens to the agency or Congress demanding that the proposed rule be overturned or modified. Affected companies and interest groups can enhance the public response by working with grassroots organizations such as FreedomWorks, a prominent force behind the Tea Party movement,[199] to educate the public about the proposed regulation and its possible economic consequences.[200]

D. Coordination with Think Tanks, Media Pundits, and Bloggers

Any agency launching a rulemaking initiative of any consequence can expect to be the object of sometimes thoughtful, but more often scornful, criticism from think tanks, media pundits, and bloggers. The American Enterprise Institute, the CEI, the American Legislative Exchange Council, and the Mercatus Institute, for example, are frequent critics of federal rulemaking activities.[201]

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198. *See supra* note 122 and accompanying text; *see also* Erica Hepp, Note, *Barking up the Wrong Channel: An Analysis of Communication Law Problems Through the Lens of Media Concentration Rules*, 85 B.U. L. REV. 553, 569–71 (2005) (describing the advertising and public-relations campaigns in response to Federal Communications Commission (FCC) consideration of media-ownership rules in the mid-2000s).

199. *See generally* Press Release, FreedomWorks for Am., FreedomWorks Launches Super PAC, "FreedomWorks for America" at Florida CPAC (Sept. 23, 2011), *available at* http://www.freedomworksforamerica.org/press-releases/freedomworks-launches-super-pac-freedomworks-for-america-at-florida-cpac (announcing the formation of the FreedomWorks for America super PAC and associating it with the Tea Party movement).

200. While the EPA was in the process of promulgating two high-stakes rules regulating emissions from power plants, FreedomWorks criticized the EPA for going "behind Congress's back" to create "a series of unnecessary 'train wreck' environmental regulations" that would impose "hundreds of billions of dollars of costs on the economy." James Hammerton, *The Train Wreck at the Obama EPA*, FREEDOMWORKS (July 21 2011), http://www.freedomworks.org/blog/jhammerton/the-train-wreck-at-the-obama-epa.

201. *See, e.g.*, DONALD T. CRITCHLOW, THE CONSERVATIVE ASCENDANCY 118–22 (2007) (discussing the American Enterprise Institute); ROSS GELBSPAN, THE HEAT IS ON 64–70 (1997) ("[T]he Republican majority on the [House Subcommittee on Energy and the Environment] introduced their big guns in the case against ozone science—Fred Singer and several witnesses from ideologically conservative think tanks, including the Competitive Enterprise Institute . . . ."); DAVID MICHAELS, DOUBT IS THEIR PRODUCT 181 (2008) (discussing the CEI and its efforts to challenge various EPA publications); JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE RIGHT NATION 49 (2004) (noting that the American Enterprise Institute is "[t]he oldest conservative think tank in Washington"); DAVID M. RICCI, THE TRANSFORMATION OF AMERICAN POLITICS 160–61 (1993) (describing the development of the

Because they can satisfy journalists' demands for sound bites and titillating anecdotes within the timeframes demanded by media deadlines, think tanks are an attractive source of information for reporters.[202] Talk-show host Rush Limbaugh is also a frequent critic of federal rulemaking.[203] When agency rulemaking initiatives attract media attention, the regulatees can usually depend on Limbaugh to come to their aid with ad hominem attacks on the agencies and agency leaders.[204] Limbaugh, for example, castigated the Durbin Amendment as the Fed was attempting to promulgate the implementing regulations.[205] High-profile talk-show hosts have been joined by dozens of bloggers and podcasters who oppose virtually any form of government intervention into the marketplace.[206]

American Enterprise Institute, including its 1971 emergence as a "Brookings-like think tank in opposition to the Carter administration"); Robert L. Borosage, *The Mighty Wurlitzer*, AM. PROSPECT, May 2002, at 13, 13 (discussing several think tanks, including the Heritage Foundation); Bob Davis, *In Washington, Tiny Think Tank Wields Big Stick on Regulation*, WALL ST. J., July 16, 2004, at A1 (discussing the Mercatus Institute's criticism of government regulation).

202. *See* DAVID BROCK, THE REPUBLICAN NOISE MACHINE 52 (2004) ("[R]eporters quoted freely from conservative research . . . ."); WILLIAM GREIDER, WHO WILL TELL THE PEOPLE 300 (1991) ("The sponsored research at Washington think tanks has become a principal source for the ideas that reporters judge to be newsworthy and for the packaged opinions from 'experts' that reporters dutifully quote on every current subject."); JACOB S. HACKER & PAUL PIERSON, OFF CENTER 179 (2005) ("Over the past two decades, conservatives have succeeded in building a substantial media empire."); WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW 153 (2004) ("Most of the newspaper journalists . . . interviewed affirmed that they had received abundant reading material from tort reform groups and often had contacted such advocates for information or commentary on articles."); TRUDY LIEBERMAN, SLANTING THE STORY: THE FORCES THAT SHAPE THE NEWS 9 (2000) ("Conservative groups have learned to boil down their messages to fit the new model of soundbite journalism, leaving the details for the weighty studies and policy analyses disseminated in more elite venues."); Gregg Easterbrook, *Ideas Move Nations*, ATLANTIC MONTHLY, Jan. 1986, at 66, 69 (describing conservative think tanks' efforts to woo reporters and the reporters' eventual dependence on them).

203. *See supra* text accompanying note 128.

204. *See, e.g.*, *Quotes: The Big Voice on the Right*, THE RUSH LIMBAUGH SHOW (Sept. 22, 2011), http://www.rushlimbaugh.com/daily/2011/09/22/quotes_the_big_voice_on_the_right (characterizing the federal government as a "marauding band" issuing a "never-ending list of regulations" and calling Elizabeth Warren "a parasite who hates her host" and "[who] is willing to destroy the host while she sucks the life out of it").

205. *See The Rush Limbaugh Show*, *supra* note 128 (blaming the Durbin Amendment for the increase in interchange fees).

206. *See, e.g.*, COFFEE & MARKETS, http://coffeeandmarkets.com (last visited Apr. 11, 2012) (archiving such podcasts).

E. Intense Congressional Oversight

Congressional authorization and oversight committees have always paid careful attention to the major rulemaking activities of the agencies for which they are responsible.[207] Congressional monitoring, through oversight hearings and less formal communications between congressional and agency staff, allows influential members of Congress to convey their preferences to agencies regarding particular rulemaking initiatives.[208] As the political parties have become more ideologically unified, however, congressional committees controlled by one party have increasingly begun to push the boundaries of civility in overseeing rulemaking that is conducted by an administration controlled by the other party.[209] Congressional oversight committees acknowledge few restrictions on their power to force agencies to take actions that may or may not be consistent with the statutes enacted by prior Congresses, even though, under the rule of law, such restrictions exist to cabin agency discretion, a phenomenon that Professors J.R. DeShazo and Jody Freeman refer to as "disjointed majoritarianism."[210]

Much of what oversight committees do can fairly be characterized as "message politics," which Professor Neal Devins defines as the use of "the legislative process to make symbolic

207. *See* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 130–35, 138–39 (2006) (finding that Congress often "attempt[s] to influence the execution of the law by communicating directly with agency personnel"); McCubbins & Schwartz, *supra* note 22, at 176 (remarking that the "widespread perception that Congress has neglected its oversight responsibility is a widespread mistake"); Weingast & Moran, *supra* note 22, at 792 ("Congressional institutions . . . afford considerable influence [over agencies].").

208. *Cf.* Seidenfeld, *supra* note 180, at 1077–78 (noting that "Congress asserts its influence on agencies" through "active monitoring by congressional committees both on a formal and informal level" and that, "[g]iven the threat of cuts in appropriations or statutory limitations on agency authority, agencies have a strong incentive to conform their actions to be at least acceptable to the committee chair and a majority of committee members").

209. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2311 (2001) ("[T]he possibility of significant legislative accomplishment . . . has grown dim in an era of divided government with high polarization . . . ."); *cf.* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2344 (2006) (asserting that electoral accountability is least effective "when party control of government is divided"); Levinson & Pildes, *supra*, at 2363 (citing Kagan) ("Dean Kagan convincingly shows that, in an era of cohesive and polarized parties, divided government tends to displace policymaking from the legislative to the administrative process."); McCubbins & Schwartz, *supra* note 22, at 165 (remarking that "neglect of oversight has become a stylized fact: widely and dutifully reported, it is often bemoaned, sometimes explained, but almost never seriously questioned").

210. J.R. DeShazo & Jody Freeman, *The Congressional Competition To Control Delegated Power*, 81 TEX. L. REV. 1443, 1500 (2003).

statements to voters and other constituents."[211] During blood-sport confrontations over agency rulemaking, the intended recipients of these messages are the companies, trade associations, and interest groups that battle over rulemaking initiatives in the agencies.[212] But the committees have the power to do much more than send messages. Agency leaders know that congressional committees have the power to amend agency statutes, cut agency budgets, and generally make life miserable for executive-branch officials who must testify in legislative and oversight hearings.[213] One prominent industry lobbyist observed in 2010 that "[i]f a regulator knows they're going to get yelled at on Capitol Hill, that influences their decisions."[214]

The 2010 elections ushered in a new focus on agency oversight. Just as banking agencies were promulgating the initial Dodd-Frank regulations, the midterm elections returned the House of Representatives to Republican control[215] and left the Democratic Party with a razor-thin majority in the Senate.[216] The fact that the Tea Party movement, which emphasized limited government and deregulation, played an important role in selecting the Republican candidates during primary season[217]—and arguably influenced the outcome of many general elections—placed regulatory oversight even

211. Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737, 758 (2011) (internal quotation marks omitted); *see also* Beermann, *supra* note 207, at 125 (noting that oversight hearings "provide an opportunity for members of Congress to express their views, often consisting of displeasure with the agency's performance, to agency personnel and the voting public").

212. *Cf.* Seidenfeld, *supra* note 180, at 1078 ("[C]ommittee members [may] wait[] until the interest groups that are affected by proposed agency actions come to them to complain about such actions. Such complaints act like a fire alarm, which, when rung, stimulates the committee to begin hearings and investigations. One suspects that agency staff also maintains contacts with representatives from affected interest groups and tries to keep such groups sufficiently placated to dissuade them from sounding the alarm to the oversight committee." (footnote omitted)).

213. *See* Beermann, *supra* note 207, at 121 ("Informal [congressional] oversight and supervision often take place with a threat in the background that if an agency does not align its actions with the desires of legislators, it will find itself subject to legislation including changes to the substance of its program, changes to its structure, reductions or reallocations of its budget or targeted appropriations riders.").

214. Schwartz, *supra* note 109 (quoting an industry lobbyist) (internal quotation marks omitted).

215. *See House Big Board*, N.Y. TIMES, http://elections.nytimes.com/2010/results/house/big-board (last visited Apr. 11, 2012) (listing the House election results).

216. *See Senate Big Board*, N.Y. TIMES, http://elections.nytimes.com/2010/results/senate/big-board (last visited Apr. 11, 2012) (listing the Senate election results).

217. Kate Zernike, *Shaping Tea Party Passion into Campaign Force*, N.Y. TIMES, Aug. 26, 2010, at A1 ("FreedomWorks has made Tea Party conservatives the surprise community organizing force of the 2010 midterm elections . . . .").

higher on the House leadership's list of priorities. The new chairman of the House Committee on Oversight and Government Reform, Darrell Issa, promised to subject the regulators in the Obama administration to "seven hearings a week, times 40 weeks."[218] The new chairman of the House Committee on Financial Services, Spencer Bachus, explained that he believed that the purpose of the federal banking agencies was "to serve the banks."[219] The new chairman of the Subcommittee on Financial Institutions and Consumer Credit, Shelley Moore Capito, announced that one of her top priorities would be to "reshape" several provisions of the Dodd-Frank Act.[220]

As discussed in Part I, the House committees that oversee financial-services regulation actively interjected themselves into the interchange-fee rulemaking while the comment periods for the rules were open and the agency was actively considering incoming comments.[221] The hearings gave the interests favored by the committee leadership a second opportunity to influence the agency's deliberations. They also gave committee members—no doubt armed with questions prepared by lobbyists—an opportunity to cross-examine agency decisionmakers on issues of law, policy, and fact that the agency was in the process of resolving in the context of the rulemaking. These interactions conveyed a none-too-subtle warning that the agency would likely suffer adverse consequences if the final rules were not friendlier to banking interests than the initial proposals.

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218. Editorial, *The Corporate House*, N.Y. TIMES, Jan. 6, 2011, at A26 (quoting Rep. Issa) (internal quotation marks omitted). The committee held a number of hearings with provocative titles. *E.g.*, *How a Broken Process Leads to Flawed Regulations: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. (2011); *Regulatory Impediments to Job Creation: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. (2011).

219. Jay Fitzgerald, *Barney Frank Lays into Successor*, BOS. HERALD, Dec. 16, 2010, at 29 (quoting Rep. Bachus) (internal quotation mark omitted).

220. Stacy Kaper, *New Subcommittee Chairs Target CFPB, GSE Reform*, AM. BANKER, Dec. 10, 2010, at 1 (quoting Rep. Capito).

221. *See* Robert Schmidt, *Wall Street Banking on GOP To Push Its Legislative Goals*, PITT. POST-GAZETTE, Sept. 19, 2010, at A10 (stating that Wall Street will try to persuade members of Congress to influence the new financial regulations); Jean Eaglesham, Deborah Solomon & Victoria McGrane, *Reprieve for Wall Street Is Expected To Be Limited*, WALL ST. J. (Nov. 4, 2010), http://online.wsj.com/article/SB10001424052748704506404575592762664134550.html (describing the committees' plans for involvement in the rulemaking); *see also supra* notes 129–42 and accompanying text.

F. Lengthy Confirmation Battles

At the outset of any new administration, interest groups attempt to persuade the White House to appoint to agency leadership positions people who are likely to favor the groups' interests in future high-stakes rulemakings. Industry groups will oppose, and beneficiary groups will support, nominees who are likely to be aggressive regulators.[222] Both will promise a difficult confirmation fight if the president nominates a disfavored candidate.[223] And if the president nevertheless chooses such a candidate, the groups will press members of the relevant Senate committee to ask hard questions during the confirmation hearings and to vote against confirmation.[224] Industry champions in the Senate will often extract substantive concessions from the administration by holding up nominations until some deregulatory condition has been met.[225] To the extent that they can deliver the votes, senators representing the interests of beneficiary groups will do the same.

In a highly partisan era, one in which the "Advice and Consent of the Senate"[226] really means the consent of a supermajority of sixty senators,[227] it is not especially difficult to hold up a presidential

222. For example, consumer groups strongly supported Elizabeth Warren, a strong consumer advocate, to be the first head of the CFPB, but banking interests strongly opposed her candidacy. *See* Binyamin Appelbaum, *Warren's Candidacy Raises a Partisan Debate*, N.Y. TIMES, July 26, 2010, at B1 (noting that "[b]ankers oppose[d] [Warren's] nomination" because she had "invented the idea" of the CFPB).

223. *Cf.* Beermann, *supra* note 207, at 110–11 ("[T]he Senate has a say in personnel and can refuse to approve appointments if it expects that the nominee will not execute the law in the manner favored by the Senate. This power is often used to 'convince' the President to nominate an individual favored by an influential Senator . . . ." (footnote omitted)).

224. *See id.* at 123 n.286 (citing Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 50–55 (1995)) (listing confirmation hearings as one of the "ways in which congressional committees insinuate themselves into the execution of the law").

225. For example, Senator David Vitter blocked a vote on President Obama's candidate to head the Department of Interior's Fish and Wildlife Service until the Department had granted fifteen permits for deepwater drilling in the waters where the Deepwater Horizon disaster had spewed oil into the Gulf of Mexico for three months in 2009. Binyamin Appelbaum, *Nominees at Standstill as G.O.P. Flexes Its Muscle*, N.Y. TIMES, June 20, 2011, at A17. At that point, Senator John Barrasso placed a hold on the nomination until the Department could conduct a review of the protected status of wolves. *Id.*

226. U.S. CONST. art. II, § 2, cl. 2.

227. *Cf.* JULIET EILPERIN, FIGHT CLUB POLITICS 36–40 (2006) (describing the growing partisan divide and animosity in Washington). Historically, it took a two-thirds majority (sixty-seven votes) to break a filibuster by invoking cloture, but a post-Watergate rules change in 1975 changed the requisite number of votes to sixty. David Nather, *A Liberal Dose of Disappointment*, 67 CQ WEEKLY 1947, 1951 (2009). As filibusters became easier to break,

nominee indefinitely. For example, not long after President Obama had nominated Professor Peter Diamond to a position on the Federal Reserve Board of Governors, Senator Richard Shelby placed a hold on the nomination.[228] The fact that Professor Diamond received the Nobel Prize in Economics while his nomination was on hold[229] did not improve his chances; the hold had nothing to do with his qualifications. Senator Shelby was adamantly opposed to the nomination, rather, because he had problems with Professor Diamond's "economic philosophy."[230] Because Senator Shelby's ideological objection had the tacit support of at least thirty-nine other Republican senators, the nomination languished for many months until Professor Diamond ultimately withdrew from the process in disgust.[231]

Long, drawn-out confirmation battles can deprive agencies of much-needed talent in leadership positions in the early stages of an administration when aggressive action is most feasible.[232] Extended confirmation processes are therefore more strategically advantageous to regulated entities that prefer agencies to engage in as little regulation as possible. Beneficiary groups may also oppose probusiness nominees, but they risk hamstringing the agency during the confirmation process. At the extreme, industry groups can use the confirmation process to stop an agency in its tracks. In one instance, Senator Shelby and forty-four other Republican senators, with the strong backing of the banking industry, refused to confirm *any* nominee to head the new CFPB until the president had agreed to replace the director of the agency with a five-member board composed of both Republicans and Democrats.[233] Because the CFPB

Senators were less reluctant to employ the strategy. *Id.* During the 111th Congress, the Democratic leadership apparently assumed that Republican senators would vote in lock-step against any cloture motion. Because the leaders were unwilling to hold up the legislative process by forcing a real filibuster, sixty votes were needed to pass any significant legislation. *See infra* notes 283–88 and accompanying text.

228. Appelbaum, *supra* note 225.

229. *Id.*

230. *Id.* (quoting Sen. Shelby).

231. Zachary A. Goldfarb & Neil Irwin, *Leadership Gaps May Hit Financial Policymaking*, WASH. POST, June 7, 2011, at A15.

232. For example, Senate Republican who were critical of the new CFPB established by the Dodd-Frank Act effectively prevented the agency from promulgating any rules under its new authority by promising to filibuster any vote to confirm Richard Cordray to be the head of the agency. Ben Weyl, *GOP's Procedural Blockade*, 69 CQ WEEKLY 1846 (2011).

233. *See* Kate Davidson & Cheyenne Hopkins, *GOP Move Likely To Force CFPB Recess Appt*, AM. BANKER, May 6, 2011, at 1 (noting Senator Shelby's involvement in the blockage);

could not promulgate any regulations until it had a full-time director, it was effectively prevented from implementing the consumer-protection provisions of the Dodd-Frank Act.[234] In essence, a single senator was nearly able to repeal the new statute, and he successfully put it on hold for a year and a half.[235]

G. Invocation of the Congressional Review Act

The Congressional Review Act,[236] enacted in 1996, provides a vehicle for Congress to overturn recently promulgated rules.[237] Under that statute, a "major" rule cannot take effect until sixty days after the agency has published it in the *Federal Register*.[238] If Congress takes no action during the review period, the rule goes into effect as written.[239] If, however, Congress passes a joint resolution disapproving of the rule during the review period and the president signs the joint resolution, or if the resolution is passed over a presidential veto, the rule may not take effect, and the agency may not issue a rule in

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Ylan Q. Mui, *McConnell To Block 'Any Nominee' for Top CFPB Job*, WASH. POST, June 10, 2011, at A12 (stating that the Republicans wanted the single director to be replaced by a five-member commission); Deborah Solomon & Maya Jackson Randall, *Bank Challenger Picked To Run Consumer Agency*, WALL ST. J. (July 18, 2011), http://online.wsj.com/article/SB1000142405 2702303661904576451921505704258.html (describing the banking industry's support for the Republican blockage).

234. JAMES HAMILTON & JOHN M. PACHKOWSKI, WOLTERS KLUWER LAW & BUS., THE CONSUMER FINANCIAL PROTECTION BUREAU: GOVERNANCE, STRUCTURE AND FUNDING ISSUES 3 (2011); Sewell Chan, *Limits Emerge for a New Bureau Without a Director*, N.Y. TIMES, Oct. 1, 2010, at B4; *see also* Davidson & Hopkins, *supra* note 233 ("What they appear to be doing is holding the nomination hostage in return for concessions that would cripple the agency . . . ." (quoting Travis Plunkett, Legislative Director, Consumer Federation of America)); Brady Dennis, *Chamber Seeking 'Pause' Before New Bureau Issues Rules*, WASH. POST, Mar. 2, 2011, at A12 (noting that the U.S. Chamber of Commerce urged the Treasury to prohibit the CFPB from promulgating regulations until it had a permanent director).

235. President Obama finally made a recess appointment of Richard Cordray to head the CFPB. David Nakamura & Felicia Somnez, *Obama Defies Senate, Puts Cordray in Consumer Post*, WASH. POST, Jan. 5, 2012, at A1.

236. Congressional Review Act, Pub. L. No. 104-121, tit. II, subtit. E, 110 Stat. 868 (1996) (codified at 5 U.S.C. §§ 801–808 (2006)).

237. *See* Beermann, *supra* note 207, at 83–84 (describing the procedures available to the Congress under the Congressional Review Act); Seidenfeld, *supra* note 180, at 1083–84 (noting that "the Congressional Review Act . . . provides for fast-track review of agency rules" and summarizing the statute's procedures).

238. Congressional Review Act sec. 251, § 801(a)(3)(A), 110 Stat. at 869 (codified at 5 U.S.C. § 801(a)(3)(A)).

239. *Id.* sec. 251, § 801(a)(5), 110 Stat. at 869 (codified at 5 U.S.C. § 801(a)(5)).

substantially the same form for ten years unless Congress enacts legislation specifically authorizing such action.[240]

The Congressional Review Act is by nature confined to high-stakes rulemaking, and it has been invoked very rarely. Between April 1996 and October 2007, federal agencies promulgated more than 46,000 rules, only thirty-two of which were the subject of a joint resolution under the statute.[241] More recently, Senator Rand Paul attempted to use the Congressional Review Act to overturn an EPA rule regulating power-plant emissions.[242] A similar attempt by Senator Lisa Murkowski to overturn the EPA's "endangerment" finding, which had triggered the agency's efforts to regulate greenhouse-gas emissions under the Clean Air Act,[243] also failed after a close vote.[244] The statute has been successfully invoked on exactly one occasion—the joint resolution overturning the Occupational Safety and Health Act's[245] ergonomics regulations, which were designed to protect workers from repetitive-strain disorders.[246] Invocation of the Congressional Review Act is an available strategy for regulated entities during blood-sport rulemakings, but it has not proved especially effective.

240. *Id.* sec. 251, § 802(c), 110 Stat. at 871 (codified at 5 U.S.C. § 802(c)).

241. CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 34354, CONGRESSIONAL INFLUENCES ON RULEMAKING THROUGH APPROPRIATIONS PROVISIONS 1 (2008).

242. Dean Scott, *Senate May Target EPA Cross-State Rule with Goal of Forcing Obama To Accept Delay*, 42 ENV'T REP. 2231 (2011).

243. Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006 & Supp. III 2009).

244. *See* Juliet Eilperin, *Senators Try To Thwart EPA Emission Curbs*, WASH. POST, Jan. 22, 2010, at A2 (describing Senator Murkowski's proposal); *GOP Rider Poses Key Test for Senate Democrats on EPA's GHG Powers*, INSIDE EPA, Sept. 25, 2009, *available at* LexisNexis (analyzing the potential political implications of the proposal); Carl Hulse, *Senate Rejects Republican Effort To Thwart Carbon Limits*, N.Y. TIMES, June 11, 2010, at A22 (stating that Senator Murkowski's proposal was defeated in the Senate in a 53–47 vote); Siobhan Hughes & Corey Boles, *Senate Rejects Ban on Greenhouse-Gas Rules*, WALL ST. J. (June 10, 2010, 7:29 PM EST), http://online.wsj.com/article/SB10001424052748704312104575298832211062408.html (same); *see also* Margaret Kriz Hobson, *Questioning Cap-and-Trade*, NAT'L J., Oct. 17, 2009, at 64, 64 (noting that Senator Murkowski questioned whether cap-and-trade is the most effective means of addressing the climate problem).

245. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2006 & Supp. IV 2010).

246. Joint Resolution of Mar. 20, 2001, Pub. L. No. 107-5, 115 Stat. 7; COPELAND, *supra* note 241, at 1; David S. Rubenstein, *"Relative Checks": Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2210 & n.206 (2010).

H. Rifle-Shot Amendments

A far more successful strategy is a "rifle-shot" amendment to a particular provision of a regulatory agency's statute that modifies or terminates an ongoing rulemaking initiative.[247] Rifle-shot amendments can be offered as stand-alone bills or attached as riders to must-pass legislation, such as appropriations bills or continuing resolutions to keep the government running.[248] If the goal is to postpone a rulemaking initiative, a three-line rider attached to an appropriations bill that provides that no monies may be expended on the rulemaking initiative can easily accomplish that goal.[249] When included in subsequent appropriations bills, appropriations riders effectively terminate a rulemaking effort.[250]

Rifle-shot amendments have become one of the most frequently invoked strategies of blood-sport rulemaking. As discussed in Part I, a bill introduced by Senator Tester would have delayed implementation of the interchange-fee regulation for two years if it had passed.[251] Three separate stand-alone bills would have amended the Clean Air Act to extend the statutory deadline for compliance with the EPA's power-plant rules.[252] Several other stand-alone bills were introduced in the first session of the 112th Congress to hamstring the CFPB and stall the EPA's efforts to reduce greenhouse-gas emissions.[253] When the stand-alone bills failed to move in the Senate, supporters attached

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247. *See* McGarity, *supra* note 25 (describing "deregulatory riders" created to disrupt a particular ongoing regulatory program implemented pursuant to authorizing legislation).

248. *See id.* (describing how riders attached to must-pass legislation are used by House leadership to avoid the veto process and skirt the relevant authorizing committee's legislative processes).

249. *See* COPELAND, *supra* note 241, at 1–2 ("Even though the [Congressional Review Act] has not proven to be an effective way for Congress to reverse agency rulemaking, Congress does influence regulatory activity in a variety of other ways [such as] provisions included in the text of agencies' appropriations bills."); Beermann, *supra* note 207, at 85 (observing that "[a]ppropriations riders typically single out a specific regulatory activity and prohibit the expenditure of funds for carrying out that regulatory activity or plan"); McGarity, *supra* note 25 (noting the effectiveness of limitation riders "associated exclusively with appropriation bills, and . . . prohibit[ing] the relevant agency from expending any of the appropriated funds to engage in a proscribed activity").

250. COPELAND, *supra* note 241, at 3.

251. Hopkins, *supra* note 145; *see also supra* notes 144–45 and accompanying text.

252. Jessica Coomes, *Johanns Bill Would Delay Cross-State Rule, Allow States To Submit Implementation Plans*, 42 ENV'T REP. 2519 (2011); Ryan Tracy, *New EPA Rules Split Power Industry*, WALL ST. J. (Nov. 10, 2011), http://online.wsj.com/article/SB10001424052970203537304577028393431399820.html.

253. McGarity, *supra* note 25 (describing stand-alone bills introduced by members of Congress to weaken the CFPB).

the same or very similar provisions to appropriations bills that Congress had to pass to keep the government running.[254]

III. SOME IMPLICATIONS OF THE BLOOD-SPORT MODEL FOR ADMINISTRATIVE LAW

The interchange-fee experience demonstrates that blood-sport rulemakings are exceedingly contentious.[255] The disputes range across a number of institutional settings as the regulated industries and beneficiary groups attempt to move the disputes to any forum that is likely to work for them.[256] The lesson of blood-sport rulemaking is not

254. *See id.* (describing the two-tiered approach to a deregulatory agenda pursued by House leadership, first attempting to pass stand-alone deregulatory bills, and then incorporating these bills into riders as necessary to overcome pushback from the Senate and the president); *cf.* H.R. REP. NO. 112-151, at 7 (2011) ("In light of ongoing concerns expressed by a bipartisan cross section of Members, the Committee has included as General Provisions a number of EPA funding prohibitions including a one-year prohibition on the use of funds for the implementation of greenhouse gas regulations . . . ."); H.R. REP. NO. 112-136, at 8 (2011) ("The Committee includes language limiting the transfer from the Federal Reserve to the BCFP to $200,000,000 for fiscal year 2012. In addition, language is included limiting the BCFP's authority to obligate funding to $200,000,000 for fiscal year 2012."). Senator Tester attempted to attach a slightly modified version of his bill as a rider to the proposed Economic Development and Revitalization Act of 2011, S. 782, 112th Cong. (2011). *See* James Hamilton, *Tester-Corker Amendment to Dodd-Frank Interchange Fee Provisions Would Delay Implementation Pending Fed Study*, JIM HAMILTON'S WORLD OF SEC. REGULATION (June 8, 2011, 09:54 AM) http://jimhamiltonblog.blogspot.com/2011/06/tester-corker-amendment-in-dodd-frank.html (describing the Tester-Corker Amendment). The rider would have required the Fed to repropose the regulation after completion of a six-month study. *See id*.

255. The participants in other major rulemaking efforts since the early 2000s have adopted blood-sport strategies. The FCC's media-consolidation rulemaking generated fierce public-relations campaigns, congressional-oversight hearings, and attempts to overturn the rules with rifle-shot legislation and riders. *See* Hepp, *supra* note 198, at 563–75 (describing the process).

256. For example, in an effort to block or amend the EPA's Utility MACT rule, utility industry groups and supporters from labor unions testified at the EPA's hearings. *Air Toxics Rule Backed by Most Speakers at Atlanta Hearing, Faulted by Utility Officials,* 42 ENV'T. REP. 1206 (2011); Sandy Bauers, *Unusual Allies Speak Out at EPA Hearing on Proposed Mercury Limit Rule*, PHILA. INQUIRER, May 25, 2011, at B1. They also met with OIRA on four occasions while the regulations were under review before that agency. *OMB Meets with Environmental Groups, Industry To Discuss Interstate Transport Rule*, 42 ENV'T REP. 1374 (2011). At the same time, they launched a major lobbying campaign directed at the EPA and the committees in Congress that had the power to influence or reverse the EPA's decision. Manuel Quinones, *Coal Industry Deploys Donations, Lobbying as Its Issues Gain Prominence*, N.Y. TIMES (Oct. 13, 2011), http://www.nytimes.com/gwire/2011/10/13/13greenwire-coal-industry-deploys-donations-lobbying-as-it-45582.html. During the first nine months of 2011, coal-mining interests donated more than $2.8 million to federal candidates, and the electric-utility industry contributed more than $5.9 million. *Id.* The top recipients were Speaker of the House John Boehner and Fred Upton, the chairman of the House Energy and Commerce Committee. *Id.* A coalition of coal and utility companies spent around $35 million on television advertising criticizing the Utility MACT rule and the cross-state rule. Anna Palmer & Dave Levinthal,

lost on the high-level agency officials who might suffer budget reductions or, worse, be required to defend the agency action—and their own integrity—before a hostile subcommittee chairperson in a congressional hearing. The easy way to avoid such an unwelcome experience is to kill the regulation, delay it for further study and thereby insulate the agency from attacks from beneficiary groups, or soften its provisions to make them palatable to the industry if the industry appears to have the upper hand.

I could, of course, be wrong to suggest that the battles over the interchange and power-plant rules are different in kind from conventional notice-and-comment rulemaking. Federal agencies have overseen contentious rulemakings and have taken abuse from congresspersons and pundits in the past.[257] Except in relatively rare cases such as that of the Federal Trade Commission's notorious "kid vid" rulemaking,[258] however, attacks on agencies have tended to be

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Energy Wars, POLITICO (Aug. 9, 2011, 2:29 PM EDT), http://www.politico.com/politicoinfluence/0811/politicoinfluence74.html; Daniel J. Weiss, *Poor Little Big Coal Says EPA Smog Standards Too Expensive*, GRIST (Nov. 17, 2011), http://www.grist.org/coal/2011-11-17-poor-little-big-coal-says-epa-smog-standards-too-expensive.

257. A good example is the EPA's highly contentious 1978 rulemaking to amend the New Source Performance Standards in light of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. §§ 7401–7671q (2006 & Supp. III 2009)). The Subcommittee on Fossil and Nuclear Energy Research, Development and Demonstration of the House Committee on Science and Technology conducted oversight hearings on the rulemaking before the agency had even published the notice of proposed rulemaking. *Oversight: Effect of the Clean Air Act Amendment on New Energy Technologies and Resources: Hearings Before the Subcomm. on Fossil & Nuclear Energy Research, Dev. & Demonstration of the H. Comm. on Sci. & Tech.*, 95th Cong. (1978). The electric-utility and coal industries lobbied the EPA and Congress on the matter throughout the pendency of the rulemaking. William C. Banks, *EPA Bends to Industry Pressures on Coal NSPS—And Breaks*, 9 ECOLOGY L.Q. 67, 85–88 (1980); Dick Kirschten, *The New Clean Air Regs—More at Stake Than Breathing*, 10 NAT'L J. 1392 (1978); Charles Mohr, *Billions at Stake as U.S. Weighs Clean-Air Rules*, N.Y. TIMES, Aug. 2, 1978, at A1; *see also* Bruce A. Ackerman & William T. Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466, 1551 (1980) (describing how a "dirty coal-dirty air alliance" formed to resist the EPA's suggested amendment to the New Source Performance Standards). EPA Administrator Douglas Costle adopted the industry-preferred sliding-scale approach to the standard after he and high-level White House officials met with Senate Majority Leader Robert Byrd to hear his complaints about the economic impact of a stringent standard on Eastern coal-producing states. Banks, *supra*, at 86–87.

258. Children's Advertising, 43 Fed. Reg. 17,967 (proposed Apr. 27, 1978); *see also* Ass'n of Nat'l Advertisers, Inc. v. FTC, 460 F. Supp. 996, 999 (D.D.C. 1978) (enjoining, at the request of concerned trade associations and companies, the chairman of the Federal Trade Commission (FTC) from participating in the rulemaking), *rev'd*, 627 F.2d 1151 (D.C. Cir. 1979); MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 71 (1982) ("Now it was the [Federal Trade] [C]ommission—not amoral business—that allegedly threatened to undermine the moral fibre and authority of the family by seeking to substitute government-imposed censorship for parental discipline."); SUSAN J. TOLCHIN &

generic in nature and have not focused upon particular agency rulemaking initiatives. There may also have been instances in which the regulated industry has lobbied Congress to take away a previously delegated power before the agency has promulgated a single rule. But in my experience, agencies implementing protective statutes enacted in the wake of crises have had a reasonable opportunity to make their respective statutes work before their efforts come under attack for being job-killing overregulation.[259]

The national debate over the role of the government in protecting citizens from the adverse effects of private-sector activities is far more contentious today than it was during the 1960s and 1970s, an era in which the legitimacy of government regulation was taken as a given and interest-group representation became the dominant model of administrative law.[260] The future will likely bring many more blood-sport battles, as the banking agencies and the CFPB

MARTIN TOLCHIN, DISMANTLING AMERICA: THE RUSH TO DEREGULATE 7 (1983) ("Critics linked regulation with America's declining productivity and industrial growth, and claimed that regulation created an uncertainty that discouraged investors.").

259. For example, despite an energy crisis in 1973–1974 that inspired several attempts to amend the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–7642 (2006 & Supp. III 2009)), Congress allowed the EPA and the states to promulgate and implement the original National Ambient Air Quality Standards before amending the statute in 1977 to address problems that had arisen during the implementation process. *See* JOHN QUARLES, CLEANING UP AMERICA: AN INSIDER'S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY 205 (1976) ("By the middle of 1973 a consensus was growing that certain amendments to the Clean Air Act would be required."); *id.* at 170 (describing the 1974 industry advertising campaign challenging pollution-control requirements); ROBERT L. SANSOM, THE NEW AMERICAN DREAM MACHINE: TOWARD A SIMPLER LIFESTYLE IN AN ENVIRONMENTAL AGE 45–46 (1976) (stating that President Nixon and "energy 'czar'" John Love announced in 1973 that "environmental standards should be relaxed"); JOHN C. WHITAKER, STRIKING A BALANCE: ENVIRONMENT AND NATURAL RESOURCES IN THE NIXON-FORD YEARS 106 (1976) (noting that the Nixon administration drafted amendments to the Clean Air Act in 1974). *See generally* Comment, *The Clean Air Act Amendments of 1977: Expedient Revisions, Noteworthy New Provisions*, 7 ENVTL. L. REP. 10,182 (1977) (describing the 1977 amendments).

260. *Cf.* Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 451 (2010) ("One response to the transmission-belt model's collapse was the emergence of an 'interest-group representation' model rooted in public choice theory. Rather than focus on Congress's statutory instructions as a source of democratic legitimacy, the interest-group representation model characterized the public's direct participation in notice-and-comment rulemaking proceedings under the APA as a form of popular representation." (footnotes omitted)); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 487–88 (2008) ("Since [the middle of the twentieth century] . . . polarization has been increasing—and most dramatically so since the late 1970s. . . . [P]olitical polarization has figured prominently both in presidential efforts to gain control of independent agencies and in efforts by the opposition party in Congress to limit presidential control.").

promulgate regulations with a large economic impact on the powerful banking industry. Should the EPA, the Occupational Safety and Health Administration (OSHA), the Federal Drug Administration (FDA), the Consumer Product Safety Commission (CPSC), the National Highway Traffic Safety Administration, or any of the other federal regulatory agencies initiate high-stakes rulemakings in the near future, blood-sport strategies will probably be in evidence. If these strategies prove to be as successful as they apparently were in the context of the interchange-fee rulemaking,[261] then administrative-law scholars need to think about the role of the law, lawyers, and the courts in a world of no-holds-barred, blood-sport rulemaking. In this Part, I offer some preliminary thoughts on the implications of blood-sport rulemaking for several important aspects of modern administrative law, starting with its implications for the never-fully-resolved bedrock question of the legitimacy of administrative rulemaking.

A. Administrative Law and Legitimacy

Countless trees have been sacrificed for debates among administrative-law scholars over whether one or more of several competing models of administrative rulemaking best legitimizes the role that regulatory agencies play in the modern political economy. The question of legitimacy largely has to do with "accountability and democratic responsiveness."[262] But the question ultimately turns on the extent to which regulatees, regulatory beneficiaries, and ordinary citizens are willing to accept agency exercises of rulemaking power as legitimate intrusions of governmental authority into private economic arrangements.

At the outset of the New Deal, the dominant paradigm for informal rulemaking was the transmission-belt model. Under this model, the regulatory agency acted as a "transmission belt,"[263] dutifully applying the policy decisions made by Congress at the time it enacted the agency's statute to the relevant facts as divined by the agency during its factfinding proceedings.[264] Under this model, the

261. *See supra* Part I.

262. Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1348 (2011).

263. Criddle, *supra* note 260, at 450–51; Kagan, *supra* note 209, at 2253.

264. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1663–64 (1975) (describing the traditional model of administrative rulemaking,

exercise of administrative rulemaking power was legitimate because Congress, not the unelected administrators, was prescribing the policies.[265] This model was replaced by the expertise model that evolved during the 1940s and 1950s, largely in response to the development of the New Deal agencies.[266] Agency implementation of the Public Interest Era statutes inspired the interest-representation model, which styled regulatory statutes as legislative articulations of "compromises struck between competing interest groups" and portrayed administrative rulemaking as a continuation of the legislative process through which interest groups once again debated and compromised over the policy questions that arose in the context of particular rulemaking exercises.[267] A more recent model stresses presidential control as the source of legitimacy.[268] That none of these models has supplied a generally accepted theory of legitimacy should not come as a surprise.

All of these models take the legitimacy of regulatory intervention itself as a given, so long as the intervention is authorized by the agency's statute.[269] But this Article concerns the possible emergence of a new period, one in which the animating debate is not over the legitimacy of administrative rulemaking but over the legitimacy of any government intervention into private economic

wherein agencies must use "factfindings supported by substantial evidence and the reasoned application of legislative directives to the facts found").

265. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 470–71 (2003).

266. *Id.* at 471–72; Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1618–19 (1985); Kathyrn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 33–34 (2009).

267. Stewart, *supra* note 264, at 1712; *see also* Bressman, *supra* note 265, at 475–78 (discussing the emergence of the interest-group-representation model); Kagan, *supra* note 209, at 2253 (same).

268. Cynthia R. Farina, *The "Chief Executive" and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 180 (1997); Kagan, *supra* note 209, at 2250–51 ("[I]n comparison with other forms of control, the new presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism."); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1137–38 (2010). Another model regards administrative agencies as "agents and trustees of the people" such that they have fiduciary obligations to exercise broad grants of delegated power in the best interest of the beneficiaries of the relevant regulatory program. Criddle, *supra* note 260, at 466–67 & n.138 (quoting THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961)).

269. *Cf.* Stewart, *supra* note 267, at 1676–77 (noting that agencies' authorizing statutes often leave agencies with considerable discretion to direct economic and social policy).

arrangements.[270] The Tea Party's extreme hostility to federal regulation is only one manifestation of a populist/libertarian assault on government that has spanned much of the period between 1976 and 2012.[271] The battle over an otherwise-routine bill to raise the debt ceiling during the summer of 2011 demonstrated that a sufficient number of members of Congress with extreme anti-interventionist views were in place to have a demonstrable impact on public policy.[272] In the dysfunctional Senate, where any legislation essentially requires sixty votes to be enacted,[273] a single libertarian senator halted legislation to improve pipeline safety—offered in the wake of the massive San Bruno, California, explosion on September 10, 2010—that had the support of both the industry and consumer advocates solely because he was opposed to government regulation on philosophical grounds.[274] If I am correct, then no simple change within or among the various models is likely to render agency rulemaking more legitimate in the minds of those who are convinced that the very task of regulation is illegitimate.

When the legitimacy of government intervention is a seriously debated question in the broader political economy, every significant rulemaking exercise becomes a possible occasion for acrimonious debate over the need for government regulation. Those who contest the legitimacy of any intervention feel free to launch an all-out war against an agency whenever the agency engages in a significant rulemaking effort, without regard to the impact on the agency's ability to carry out its statutory mandate.[275] The industries affected by

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270. *See generally* William Greider, *Rolling Back the 20th Century*, NATION, May 12, 2003, at 11 (discussing what Greider perceives to be the George W. Bush era's "assault" on modern liberalism through deregulation and the protection of private wealth).

271. *See* MCGARITY, *supra* note 2 (manuscript ch. 7).

272. *See generally* Fred Barbash & Richard E. Cohen, *Summer of Strife*, 69 CQ WEEKLY 1736, 1736–39 (2011); Elizabeth Drew, *What Were They Thinking?*, N.Y. REV. BOOKS, Aug. 18, 2011, at 13.

273. *See* Kagan, *supra* note 209, at 2311–12 (discussing the increased use of the filibuster as evidence of the polarization of political parties in Congress).

274. Joan Lowy, *No Regs Are Good Regs: Single Senator Blocks Pipeline Safety Bill on Principle*, ASSOCIATED PRESS, Sept. 27, 2011, *available at* Factiva, Doc. No. APRS000020110927e79r001bx. After about a month, the senator grudgingly relented, and the Senate passed the Pipeline Transportation Safety Improvement Act of 2011, S. 275, 112th Cong. (2011). Jaxon Van Derbeken, *Tea Party Senator Lifts His Hold on Safety Bill*, S.F. CHRON., Oct. 18, 2001, at A1.

275. Senator Paul's objection to the Pipeline Transportation Safety Improvement Act, *see supra* note 274 and accompanying text, is a good example of this phenomenon. The attacks by many members of Congress on the EPA's 2009 finding that greenhouse gases endanger public

proposed regulations have in the past attracted support from various coalitions of companies, such as the U.S. Chamber of Commerce, that might be affected by similar regulations in the future.[276] But now, industries can draw into the fray a wide variety of other organizations, such as think tanks, business-oriented grassroots groups, talk-show hosts, and bloggers, that are persuaded that because government is always the problem, it can never be the solution.[277]

The experience with the interchange-fee rule suggests that agencies may have more reason to fear congressional oversight than in the past. First, during the 112th Congress, the House of Representatives intervened earlier in the implementation process than past Congresses by passing bills containing rifle-shot amendments to agency statutes regarding matters that had only reached the proposal stage or that were still percolating within the agency. For example, in early March 2011, Representative Fred Upton and Senator James Inhofe introduced identical bills to prohibit the EPA from promulgating any regulation or taking any other action to address climate change—or even from considering the emission of a greenhouse gas when undertaking such action.[278] Second, during two decades of fiercely divided government, the majority party in one or

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health and welfare provides another example. Among other things, Senator John Barrasso placed a hold on the nomination of Regina McCarthy to be the EPA's Assistant Administrator for Air and Radiation, claiming that the "economic consequences of hi-jacking the Clean Air Act [would] be devastating." Press Release, Sen. John Barrasso, EPA Nominee on Hold, Barrasso Fears Hijack (Apr. 30, 2009), *available at* http://barrasso.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=f8ef2677-e376-4d55-ddc6-d1c95b07e842 (quoting Sen. Barrasso). Senator James Inhofe excoriated the finding as "the beginning of a regulatory barrage that will destroy jobs, raise energy prices for consumers, and undermine America's global competitiveness," and he urged Congress to pass legislation immediately overturning the finding without any acknowledgment of the impact of such an action on the climate. Press Release, Sen. James Inhofe, Inhofe Says EPA Endangerment Finding Will Destroy Jobs, Harm Consumers (Apr. 23, 2009), *available at* http://inhofe.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=b4d0a2a5-802a-23ad-43a2-5cb9149b73a7&Region_id=4ac9611a-f866-2d29-9bcc-49bf092f17c0&Issue_id=4afeb468-d083-8a0b-ce78-0731b2c4df61 (quoting Sen. Inhofe) (internal quotation mark omitted).

276. The U.S. Chamber of Commerce, for example, has been "standing up for American Enterprise" in Washington, D.C., since 1912. *About the U.S. Chamber of Commerce*, U.S. CHAMBER OF COMMERCE, http://www.uschamber.com/about (last visited Apr. 11, 2012); *100th Anniversary*, U.S. CHAMBER OF COMMERCE, http://www.uschamber.com/about/100th-anniversary (last visited Apr. 11, 2012). Other coalitions include the Business Roundtable, the National Association of Manufacturers, and the National Federation of Independent Business. *See* MCGARITY, *supra* note 3.

277. *See supra* notes 201–06 and accompanying text.

278. Energy Tax Prevention Act of 2011, H.R. 910, 112th Cong. (2011); Energy Tax Prevention Act of 2011, S. 482, 112th Cong. (2011).

both houses of Congress has been more aggressive in attaching riders to appropriations and other must-pass legislation to change specific agency policies.[279] For example, the resolution to fund the government for the remainder of 2011 contained a number of riders prohibiting the EPA from expending any funds to pursue environmental initiatives, including the regulation of mountaintop-removal mining.[280] Third, the interrogation of high-level agency officials in congressional oversight hearings may be less civil than in the past.[281] For example, Republican members of the House Subcommittee on Energy and Power spent more than two hours berating EPA Administrator Jackson for finding that greenhouse-gas emissions endanger the public health and the environment; they asserted that the science underpinning her finding was a hoax and accused the Obama administration of killing jobs in a quixotic quest to address a nonproblem.[282] Finally, members of the Republican Party in both houses of Congress have grown far more likely to vote in lockstep than in the past, when many members characterized themselves as "moderate" Republicans.[283] In particular, Republican senators are not likely to defy a demand by the leadership to vote against cloture.[284] This lockstep voting pattern ensures that no legislation of any significance can pass Congress without the approval of the Republican leadership when the Republican Party holds more than forty seats in the Senate—a number that becomes even smaller when Independents or conservative Democrats are willing to support a filibuster.[285]

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279. McGarity, *supra* note 25.

280. 157 CONG. REC. H1304 (daily ed. Feb. 18, 2011).

281. I do not want to press this point too strongly because congressional committee hearings have also created spectacles in the past. For example, House committees were very hard on high-level EPA officials during the Gorsuch scandals of 1983. *See, e.g.*, *EPA: Investigation of Superfund and Agency Abuses (Part 2): Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 98th Cong. 130–48 (1983) (relaying how then-Representative Al Gore grilled EPA officials on the agency's failure to clean up contaminated sites).

282. *H.R. ___, The Energy Tax Prevention Act of 2011: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 112th Cong. 30–72 (2011); John M. Broder, *House Republicans Take E.P.A. Chief to Task*, N.Y. TIMES, Feb. 10, 2011, at A16; Margaret Kriz Hobson, *Political Tidal Wave Turns EPA Strategy*, 69 CQ WEEKLY 335 (2011).

283. Kagan, *supra* note 209, at 2311–12.

284. HACKER & PIERSON, *supra* note 3, at 210–11.

285. Only three of the thirty-eight Republican senators voted in favor of the Dodd-Frank Act in July 2010. *See* 156 CONG. REC. S5932–33 (daily ed. July 15, 2010) (recording the votes on the conference report of the Dodd-Frank Act); *H.R. 4173 (111th): Dodd-Frank Wall Street*

B. Implications for Agency Structure

Congress pays a great deal of attention to the structure of regulatory agencies when it enacts statutes empowering agencies to intervene in private economic arrangements.[286] Congress places many regulatory agencies in the executive branch, where agency leaders are appointed by the president with the advice and consent of the Senate but are subject to removal at will by the president.[287] Congress also creates independent agencies that are shielded from the political influence emanating from the White House and, to a lesser extent, from Congress.[288] Usually designed as multimember commissions made up of appointees from both major political parties, independent agencies are supposed to stand above the political fray.[289] Yet although independent agencies have never been entirely immune to politics,[290] it appears that they are even less so in the context of high-impact rulemaking, particularly when the participants employ blood-sport strategies.[291] The fact that the Fed, perhaps the most

Reform . . . (On the Conference Report), GOVTRACK.US, http://www.govtrack.us/congress/votes/111-2010/s208 (last visited Apr. 11, 2012) (breaking down the results by political party).

286. *See* Beermann, *supra* note 207, at 108 (recounting the debate between labor and business interests over how to structure agency enforcement of the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1592 (codified as amended at 29 U.S.C. §§ 651–678 (2006 & Supp. IV 2010))); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 431–32 (1989) (describing the "extensive debate" in Congress over how to structure the EPA's rulemaking process).

287. RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 4.4.1, at 99–100 (5th ed. 2009).

288. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 19 (2010) ("The aim in creating an independent agency is to immunize it, to some extent, from political pressure."); *see also* Devins & Lewis, *supra* note 260, at 459, 464–66 (discussing concerns about presidential control over agency policy). *But see* O'Connell, *supra* note 6, at 484–85 (noting political constraints on agency rulemaking).

289. *See* Devins & Lewis, *supra* note 260, at 462–63 (describing how the bipartisan, politically insulated nature of independent regulatory agencies is intended to facilitate expertise-driven approaches to policy problems).

290. *See* Beermann, *supra* note 207, at 109 ("Theoretically, these agencies are supposed to be insulated from politics, but the truth is that while the independent agencies may be insulated from the President, they are often much more responsive to direct (albeit informal) congressional supervision than agencies within the executive branch."); Keith S. Brown & Adam Candeub, *Partisans & Partisan Commissions*, 17 GEO. MASON L. REV. 789, 810 (2010) ("The scholarly literature underappreciates that independent agencies need *not* necessarily be independent. . . . Independence is a choice . . . ."); Calabresi, *supra* note 224, at 83–84 ("[T]here are no 'independent' government actors in Washington, D.C.").

291. *See* Devins & Lewis, *supra* note 260, at 461–62 (referencing federal agencies' politicized responses to Hurricane Katrina and the credit crisis of 2008).

independent of all of the regulatory agencies, became the locus of a blood-sport battle over interchange fees suggests that the structure of regulatory agencies may have little impact on the inclination of participants to engage in blood-sport battles.[292] If Congress wants to shield agency decisionmaking from the influence that blood-sport tactics are capable of generating, it will probably have to look beyond agency structure for solutions.

C. *Implications for the Quality of Agency Leadership*

The blood-sport model has powerful implications for the quality of agency leadership. In a contentious political environment, it is very difficult for a nominee to achieve Senate confirmation if he or she has taken a strong position in the past on issues that he or she is likely to face when in office.[293] In the not-too-distant past, the opposition party assumed that the president was entitled to choose his people to head regulatory agencies without much second guessing from opposition-party senators.[294] That is no longer the assumption. A single senator can place an indefinite hold on a nominee that will last until the nominee's proponents can put together the sixty votes necessary to overturn what has become an automatic filibuster threat.[295] Unless one party attains a dependable sixty-senator majority, affected interest groups, through their allies in Congress, can enjoy an effective veto over any nomination to an important regulatory agency.

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292. *Cf. id.* at 465–66 (describing congressional concerns about the Fed's independence).

293. Karen Sloan, *Law Professors Find a Hard Road to Federal Appointments*, NAT'L L.J., July 25, 2011, at 1.

294. *See* Beermann, *supra* note 207, at 136 (writing in 2006 that "[t]he Senate normally recognizes the President's prerogative to appoint high-level officials"). Professors Devins and Lewis chronicle the increase in partisan opposition to a president's appointees since the beginning of the Reagan administration. Devins & Lewis, *supra* note 260, at 461.

295. *See* Beermann, *supra* note 207, at 110–11 ("[U]nder Senate rules and practices, a committee can prevent a nomination from coming up for a vote, and less than a majority of the full Senate can filibuster, which also prevents the full Senate from taking a vote."); Devins & Lewis, *supra* note 260, at 462 (noting that "the opposition party in the Senate will make use of holds and other delaying strategies . . . to ensure the President appoints opposition-party commissioners [to multimember commissions] who are acceptable to opposition-party leaders"); David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 BRIT. J. POL. SCI. 377, 378 (2004) ("[Congress has] diluted presidential appointment powers by giving agency administrators fixed terms and writing into law specific qualifications for appointees.").

In addition, nominees opposed by powerful interest groups can be subjected to intensive questioning about every aspect of their lives and about their positions on important issues of the day, regardless of how irrelevant such matters may be to their qualifications to lead the agency.[296] Such nominees can also be harassed by committees other than the ones with jurisdiction over the nomination.[297] And nominees can count on being subjected to withering attacks from surrogates in think tanks, on talk radio, and in the blogosphere.[298] Ad hominem attacks on nominees do not cease after those nominees' confirmations. They can continue throughout the nominees' eventual tenures at the agencies. Former Federal Communications Commission (FCC) Commissioner Michael Powell, for example, was subjected to "[s]evere personal attacks" during the FCC's consideration of its media-ownership rules.[299] One commentator suggested that "[i]f Saddam Hussein had stayed in business, Powell might have made a great minister of information."[300] Given the abuse that nominees typically take both during confirmation hearings and after assuming office, it is a wonder that any highly credentialed candidate with a job would agree to become a nominee.

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296. *Cf., e.g.*, *Nomination of Harold Craig Becker: Hearing of the S. Comm. on Health, Educ., Labor, & Pensions*, 111th Cong. 1, 3 (2010) (opening statement of Tom Harkin, Chairman, S. Comm. on Health, Educ., Labor, & Pensions) (noting that Becker, "a nominee for the National Labor Relations Board," answered more than 280 written questions from committee members); *id.* at 4 (prepared statement of Michael B. Enzi, Member, S. Comm. on Health, Educ., Labor, & Pensions) (demanding to know whether Becker's "financial interests ha[d] changed" during the past seven months); *id.* at 16 (prepared statement of Orrin G. Hatch, Member, S. Comm. on Health, Educ., Labor, & Pensions) (questioning Becker about work that he had performed in the past for ACORN, a community-organizing group); *id.* at 17 (complaining that Becker's answers "to well over 200 written questions" that Hatch had submitted to Becker the previous year had been "entirely unsatisfactory").

297. *See How Will the CFPB Function Under Richard Cordray?: Hearing Before the Subcomm. on TARP, Financial Services, & Bailouts of the H. Comm. on Oversight & Gov't Reform*, 112th Cong. (2012), *available at* http://oversight.house.gov/hearing/how-will-the-cfpb-function-under-richard-cordray.

298. Personal attacks on agency heads are not a new phenomenon. FDA head David Kessler, a vigorous regulator who was appointed by President George H.W. Bush and then reappointed by President Clinton, was the target of fierce personal attacks by the drug industry and its allies in Congress. Then-House Speaker Newt Gingrich called Kessler "a thug and a bully." John Schwartz, *Conservative Foes of Government Regulation Focus on the FDA*, WASH. POST, Jan. 21, 1995, at A7 (internal quotation marks omitted).

299. Hepp, *supra* note 198, at 572–73.

300. *Id.* at 573 (quoting Jeff Chester, Executive Director, Center for Digital Democracy) (internal quotation marks omitted).

D. Implications for Agency Choice of Policymaking Vehicles

Most agencies can choose to make policy through notice-and-comment rulemaking; through case-by-case adjudication in permitting, licensing, or enforcement actions; or through nonbinding articulations of agency policy in policy statements, interpretational rules, guidance documents, and the like.[301] Over two decades, many agencies have migrated toward less formal policymaking tools in response to the congressional and presidential imposition of additional analytical requirements for informal rulemaking and more intense judicial review under the "hard-look" doctrine.[302] When faced with the daunting prospect of blood-sport battles, however, agencies may be even more inclined to adopt less constrained policymaking tools. To avoid a looming battle, most agencies have two alternatives: negotiated rulemaking and various nonbinding options.[303]

Negotiated rulemaking, a process that gained prominence in the early 1980s, initially offered a promising decisionmaking method for escaping rulemaking ossification.[304] Under this approach, which has a statutory basis,[305] the agency convenes a group of representatives from all of the affected interests and charges the committee with reaching a

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301. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386–90 (2004) (describing the "[m]enu" of agency choices).

302. Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO N.U. L. REV. 469, 478 (2008); Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 164–66 (2000); *see also* Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7, 11–12 (1991) (describing the increasing reliance on ad hoc adjudication, instead of publicly visible decisionmaking procedures, in administrative rulemaking to deflect pressure from hostile legislatures and constituencies). *See generally* McGarity, *supra* note 21 (identifying ossification, its causes, and tools to avoid it); Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995) (discussing jurisprudential shifts with the potential to deossify agency rulemaking).

303. Rakoff, *supra* note 302, at 166–67.

304. *See* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1261–62 (1997) ("Negotiated rulemaking was introduced more prominently in the early 1980s as a way of curing a 'malaise' that some thought characterized federal rulemaking practice at the time." (quoting Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 113 (1982))); Daniel P. Selmi, *The Promise and Limits of Negotiated Rulemaking: Evaluating the Negotiation of a Regional Air Quality Rule*, 35 ENVTL. L. 415, 417 (2005) ("For almost 25 years the possibility of utilizing negotiation as a means of breaking deadlocks over administrative rulemaking has attracted the attention of academic commentators.").

305. *See* Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561–570a (2006) (codifying "a framework for the conduct of negotiated rulemaking").

consensus on as many aspects of the rulemaking initiative as possible.[306] If the committee is successful, the agency publishes the consensus rule as a proposal and accepts public comments in what is hopefully a pro forma exercise.[307] Although it is unnecessary for every affected entity to agree with the consensus, negotiated rulemaking fails if a party is sufficiently troubled by the consensus result to challenge it in court or in another public arena.[308] Whatever benefits negotiated rulemaking may bestow on the agencies that use it to facilitate routine rulemakings, it is not likely to be of any use in the high-stakes rulemaking initiatives in which the stakeholders are tempted to engage in blood-sport strategies. In a divided and highly partisan atmosphere, an agency's desire to secure a truce among the warring factions in a high-stakes rulemaking is often wishful thinking.

Agencies usually have the option of avoiding notice-and-comment rulemaking altogether by issuing guidance documents, policy statements, and interpretative rules that are not legally binding but that nevertheless determine agency policy for purposes of issuing permits or filing enforcement actions.[309] These less formal actions "can have substantial practical impact when issued by those in power."[310] The advent of blood-sport strategies should give agencies an even stronger incentive to avoid notice-and-comment rulemaking and to make policy through these less formal decisionmaking vehicles. This strategy may ultimately fail, however, as stakeholders with the resources to do so may follow the agency into these less charted waters with additional blood-sport strategies, such as

306. *Id*. §§ 563–570a (establishing the rules for convening a rulemaking committee and the duties of such a committee).

307. *See* Coglianese, *supra* note 304, at 1257 ("[When] the committee reaches consensus, the agency typically adopts the consensus rule as its proposed rule and then proceeds according to the notice-and-comment procedures specified in the APA." (footnote omitted)).

308. *See* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 33–66 (1997) (describing the negotiated-rulemaking process and providing illustrations of the process in action); Harter, *supra* note 304, at 28–31 (identifying several advantages of negotiated rulemaking, including the ability of parties to shape substantive rules); Rakoff, *supra* note 302, at 166 ("The assumption . . . is that the negotiated rule will become the final rule and, moreover, that it will not be challenged in court because it has already been vetted by the interests involved.").

309. Administrative Procedure Act (APA) § 4(b)(3)(A), 5 U.S.C. § 553(b)(3)(A) (2006); *see also* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278 (2010) ("Nonlegislative rules . . . are not meant to have binding legal effect, and are exempted from notice and comment by the APA as either 'interpretative rules' or 'general statements of policy.'" (quoting APA § 4(b)(3)(A), 5 U.S.C. § 553(b)(3)(A))).

310. Rakoff, *supra* note 302, at 167.

persuading Congress to expand notice-and-comment and regulatory-analysis requirements to policy statements and guidance documents that have a significant impact on the economy.

E. Implications for Rulemaking Procedure

Administrative-law scholars understand that the rulemaking process is a good deal more complicated in the real world than the conventional model suggests. The advent of blood-sport rulemaking represents what may be the culmination of a long-running tendency in rulemaking away from the informal, but still confining, procedures of the conventional model toward an unconstrained, influence-oriented model that more closely resembles a political free-for-all. A single private meeting with the head of an agency or the head of OIRA may have a greater impact on the outcome of a rulemaking exercise than ten thousand pages of technical data and analysis. A single hearing in which members of Congress who are sympathetic to a regulated industry cross-examine the agency decisionmaker may be worth more than the most deftly crafted appellate brief. Public policymaking through rulemaking has become a full-contact sport in which the strategies highlighted in this Article and strategies that are still in the process of evolving are more likely to yield results than even the most thoughtful and thoroughly prepared public comments.

In the context of adjudication, the APA prohibits ex parte overtures to the decisionmaker.[311] Given that the content of such communications is not part of the public record and is not reflected in any written opinion, these communications are inconsistent with the due-process norm that the decision should be based on the evidence presented at trial.[312] In addition, ex parte contacts raise the unseemly possibility that the judge's decision may be based on irrelevant considerations or on "threats, bribes or flattery."[313] In the context of legislation, however, things are very different. Attempts to influence legislators are part of the everyday life of the highly paid lobbyists

311. *See* APA § 8(d), 5 U.S.C. § 557(d) (banning ex parte communications in formal adjudications); Edward Rubin, *It's Time To Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 119 (2003) ("The prohibition of ex parte contacts emanates from the basic character of adjudication as an adversary proceeding with a decision 'on the record' by an impartial decision maker.").

312. Rubin, *supra* note 311, at 119.

313. *Id.*

who inhabit K Street in Washington, D.C.[314] In high-stakes rulemaking, attempts to influence agency staff and high-level agency officials either directly or through the intervention of the White House or sympathetic congresspersons are common blood-sport strategies. In these situations, agency officials, OIRA staff, and even the White House chief of staff think nothing of meeting with lobbyists who represent stakeholders with sufficient resources to pay them.[315] Although the contents of those conversations are rarely made public, one suspects that they include threats, flattery, and even thinly veiled bribes in the form of campaign contributions or a loss of appropriations.

The law on the extent to which ex parte overtures are permissible remains "somewhat murky."[316] The Supreme Court has yet to decide a case on point, and the D.C. Circuit precedents are not altogether consistent.[317] In *Home Box Office, Inc. v. FCC*,[318] the D.C. Circuit held that an agency should place in the rulemaking record any written ex parte contacts and written summaries of any ex parte oral communications that have occurred during the comment period.[319] In *Sierra Club v. Costle*,[320] however, the same court held that an "ex parte blitz" of contacts from interested parties after the close of a comment period, including numerous meetings with lobbyists for interested parties and members of Congress, was not prohibited by the APA.[321] The court observed that "[w]here Congressmen keep their comments focused on the substance of the proposed rule . . . , administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources."[322] The court did, however, find that provisions in the Clean Air Act prohibited the EPA from relying on any material not included in the rulemaking record and required the EPA to place in the rulemaking

314. *See generally* JACK ABRAMOFF, CAPITOL PUNISHMENT: THE HARD TRUTH ABOUT WASHINGTON CORRUPTION FROM AMERICA'S MOST NOTORIOUS LOBBYIST (2011) (detailing Jack Abramoff's experience as a lobbyist); JOHN HARWOOD & GERALD F. SEIB, PENNSYLVANIA AVENUE: PROFILES IN BACKROOM POWER (2008) (exploring the modern political process through profiles of effective dealmakers).

315. *See supra* notes 185–93.

316. Beermann, *supra* note 207, at 130.

317. *Id.* at 131.

318. Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977) (per curiam).

319. *Id.* at 57.

320. Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

321. *Id.* at 396.

322. *Id.* at 409–10.

record any documents it had received and summaries of any oral communications that had been of central relevance during the rulemaking.[323] The consensus appears to be that, because the APA does not prohibit such contacts in informal rulemaking and does limit them in formal rulemaking and adjudication, they are probably not unlawful per se.[324]

Yet, as Professor Rubin notes, "There is something vaguely troubling . . . about the image of all those legally required written comments flowing in, to be time-stamped and filed by the back-room myrmidons, while interest group representatives whisper into the ears of the agency's top officials over steak and champagne dinners."[325] Members of the public-health and environmental groups who had spent more than a decade trying to persuade the EPA to lower the primary National Ambient Air Quality Standard for ozone were no doubt more than vaguely troubled to learn that President Obama had ordered the administrator of the EPA to withdraw the agency's final ozone rule after the president met with industry lobbyists who had focused his chief of staff's attention on the political implications of tightening the standard.[326] But for the oil companies whose economic interests were greatly advanced during that meeting, the overture only confirmed the value of blood-sport strategies in rulemaking.

F. Implications for Transparency in Policymaking

By almost any measure, the conventional model of informal rulemaking is quite transparent.[327] Under the APA as interpreted by

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323. *Id.* at 402.

324. *See* Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 932 (2009) (reading the case law as clarifying "that there is no *inherent* legal bar" against "interactions with external entities following the issuance" of the notice of proposed rulemaking); Rubin, *supra* note 311, at 119–20 ("[P]rovisions [that bar ex parte communications relevant to the merits of the proceeding and require other ex parte contacts to be placed on the public record] do not apply to informal rulemaking under [5 U.S.C.] § 553 . . . ."); Watts, *supra* note 266, at 48 ("The APA expressly regulates ex parte contacts in the context of formal adjudications and formal rulemakings required to be conducted on the record but not in the context of informal notice-and-comment rulemakings. This suggests that Congress did not intend to prohibit or limit ex parte communications, including those coming from political actors, in informal rulemakings." (footnote omitted)).

325. Rubin, *supra* note 311, at 120.

326. *See supra* text accompanying note 193.

327. *See* Coglianese et al., *supra* note 324, at 930 ("Compared to many other countries, the United States has long had a relatively open and transparent rulemaking process."); Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the*

the courts, agencies must identify the information that they have relied on and the policy judgments that determine the outcome of individual rulemakings in their notices of proposed and final rulemaking.[328] But OIRA review is not governed by the APA, and the transparency of that review process has waxed and waned over the years.[329] Negative reactions by beneficiary groups to attempts by regulated interests to influence rulemaking outcomes through sympathetic officials in OIRA during the 1980s resulted in somewhat more transparency with respect to communications between outsiders and OIRA—as well as between OIRA and the agencies—while rules are pending.[330] Often this information winds up in the administrative record, either because the agency places it there or because one of the participants submits it.[331]

The content of conversations between lobbyists and agency officials during the preproposal stage of informal rulemaking, however, need not be disclosed to the public; nor do communications among lobbyists, officials in OIRA, and the immediate inner circle at the White House have to be disclosed.[332] OIRA review remains far

Administrative State, 76 U. CHI. L. REV. 1157, 1161–62 (2009) ("Conceptually, we note that administrative agencies in the United States are some of the most extensively monitored government actors in the world. Almost all policy decisions an agency makes must be published in the Federal Register for all to see.").

328. *See* RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS §§ 7.2, 7.3.3, at 382–84, 390–92 (5th ed. 2009) (describing the Court's jurisprudence requiring agencies to provide substantial evidence from agency rulemaking procedures in order to enable judicial review of agency decisions).

329. *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1309–10 (2006) ("OIRA has a long and well-documented history of secrecy. Although sustained criticism in the 1980s led to reforms that made the review process more transparent, it remains remarkably difficult today for outsiders to get a strong grasp of what OIRA review entails." (footnote omitted)).

330. Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 580–82 (1989) (describing the pressure to reform OIRA).

331. *See id.* at 582–86 (describing OIRA's increased transparency following 1986 reforms); Kagan, *supra* note 209, at 2287 ("[A]fter publication of the regulatory action (or a decision not to go forward with it), OIRA was required to disclose all written communications between itself and the agency."); John Shattuck & Muriel Morisey Spence, *The Dangers of Information Control*, TECH. REV., Apr. 1988, at 62, 72 ("[Congressional efforts to cut OIRA's funding] prompted OIRA director Wendy Gramm to set up a policy of disclosing OMB exchanges with other agencies . . . .").

332. *See* Wagner, *supra* note 5, at 1368 ("The agency must log its ex parte contacts in the public record only after publishing the proposed rule and generally not before."). In 1986, OMB reached an agreement with members of the Senate Committee on Governmental Affairs in which it agreed to send to agencies the written materials it had received from outside parties and to advise the agency of all of its outside communications. Bruff, *supra* note 330, at 582–83. I am aware of no judicial holding that these disclosures were required; and, more importantly, the

from transparent because the rules of engagement with agencies are often ignored in practice.[333] A 2011 study concluded that OIRA had routinely violated the governing executive order's[334] requirement that OIRA disclose the content of its communications with agencies.[335]

Still another round of conversations between industry and interest-group representatives and government officials may take place after the rule has been challenged in court,[336] a virtual certainty in high-stakes rulemaking. At that time, the parties will negotiate about the content of the regulations as part of an overall effort to settle the litigation amicably.[337] These negotiations are not bound by any rules or procedures, and the content of the discussions is not generally available to the public.[338]

Similarly, I am not aware of any disclosure requirements regarding the content of conversations between lobbyists for affected entities and members of Congress or their staffs, even when the lobbyists are feeding questions to members of committees or drafting rifle-shot legislation to overturn or delay ongoing rulemaking. Indeed, the riders themselves are often far from transparent, and members may vote favorably on legislation containing riders without even knowing that the riders are in the bill.[339] And I am unaware of any requirement that the provenance of attack advertisements and other sophisticated public-relations exercises be disclosed to the public. Think tanks functioning as 501(c)(3) charities need not disclose the identities of the individuals who have contributed to their coffers or

agreement did not oblige the agency to disclose the information it received from OMB to the public. *See id.* at 583 (noting that OMB agreed to "make[] available in its public reading room written materials and lists of meetings and communications involving persons outside the federal government").

333. *See* Bagley & Revesz, *supra* note 329, at 1309–10 (describing OIRA's stubborn lack of transparency); Mendelson, *supra* note 262, at 1354 (noting the difficulty of determining the influence of executive review on specific rules).

334. Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 745 (2006), *and* 5 U.S.C. § 601 app. at 108 (Supp. IV 2010).

335. STEINZOR ET AL., *supra* note 188, at 7.

336. Wagner, *supra* note 5, at 1369.

337. *See id.* ("Litigation thus opens the doors to a second round of negotiations that, even more than the pre-NPRM period, can involve secret deals over details, interpretations, and related features of a rule with only a narrow slice of the affected interests.").

338. *Cf. id.* at 1369–70 (explaining that the privileged status of this round of negotiations contributes to an even greater degree of secrecy).

339. Beermann, *supra* note 207, at 88–89.

the content of their interactions with their sponsors.[340] And bloggers who may receive substantial support from industries that have been aided by those bloggers' attacks on regulatory agencies do not have to reveal such support in their blogs and podcasts.[341] In short, the aspects of informal rulemaking that fall within the conventional model are modestly transparent, whereas the blood-sport strategies that often characterize high-stakes rulemaking are generally shielded from public disclosure.

G. Implications for the Quality of Agency Decisionmaking

One of the primary functions of regulatory agencies is to provide the expertise needed to resolve complex questions that arise in the course of implementing regulatory programs.[342] An agency acquires technical expertise by hiring scientists, engineers, economists, and other professionals with the training and experience in the kinds of issues that the agency must typically resolve.[343] Blood-sport strategies, by contrast, are designed to win policy battles, not to achieve technically sound policy outcomes. Blood-sport contests are fought over easily comprehensible concepts that can be reduced to sound bites. For example, when the Luminant Corporation announced that it would be closing two power plants and laying off five workers because of the EPA's cross-state rule, the debates focused on the EPA's willingness to adjust the emissions cap for the state of Texas, not on the engineering logistics of complying with standards that

340. Note, *The Political Activity of Think Tanks: The Case for Mandatory Contributor Disclosure*, 115 HARV. L. REV. 1502, 1515 (2002) ("Think tanks offer a way to affect the political process while avoiding disclosure; indeed, such avoidance is often a primary motivation for using section 501(c)(3) organizations rather than political committees.").

341. The FTC published guidelines governing endorsements of products, companies, services, or industries by bloggers. Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. §§ 255.0–.5 (2011). The guidelines, however, do not apply to endorsements or criticisms of regulations or legislation. *See id.* § 255.0 ex. 8.

342. *See* Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power To Preempt State Regulation*, 46 U. PITT. L. REV. 607, 655 (1985) ("[I]n any area of regulation, the federal government is likely to have some comparative advantage in access to expertise vis a vis smaller states."); Rubenstein, *supra* note 246, at 2184 ("[A]gencies generally have more expertise with regulatory issues than do Congress, the President, or the courts.").

343. *See* THOMAS O. MCGARITY, THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES 180 (2008) ("Federal regulatory agencies typically employ their own experts to gather information and prepare analyses of proposed agency actions. When specialized expertise is required, they can hire independent consultants. They can also call on more formal sources of expertise by empaneling scientific advisory committees . . . .").

similar power plants were meeting with relative ease.[344] In addition to breeding public distrust in agency decisionmaking, this tendency of blood-sport strategies to allow political salience to trump expertise is a recipe for bad decisions that may have adverse long-term consequences.[345]

H. Implications for the Rulemaking Record and Judicial Review

Judicial challenges to agency rules are routine in high-stakes rulemaking, but the advent of blood-sport strategies may alter the focus of judicial review of agency action.[346] In the future, beneficiaries of regulatory programs may attempt to persuade courts to set aside regulations on the ground that the decisionmaker had been unduly influenced by political pressure generated by the regulated industries and channeled through sympathetic members of the relevant oversight and appropriations committees.

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344. Nancy J. Moore, *Luminant To Close Texas Facilities, Sues EPA over Cross-State Air Rule*, 42 ENV'T REP. 2057 (2011) (relaying Luminant's and Texas Governor Rick Perry's complaints that the regulation would lead to lost jobs); Elizabeth Souder, *EFH Says It Will Keep 500 Jobs if EPA Backs Off Pollution Rule*, DALL. MORNING NEWS, Sept. 14, 2011, at D1; Souder & Loftis, *supra* note 192 (reporting a dispute between Luminant and the EPA over Luminant's ability to comply with regulations); Elizabeth Souder, *Utility Blames EPA for Job Cuts*, DALL. MORNING NEWS, Sept. 13, 2011, at A1 (same); Jim Marston, *Playing Politics with Power*, ENVTL. DEF. FUND (Sept. 15, 2011), http://blogs.edf.org/texascleanairmatters/2011/9/15/playing-politics-with-power (quoting Robert Flexon, CEO of Dynergy, as seeking enforcement of the cross-state rule to protect his company's "investment-backed expectations").

345. *See* Levinson & Pildes, *supra* note 209, at 2363 ("We should expect that the same party competition under divided government that gridlocks the legislative process and motivates presidential administration will create an adversarial 'oversight arms race' between the President and Congress over the bureaucracy. The administrative equivalent of legislative impasse is a politicized, strategic bureaucracy, subject to fragmented and conflicting accountability, sacrificing neutral competence and efficiency . . . ." (footnotes omitted) (quoting Cynthia R. Farina, *Undoing the New Deal Through Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 235 (1998))).

346. The APA empowers a court to set aside an agency rule that reflects an impermissible interpretation of the agency's statute, that was arrived at through impermissible procedures, or that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act § 10(2)(A), 5 U.S.C. § 706(2)(A) (2006). The Fed's interchange-fee rule, the EPA's greenhouse-gas rules, and the EPA's cross-state rule have all been challenged in the federal courts. *See* Robin Bravender, *16 'Endangerment' Lawsuits Filed Against EPA Before Deadline*, N.Y. TIMES (Feb. 17, 2010), http://www.nytimes.com/gwire/2010/02/17/17greenwire-16-endangerment-lawsuits-filed-against-epa-bef-74640.html (listing the lawsuits filed in response to EPA's greenhouse-gas endangerment finding); Gabriel Nelson, *Lawsuits Pour in Before Deadline To Challenge EPA's Cross-State Air Pollution Rule*, N. Y. TIMES (Oct. 10, 2011), http://www.nytimes.com/gwire/2011/10/10/10greenwire-lawsuits-pour-in-before-deadline-to-challenge-67959.html (noting that over thirty lawsuits were filed in response to the cross-state rule); *see also supra* note 162 and accompanying text.

The Fifth Circuit, in *Pillsbury Co. v. FTC*,[347] held that a congressional committee's intense questioning of the chairman of an independent agency on a legal question central to the resolution of a pending adjudication could be grounds for setting aside the agency action.[348] Then, in the *Three Sisters Bridge* case,[349] Judge David Bazelon of the D.C. Circuit suggested that a threat by a powerful congressman to reduce an appropriation to the Department of Transportation for a subway construction project could invalidate the agency's quasi-adjudicatory decision to build a bridge from the Virginia suburbs to the District of Columbia.[350] Applying the nascent hard-look doctrine of judicial review, Judge Bazelon reasoned that the agency's statute specified the exclusive decisionmaking criteria that the agency could consider, and a threat of lost congressional appropriations for a subway did not fall within those criteria.[351] According to Judge Bazelon, allowing the agency's decision to turn on such congressional pressure would "effectively emasculate the statutory scheme," which was designed to preserve urban parkland.[352]

Several years later, the D.C. Circuit limited the scope of the *Three Sisters Bridge* dicta in *Sierra Club v. Costle*, a case involving the EPA's monumental struggle to promulgate a New Source Performance Standard for coal-fired steam electric plants.[353] In that case, which involved informal rulemaking, the court addressed an environmental group's allegation that Senator Robert Byrd had improperly influenced EPA Administrator Douglas Costle's

347. Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966).

348. *Id.* at 965.

349. D.C. Fed'n of Civic Ass'ns v. Volpe (*Three Sisters Bridge*), 459 F.2d 1231 (D.C. Cir. 1972).

350. *Id.* at 1246–47.

351. *Id.* at 1247–48.

352. *Id.* at 1248; *see also* Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from* Chevron *and* Mistretta, 57 U. CHI. L. REV. 481, 496 (1990) ("The court found that Secretary Volpe's decision was infected with impermissible bias as a result of pressure from the legislative branch."); Mark Seidenfeld, The Irrelevance of Politics for Arbitrary and Capricious Review 20–21 (Nov. 18, 2011) (unpublished manuscript), *available at* http://ssrn.com/abstract=1961753 ("[T]he District Council's response to the threat regarding the withholding of subway funds constituted a consideration of a factor that was not relevant to the approval of the bridge.").

353. Sierra Club v. Costle, 657 F.2d 298, 311–12 (D.C. Cir. 1981) ("On this appeal we consider challenges to the revised [standards] brought by environmental groups which contend that the standards are too lax and by electric utilities which contend that the standards are too rigorous. Together these petitioners present an array of statutory, substantive, and procedural grounds for overturning the challenged standards.").

decisionmaking process by "strongly hinting" to Costle and White House adviser Stuart Eizenstat that he would withdraw his much-needed support for the pending Strategic Arms Limitation Treaty[354] and the windfall-profits tax if the EPA's standard were to constrict national markets for West Virginia coal.[355] Relying on the *Three Sisters Bridge* case, the court stated that an informal rulemaking would be overturned if two conditions were met: "First, the content of the pressure upon the [agency] is designed to force [it] to decide upon factors not made relevant by Congress in the applicable statute. . . . Second, the [agency's] determination must be affected by those extraneous considerations."[356] In the case before it, the court held that there was no "persuasive evidence" that either criterion had been satisfied.[357] The relevant question for blood-sport rulemaking is whether the *Three Sisters Bridge* case retains any vitality or is merely a quaint judicial relic that should be placed on a shelf next to Judge Bazelon's opinion in *Natural Resources Defense Council, Inc. v. U.S. Nuclear Regulatory Commission*.[358]

But the pressure emanating from congressional committees is not always covert, such that "persuasive evidence" may be difficult to gather. Sometimes it is exposed to full view, such as in the case of Senator Estes Keefauver's grilling of FTC Chairman John Howrey in *Pillsbury Co. v. FTC*.[359] The pressure may come from a member of Congress bent on securing a particular regulatory outcome for a constituent, but it is more likely to come from a member who has voted against the law that the agency is tasked with implementing. Is capitulation to a browbeating member of Congress—who strongly

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354. Treaty on the Limitation of Strategic Offensive Arms and Protocol Thereto, U.S.-U.S.S.R., June 18, 1979, S. Exec. Doc. Y, 96-1 (1979).

355. *Costle*, 657 F.2d at 409 n.539 (emphasis omitted) (quoting Margot Hornblower, *EPA Will Relax Pollution Rules for Coal Power*, WASH. POST, May 5, 1979, at A1 (emphasis added)).

356. *Id.* at 409.

357. *Id.*

358. Natural Res. Def. Council, Inc., v. U.S. Nuclear Regulatory Comm'n, 547 F.2d 633 (D.C. Cir. 1976), *rev'd sub nom.* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978); *see also id.* at 646 (observing that to preserve the meaningful dialogue envisioned by the APA's rulemaking section, agencies must provide a "reasoned response," including "particulars in the record"). Professor Richard Pierce argues for the latter view. *See* Pierce, *supra* note 352, at 496–98 (calling the *Three Sisters Bridge* decision "hard to explain" and "a singularly arrogant decision").

359. Pillsbury Co. v. FTC, 354 F.2d 952, 956 (5th Cir. 1966) ("The questions were so probing that Mr. Howrey, the chairman of the Commission, announced to chairman Kefauver of the subcommittee that he would have to disqualify himself from further participation in the Pillsbury case.").

believes that the agency should not be doing what the statute instructs the agency to do—a sufficient departure from reasoned decisionmaking to warrant overturning an insufficiently stringent agency rule? This question goes to the first of the two *Sierra Club* inquiries—whether the content of the pressure was designed to use statutorily irrelevant factors to affect the agency's decision.[360] Is a member's conviction that Congress erred in enacting the statute under which the agency is acting a relevant factor? Is a direct or indirect threat to the agency's appropriation a statutorily irrelevant factor? If *Three Sisters Bridge* has any vitality left, these are questions that easily could come up during judicial review of agency decisions allegedly influenced by improper congressional pressure.[361]

There exists a lively debate among administrative-law scholars over the extent to which reviewing courts should allow agencies to rely on political considerations as part of their reasoned analysis in support of rulemaking. Nearly all scholars acknowledge that political considerations are relevant to, and sometimes dominate, regulatory decisionmaking in high-stakes rulemakings. According to Professor Nina Mendelson, agencies almost never relate the political considerations that have influenced their decisions in informal rulemaking, even though such considerations often play as strong a role in determining the outcome as the factors identified in the agency's statute.[362] Professor Kathryn Watts suggests that a primary reason for this phenomenon is that agencies know that courts would be highly unreceptive to such explanations.[363] Consequently, agencies either "fail[] to disclose or affirmatively hid[e] political factors that enter[ed] into the mix."[364]

Professor Watts argues that courts should expand what they count as "valid" considerations to include "certain political influences from the President, other executive officials, and members of Congress, so long as the political influences are openly and

360. *See supra* text accompanying note 356.

361. The conspicuous invocation of the *Three Sisters Bridge* case in *Aera Energy LLC v. Salazar*, 642 F.3d 212 (D.C. Cir. 2011); *id.* at 220, suggests that the case has retained its relevancy.

362. *See* Mendelson, *supra* note 268, at 1146–59 ("Despite [presidential] directives and the executive order disclosure requirements . . . public information about the content of the executive supervision of an agency decision itself . . . is surprisingly rare.").

363. Watts, *supra* note 266, at 5–6.

364. *Id.* at 6.

transparently disclosed in the agency's rulemaking record."[365] She reasons that if courts accept that agencies may properly be influenced by political considerations in rulemaking, then courts should be prepared to deal with an agency's truthful acknowledgment of that reliance and should allow the agency to cite such considerations in its rulemaking rationales.[366] Among other things, this revision in permissible considerations would reduce the pressure that agencies feel to stretch scientific and technical rationales to explain decisions reached on political grounds and would increase political accountability.[367]

Not all administrative-law scholars—and, one suspects, appellate judges—are prepared to accept Professor Watts's bold suggestion.[368] One serious problem with increased transparency and candor about relying on externally generated political considerations is that such considerations will rarely be among the criteria specified in an agency's statute or susceptible of derivation from less-than-precise statutory language.[369] I am not aware of any regulatory statute that lists "politics" or "political considerations" among the factors that agencies may consider in promulgating particular rules, and it is unlikely that Congress would ever list "the President's political preferences" as a criterion. There is, however, authority for the proposition that agencies may consider factors in rulemaking that are not explicitly identified in the statute at issue if those factors are consistent with the underlying policies of the statute.[370]

365. *Id.* at 8 (internal quotation marks omitted).

366. *Id.* at 32–33.

367. *Id.* at 40–42.

368. *See* Seidenfeld, *supra* note 352, at 2–3 (rejecting Professor Watts's suggestion). Professor Mark Seidenfeld worries that allowing agencies to rely upon political considerations runs the risk of encouraging them to "hide value judgments behind simple incantations that their actions are justified by political influence." *Id.* at 3, 22–24.

369. In its seminal opinion in *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), the Supreme Court concluded that a reviewing court may set aside an agency action as arbitrary and capricious when "the agency ha[d] relied on factors which Congress ha[d] not intended it to consider," *id.* at 43; *see also* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1829 (2009) (Breyer, J., dissenting) (arguing that applicable law "does not permit [agencies] to make policy choices for purely political reasons nor to rest them primarily upon unexplained policy preferences").

370. *See* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.4, at 453–55 (4th ed. 2002) (noting that "[t]he D.C. Circuit had adopted the interpretation" that an agency is prohibited from "considering a factor only if Congress prohibited an agency from considering that factor"); Watts, *supra* note 266, at 47–48 (positing that "Congress's silence leaves agencies *free* to consider political factors and influences" when not explicitly prohibited).

Professor Watts sees a way around this objection by distinguishing between "valid" or "permissible" political considerations, upon which agencies may properly rely, and "invalid" or "impermissible" political considerations, which the agencies may not cite in support of their decisions and, apparently, must ignore.[371] In the first category are "those influences that seek to further policy considerations or public values," whereas the second category includes "those that seek to implement raw politics or partisan politics unconnected in any way to the statutory scheme being implemented."[372] In the real world of high-stakes rulemaking, however, it is highly unlikely that any agency would ever rely on "raw politics or partisanship" to explain a regulatory decision, and not just because such an explanation would invite judicial reversal. Pundits and partisans from the other party would pillory the agency and the president it served if the agency were to cite raw political advantage as a reason for government intervention into the marketplace. Instead, the agency would always frame the political contribution to its decisionmaking process in terms that were compatible with public values or the policies underlying the agency's statute.[373] From a transparency perspective, it is hard to see how this arrangement would be an improvement over the status quo.

An even more serious drawback to Professor Watts's suggestion is that it would leave the matter entirely within the agency's discretion. If political considerations do in fact play a prominent role in determining the outcome of the rulemaking process—a definite possibility when blood-sport strategies are employed—it is unclear why it should be up to the agency to decide when to cite those considerations and how to characterize them in its "reasoned decisionmaking."[374] If one or more of the rulemaking participants have evidence to suggest that political considerations, be they valid or invalid, played a role in the agency's decision, it is unclear why that evidence should not be included in the record for the parties to cite in

371. Watts, *supra* note 266, at 8–9 (internal quotation marks omitted).

372. *Id.* at 9; *see also id.* at 53–57 (discussing "what sorts of political influences should be viewed as legitimate").

373. *See* Seidenfeld, *supra* note 352, at 27 ("[T]he administration would couch its decision as being based on opposition to intrusive and needless government regulation, or some similar political platitude."); *id.* at 36 ("Any government action can be framed as serving some purpose other than merely satisfying the preferences of those in political power.").

374. Watts, *supra* note 266, *passim*.

challenges to the rule under the arbitrary-and-capricious test.[375] Nor is it clear why reviewing courts should not require the agency to explain how political considerations did or did not affect the rulemaking outcome if a participant introduces evidence of political pressure into the rulemaking record.[376]

I. Implications for the Stability of Regulatory Regimes

Stability is a virtue in any legal regime. It is, for example, the primary virtue underlying the hallowed common-law doctrine of stare decisis.[377] Individuals and organizations that are subject to particular rules or that benefit from particular rules need to know that those rules are not likely to change dramatically over short periods of time to be able to plan for the future. Companies that spend millions of dollars complying with regulations need some assurance that those regulations will not be changed in a way that gives an advantage to competitors that have not bothered to comply. If every decision made by an agency is instantly contestable and subject to renegotiation after every national election, the necessary stability will be lacking.

The blood-sport model of rulemaking is generally inconsistent with regulatory stability. Participants in blood-sport attacks on agency rules sometimes challenge not merely a specific aspect of a particular rulemaking, but also the legitimacy of the entire rulemaking exercise.[378] On some occasions, the interest groups engaged in blood-

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375. For example, Professor Watts cites as an example of an invalid consideration that should not be citable by an agency to support a decision "one congressman's 'hard-ball' threats made through the back door to an executive agency (e.g., a threat that if the agency proceeds with a certain rule, the congressman will withhold all financial support for other unrelated programs)." Watts, *supra* note 266, at 65. In my view, if evidence of such a threat is included in the record, either by the agency or by some other person, the agency should be required to explain the role that the threat played in a subsequent decision to withdraw the rule or soften its requirements. If the agency may rely on valid political overtures in its reasoned decisionmaking, it should also be obliged to include in its analysis an explanation as to how it excluded invalid overtures.

376. *Id.* at 66.

377. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 N.Y.U. L. REV. 723, 749 (1988) ("At its most general level, stare decisis operates to promote systemwide stability and continuity by ensuring the survival of governmental norms that have achieved unsurpassed importance in American society.").

378. Several opponents of the EPA's greenhouse-gas rules took the position that the entire rulemaking exercise had been illegitimate, despite a Supreme Court holding in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that the EPA did have the authority to regulate greenhouse gases under the Clean Air Act, *see, e.g.*, *H.R. ___, the Energy Tax Prevention Act of 2011*, *supra* note 280, at 76 (prepared statement of Greg Abbott, Att'y Gen., State of Texas) (advocating for legislation that would overrule the EPA's greenhouse-gas endangerment finding); GEORGE

sport attacks opposed the statute at the time it was enacted and have never reconciled themselves to the new statutory regime.[379] One suspects that these groups' ultimate strategy is to undermine political support for the statutory regime and overthrow it. To these combatants, regulatory stability is not a significant concern.

J. *Implications for Influence Asymmetries*

Administrative-law scholars have long observed that the broadly participatory informal-rulemaking model has evolved into an unwieldy amalgamation of submissions, analyses, and explanations that favors those entities with the resources to generate the most information and the most sophisticated arguments.[380] Professor Wagner cautions that "[p]luralistic processes integral to administrative governance threaten to break down and cease to function when an entire, critical sector of affected interests drops out due to the escalating costs of participation."[381] High-stakes rulemakings are precisely the sort of proceedings in which companies and trade associations have a strong incentive to control the outcome by flooding the agency with information and analysis.

The advent of e-rulemaking has greatly facilitated participation by individual members of the public and representatives of beneficiary groups in the conventional aspects of rulemaking.[382] But it has not necessarily increased their influence over rulemaking

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ALLEN & MARLO LEWIS, COMPETITIVE ENTER. INST., OVERTURNING EPA'S ENDANGERMENT FINDING IS A CONSTITUTIONAL IMPERATIVE 2–3 (2010), *available at* http://cei.org/sites/default/files/Marlo%20Lewis%20-%20Overturning%20EPA's%20Endangerment%20Finding%20-%20FINAL,%20May%2019,%202010,%20PDF.pdf (arguing that the EPA's tailoring rule constituted a "blatant breach of the separation of powers").

379. The banking industry opposed the Durbin Amendment to the Dodd-Frank Act and the interchange-fee rule that implemented that amendment. *See supra* notes 66, 84–86, 92–119 and accompanying text. Similarly, large Wall Street banks opposed the Volcker Amendment to the Dodd-Frank Act and later the regulations implementing that amendment. David D. Kirkpatrick, *Irked, Wall St. Hedges Its Bet on Democrats*, N.Y. TIMES, Feb. 8, 2010, at A1 (noting the banking industry opposition to the Volcker Rule prior to its enactment); Aaron Lucchetti & Liz Rappaport, *Officials, Bankers Face Off on Reach of Volcker Rule*, WALL ST. J., Nov. 8, 2010, at C1 ("Dozens of career regulators at the Federal Reserve, the Securities and Exchange Commission and the Treasury Department are facing off against bankers, lawyers and other officials at financial firms that want to soften the impact of the rule named after former Fed Chairman Paul Volcker . . . .").

380. *See, e.g.*, Coglianese et al., *supra* note 324, at 932 ("Agency officials too often hear mainly from politically popular or well-organized interests, which may make up only a subset of the overall interests that will be affected by many regulatory decisions.").

381. Wagner, *supra* note 5, at 1332.

382. Lubbers, *supra* note 302, at 479.

outcomes. Professor Mendelson notes that comments from individual members of the public tend "to relate to . . . questions of value or policy" rather than to the economic and technical underpinnings of the rulemaking exercise.[383] Because agencies are putatively more interested in sophisticated technical input—which is far more relevant to judicial review than expressions of opinion—they tend to discount comments from members of the public.[384] Consequently, those who have sufficient resources and access to prepare sophisticated economic and technical analyses retain a considerable advantage in conventional rulemaking.[385] This advantage persists in the context of high-stakes rulemaking despite the fact that policy considerations, rather than technical judgments, often dominate.[386] When regulatees deluge the agency with thousands of pages of technical comments, the flood can distract the agency from the less technical comments submitted by other groups.[387]

The influence asymmetry persists when the forum shifts to OIRA. A 2011 analysis of meetings between OIRA officials and members of the public from 2001 to 2011 found that 65 percent of the rulemaking participants who had met with OIRA officials represented regulated industries, whereas only about 13 percent of the meetings had been with representatives of public-interest groups.[388] OIRA met with representatives of industry alone 73 percent of the time, and it met with representatives of public-interest groups alone only 7 percent of the time.[389] OIRA changed 76 percent of the rules submitted for review during the Obama administration and 64 percent during the George W. Bush administration.[390] Rules that were the subject of meetings with outsiders were changed 29 percent more often than other rules.[391] Thus, the survey suggests unsurprisingly that information asymmetry benefits industry.

383. Mendelson, *supra* note 262, at 1346.

384. *Id.* at 1346, 1359.

385. *See id.* at 1357–58 (noting that "business groups dominate rulemaking participation [because] . . . participation is not cost free" and because "regulated entities possess greater control of certain types of information . . . that may be especially valuable to agencies").

386. *See id.* at 1349–52 ("[A]gencies must decide values and policy questions left unresolved by their authorizing statutes.").

387. *Id.* at 1358.

388. STEINZOR ET AL., *supra* note 188, at 21.

389. *Id.*

390. *Id.* at 9.

391. *Id.*

There are good reasons to believe that the disparity is even worse when the forum shifts to Congress or the court of public opinion.[392] Rifle-shot legislation and appropriations riders are the tools of special-interest lobbyists with access to key congressional players; they are not the tools of the ordinary citizens who are the intended beneficiaries of most regulatory programs.[393] Public-interest groups can be effective lobbyists for these beneficiaries, but these groups lack sufficient resources to flood the agencies and halls of Congress with well-connected staffers and former legislators to get responses from people in power.[394]

Beneficiary groups can also sponsor the occasional advertisement in the Washington, D.C., area or on television and radio networks in key congressional districts, but they cannot devote the tens of millions of dollars that business groups such as the U.S. Chamber of Commerce, the Business Roundtable, and the American Petroleum Institute can spend on a single public-relations initiative.[395] Likewise, a few progressive think tanks, such as the Center for American Progress, the Center for Progressive Reform, and the Economic Policy Institute, can produce white papers and blogs on high-stakes rulemakings.[396] But even they cannot match the output of

392. Mendelson, *supra* note 262, at 1370 ("[C]ompared with well-organized groups, individuals who submit comments may have less ability to invoke forms of political discipline (whether it is congressional or presidential oversight) and fewer resources with which to challenge an agency action in court.").

393. *Cf.* Beermann, *supra* note 207, at 88 ("[One] criticism of the use of riders is that they often fly below the political radar, placed in the bill by a few connected members of Congress.").

394. As described in Part I.F, the Independent Community Bankers of America alone spent around $1.2 million lobbying banking regulators and Congress during the first quarter of 2011. *See supra* text accompanying note 101. The Public Interest Research Group, a lobbyist for consumer interests in the interchange-fee proceedings, expended a total of $48,336 on all its issues for the entire year. U.S. PUB. INTEREST RESEARCH GRP., LOBBYING REPORT 1 (2011), *available at* http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=41D32B79-96D7-4927-836C-2C0B49C28A2D.

395. For example, the Global Climate Coalition—which was composed of most of the major oil companies, the American Forest and Paper Association, the American Petroleum Institute, the major automobile manufacturers, and the U.S. Chamber of Commerce and managed by a major Washington, D.C., public-relations firm—spent more than $63 million between 1994 and 2001 on advertising and a "grassroots" letter-writing and telemarketing campaign against efforts in Congress and the EPA to regulate greenhouse gases. SHELDON RAMPTON & JOHN STAUBER, TRUST US, WE'RE EXPERTS! 270–71 (2002). The entire budget for the Public Interest Research Group in 2009 was $1,363,768. U.S. PUB INTEREST RESEARCH GRP., IRS FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX pt. 3, § 4a, at 2 (2010).

396. *See, e.g.*, John Irons & Isaac Shapiro, *Regulation, Employment, and the Economy*, ECON. POL'Y INST. (Apr. 12, 2011), http://www.epi.org/publication/regulation_employment_

the Heritage Foundation, the American Enterprise Institute, or the Mercatus Center, all of which devote considerable attention to regulatory issues.[397] Because blood-sport strategies are largely employed by regulated interests with money to spend and not by beneficiaries or beneficiary groups, they give those regulated interests an inherent advantage in high-stakes rulemaking exercises.[398]

K. Implications for Administrative Lawyers

For administrative lawyers, perhaps the most difficult question raised by the ascent of blood-sport strategies in high-stakes rulemaking concerns the extent to which lawyers should engage in blood-sport battle. In administrative adjudications, the lawyer's role is virtually identical to that of the attorney in civil litigation. In the context of rulemaking, however, attorneys for both the agency and the stakeholders serve their clients best when they provide legal arguments for interpreting the relevant statute consistently with their clients' positions, present technical and economic studies in the light most favorable to their positions, and marshal policy arguments to support their preferred outcomes. Although the latter two functions are not foreign to civil litigation, they are far more common in informal rulemaking.

The American Bar Association's (ABA's) Model Rules of Professional Conduct[399] provide that lawyers representing clients in nonadjudicative proceedings must conform to most of the rules governing candor toward the tribunal, fairness to opposing parties, impartiality, and decorum that apply to attorneys representing clients before courts.[400] Thus, the ethical obligation of an attorney not to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation is fully applicable to attorneys engaged in

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and_the_economy_fears_of_job_loss_are_overblown; Alice Kaswan, *Greenhouse Gas Standards for New Power Plants: Glass Half-Full and Half-Empty*, CPRBLOG (Mar. 28, 2012), http://www.progressivereform.org/CPRBlog.cfm?idBlog=5AB070F0-CCCE-C1CD-B9F7C9D9AB10A2F9; Daniel J. Weiss & Zachary Rybarczyk, *Don't Believe the Hype: Opponents of Mercury Rules Puff Up Costs While Ignoring Benefits*, THINK PROGRESS (Feb. 9, 2012, 10:04 AM), http://thinkprogress.org/romm/2012/02/09/421812/dont-believe-the-hype-opponents-of-mercury-rules-puff-up-costs-while-ignoring-benefits.

397. *Cf. supra* note 201 and accompanying text.

398. *See* CROLEY, *supra* note 3, at 29–52 (discussing various theories that explain the collective-action problem in agency decisionmaking).

399. MODEL RULES OF PROF'L CONDUCT (2010).

400. *Id.* R. 3.9.

rulemaking activities and is not limited to factual statements.[401] Attorneys would presumably run afoul of their ethical obligations if they consciously falsified data in a submission or manipulated an economic or technical analysis in a way that rendered it misleading.[402] High-stakes rulemaking might generate pressure from clients to violate these ethical obligations, but conscious falsification of data or manipulation of analyses are hopefully not characteristics of blood-sport rulemaking.

The role of the lawyer as a lobbyist in high-stakes rulemaking is also nothing new. Full-service law firms are prepared to present information and arguments to agencies outside of the procedural confines of informal rulemaking and to lobby members of Congress for legislation that they have drafted that would change relevant statutes.[403] When they engage in lobbying activities, lawyers are bound by similar rules of professional conduct.[404] Rule 5.7 of the ABA Model Rules provides that a lawyer who provides "law-related services,"[405] a term that includes lobbying,[406] is subject to all of the rules applicable to nonadjudicative proceedings if those services are provided "by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients."[407] Representing a client in an administrative rulemaking by lobbying agency officials before, after,

401. *Cf. id.* R. 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation . . . .").

402. Falsifying data would also presumably violate Model Rule 3.3(a)(1), which provides that a lawyer shall not knowingly "make a false statement of material fact or law to a tribunal." *Id.* R. 3.3(a)(1).

403. *Cf.* Michelle Gilbert, *Some Law Firms Hire Non-Lawyers as Their Lobbying Arm on Capitol Hill*, 15 NAT'L J. 1899 (1983) (describing law firms that specialize in lobbying); Burt Solomon, *Clout Merchants*, 19 NAT'L J. 662 (1987) (describing "mega-firms" that "offer one-stop, all-purpose cures for what ails their clients"); Matthew C. Stephenson & Howell E. Jackson, *Lobbyists as Imperfect Agents: Implications for Public Policy in a Pluralist System*, 47 HARV. J. ON LEGIS. 1, 5–6 (2010) (describing "'contract lobbyists'—typically public relations firms or law firms").

404. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 3.9 ("A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding . . . shall conform to the provisions [governing candor to the tribunal, fairness, impartiality, and decorum]."). Comment 3 clarifies that "[t]his Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument." *Id.* R. 3.9 cmt. 3. To the extent that a lawyer's lobbying efforts are carried out in connection with such an official hearing or meeting, the provisions of Rule 3.9 apply.

405. *Id.* R. 5.7(a).

406. *Id.* R. 5.7 cmt. 9.

407. *Id.* R. 5.7(a)(1).

or during the formal comment period is probably indistinguishable from providing other legal services to those clients. Whether lobbying for a client to change an agency's statute is similarly a "law-related service[]"[408] is perhaps a closer question, but it is probably also indistinguishable from the provision of other legal services.

The role of the lawyer in more far-ranging blood-sport strategies, such as public-relations campaigns aimed at swaying public opinion and feeding information to talk-show pundits and bloggers, has been the subject of little attention in the legal literature.[409] One question worth raising at the outset is whether such activities are "law-related services" within Rule 5.7, which defines that term to mean "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer."[410] Although lawyers have not traditionally been associated with the preparation of advertisements, press releases, blogs, and the like on issues of relevance to ongoing rulemakings, their involvement is apparently becoming more common in blood-sport rulemakings.[411] The prescriptions and proscriptions of the Model Rules are therefore arguably applicable to these functions when lawyers perform them for clients. In any event, the proscription in Rule 4.1 against a lawyer's knowingly making a false statement of material fact to a third person is presumably applicable to statements made in support of a client's position in advertisements; in press releases; and in overtures to think tanks, pundits, and bloggers.[412]

Professor Michele Beardslee has written an important two-part article[413] on the ethical obligations of corporate counsel with respect to public-relations campaigns undertaken by their companies on legal

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408. *See supra* note 405 and accompanying text.

409. *See* Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion* (pt. 2), 23 GEO. J. LEGAL ETHICS 1119, 1123 (2010) (noting the lack of scholarship in this area).

410. MODEL RULES OF PROF'L CONDUCT R. 5.7(b) (internal quotation marks omitted).

411. *See* Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion* (pt. 1), 22 GEO. J. LEGAL ETHICS 1259, 1279 (2009) ("A major sentiment [in the literature] is that lawyers are behind the eight ball when it comes to legal [public relations]. . . . However, more recently, there is . . . literature contending that lawyers are increasingly developing sophisticated, integrated legal [public-relations] strategies." (footnote omitted)).

412. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 4.1 (prohibiting lawyers from making "false statement[s] of material fact" "[i]n the course of representing a client").

413. Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion* (pts. 1 & 2), 22 GEO. J. LEGAL ETHICS 1259 (2009), 23 GEO. J. LEGAL ETHICS 1119 (2010).

matters that are tried in the "court of public opinion."[414] Although both parts of the article are mostly limited to corporate public-relations campaigns in the context of ongoing civil or criminal litigation, some of the analysis is clearly relevant to public-relations campaigns undertaken in association with high-stakes rulemaking activities.[415] The corporate counsel whom Professor Beardslee interviewed demonstrated a clear concern for "the way that a legal issue is spun in the media," and they indicated that "corporate lawyers are avidly advocating in the court of public opinion, but doing so 'behind the scenes.'"[416]

Professor Beardslee's analysis of the applicable rules of professional responsibility suggests that "current ethics rules are not relevant for corporate practice as it relates to public relations," because they "do not provide adequate guidance to lawyers on how far they may or should go towards using the media in favor of their corporate client when they are not acting as spokespersons but instead are managing legal PR behind the scenes."[417] According to Professor Beardslee's assessment, the existing rules "do not actively encourage lawyers to behave socially responsibly or to convince clients to behave socially responsibly in the court of public opinion."[418] Indeed, the existing rules, which are "grounded in the adversary ethic[,] risk a race to the bottom—where corporate lawyers act like 'hired guns,' valued (professionally and economically) for manipulating legal PR over providing effective legal advice that incorporates PR concerns *and* the corporation's and public's long-term interests."[419] The absence of clear guidance is even more apparent in the context of public-relations activities undertaken in support of a company's position in an agency rulemaking proceeding or during congressional consideration of legislation that would affect the outcome of a particular rulemaking proceeding.[420] Administrative

414. Beardslee, *supra* note 411, at 1259; Beardslee, *supra* note 409, at 1121–22.

415. Beardslee, *supra* note 409, at 1123–24 ("The first installment of this Article investigates the emerging trend of general counsels acting as legal public relations managers for legal issues facing large, publicly traded corporations . . . . [T]his installment . . . turns to the existing ethical obligations that regulate attorneys' management of legal [public relations].").

416. *Id.* at 1124.

417. *Id.* at 1124–25; *see also id.* at 1145 ("For statements that misrepresent or stretch the truth, the current interpretations of the *Model Rules* do little to constrain the behavior with which this Article is concerned.").

418. *Id.* at 1124–25.

419. *Id.* at 1125.

420. *Cf. supra* notes 402–12 and accompanying text.

lawyers need better ethical guidance tailored to the rulemaking environment.

IV. SOME POSSIBLE RESPONSES TO BLOOD-SPORT STRATEGIES

The APA was enacted in 1946[421] after "a long period of study and strife"[422] in which the business community resisted the regulatory controls that had been imposed in response to strong public demand for a greater government role in protecting citizens in the wake of the Great Depression.[423] The APA represented an effort by the business community and its lawyers to square the exercise of bureaucratic power with existing legal norms.[424] As the nation struggles with the economic dislocation brought on by the Great Recession and the financial meltdown of 2008, the government may be in the midst of a similar period of study and strife. It might therefore be an appropriate time to think about amending the rulemaking provisions of the APA to include procedural constraints on the tactics that may be employed to influence agency decisionmakers, or at least to think about imposing disclosure requirements aimed at exposing blood-sport strategies to the public. If the impetus for procedural change that ultimately insulated agencies from political influences in the early 1940s came from the regulated industries, the advocates of change this time will be the representatives of beneficiaries who are greatly disadvantaged by the shift to blood-sport rulemaking.

Administrative-law scholars should be thinking about several questions: (1) whether this new blood-sport approach to regulatory implementation is consistent with the due-process and participatory norms that underlie modern conceptions of administrative law; (2) whether blood-sport rulemaking is a desirable development; and (3) if the answer to either of the previous questions is "no," whether

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421. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706 (2006)).

422. Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950), *superseded by statute on other grounds*, Supplemental Appropriation Act, 1951, ch. 1052, 64 Stat. 1044 (1950), *as recognized in* Ardestani v. INS, 502 U.S. 129 (1991).

423. George B. Shepherd, *Fierce Compromises: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1561–62 (1996) (describing the pre-APA backlash from the business community against the "avalanche of new federal agencies and commissions" created under the New Deal).

424. *Id.* at 1569–72 (describing the ABA's efforts on behalf of the APA as being driven both by "the elite bar's fears for its major [industry] clients" and lawyers' desire to protect the legal status quo).

blood-sport strategies can be cabined by law so as to make high-stakes rulemaking more consistent with legal and democratic norms, given First Amendment[425] constraints on the power of the federal government to limit the rights of citizens—human and, more recently, corporate[426]—to petition the government.[427] Working from an assumption that many scholars would answer one of the first two questions in the negative, this Part suggests some potential responses to the third question.

A. Legislative Responses

1. *Structural Shields.* Independent agencies were created to shield administrative decisionmaking from political influences.[428] The Fed's experience with the interchange-fee rulemaking, however, suggests that independence alone will not necessarily protect such agencies from blood-sport strategies.[429] Nevertheless, political influence may be more difficult to exert on an agency whose head serves for a term of years and whose budget is not subject to annual appropriations. It may therefore be advisable for Congress to give future agencies greater financial independence from the annual budget-setting process, at least for the first few years of those agencies' lives. Even with this added protection, however, the early history of the CFPB suggests Congress's hesitancy to rely exclusively on agency structure to protect regulators from blood-sport strategies.[430]

Proponents of stringent financial-services regulation originally designed the CFPB to have a single director and thus to be free from the institutional and administrative constraints of independent

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425. U.S. CONST. amend. I.

426. *See* Citizens United v. FEC, 130 S. Ct. 876, 909 (2010) ("[T]he First Amendment does not allow political speech restrictions based on a speaker's corporate identity."). In *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the Court "explicitly overruled longstanding Court precedent and struck down as unconstitutional federal prohibitions on the use of corporate treasury funds for campaign finance expenditures." Michael S. Kang, *After* Citizens United, 44 IND. L. REV. 243, 243 (2010).

427. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

428. *See* Barkow, *supra* note 288, at 19 ("The main aim in creating an independent agency is to immunize it, to some extent, from political pressure.").

429. *See supra* notes 100–60 and accompanying text.

430. *See supra* notes 233–35 and accompanying text.

commissions and insulated from partisan attacks on its budget.[431] But the financial-services industry's allies in the Senate successfully neutered the new agency by refusing to confirm any appointee to be director of the agency unless the statute was amended to turn the leadership position into a multimember agency with an annual appropriation.[432] The battle over the confirmation of a CFPB head is a testament to the staying power of blood-sport strategies in the context of independent agencies.

2. *Procedural Shields.* Congress could reduce the influence of stakeholders employing blood-sport strategies by limiting the contacts that can occur between agency officials and lobbyists for potentially affected parties. Ex parte contacts with an agency before the publication of a notice of proposed rulemaking and after publication of a notice of final rulemaking are not prohibited by the APA, and it is not at all clear that ex parte contacts during the time that the agency is receiving written submissions are prohibited either.[433] A new APA could be modeled after the CPSC, which has promulgated regulations that govern ex parte contacts with respect to matters of "substantial interest," a term that is defined to include any nontrivial issue "that is likely to be the subject of a regulatory or policy decision by the Commission."[434] The agency publishes public notice of all meetings between agency personnel and outside parties involving such matters and makes records of those meetings available to the public.[435] The agency further discourages telephone conversations between agency staff and outside parties concerning matters of substantial interest, and when they do occur, the agency recipients are

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431. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 1011(b)(1), 12 U.S.C. § 5491(b)(1) (Supp. IV 2010) (creating "the position of the Director, who shall serve as the head of the Bureau").

432. *See* Solomon & Randall, *supra* note 233 (noting that Republican senators vowed to block confirmation of any CFPB director unless the agency was turned into a multimember commission and describing the banking industry's support for this position).

433. *See* Richard A. Nagareda, Comment, *Ex Parte Contacts and Institutional Roles: Lessons from the OMB Experience*, 55 U. CHI. L. REV. 591 (1988) (describing the ambiguities in judicial, legislative, and executive prohibitions on ex parte contacts in informal-rulemaking procedures and arguing that this lack of clarity has enabled regulated industries to influence administrative decisionmaking).

434. 16 C.F.R. §§ 1012.1(a), 1012.2(d) (2011); *see also* Bremberg, *supra* note 180, at 31–32 (discussing the agency's "[o]pen meetings policies").

435. 16 C.F.R. § 1012.1(a).

required to memorialize the content of such conversations and then to place that documentation in a public file in chronological order.[436]

A new APA could define a moment in time at which a similar "cloak of invisibility" is draped over agency officials involved in a particular rulemaking exercise to protect them from overtures by outsiders. The statute could allow agency officials to seek information from outsiders but could also make it improper for outsiders to initiate ex parte communications with agency officials from the initiation of the rulemaking initiative within the agency—usually signaled by the convening of a working group—through the publication of the final rule in the *Federal Register*.[437] The same prohibitions would have to be imposed on contacts between stakeholders and OIRA during that time period. This statutory prohibition might not put an end to attempts by participants in high-stakes rulemakings to influence agency officials, but it would give the officials a good reason to avoid unwanted overtures.

To be effective, the prohibitions on ex parte contacts would have to be extended to members of Congress and their staffs. Otherwise, a stakeholder could simply avoid the prohibition entirely by channeling its contacts through a sympathetic congressional office. It is difficult to imagine a crisis of sufficient magnitude, however, to impel Congress to enact such legislation. Members of Congress have become so dependent on moneyed interests to finance their campaigns that, in my view, they are unlikely to vote for a measure that would predictably reduce the flow of funds from stakeholders who could no longer seek subtle quid pro quos for their contributions. Whether a similar prohibition should extend to OIRA and White House communications with agency staff and upper-level agency decisionmakers is a far more controversial topic that is beyond the scope of this Article.

3. *Greater Transparency.* One response to the blood-sport phenomenon that should not be controversial would be to increase the transparency of interactions between the agency and interested outsiders, OIRA, and Congress. Transparency enhances the legitimacy of the rulemaking process, ensures that the decisionmaking

436. *Id.* § 1012.7.

437. *Cf.* Wagner, *supra* note 5, at 1422–23 (suggesting that agencies should "be largely, if not completely, insulated from stakeholders and political input during the embryonic stage of the development of [their] regulatory proposal[s]").

process is not contaminated by extraneous and irrelevant political considerations unrelated to the agency's statute, and generally enhances the quality of the policy decisions that underlie the resulting rules.[438] In lieu of a flat prohibition on ex parte contacts, Congress could at least require that the content of such contacts be memorialized and placed in the public record. Disclosure could go a long way toward holding the initiators and recipients of such contacts accountable for their behind-the-scenes attempts to influence the outcomes of high-stakes rulemakings. Disclosure should reduce the incidence of backroom deals in which agencies barter away public protections in return for promises from stakeholders and members of Congress to reduce political pressure. And that dynamic in turn may make stakeholders and members of Congress more reluctant to initiate contacts in the first place.

Greater transparency will not, however, eliminate blood-sport strategies in high-stakes rulemaking. Even if stakeholders were to avoid direct overtures to agency personnel, they could still make their positions known through public-relations and advertising campaigns, and think tanks and media pundits would continue to amplify stakeholder attacks. Another step in the direction of greater transparency would be a requirement that entities, such as the U.S. Chamber of Commerce, that pay for political advertisements[439] must identify the companies that have contributed toward the purchase of those advertisements. This requirement would allow the public to draw the connection between the economic interests of the companies sponsoring the advertisements and the content of the advertisements.

4. *Leveling the Playing Field.* One unintended consequence of the interest-group-representation model was to cast regulatory beneficiaries as just another interest group with a place at the bargaining table, thereby relieving the regulatory agency to some extent of its statutory obligation to represent the intended beneficiaries of protective regulation.[440] The practical problem with

438. Coglianese et al., *supra* note 324, at 927–28.

439. *See* Tom Hamburger, *Chamber of Commerce Vows To Punish Anti-Business Candidates*, L.A. TIMES, Jan. 8, 2008, at A1 (describing how the Chamber of Commerce uses corporate contributions to create "attack ads targeting individual candidates without revealing the name of the businesses involved in the ads").

440. *Cf.* Stewart, *supra* note 267, at 1764 (arguing that "'[p]ublic interest' advocates . . . do not represent . . . the interests of the community as a whole").

the model is that the representatives of beneficiary groups do not bring equivalent resources to the table and therefore lack equivalent bargaining power.[441] Because all of the participants in a high-stakes rulemaking presumably know that the regulatees can direct more firepower at the agency than beneficiary groups can, this disparity can predictably affect the outcome of the rulemaking exercise.[442]

A strong argument can be made that blood-sport rulemaking is a desirable way to democratize bureaucratic decisionmaking. Blood-sport strategies may render agencies more responsive to the interests that engage in those strategies. But they do not necessarily make agencies more responsive to the beneficiaries of regulatory programs. Although blood-sport strategies have been employed by public-interest groups representing the beneficiaries of regulation, the overall impact of the move toward blood-sport strategies in administrative rulemaking has been to advance the interests of the regulatees over those of the beneficiaries, despite numerous polls reporting that a large majority of Americans supports strong regulation of business conduct.[443]

Professor Wagner suggests that Congress should consider subsidizing public participation in "specific rulemakings in which certain sets of interests, such as those representing the diffuse public, will be otherwise underrepresented."[444] This suggestion was high on the political agenda in the 1970s,[445] but it fell out of favor during the Reagan administration.[446] Though this leveling approach remains

441. *See* Kuttner, *supra* note 186, at 28 ("Every lawyer in town is on the payroll of one bank or another. There is a huge imbalance of resources . . . ." (quoting former FDIC Chairperson Sheila Bair) (internal quotation mark omitted)).

442. *See* Stewart, *supra* note 267, at 1713 ("It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests." (footnotes omitted)).

443. *See* Rena Steinzor, *The Truth About Regulation in America*, 5 HARV. L. & POL'Y REV. 323, 334 (2011) (summarizing the results of a poll demonstrating public support for strict regulation).

444. Wagner, *supra* note 5, at 1416.

445. *Federal Agencies That Pay the Way*, 12 NAT'L J. 778 (1980); *Paying To Hear Divergent Views*, BUS. WK., Jan. 15, 1978, at 110; *Taking Public Hearings Public*, BUS. WK., Mar. 7, 1977, at 43.

446. *See, e.g.*, Michael Wines, *Miller's Directive to the FTC—Quit Acting like a "Consumer Cop*,*"* 13 NAT'L J. 2149 (1981) ("[FTC Chairman James Clifford Miller III]'s proposed 1982 budget would eliminate funds for the agency's 'public intervenor program,' under which public interest groups receive grants to research consumer issues and present arguments to the commission.").

attractive, it probably does not represent an adequate response to the blood-sport phenomenon for at least two reasons. First, it is extremely unlikely that Congress in this highly partisan age would enact such legislation. Second, should Congress manage to pass such legislation, the bill would still do nothing to remedy the disparate resources of companies and trade associations that can bring blood-sport strategies to other fora, such as the broadcast media. The same legislative realities probably doom other solutions aimed at enhancing the ability of beneficiary groups to participate in blood-sport rulemaking—solutions like creating consumer advocates within agencies to solve the collective-action problems in regulatory programs with diverse and unorganized beneficiaries.

B. Judicial Responses: Modifying Judicial Review

In light of the advent of blood-sport strategies in high-stakes rulemaking, it may make sense to take Professor Watts's suggestion a step further and to allow any participant in a rulemaking to raise political considerations in its comments, invite participants to add evidence of agency reliance on political overtures to the rulemaking record, and require agencies to explain how such considerations did or did not affect their decisions. First, the courts might expand the scope of "political" considerations to include political pressure from sources other than officials located in the executive and legislative branches of government. For example, a subtle warning from a well-connected lobbyist that the agency's budget might suffer if the lobbyist's client were adversely affected by a proposed rule should count as a political consideration.[447]

Second, if the record reveals that political considerations may have influenced the agency, then the courts might *require*, not merely allow, agencies to include documentation of communications involving those considerations in the rulemaking record and to explain how those communications factored into the agency's decision.[448] If, for example, orchestrated attacks on agency decisionmakers are now the norm in high-stakes rulemaking, then it

447. Professor Watts would apparently limit the sources of political influence to formal and informal communications from the president, high-level White House officials, and members of Congress. *See* Watts, *supra* note 266, at 57–65 (identifying the president, other high-level officials in the executive branch, and Congress as the source of opinions that "might most appropriately count as valid factors").

448. *See* Mendelson, *supra* note 268, at 1129–31 (proposing judicially enforced disclosure requirements to reveal political motivators in agencies' decisionmaking processes).

might be appropriate to expand the definition of the rulemaking record to include evidence of those attacks and to allow that evidence to be cited by parties seeking judicial review.

Third, the courts might require agencies to respond to comments referencing evidence of ex parte communications of a political nature by explaining how those communications affected the agency's decisions. Finally, if political considerations or ex parte communications have played a role in the decisionmaking process, the reviewing court might consider whether such considerations are relevant factors under the agency's empowering statute during its substantive review of the rule.[449]

These suggestions naturally raise the practical question of enforcement. How would anyone know whether an agency decisionmaker has received ex parte communications of a political nature? The Freedom of Information Act[450] may be available to uncover documentary evidence of attempts to exert improper political influence.[451] Beyond that, media reports and congressional investigations can draw out such information, and when they do, there is no reason not to include that information in the rulemaking record. If the reports or investigations are factually erroneous, the agency may say so in its reasoned analysis.[452] Many political overtures that influence high-stakes rulemakings will no doubt escape public scrutiny, but that fact should not deter the courts from requiring agencies to explain those overtures that do find their way into the rulemaking record.

C. Legal Responses: Changing the Political Culture

There are many grounds for pessimism about the prospect of reforming rulemaking to reduce the impact of blood-sport strategies on regulatory agency decisionmaking. Attacks on government in

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449. See *supra* note 369.

450. Freedom of Information Act, 5 U.S.C. § 552 (2006 & Supp. IV 2010).

451. *See id.* (setting "public information" requirements for government agencies).

452. Professor Watts raises the possibility that an affirmative obligation should be imposed on agencies to disclose political influences as they are brought to bear on an agency. Watts, *supra* note 266, at 76. She correctly notes that this change would no doubt require an amendment to the APA, and she ultimately concludes that such a change "would likely face various hurdles—including claims of executive privilege." *Id.* I agree that requiring disclosure of political pressure from the Oval Office and nearby offices might raise executive-privilege claims, but that in no way undermines the attractiveness of the suggestion as it applies to ex parte contacts from members of Congress, their staffs, and politically well-connected lobbyists.

general and regulatory agencies in particular are commonplace, and this constant "bureaucrat bashing" has bred a political culture in which the public no longer trusts regulatory agencies to enhance the public welfare.[453] Before any significant substantive or procedural changes can be implemented, there will probably need to be a change in the prevailing culture of distrust.

It may be that the same American legal culture that resisted the politicization of regulatory agencies in the post-New Deal years will likewise resist the politicization of the regulatory process through blood-sport rulemaking. In an era in which government agencies are perceived by many powerful politicians as wholly illegitimate, it is encouraging to see Peter Barton Hutt, the dean of food and drug lawyers, urging Congress and anyone else who will listen to support legislation to maintain a robust FDA.[454] Professor Beardslee suggests that lawyers who engage in public-relations activities should serve as a "professional conscience" to their clients, "balancing public-mindedness against zealous partisanship."[455] If the attorneys who regularly participate in high-stakes rulemakings could be persuaded to adopt a public-conscience role in their lobbying activities as well as their public-relations work, it might go a long way toward civilizing blood-sport strategies.

As I have discussed, the ABA Model Rules do not directly address the lawyer's role in public-relations activities related to informal rulemaking.[456] As blood-sport strategies, which nearly always involve public-relations exercises, become more prevalent in agency rulemaking, more detailed guidance from the ABA along these lines would be beneficial. Such guidance is unlikely to materialize, however, because a professional-conscience role is not one to which many lawyers have become accustomed. Moreover, it is difficult for in-house lawyers and even outside counsel "to separate themselves and their professional ethical obligations from organizational

453. Steinzor, *supra* note 443, at 329 (internal quotation marks omitted).

454. *See* Peter Barton Hutt, *The State of Science at the Food and Drug Administration*, *in* SUBCOMM. ON SCI. & TECH., FDA SCI. BD., FDA SCIENCE AND MISSION AT RISK app. B at B-1 (2007) ("Congress must commit to a two-year appropriations program to increase the FDA employees . . . and to double the FDA funding, and then at least to maintain a fully burdened yearly cost-of-living increase . . . across all segments of the agency.").

455. Beardslee, *supra* note 409, at 1126 n.20 (internal quotation marks omitted).

456. *See supra* notes 402–12, 417–20 and accompanying text.

objectives and the norms elevated by the most powerful players" in the corporations that they serve.[457]

CONCLUSION

As the radical regulatory reformers of the 104th Congress aggressively attempted to tear down the protective governmental infrastructure that Congress had put in place during the Public Interest Era of the 1960s and 1970s, I wrote the following about the prospects for a revival of the role of government in regulating business conduct:

> The prospects for a revived regulation scenario are probably highest if the radical relief scenario first plays itself out. Congress may be willing to contemplate enacting additional protections only after a period of time in which the radical anti-interventionists and free marketeers have their way: the existing protective statutes are repealed or undermined, the free market reigns supreme, the consequences of unrestrained capitalism become increasingly apparent, and pressures build to remedy the most egregious abuses. It may, in other words, take another tragedy like the Great Depression to revive the conviction that government has an important protective role to play in private arrangements.[458]

During the past five years, this nation has experienced just such a confluence of crises, including a financial meltdown, the largest oil spill in U.S. history, the deadliest mining disaster in decades, and a deep recession with persistently high unemployment rates. Yet blood-sport strategies have, if anything, become even bloodier. Government agencies seem even less capable of going about the business of regulating than they were before the enactment of the reform legislation of the late 2000s.

The reaction of the financial-services industry to the new consumer-protection program of the Dodd-Frank Act demonstrates how far beyond the familiar processes and procedures of administrative law the strategies have ranged. Rather than hiring seasoned administrative lawyers to engage in the familiar process of

457. Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 634 (2005) (quoting Sarah Helene Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 ST. LOUIS. U. L.J. 989, 1023 (2007)).

458. Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1531 (1996).

eroding statutory protections, the regulated industries have begun employing political strategists, lobbyists, and public-relations experts. These players pursue strategies aimed at indirectly disrupting the implementation of regulatory programs by blocking Senate confirmation of new agency leaders, cutting off promised funding for agencies, introducing rifle-shot riders aimed at undoing ongoing agency action, and subjecting agency heads to contentious oversight hearings in an attempt to intimidate them into adopting industry-friendly positions.

At this early juncture, I remain pessimistic about the prospect of limiting these blood-sport strategies in informal rulemaking. They could be a transient phenomenon, limited to a moment in time in which the business community somehow co-opted a budding populist movement by replacing that movement's outrage over government bailouts of Wall Street banks with outrage over government spending. But that assessment overlooks important realities. Blood-sport strategies were largely in place before the Tea Party made its surprise appearance in 2009, and they are likely to remain in place until their practitioners are shamed into abandoning them or until they no longer work. Because members of Congress have become heavily involved in blood-sport strategies, such strategies are likely to continue for as long as voters fail to punish their representatives for uncivil attacks on regulatory agencies and the public servants who are attempting to advance the goals of protective legislation.