Assessing Consensus: The Promise and Performance of Negotiated Rulemaking

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Negotiated rulemaking appears by most accounts to have come of age. A procedure that once seemed confined to discussion among administrative law scholars has in the past decade captured the attention of policymakers throughout the nation's capital. Congress officially endorsed regulatory negotiation in the Negotiated Rulemaking Act of 1990, and it permanently reauthorized the Act in 1996. Over the past few years, the executive branch has visibly supported regulatory negotiation, both through the Clinton administration's National Performance Review (NPR) and
through specific presidential directives to agency heads. Congress has also begun to mandate the use of negotiated rulemaking by certain agencies in the development of specific regulations. As a result of these and other efforts, federal agencies have begun to employ the consensus-based process known as negotiated rulemaking.

Negotiated rulemaking supplements the notice-and-comment procedures of the Administrative Procedure Act (APA) with a negotiation process that takes place before an agency issues a proposed regulation. The agency establishes a committee comprised of


5. Some recent bills introduced in Congress would require specific agencies to use negotiated rulemaking in developing regulations. See, e.g., Intermodal Transportation Safety Act of 1997, S. 1267, 105th Cong. § 521 (requiring the establishment of a motor vehicle safety advisory committee to assist in negotiated rulemaking); Tribal Self-Governance Amendments of 1997, H.R. 1833, 105th Cong. § 517 (requiring negotiated rulemaking with Indian Tribes); Public Housing Reform and Responsibility Act of 1997, S. 462, 105th Cong. §§ 106(b)(2), 110(b)(1), 208 (requiring use of negotiated rulemaking to implement various legislative provisions). For a list of statutes requiring the use of negotiated rulemaking, see infra note 75. One of the more salient legislative debates over a mandate for negotiated rulemaking occurred in June of 1995 when Congress turned its attention to new meat safety standards to be issued by the Department of Agriculture. Secretary of Agriculture Dan Glickman successfully resisted congressional efforts to compel the use of a formal negotiated rulemaking process for these regulations, agreeing instead to hold a series of informal meetings with affected parties. See Accord is Reached on Meat Safety Issue, N.Y. TIMES, July 20, 1995, at B11; Compromise Reached on USDA’s HACCP Rule: Walsh to Withdraw Amendment, BNA WASH. INSIDER, July 20, 1995, at D10.

6. Negotiated rulemaking is defined by statute to mean “rulemaking through the use of a negotiated rulemaking committee[,]” and such a committee is in turn defined as “an advisory committee established by an agency . . . to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule.” 5 U.S.C. § 562 (1994 & Supp. I 1995). In this Article, I sometimes use the term “negotiated rulemaking” interchangeably with “regulatory negotiation” (reg neg), even though regulatory negotiation actually connotes a broader range of methods used by agencies for soliciting public input. Such other methods can include public hearings, one-time workshops, occasional roundtables, and established advisory committees. What distinguishes these forms of public participation from the formal negotiated rulemaking process is the explicit quest in negotiated rulemaking for “reaching a consensus [among the participants] in the development of a proposed rule.” Id. Thus, in seeking to assess consensus, as the title of this Article suggests, I am focusing only on the most extreme form of public participation, which seeks to achieve not merely the input and support of outside parties, but the achievement of a consensus among them.

representatives from regulated firms, trade associations, citizen groups, and other affected organizations, as well as members of the agency staff. The committee meets publicly to negotiate a proposed rule. If 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. Proponents of negotiated rulemaking claim that these procedures—which encourage affected parties to reach an agreement at the outset—will decrease the amount of time it takes to develop regulations and, more notably, reduce or eliminate subsequent judicial challenges.

Does negotiated rulemaking achieve its instrumental goals for federal agencies, such as those of saving time and reducing litigation? Many seem convinced that it does. In legislative hearings leading up to the Negotiated Rulemaking Act of 1990, Senator

9. Negotiated rulemaking committees must generally meet the applicable requirements for advisory committees, see id. § 565(a)(1), one of which is the Federal Advisory Committee Act's requirement that meetings be open to the public. See 5 U.S.C. app. § 10(a)(1) (Supp. I 1995).
10. By statute, "consensus" is defined as unanimous concurrence or any lesser concurrence if agreed to unanimously by the committee. See 5 U.S.C. § 562(2) (1994).
11. These procedures include publication of a notice of proposed rulemaking, an opportunity for the interested persons to comment on the rule, and a statement of the basis and purpose of the final rule. See id. § 553. For an overview of notice-and-comment rulemaking, see James V. DeLong, Informal Rulemaking and the Integration of Law and Policy, 65 VA. L. REV. 257 (1979).
13. See, e.g., NATIONAL RESEARCH COUNCIL, UNDERSTANDING RISK: INFORMING DECISIONS IN A DEMOCRATIC SOCIETY 202 (Paul C. Stern & Harvey V. Fineberg eds., 1996) ("The purpose of regulatory negotiation is to reduce legal challenges to new rules by involving would-be adversaries directly in the rule-making process and by producing a draft rule that meets legal requirements and is acceptable to a wide array of interested and affected parties."); Patricia M. Wald, Negotiation of Environmental Disputes: A New Role for the Courts?, 10 COLUM. J. ENVTL. L. 1, 18 (1985) (noting that advocates of negotiated rulemaking claim this procedure will "soften the adversary posture that animates the current comment process and reduce the inevitability of legal challenges to adopted rules"). See also infra notes 29–31, 39–57, 60–61, 87 and accompanying text.
Carl Levin remarked that while in the initial years "there was little evidence that [the] potential benefits of negotiated rulemaking would actually accrue," negotiated rulemaking now has "a track record of success." The NPR staff more recently urged others to follow the lead of those "federal agencies [that] have successfully pioneered a consensus-based approach to drafting regulations." The authors of the NPR report concluded that at least at the Environmental Protection Agency (EPA) "regulatory negotiations, on average, take less time than other rulemakings" and have resulted in a significant decline in the rate of judicial challenges.

Such claims notwithstanding, the instrumental value of negotiated rulemaking has more often been asserted than demonstrated. The reported literature on negotiated rulemaking consists largely of descriptive case studies (sometimes authored by participants themselves) and of prescriptive accounts espousing the theoretical advantages of negotiated rulemaking. Yet as the author of a


15. IMPROVING REGULATORY SYSTEMS, supra note 3, at 29.

16. Id. at 31. The promise of negotiated rulemaking has led one administrative law scholar to embrace the procedure as "the policymaking idea of the 21st Century." Conference, supra note 12, at 875 (statement of Michael Asimow).

leading text on rulemaking has observed, "[t]he purported superiority of consensual processes over decisionmaking techniques that employ methods outlined in the APA ... cannot be established by mere positing of generalities and abstractions."\textsuperscript{18} Negotiated rulemaking has long lacked systematic evidence showing that it yields superior results over conventional rulemaking. Consequently, while both Congress and the President have been urging federal agencies to initiate more negotiated rulemakings, scholars have been acknowledging that the impact of regulatory negotiation remains an open empirical question.\textsuperscript{19} Even one of negotiated rulemaking's biggest institutional supporters, the now-defunct Administrative Conference of the United States (ACUS), noted in one of its final reports that "[t]here has been little formal evaluation of the use of negotiated rulemaking."\textsuperscript{20}

In an effort to fill this void, this Article presents an empirical assessment of the impact of negotiated rulemaking on two of its principal goals: reducing overall rulemaking time and decreasing the number of judicial challenges to agency rules.\textsuperscript{21} Unlike other


\textsuperscript{19} See, e.g., Wolfgang Hoffman-Riem & Irene Lamb, Negotiation and Mediation in the Public Sector—The German Experience, PUB. ADMIN. 309, 325 (1994) (noting that the benefits of mediation in the public sector remain an "open issue"); Rosemary O'Leary, Environmental Mediation: What Do We Know and How Do We Know It?, in Mediating Environmental Conflicts: Theory and Practice 17, 32 (J. Walton Blackburn & Willa Marie Bruce eds., 1995) (observing that more research is needed on public negotiation and mediation); Susan Rose-Ackerman, Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation, 43 DUKE L.J. 1206, 1212 (1994) (suggesting that widespread benefits of negotiated rulemaking are largely speculative).

\textsuperscript{20} ACUS, BUILDING CONSENSUS, supra note 12, at 28. If negotiated rulemaking were costless, it might well be fine to forego the challenges inherent in conducting a systematic evaluation. But negotiated rulemaking does demand much time and effort on the part of federal agencies as well as nongovernmental actors. See infra notes 127-31, 317 and accompanying text. A systematic evaluation of the main goals of negotiated rulemaking can therefore help guide agency decisions about how to structure rulemaking proceedings. Such an evaluation is also consistent with the principles underlying the Government Performance and Results Act of 1993, Pub. L. 103-62, 107 Stat. 285 (codified in scattered sections of 5 U.S.C., 31 U.S.C., and 39 U.S.C.) (designed to promote the evaluation of the results of governmental programs).

\textsuperscript{21} By limiting my focus to these two primary goals, I do not necessarily endorse
research, my analysis considers the use of regulatory negotiation by all federal agencies over the past thirteen years. Like others, I too give special attention to rulemaking at the EPA because it has pursued by far the most negotiated rulemakings and it has been the focus of many of the claims about the purported success of the negotiated process.

In Part I, I review the development of negotiated rulemaking over the past decade and a half, giving close attention to the previously unexamined legislative history underlying the Negotiated Rulemaking Act of 1990. My review shows that the chief goals of negotiated rulemaking have been to reduce both rulemaking time and the filing of petitions for judicial review. In Part II, I report on the extent to which federal agencies have used negotiated...
ed rulemaking and the outcomes they have achieved in terms of the two main goals of timeliness and reduced litigation. My findings run counter to the prevailing consensus in favor of negotiated rulemaking and draw into question the continued value of formal negotiated rulemaking. Despite all the postulations about how negotiated rulemaking will save time and eliminate litigation, the procedure so far has not proven itself superior to the informal rulemaking that agencies ordinarily use. In Part III, I anticipate and respond to potential criticisms of my analysis and conclude that it is time to reassess the value of full-scale negotiated rulemaking in light of its surprisingly weak track record.

I. THE PROMISE OF NEGOTIATED RULEMAKING

Proponents have promised many benefits from negotiated rulemaking, but chief among them have been the procedure’s ability to develop regulations more quickly and with less resulting litigation. In order to understand these principal goals of negotiated rulemaking, it is helpful to turn to the history leading up to the Negotiated Rulemaking Act of 1990 and subsequent initiatives to expand the use of regulatory negotiation.

The idea of involving affected parties in executive branch policymaking dates back at least to the New Deal, and the idea has returned with renewed vigor in the past twenty years. In the mid-1970s, Secretary of Labor John Dunlop proposed that the parties most affected by federal regulations should play a greater role in the development of those same regulations. Dunlop

22. As early as 1919, the Federal Trade Commission employed a negotiated process first called “trade practice submittals” and later referred to as “trade practice conferences.” See Charles H. Koch, Jr. & Beth Martin, FTC Rulemaking Through Negotiation, 61 N.C. L. Rev. 275, 294 (1983). As part of the New Deal, the National Industrial Recovery Act (NIRA) delegated authority to the President to give legal force to codes adopted by industrial associations. See 15 U.S.C. § 703 (1933). Although the Supreme Court held that NIRA amounted to an unconstitutional delegation of legislative power, the Court did acknowledge that the statute arose from a perceived need to foster cooperation by “permitting [regulated industry] to initiate the adoption of codes.” A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935). The Fair Labor Standards Act of 1938 also provided for procedures similar to regulatory negotiation by requiring wage orders to be developed through committees composed of employer and employee representatives. See Pub. L. No. 75-718, §§ 5, 8, 52 Stat. 1060, 1062, 1064–65 (1938).

23. See John T. Dunlop, The Limits of Legal Compulsion, 27 LAB. L.J. 67 (1976) (urging agencies to engage in direct discussion with affected parties in developing regulations); see also John T. Dunlop, The Negotiations Alternative in Dispute Resolution, 29 VILL. L. Rev. 1421 (1983–84) (arguing that negotiation promises important benefits for
chaired the opening meeting of the National Coal Policy Project in the late 1970s, one of the most prominent early experiments with negotiation over regulatory policy. The National Coal Policy Project sought the consensus of environmental groups and industry on policies related to increased coal production, and achieved agreement on several hundred proposals. Although most of these proposals were never ultimately enacted, the Project did serve as a model for negotiated rulemaking by demonstrating that consensus could be built across conflicting groups of interests.

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. This malaise was attributed to the time and expense of rulemaking, as well as the amount of conflict and litigation over agency rules. According to Philip Harter’s 1982 report to ACUS on negotiated rulemaking, the process of negotiating rules could reduce conflict, improve the exchange of information, decrease the length and cost of rulemaking, and overall lead to more effective and legitimate regulations. Proponents alleged that if used in appropriate cases, negotiated rulemaking “should eliminate major controversy during the period after publication of the notice, unlike the hybrid rulemaking process in which the notice is an invitation to fight.”

One of the most cited reasons for using negotiation has been its potential to ward-off judicial review challenges. Intuitively,
rules developed through a process that seeks the consensus of affected parties at the outset would seem less likely to generate subsequent conflict and litigation.\textsuperscript{30} By seeking to resolve conflicts through a quest for a negotiated agreement, the agency in theory is supposed to save time during the rulemaking process as well as afterwards by avoiding litigation.\textsuperscript{31}

In response to Philip Harter's report, ACUS recommended that agencies use the negotiated rulemaking process.\textsuperscript{32} In 1983, the Federal Aviation Administration (FAA) initiated the first formal negotiated rulemaking.\textsuperscript{33} A few other agencies followed the FAA in experimenting with the alternative procedure, most prominently the EPA. Although these early attempts at negotiation were generally considered valuable experiences, by 1990 only five federal agencies had promulgated rules using negotiated rulemaking.\textsuperscript{34} Even though the Federal Advisory Committee Act (FACA)\textsuperscript{35} effectively authorized agencies to establish committees

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\textsuperscript{30} Sometimes the parties to the negotiation even explicitly agree not to file a legal challenge if the final rule is consistent with the consensus reached in the negotiations. See, e.g., AGREEMENT OF EPA NEGOTIATING COMMITTEE FOR NEW SOURCE PERFORMANCE STANDARD FOR RESIDENTIAL WOOD HEATERS ¶ 5 (1986), reprinted in ADMINISTRATIVE CONFERENCE OF THE U.S., NEGOTIATED RULEMAKING SOURCEBOOK 240 (David M. Pritzker & Deborah S. Dalton eds., 1995) [hereinafter 1995 SOURCEBOOK] ("Each party other than EPA agrees not to challenge the final rule in court if the final rule and its preamble are consistent with the recommended proposed rule.").

\textsuperscript{31} See, e.g., Harter, supra note 12, at 59 (arguing that regulatory negotiation can head off the "wrangling and disputes" that make "regulations take an enormously long time to become effective," and that it can "provide a forum for more direct reconciliation of [regulatory] disputes in a less time consuming fashion").


\textsuperscript{34} The five agencies were the Department of Education, Department of Labor, Department of Transportation, Environmental Protection Agency, and Nuclear Regulatory Commission. Three other agencies—the Department of Agriculture, Department of Interior, and Federal Trade Commission—had initiated negotiated rulemaking proceedings but had yet to issue final rules following these negotiations.

to negotiate rules,36 agencies were thought reluctant to proceed in
the absence of clear congressional guidance specifically approving
negotiated rulemaking committees.37

As early as 1980, members of Congress began introducing
legislation to encourage the use of negotiated rulemaking.38 Even
during these early years of Congressional consideration, advocates
portrayed negotiated rulemaking as a means of reducing regulatory
delays and avoiding judicial challenges. In joint congressional hear-
ings on negotiated rulemaking in 1980, members of Congress sin-
gled out judicial challenges of federal regulations as a pressing
problem. Senator Gaylord Nelson observed that federal regulations
frequently ended up in court, prolonging the rulemaking process
and increasing agency costs.39 Several other participants in the
hearings, including Senator Carl Levin,40 EPA Deputy Assistant
Administrator Roy Gamse,41 and industry representatives Harri-
son Loesch42 and M. Kendall Fleeharty,43 warned of the growing
resort to judicial review and the mounting costs of litigation.

Several years later, in a congressional hearing on the Negoti-
ated Rulemaking Act of 1987, Representative Don Pease observed
that “administrative regulations often become the object of pro-
tracted litigation.”44 A leading sponsor of negotiated rulemaking
legislation, Pease invoked a statistic that to this day continues to
be cited to illustrate the need for negotiated rulemaking. “For
example,” Pease said, “roughly 80 percent of the 300 regulations
issued each year by the Environmental Protection Agency end up
in court. . . . For now, I would simply state that the Federal Gov-

36. Id. app. §§ 1–5.
37. See ACUS Recommendation No. 85–5, supra note 32, reprinted in 1995
SOURCEBOOK, supra note 30, at 13; Formation of Negotiated Rulemaking Committees,
38. The 1982 ACUS recommendation formally called for legislation “explicitly autho-
rizing agencies to conduct rulemaking proceedings” using a negotiated process. See ACUS
Recommendation No. 82–4, supra note 32, reprinted in 1995 SOURCEBOOK, supra note 30,
at 11.
39. See Regulatory Negotiation: Joint Hearings Before the Senate Select Comm. on
Small Bus. and the Subcomm. on Oversight of Gov’t Management of the Senate Comm.
40. See id. at 2–3.
41. See id. at 6–8.
42. See id. at 89.
43. See id. at 128.
costly litigation. In the same hearing on the 1987 bill, Senator Carl Levin testified that negotiated rules would be less vulnerable to challenge in court. In addition, the chairman of the Administrative Conference, Marshall Breger, testified that negotiated rulemaking had arisen as a response to “the explosion in litigation that has occurred in the last 20 years regarding the United States Government’s rules.” He, too, cited the 80 percent litigation rate of EPA rules as evidence of the problem.

In another hearing, Breger again testified that over three-quarters of EPA’s rules were challenged in court. Both he and Representative Pease subsequently repeated their belief that regulatory negotiation would reduce the number of judicial challenges. Thomas Kelly, the director of EPA’s Office of Standards and Regulations, testified that negotiated rulemaking would allow agencies to escape what he termed a “regulate, litigate, regulate, litigate” syndrome. With testimony such as this, it was not surprising that the report of the Senate Committee on Governmental Affairs on the 1989 legislation stated that negotiated rulemaking would address “the poor quality of rules produced, the burdensome nature of the rulemaking process, the length of time it takes to promulgate rules, and the frequency of litigation that follows.”

In a similar vein, the House committee report on the Negotiated Rulemaking Act of 1990 emphasized that negotiation would head off judicial challenges to agency rules. The committee also cited the 80 percent litigation rate for EPA rules and concluded that negotiated rulemaking would reduce the volume of litigation. During floor debate in the House, Representatives Pease

45. Id.
46. See id. at 28.
47. Id. at 35 (statement of Marshall L. Breger, chairman, ACUS).
48. See id.
51. Regulation Through Negotiation, supra note 49, at 8 (statement of Thomas Kelly, Director of EPA Office of Standards and Regulations).
54. See id. at 9, 17.
and James indicated that reducing litigation was a major purpose of the Act. Pease stated that "too often in the past, and currently, rules are promulgated by agencies and then those groups that are affected by the rule go into court and challenge it." In contrast, he argued, negotiated rulemaking "would, hopefully, avoid the litigation which now costs a lot of money and also results in long, protracted proceedings before the rule can finally go into effect." James similarly claimed that negotiated rulemaking would "encourage those parties who are most affected by the rules to try to address the problems that the administrative rules create prior to their being utilized in the administrative agencies which ultimately leads to very expensive litigation."

In the fall of 1990, Congress passed the Negotiated Rulemaking Act. In adopting the Act, Congress found that "[a]gencies currently use rulemaking procedures that may . . . cause parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation over agency rules." Negotiated rulemaking, Congress announced, "can increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court. It may also shorten the amount of time needed to issue final rules." Upon signing the Act, President Bush affirmed that the legislation would encourage negotiation "as a means of avoiding costly and time-consuming litigation."

The Negotiated Rulemaking Act of 1990 does not require agencies to use formal negotiated procedures for rulemaking. Rather, it authorizes a procedure through which an agency can bring interested parties into the rulemaking process before it issues a proposed rule. The procedure for negotiated rulemaking begins with a determination by the head of the agency that a negotiated process would be appropriate and consistent with the public inter-

56. Id.
60. Id. § 2(5), 104 Stat. at 4969 (codified at 5 U.S.C. § 561 (1994)).
est, based on several criteria listed in the Act. These criteria include "a limited number of identifiable interests that will be significantly affected by the rule," a "reasonable likelihood" that representatives of such interests will negotiate in good faith, and a "reasonable likelihood that a committee [of such representatives] will reach a consensus . . . within a fixed period of time."

After the agency makes a determination that negotiated rulemaking would be appropriate, the agency must publish a notice in the Federal Register indicating its intent to establish a negotiated rulemaking committee that will meet to reach a consensus on a proposed rule. This notice needs to include, among other things, a description of the subject of the rulemaking, a list of the main interests likely to be affected by the rule, and a proposed list of persons who will represent these interests on the committee. Interested parties have 30 days to submit comments on the notice and to apply for a seat on the committee. The agency, after considering any comments or applications submitted, may establish a negotiated rulemaking committee if it still determines that one is appropriate. The Act limits the size of the committee to 25 members, "unless the agency head determines that a greater number . . . is necessary for the functioning of the committee or to achieve balanced membership."

Once constituted, the committee attempts to reach a consensus on a proposed rule. A designated person or persons from the agency "shall be authorized to fully represent the agency in the discussions and negotiations of the committee." The agency may also appoint, with the approval of the committee, an impartial facilitator or mediator to chair the meetings and assist in the negotiations. If the negotiation process results in a "consensus" among the committee on language for a proposed rule, the committee is required to submit the rule, with an accompanying

63. Id. § 563(a)(2).
64. Id. § 563(a)(3).
65. Id. § 563(a)(4).
66. See id. § 564(a).
67. See id. § 564(a)(2)–(4).
68. See id. § 564(c).
69. Id. § 565(b).
70. Id. § 566(b).
71. See id. § 566(c).
72. See supra note 10.
The agency, in turn, is expected to use the committee's rule as the basis for its own proposed rule. The end product should be a rule that is more balanced and agreeable than it might otherwise be.

In addition to the Negotiated Rulemaking Act, Congress has adopted at least a dozen statutes that mandate specific agencies to use negotiated rulemaking to develop certain regulations. Affected agencies include the Departments of Education, Health and Human Services, Housing and Urban Development, and Interior, as well as the Nuclear Regulatory Commission.

73. See 5 U.S.C. § 566(f).
74. See id. § 563(a)(7).
More recently, negotiated rulemaking has been visibly promoted by the Clinton administration. In March of 1993, President Clinton asked Vice President Gore to head a six-month review of the federal executive branch in order to make governmental operations more efficient. At the end of the first phase of this National Performance Review (NPR), the Vice President recommended that agencies increase their use of "consensus-based rulemaking." The NPR report issued in early September 1993 attributed a host of benefits to negotiated rulemaking, including: increased innovation in the substance of regulations; earlier implementation and an overall reduction of "time, money, and effort;" increased rates of compliance; "more cooperative relationships" between regulated parties and federal agencies; and "the potential for avoiding litigation." 76

Following the recommendation set forth in the NPR report, the Clinton administration took a variety of steps to increase the use of negotiated rulemaking across the federal government. In his September 30, 1993 Executive Order on regulatory review, Clinton directed each agency "to explore, and where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking." 77 In a memorandum accompanying the executive order, President Clinton specifically directed eighteen executive departments and agencies to identify at least one rule to develop through negotiated rulemaking in 1994, or to explain why negotiated rulemaking would not be feasible. 78 In early March 1995, with the newly-installed Republican Congress clamoring for comprehensive regulatory reform, President Clinton sent another memorandum to agency heads directing them "to expand substantially [their] efforts to promote consensual rulemaking" and to submit another "list of upcoming rulemakings that can be converted into negotiated rulemakings." 79 Finally, in a subsequently-re-

76. IMPROVING REGULATORY SYSTEMS, supra note 3, at 30.
78. See President's Negotiated Rulemaking Memorandum, supra note 4, at 52,391. According to a General Accounting Office report, 17 agencies responded to the order and 16 identified rules that either "will use, or be considered for, a negotiated rulemaking." U.S. GENERAL ACCOUNTING OFFICE, MANAGEMENT REFORM: IMPLEMENTATION OF THE NATIONAL PERFORMANCE REVIEW'S RECOMMENDATIONS 519 (1994).
79. President's Memorandum on Regulatory Reform, Subject: Regulatory Reinvention Initiative, 1 PUB. PAPERS 304, 305 (Mar. 4, 1995).
leased strategy paper for "reinventing" federal environmental regulation, the Clinton administration specifically directed the EPA to review all its rules to identify potential candidates for negotiated rulemaking.80

In 1996, the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee held hearings on the reauthorization of the Negotiated Rulemaking Act.81 In testimony before the committee, Assistant Secretary of Labor for Occupational Safety and Health, Joseph Dear, reiterated concerns that before the 1990 Act rulemaking had fostered antagonism among the parties. "Many times," he testified, "the adversarial relationship resulted in time-consuming expensive litigation."82 Neil Eisner, an Assistant General Counsel at the Department of Transportation, testified that the process of negotiating a regulation "should make the rule more acceptable to all of the parties and should make them less likely to challenge it."83 Testifying on behalf of the American Bar Association, Philip Harter quoted a Carnegie Commission report to the effect that "the use of negotiation often saves EPA a year or two of 'rulemaking' time."84 In floor discussion, Senator Levin stated that "[a]gencies and others have discovered that, in many rulemaking situations, negotiation beats confrontation in terms of cost, time, aggravation, and the ability to develop regulations that parties with very different per-

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80. See President Bill Clinton & Vice President Al Gore, Reinventing Environmental Regulation 5 (1995).
82. 1996 Reauthorization Hearings, supra note 81, at 53 (statement of Joseph A. Dear, Assistant Secretary, Occupational Safety and Health Administration). Dear also suggested that "the ramifications associated with litigation [are] reduced" by the negotiated rulemaking process. Id.
83. Id. at 94 (statement of Neil Eisner, Assistant General Counsel for Regulation and Enforcement, United States Department of Transportation).
84. Id. at 69 (statement of Philip Harter on behalf of the American Bar Association) (quoting Carnegie Comm'n on Science, Tech., & Gov't, Risk and the Environment: Improving Regulatory Decision Making 111 (1993)).
perspectives can accept.\textsuperscript{85} Virtually all of the legislative discussion on the reauthorization of the Negotiated Rulemaking Act affirmed the success of regulatory negotiation and its continued potential for, among other things, saving time and reducing legal challenges. Without much fanfare, legislation permanently reauthorizing the Act passed through both houses of Congress and was signed by President Clinton on October 19, 1996.\textsuperscript{86}

As this brief history demonstrates, negotiated rulemaking has at various times been advertised as something of a cure-all for most regulatory ills—making rules faster, better, and more effective, while making affected parties satisfied, empowered, and better informed. Proponents have emphasized that the primary purposes of negotiated rulemaking are to reduce rulemaking time and decrease litigation over regulations.\textsuperscript{87} With Congress and the President directing more agencies to use negotiated rulemaking procedures, it is important to assess how effectively negotiated rulemaking has achieved its two main purposes.

\section*{II. THE PERFORMANCE OF NEGOTIATED RULEMAKING}

In the past, most research on negotiated rulemaking has drawn on case studies of specific negotiations. Recently, more systematic research that attempts to evaluate the negotiated rulemaking process has begun to emerge. Much of this work is still underway. Brian Polkinghorn, for example, has conducted extensive interviews with agency staff at the EPA that show how the use of negotiated rulemakings represents a philosophical shift in EPA rulemaking towards incorporating the views of outside groups.\textsuperscript{88} Cornelius Kerwin and Laura Langbein have completed the first phase of an evaluation of regulatory negotiation at EPA

\textsuperscript{87} In the first appellate court opinion to examine the purposes of the Negotiated Rulemaking Act, Judge Richard Posner confirmed that “[t]he Act’s purpose [is] to reduce judicial challenges to regulations by encouraging the parties to narrow their differences in advance of the formal rulemaking proceeding.” USA Group Loan Servs., Inc. v. Riley, 82 F.3d 708, 715 (7th Cir. 1996).
and have reported data drawn from interviews with over a hundred individuals involved in EPA negotiated rulemakings. They found that the participants they interviewed tended overall to view the process favorably. As Kerwin and Langbein acknowledge, their conclusions are tentative in that their first phase was limited to a study of only eight negotiated rulemakings convened by the EPA without any comparison to conventional rulemaking. Preliminary results from the second phase of their study show that participants in conventional EPA rulemakings similarly view the conventional process favorably.


90. See id. at 37 (“Seventy-eight percent responded that the benefits [they realized from participation] did exceed the costs.”). Even among their respondents, however, the level of support for negotiated rulemaking varies considerably. For example, they find that representatives from environmental groups reported significantly less satisfaction with the formal negotiation process. See id. at 40. For examples of environmental group dissatisfaction with regulatory negotiation, see Cindy Skrzycki, Emission Impossible: The EPA Takes on Lawn Tool Makers, WASH. POST, June 21, 1996, at D1 (reporting disappointment over an informal agreement between EPA and industry following a negotiated rulemaking); Citizens Coal Council Declines OSM’s Invitation to Join “Reg-Neg,” INSIDE ENERGY WITH FEDERAL LANDS, June 13, 1994, at 15 (describing citizen group’s rejection of agency’s invitation to participate in a negotiated rulemaking).

91. Kerwin & Langbein, supra note 89, at 7, 46, 48. It is not clear from Kerwin and Langbein’s first phase report whether the eight rulemakings were selected at random or on the basis of other selection criteria. They report that seven of the eight rulemakings had been “successfully concluded” and one failed to result in a consensus-proposed rule. Id. at 2. Only six of their 101 interview respondents came from the one “failed” negotiation. Furthermore, due to difficulties in locating respondents, Kerwin and Langbein dropped from their sample the farmworker protection negotiation, which had encountered considerable controversy. See id. at 5–6. Although these sampling limitations may constrain the conclusions one can draw from Kerwin and Langbein’s otherwise ambitious research, their sample does include seven of the 12 negotiated rules that EPA has finalized, including four rules over which petitions for review were filed. See id. at 2–3. It is not clear from the first phase report how respondents were selected nor how many respondents came from EPA, industry, and environmental groups, categories which have significantly different overall ratings of negotiated rulemaking. See id. at 40.

92. Kerwin and Langbein are continuing a second phase of their project that involves approximately 50 interviews with participants from six conventional EPA rulemakings. A preliminary draft of this second phase report was made available at the time this Article was in press. Although a full review of the second phase results cannot be made at this time, it bears noting that Kerwin and Langbein found no significant difference in the net value participants attributed to their participation in negotiated rulemaking as opposed to conventional rulemaking. See Cornelius Kerwin & Laura Langbein, An Evaluation of Negotiated Rulemaking at the Environmental Protection Agency: Phase II: A Comparison of Conventional and Negotiated Rulemaking 26 (Aug. 1997) (unpublished manuscript, on file with author) (“[T]here was both no statistically significant difference between the two
As these studies suggest, much of the current empirical analysis of negotiated rulemaking focuses on the EPA. Because the EPA has attempted and completed the most negotiated rulemakings,93 and has figured prominently in past claims about both the need for, and success of, negotiated rulemaking,94 researchers must continue to focus on the EPA in order to assess the performance of negotiated rulemaking. That said, a more comprehensive understanding of the impact of negotiated rulemaking can be gleaned from an initial examination of the extent to which other agencies have used consensus-based procedures.

Using searches of Federal Register notices supplemented with listings published by ACUS, I was able to identify a comprehensive dataset of negotiated rulemakings across all federal agencies.95 The data reveal the overall infrequent use of negotiated rulemaking at the federal level. By the end of 1996, seventeen federal agencies had initiated at least one negotiated rulemaking process (Table 1). Each of these agencies had initiated an average of 4 (or median of 2) negotiated proceedings. Of the seventeen agencies, only twelve had actually issued a final rule based on a regulatory negotiation. As a point of comparison, almost sixty regulatory agencies are listed in a recent unified agenda of federal regulations,96 and over fifty agencies regularly have their rules reviewed by the Office of Management and Budget.97

93. See infra Table 1.
94. See, e.g., IMPROVING REGULATORY SYSTEMS, supra note 3, at 31 (using EPA to illustrate purported time savings and reduction in litigation from negotiated rulemaking); Susskind & MacMahon, supra note 17, at 133 (relying on EPA case studies to suggest the “great promise” of negotiated rulemaking). ACUS has reported that “[o]nly one agency, EPA, has institutionalized negotiated rulemaking with a small full-time staff to evaluate candidates for either reg-neg or other consensus-building processes and to manage the process ultimately selected.” ACUS, BUILDING CONSENSUS, supra note 12, at 16.
95. The Negotiated Rulemaking Act requires agencies to publish a notice in the Federal Register “that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule.” 5 U.S.C. § 564(a)(1) (1994).
Table 1. Agency Use of Negotiated Rulemaking, 1983-1996

<table>
<thead>
<tr>
<th>Agency</th>
<th>Abandoned</th>
<th>Pending</th>
<th>Final</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arch'l &amp; Transp. Barriers Compl. Bd.</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Dep't of Agriculture</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Dep't of Education</td>
<td>1</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Dep't of Energy</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Dep't of Health &amp; Human Services.</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Dep't of Housing &amp; Urban Dev.</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Dep't of Interior</td>
<td>3</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Dep't of Labor</td>
<td>0</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Dep't of Transportation</td>
<td>0</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>Envtl. Protection Agency</td>
<td>3</td>
<td>3</td>
<td>12</td>
</tr>
<tr>
<td>Equal Opportunity Empl. Comm'n</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Farm Credit Admin.</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Fed. Communications Comm'n</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Fed. Trade Comm'n</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Interstate Commerce Comm'n</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Nuclear Regulatory Comm'n</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Pension Benefit Guar. Corp.</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

Sources: On-line searches of Federal Register volumes from 1980 through 1996 were made and supplemented with a review of reports published by the Administrative Conference of the United States. The category of “abandoned” rules represents those rulemakings for which, at some point following publication of the intent to establish a negotiated rulemaking committee, the agency failed to commence negotiations, the agency disbanded an established committee prior to attempting to reach even a limited resolution, or the agency withdrew the underlying rulemaking altogether. The category “pending” represents those rulemakings for which a negotiated rulemaking committee was utilized but for which a final rule had yet to be promulgated by the end of 1996. The category of “final” represents those negotiated rulemakings that have resulted in at least one final rule, notwithstanding subsequent efforts to make further revisions or promulgate additional rules. Appendices A, B, and C contain citations to the rulemakings in each of these three categories.

Of the sixty-seven negotiated rulemakings that had been announced by the end of 1996, in 13 proceedings (or nearly 20 percent) the agency abandoned the formal negotiated process before any consensus could develop.98 Nineteen of the rulemakings re-

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98. By “abandoned,” I do not mean that the participants failed to reach a consensus. Rather, I refer to those rules for which, at some point after the agency published an intent to negotiate, the agency decided not to commence negotiations, disbanded the committee before seeking even a limited agreement, or withdrew the underlying regulatory action altogether. Appendix A contains citations to the notices of intent to negotiate for this category of “abandoned” negotiations. In one instance, the Department of Interior
mained pending, with a final rule yet to be issued. Since 1983, when the FAA initiated the first negotiated rulemaking, federal agencies have promulgated only thirty-five rules using the alternative procedure, or about 2.7 each year.

Compared with the number of federal agencies and the volume of rules promulgated each year, this level of rulemaking is low. Figure 1 shows the annual number of negotiated rules initiated and promulgated from 1983 to 1996. The use of negotiated rulemaking has increased somewhat in recent years, following the

(20) (DOI) did not publish a separate notice of intent for one of its negotiated rulemakings. The citation listed in Appendix A for the DOI offshore air quality rulemaking refers to the earliest Federal Register notice that acknowledged DOI's decision to use formal negotiation for this rulemaking.

99. Appendix B contains citations to the notices of intent to negotiate these nineteen rules. Extensive searches of the Federal Register were made to confirm the status of these pending rulemakings as of the end of 1996.

100. Appendix C contains citations to the final negotiated rules promulgated by the end of 1996. In compiling this list of final rules, I made three choices that should be noted. First, one negotiated rulemaking, on Indian self-determination, was jointly convened by both the Department of Interior and the Department of Health and Human Services. I have treated it as one rulemaking, even though it is counted twice in the breakdown by agency in Table 1. See Indian Self-Determination, 61 Fed. Reg. 32,482 (1996). Second, I have included in this listing only one of the Department of Education's final rules which emerged from its modified negotiated rulemaking process under the Higher Education Amendments of 1992. See Higher Education Amendments of 1992, 59 Fed. Reg. 22,348 (1994). The process was modified in the sense that the Department presented the negotiated rulemaking committee with draft proposed rules at the outset of the committee process. The committee participants divided into several meetings and the agency promulgated three additional final rules. See Institutional Eligibility Under the Higher Education Act of 1965, as amended; Eligibility of Foreign Medical Schools Under the Guaranteed Student Loan Program (GLSP), 59 Fed. Reg. 22,062 (1994) (codified at 34 C.F.R. pts. 600 & 601); Secretary's Procedures and Criteria for Recognition of Accrediting Agencies, 59 Fed. Reg. 22,250 (1994) (codified at 34 C.F.R. pt. 602); Institutional Eligibility Under the Higher Education Act of 1965, as amended, 59 Fed. Reg. 22,324 (1994) (codified at 34 C.F.R. pt. 600). By including only one higher education rule, I have followed the categorization of ACUS which lists the process as a single negotiated rulemaking proceeding. See ACUS, BUILDING CONSENSUS, supra note 12, at 45-46. The findings reported in this Article would not change in any substantial way if the three additional higher education rules were included in the analysis. Finally, I have treated the EPA's disinfectant byproducts negotiated rulemaking as having been completed, even though in actuality only one of the three proposed rules to emerge from that set of negotiations has been made final. See Drinking Water Information Collection Rule, 61 Fed. Reg. 24,354 (1996) (codified at 40 C.F.R. pt. 141). Two additional proposed rules, which would set substantive drinking water standards, remain pending from the disinfectant byproducts negotiation. See Disinfectants and Disinfection Byproducts, 59 Fed. Reg. 38,668 (1994) (to be codified at 40 C.F.R. pts. 141 & 142) (proposed July 29, 1994); Enhanced Surface Water Treatment Requirements, 59 Fed. Reg. 38,832 (1994) (to be codified at 40 C.F.R. pts. 141 & 142) (proposed July 29, 1994).
Negotiated Rulemaking Act and the various presidential and statutory directives. Nevertheless, the overall proportion of agency regulations adopted using negotiated rulemaking remains consistently small—less than one-tenth of one percent, as shown in Table 2. In comparison with overall regulatory activity, then, the rate of negotiated rulemakings has been minuscule. In these terms, negotiated rulemaking certainly is very much still "a novelty in the administrative process," as Judge Richard Posner opined in a recent Seventh Circuit decision.

Whatever the purported benefits of negotiated rulemaking, agency staff appear not to perceive these benefits as a singularly motivating factor. Indeed, Polkinghorn reports that "the negotiati-
Table 2. Negotiated Rulemaking as Percentage of Final Rules

<table>
<thead>
<tr>
<th>Year</th>
<th>Final Rules</th>
<th>Negotiated Rules</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>1983</td>
<td>3931</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>1984</td>
<td>3515</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>1985</td>
<td>3351</td>
<td>2</td>
<td>0.06%</td>
</tr>
<tr>
<td>1986</td>
<td>3287</td>
<td>1</td>
<td>0.03%</td>
</tr>
<tr>
<td>1987</td>
<td>3295</td>
<td>2</td>
<td>0.06%</td>
</tr>
<tr>
<td>1988</td>
<td>3442</td>
<td>3</td>
<td>0.09%</td>
</tr>
<tr>
<td>1989</td>
<td>3416</td>
<td>2</td>
<td>0.06%</td>
</tr>
<tr>
<td>1990</td>
<td>3174</td>
<td>1</td>
<td>0.03%</td>
</tr>
<tr>
<td>1991</td>
<td>3184</td>
<td>2</td>
<td>0.06%</td>
</tr>
<tr>
<td>1992</td>
<td>3022</td>
<td>4</td>
<td>0.13%</td>
</tr>
<tr>
<td>1993</td>
<td>3184</td>
<td>3</td>
<td>0.09%</td>
</tr>
<tr>
<td>1994</td>
<td>3567</td>
<td>5</td>
<td>0.14%</td>
</tr>
<tr>
<td>1995</td>
<td>3473</td>
<td>3</td>
<td>0.09%</td>
</tr>
<tr>
<td>1996</td>
<td>3762</td>
<td>7</td>
<td>0.19%</td>
</tr>
<tr>
<td>Total</td>
<td>47603</td>
<td>35</td>
<td>0.07%</td>
</tr>
</tbody>
</table>

Sources: The numbers for final rules were obtained using computer searches conducted by year in the LEXIS Fedreg database. I used a restrictive search that retrieved all documents containing the words “final rule” or “final rulemaking” in the action category, but excluded those documents with the words “correction,” “technical amendment,” or “clarification” in the same category. The numbers for final negotiated rules were obtained using searches in the Federal Register supplemented with a review of reports of the Administrative Conference of the United States.

on process has not been as popular with EPA employees as it was originally anticipated for resolving crucial rulemaking problems.”103 There are certainly any number of possible explanations for the infrequent reliance on negotiated rulemaking, including the inappropriateness of a formal negotiation process for many rules or the difficulties associated with chartering an advisory committee.104 It may well also be that skepticism on the part of agency


104. The procedural requirements associated with creating an advisory committee may serve to discourage the use of negotiated rulemaking. The statute reauthorizing the Negotiated Rulemaking Act directs the Office of Management and Budget to streamline Federal Advisory Committee Act (FACA) requirements and make recommendations for further amendments to FACA that will encourage more negotiated rulemaking. See Ad-
staff partly explains why the use of negotiated rulemaking has made only a tiny dent in the overall regulatory activity of the federal government. Although a complete explanation for the infrequent use of negotiated rulemaking is beyond the scope of this Article, I do seek to consider whether the apparent reluctance of agency staff to use negotiated rulemaking is itself justified. In other words, should agency managers concerned with reducing regulatory delays and avoiding litigation use negotiated rulemaking more frequently?

A. The Length of Negotiated Rulemaking Proceedings

One advantage formal negotiated rulemaking purportedly has over informal rulemaking is its ability to produce rules in less time. Yet the impact negotiation has on the time it takes to develop a regulation remains unclear. In a 1987 article, former EPA Administrator Lee Thomas stated that “as we look back upon our experiences with negotiated rules so far, they have saved time. Regulatory negotiation shortened our total process on each one of them.” The National Performance Review report on the regulatory process similarly stated that negotiated rulemaking at EPA has saved up to eighteen months compared with conventional rulemaking. Despite this proclaimed efficiency, the NPR authors also interestingly cautioned Congress not to impose “short

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105. Thomas, supra note 29, at 3. The final ACUS report on negotiated rulemaking quotes Sheldon M. Gutman, Associate General Counsel and Dispute Resolution Specialist at the Federal Communications Commission (FCC), as concluding that “[t]he Commission continues to view negotiated rulemaking as a time saving and cost effective method of developing standards. . . . We have found that negotiated rulemaking forces parties to focus quickly on the key issues and ultimately saves us time and money in rulemaking matters.” ACUS, BUILDING CONSENSUS, supra note 12, at 27. It is difficult to say on what basis the FCC made such a “finding” of the “ultimate” time savings of negotiated rulemaking. At that time, the FCC had only finalized one rule through a formal negotiated rulemaking process. See Provision of Non-Voice Low Earth Orbit Satellite Services, 58 Fed. Reg. 68,053 (1993) (codified at 47 C.F.R. pts. 2 & 25) (FCC). The experience of the FCC in finalizing negotiated rules was so limited at that time that the same ACUS report that quoted Gutman did not list any FCC negotiated rule as having been completed. ACUS, BUILDING CONSENSUS, supra note 12, at 63–64 (listing no final rule for the FCC in its table of federal negotiated rulemakings).

106. See IMPROVING REGULATORY SYSTEMS, supra note 3, at 32–33 n.8.
statutory deadlines to issue proposed or final rules, especially if they are shorter than two years [because this may] preclude the use of negotiated rulemaking. In at least one instance, a federal agency decided that "negotiated rulemaking was not a practical option" for the development of regulations because of statutory time constraints. Although negotiated rulemakings may not be sufficiently fast when an agency must meet stringent deadlines, overall they have been thought to be potential time-savers.

To measure the impact of negotiated rulemaking on regulatory development time, I analyzed the federal negotiated rulemakings that have been completed to date. The average negotiated rulemaking takes a little less than two and a half years to complete, from the time the agency announces its intent to form a negotiated rulemaking committee to the time the final rule is published (see Table 3). Among all 35 regulatory negotiations that have yielded final rules, the shortest took only about half a year to complete—Coast Guard regulations for drawbridges over the Chicago River (179 days). At the other extreme, the EPA's farmworker pesticide protection standards, which failed to achieve full consensus after one of the parties left the negotiation, took 2,528 days, or nearly seven years, to complete. The average

107. Id. at 32.
108. Food Labeling Regulations, 56 Fed. Reg. 60,394, 60,397 (1991) (FDA). Ordinarily, of course, it has been thought that deadlines will help move negotiations along. See infra note 287 and accompanying text. It is not known how many agencies rule out the use of negotiated rulemaking due to concerns about deadlines. If it could be shown that many agencies do not use negotiated rulemaking because of deadline concerns, this finding would tend to undermine claims about time savings from negotiated rulemaking.
109. See supra notes 12, 31, 60 and accompanying text.
111. See Intent to Form an Advisory Committee to Negotiate Proposed Farmworker Protection Standards for Agricultural Pesticides, 50 Fed. Reg. 38,030 (1985) (notice of intent to negotiate published on Sept. 19, 1985); Worker Protection Standard, 57 Fed. Reg. 38,102 (1992) (final rule published on Aug. 21, 1992). To say that the worker protection rule is "completed" is somewhat of a misnomer. The rule is still subject to contentious debate. EPA has issued extensions and changes to the rule, Congress has entered the fray, and outside groups have threatened litigation. See, e.g., Act of April 6, 1994, Pub. L. No. 103-231, 108 Stat. 333 (extending compliance dates for worker protection standards); Worker Training Grace Period Suit Against EPA Likely, 23 PESTICIDES & TOXIC CHEMICAL NEWS, Apr. 19, 1995, at 10 (discussing intention of several parties to sue the EPA depending on the length of the worker training grace period found in the worker protection standard); Brian Broderick, Pesticides: EPA Issues Changes to Farm...
number of days for completion so far has been 835 (with a standard deviation of 577); the median has been 651, or over one and three quarters years. Of course, a couple of years may seem short compared with the decades that certain notorious rulemakings sometimes seem to last, or it may seem somewhat long compared with the speed that some might expect of the government in addressing serious public concerns. What is needed is a standard for comparison, a group of comparable rules developed using conventional notice-and-comment procedures.112

Any number of variables may offset the length of the rulemaking process, including the agency promulgating the rule, the complexity of the rule to be issued, and the priority the rule holds for the agency. Establishing the comparability of two regulations is no easy matter, but Kerwin and Furlong made an initial attempt in their valuable study of the length of rulemaking at EPA.113 They compared the time of four negotiated EPA rulemakings with the average time for all EPA rulemakings that entered into the agency’s internal regulatory development management system during fiscal years 1987–1990. The latter group amou-

112. Some readers may begin to wonder whether I have chosen the appropriate set of rules for comparison in the analyses to follow. As I explain in the text, the types of rules I compare in this Article are identical to those others have used in the past to support claims about the impact of negotiated rulemaking, in the few instances where such claims have been supported with data. In Part III.A of this Article, I examine the issue of “treatment” and “control” groups more closely, paying attention to the possibility of bias in the rules selected for formal negotiation. That analysis confirms the appropriateness of the comparison groups I use. See infra Part III.A.

### Table 3. Time for Completed Negotiated Rulemakings, 1985-1996

<table>
<thead>
<tr>
<th>Agency</th>
<th>Negotiated Rulemaking</th>
<th>Reg-Neg Announced</th>
<th>Final Rule Published</th>
<th>Days</th>
</tr>
</thead>
<tbody>
<tr>
<td>DOT</td>
<td>Flight Time Requirements</td>
<td>5/12/83</td>
<td>7/18/85</td>
<td>798</td>
</tr>
<tr>
<td>DOL</td>
<td>Occup’l Exp. to Benzene</td>
<td>7/8/83</td>
<td>9/11/87</td>
<td>1526</td>
</tr>
<tr>
<td>EPA</td>
<td>Nonconformance Penalties</td>
<td>4/24/84</td>
<td>8/30/85</td>
<td>493</td>
</tr>
<tr>
<td>EPA</td>
<td>Emergency Pesticide Exemptions</td>
<td>8/3/84</td>
<td>1/15/86</td>
<td>530</td>
</tr>
<tr>
<td>EPA</td>
<td>Farmworker Protection Standards</td>
<td>9/19/85</td>
<td>8/21/92</td>
<td>2528</td>
</tr>
<tr>
<td>DOL</td>
<td>4,4’-Methyleneedianiline</td>
<td>10/22/85</td>
<td>8/10/92</td>
<td>2484</td>
</tr>
<tr>
<td>EPA</td>
<td>Residential Woodstoves</td>
<td>2/7/86</td>
<td>2/26/88</td>
<td>749</td>
</tr>
<tr>
<td>EPA</td>
<td>Underground Injection</td>
<td>7/14/86</td>
<td>7/26/88</td>
<td>743</td>
</tr>
<tr>
<td>EPA</td>
<td>RCRA Permit Modifications</td>
<td>7/16/86</td>
<td>9/28/88</td>
<td>805</td>
</tr>
<tr>
<td>DOT</td>
<td>Nondiscrimination in Air Travel</td>
<td>8/22/86</td>
<td>3/6/90</td>
<td>1292</td>
</tr>
<tr>
<td>NRC</td>
<td>Waste-Site Licensing Records</td>
<td>12/18/86</td>
<td>4/14/89</td>
<td>848</td>
</tr>
<tr>
<td>EPA</td>
<td>Asbestos in Schools</td>
<td>1/13/87</td>
<td>10/30/87</td>
<td>290</td>
</tr>
<tr>
<td>DOE</td>
<td>Financial Ass. for Special Educ.</td>
<td>7/12/88</td>
<td>5/19/89</td>
<td>311</td>
</tr>
<tr>
<td>EPA</td>
<td>VOC Equipment Leaks</td>
<td>4/25/89</td>
<td>4/22/94</td>
<td>1823</td>
</tr>
<tr>
<td>DOT</td>
<td>Handicapped Parking</td>
<td>6/12/89</td>
<td>3/11/91</td>
<td>637</td>
</tr>
<tr>
<td>DOA</td>
<td>Control of Scrapie</td>
<td>7/13/89</td>
<td>12/9/92</td>
<td>1245</td>
</tr>
<tr>
<td>DOE</td>
<td>Vocational &amp; Technology Educ.</td>
<td>10/12/90</td>
<td>8/14/92</td>
<td>672</td>
</tr>
<tr>
<td>DOT</td>
<td>Transp. for Disabled</td>
<td>1/11/91</td>
<td>9/6/91</td>
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<td>Clean Fuels</td>
<td>2/8/91</td>
<td>2/16/94</td>
<td>1104</td>
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<td>DOT</td>
<td>Oil Spill Vessel Response Plans</td>
<td>11/18/91</td>
<td>1/12/96</td>
<td>1516</td>
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<td>EPA</td>
<td>Coke Oven Batteries</td>
<td>1/15/92</td>
<td>10/27/93</td>
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<tr>
<td>FCC</td>
<td>Non-Voice Satellite Servs.</td>
<td>5/1/92</td>
<td>12/23/93</td>
<td>601</td>
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<td>FCA</td>
<td>Administrative Expenses</td>
<td>5/6/92</td>
<td>2/23/93</td>
<td>293</td>
</tr>
<tr>
<td>DOE</td>
<td>Higher Educ. Amendments</td>
<td>8/26/92</td>
<td>4/29/94</td>
<td>611</td>
</tr>
<tr>
<td>EPA</td>
<td>Drinking Water Info. Collection</td>
<td>9/15/92</td>
<td>5/14/96</td>
<td>1337</td>
</tr>
<tr>
<td>EPA</td>
<td>Wood Furniture Coatings</td>
<td>11/25/92</td>
<td>12/7/95</td>
<td>1107</td>
</tr>
<tr>
<td>DOE</td>
<td>Direct Student Loans</td>
<td>12/28/93</td>
<td>12/1/94</td>
<td>338</td>
</tr>
<tr>
<td>DOE</td>
<td>Guaranty Agency Reserves</td>
<td>1/19/94</td>
<td>11/25/94</td>
<td>310</td>
</tr>
<tr>
<td>DOT</td>
<td>Roadway Worker Protection</td>
<td>8/17/94</td>
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<td>10/28/94</td>
<td>7/3/95</td>
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<td>Hearing Aid Compatible Telephones</td>
<td>11/23/94</td>
<td>8/14/96</td>
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<td>12/29/94</td>
<td>6/24/96</td>
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<td>1/3/95</td>
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<td>Reportable Events</td>
<td>8/11/95</td>
<td>12/2/96</td>
<td>479</td>
</tr>
</tbody>
</table>

Abbreviations: DOA - Dept. of Agriculture; DOE - Dept. of Education; DOI - Dept. of Interior; DOL - Dept. of Labor; DOT - Dept. of Transp.; EPA - Envtl. Protection Agency; FCA - Farm Credit Admin.; FCC - Fed. Communications Comm’n; HHS - Dept. of Health & Human Servs.; HUD - Dept. of Housing & Urban Develop.; NRC - Nuclear Regulatory Comm’n; PBGC - Pension Benefit Guar. Corp.
nted roughly to the most substantial 15 percent of all EPA rules adopted during this period.114

In calculating the length of a rulemaking, Kerwin and Furlong relied on internal EPA files to determine the date when each rule entered into the agency’s regulatory development management system and the date when it was finalized. They found that the rules in their study took an average of 3.0 years (1108 days) from start to finish. In contrast, the four negotiated rules initiated during the time period of their study took an average of only 2.1 years (778 days) to complete, a time savings of eleven months.115

Although Kerwin and Furlong acknowledged that the number of negotiated rules in their study was small, they interpreted their data to demonstrate that negotiated rulemaking is “more expeditious” than conventional rulemaking.116 Their analysis underlies the National Performance Review report’s claim that regulatory negotiation is faster than conventional rulemaking.117

Of course, if all twelve of EPA’s negotiated rules are examined, rather than just four, the suggested time savings of negotiated rulemaking could well be different.118 To determine the

114. As Kerwin and Furlong noted, they limited their analysis “to those rules developed under the normal rulemaking process in the agency. This left out of the study those classes of rules deemed sufficiently routine or inconsequential to be exempted from OMB review, as well as from most EPA internal management requirements.” Id. at 122. Their sample included 150 rules that EPA initiated between October 1, 1986, and September 30, 1989. See id. My research shows that during this same period, EPA issued approximately 1000 final rules, excluding corrections and technical amendments. 115. See id. at 124, 134. The median time found by Kerwin and Furlong, however, does not show any notable time savings. The median time for negotiated rules (868 days) was virtually the same as the median time for all rules (872 days). See id. at 134.

116. Id. at 124.

117. See IMPROVING REGULATORY SYSTEMS, supra note 3, at 32–33 n.8 (citing Kerwin & Furlong, supra note 113, at 124). The National Performance Review report also refers to an interview with Chris Kirtz, the director of EPA’s Office of Consensus and Dispute Resolution, indicating that EPA saved from 6 to 18 months with seven of its negotiated rulemaking proceedings. See id. 118. The twelve negotiated rules are those for which the EPA has promulgated a final rule. See infra Appendix C. All 12 of these rules are included in EPA’s internal list of negotiated rulemakings, as are three negotiated rulemakings for which the agency has yet to issue a final rule. See U.S. Envtl. Protection Agency, Negotiated Rulemaking at the Environmental Protection Agency (1994) [hereinafter Negotiated Rulemaking at EPA]; see also ACUS, BUILDING CONSENSUS, supra note 12, at 55–63 (listing negotiated rulemaking proceedings at EPA). The only other rulemaking included on EPA’s internal list is the lead acid battery recycling rule, see id. at 59, which I treat as “abandoned” because the EPA withdrew the entire rulemaking and adjourned the negotiation committee after several meetings. See supra note 98.
length of all EPA negotiated rulemakings, I calculated the difference in time between the date the agency announced its intent to create a negotiated rulemaking committee and the date the agency published its final rule in the Federal Register. Although this method differs from that used by Kerwin and Furlong in that it relies on published government records instead of internal agency files, my reliance on published materials turns out to favor time savings for negotiated rules. For example, Federal Register listings yield an average time for the four negotiated rules in the Kerwin and Furlong study of 1.8 years (647 days), more than four months shorter than the average they report for the same rules. The difference is likely explained by the considerable amount of preparatory work that goes into deciding whether and how to conduct a negotiated rulemaking, work which precedes the publication of a notice to establish a negotiation committee.

The average time period for all 12 of the negotiated rules promulgated by the EPA is 2.8 years (1013 days). The four negotiated rules in the Kerwin and Furlong study therefore turn out to be rather atypical, taking roughly half as long on average as the other rules.

In contrast to the eleven-month time savings sug-

119. In seeking to dismiss my findings as “meaningless” and “fundamentally flawed,” Philip Harter has mischaracterized my method of analysis. See Philip J. Harter, Fear of Commitment: An Affliction of Adolescents, 46 DUKE L.J. 1389, 1421–22 & n.117 (1997). He invokes examples of rulemakings for which the Coast Guard and FAA published notices of proposed rulemakings before they initiated negotiated rulemaking processes. According to Harter, these examples show that using Federal Register notices as a basis for measurement “makes the process appear very long.” Id. The implication is that I based my analysis on the earliest Federal Register notice I could find for a rulemaking. As I make clear in the text, however, I did not use early notices or advance notices of proposed rulemaking as a starting point for calculating rulemaking time. I used agency notices of intent to use negotiated rulemaking. The “clock” had not started “ticking” when the Coast Guard and FAA published their initial notices of proposed rulemaking. It only started ticking when the agencies announced their plans to use negotiated rulemaking.

120. It should be noted that one of these twelve rules, the disinfectant byproducts rule, is incomplete. The EPA has promulgated one final rule resulting from the negotiation, but it is a rule designed to collect additional data for the EPA to use in promulgating its substantive drinking water standards. See Drinking Water Information Collection Rule, 61 Fed. Reg. 24,354 (1996) (codified at 40 C.F.R. pt. 141). The substantive standards have been proposed but as of this writing were still pending while the agency gathered information under the ICR. See Enhanced Surface Water Treatment Requirements, 59 Fed. Reg. 38,832 (1994) (to be codified at 40 C.F.R. pts. 141 & 142) (proposed July 29, 1994); Disinfectants and Disinfection Byproducts, 59 Fed. Reg. 38,668 (1994) (to be codified at 40 C.F.R. pts. 141 & 142) (proposed July 29, 1994). By using the date of the first final rule to emerge from this negotiated rulemaking process, even though it is an information collection rule and not a drinking water standard, I introduce
gested by Kerwin and Furlong, my analysis of all of EPA's negotiated rules suggests (at most) little more than three months savings compared with the rules issued in the period studied by Kerwin and Furlong, a difference which could well be accounted for by choices of measurement.121 When the EPA's three pending negotiated rules are added, the time savings between the two procedures disappears altogether.122 If we were to assume, for sake of estimation, that the EPA had promulgated all three pending rules at the end of December 1996, the average time for promulgating negotiated rules at EPA would increase to 3.1 years (1129 days), three weeks longer than the average reported by Kerwin and Furlong for all EPA rules.123

The whole of the available evidence on the time span of EPA's negotiated rules markedly contrasts with the claims of considerable time savings attributed to negotiated rulemaking. Of course, any comparison of negotiated and conventional rules may have its limits because the time it takes to develop rules is surely affected by factors other than just the use or nonuse of formal negotiated procedures.124 Even though the EPA has conducted the

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121. As noted earlier, my method of calculating rulemaking time underestimates the internal rulemaking time by as much as four months when compared with the method used by Kerwin and Furlong. See supra text accompanying note 119.


123. See Kerwin & Furlong, supra note 113, at 134. Using the median length of rulemaking, the time differences are more mixed. The median time for the 12 completed EPA negotiated rules (777 days) is several months shorter than the median for all EPA rules (872 days). See supra note 115 and accompanying text. However, the median time for all 15 EPA negotiated rules is 1104 days, notably longer than the median for all EPA rules.

124. One factor delaying promulgation in some cases might be the intervention of governing legislation. In response to an earlier version of this Article, Philip Harter correctly noted that the volatile organic chemical equipment leaks rulemaking was delayed due to factors outside the negotiation process itself. See Harter, supra note 119, app. B, at 1425. The equipment leaks negotiations were conducted in the months prior to the passage of the 1990 Clean Air Act amendments, Pub. L. No. 101-549, 104 Stat. 2399 (1990). Following passage of the amendments, the EPA folded the equipment leaks rule into the larger Hazardous Organic Chemical Emission Rule, 59 Fed. Reg. 19,402 (1994) (codified at 40 C.F.R. pt. 80) (EPA). While the time EPA needed to promulgate this
most negotiated rulemakings of any agency, it still has only pro-
mulgated 12 rules (and has only three others pending). Yet as I
discuss in Part III.A, it does not appear that these negotiated rules
were prone at the outset to demand more of the EPA's time.125
Moreover, the experience at EPA seems consistent with the im-
pression of at least one other agency that has completed a number
of rules through the negotiated rulemaking process. The Depart-
ment of Education "has reported that it realized no significant
time savings through the use of the process."126

In addition, it is important to keep in mind that the mere
passage of chronological time—from notice of intent to final
rule—probably itself understates the amount of time devoted to
negotiated rulemaking. After all, rules that the EPA issues in a
shorter amount of "chronological time" may well reflect the ex-
penditure of substantially more "aggregate time" by agency staff
and interest group representatives. Rules that appear to take more
chronological time may do so simply because they sit dormant
while agency staff members tend to other matters.

Even though negotiated rulemaking at the EPA takes at least
the same amount of chronological time as all rules studied by
Kerwin and Furlong, by most accounts negotiated rulemaking
demands much more concentrated amounts of time on the part of
agency and non-agency participants.127 To borrow a phrase from

125. See infra notes 272–74, 281–93 and accompanying text.
126. ACUS, BUILDING CONSENSUS, supra note 12, at 29 n.38 (citing Memorandum
from Ted Sky, Senior Counsel, Department of Education, to Judith Winston, General
Counsel, Department of Education (Nov. 3, 1994)).
127. See, e.g., KERWIN, supra note 18, at 190 (stating that negotiated rulemaking
demands an "extraordinary commitment of time" and "negotiation sessions themselves are
demanding activities that can wreak havoc with normal work responsibilities"); Peter
Schneider & Ellen Tohn, Success in Negotiating Environmental Regulations, 9 ENVTL.
IMPACT ASSESSMENT REV. 67, 77 (1985) ("Regulatory negotiation is surprisingly resource
intensive."); Siegler, supra note 17, at 10,651 ("A major disadvantage of the reg-neg pro-
cess is that it can be extremely resource-intensive and stressful."); ACUS, BUILDING
CONSENSUS, supra note 12, at 28 (reporting that Department of Agriculture has found
negotiated rulemaking to be "expensive").
Brian Polkinghorn, negotiated rulemaking is a "time compressor."

The negotiated rulemaking process contains all the elements of the conventional procedure, but "in reg-neg all of them are compressed into one preemptive, intense, time consuming negotiated interaction." As an early EPA report on the agency's experience with negotiated rulemaking described, "EPA managers who have been the Agency's negotiators have devoted far more time to the negotiations in which they were involved than they ordinarily would spend on a single rulemaking effort." Once the negotiations are completed, moreover, EPA staff still must spend the additional time associated with drafting regulatory language and responding to comments. Even those who are otherwise positively inclined toward regulatory negotiation acknowledge that the process demands a considerable amount of time and resources up-front. When negotiated rulemaking compresses staff time in this way and still ends up taking at least as long as conventional rulemaking, it is impossible to conclude that it has successfully increased the speed of the regulatory process.

B. Negotiated Rulemaking and Litigation

If formal regulatory negotiations do not save agencies (or at least the EPA) much in the way of time, at least they are thought to stave off litigation. By bringing interested parties together to reach a consensus, the agency expects to avoid subsequent petitions for review. In this way, negotiated rulemaking could in theo-

129. Id. at 4.
131. See, e.g., IMPROVING REGULATORY SYSTEMS, supra note 3, at 32 ("[T]he concentrated investment of effort and expense in the short term may be a serious obstacle."); Steven Kelman, Adversary and Cooperationist Institutions for Conflict Resolution in Public Policymaking, 11 J. POL'Y ANALYSIS & MGMT. 178, 200 (1992) (noting that "service in regulatory negotiations has proven to be quite time-consuming compared to the adversary process, which creates a problem for organizations with limited resources"); Daniel Fiorino, Regulatory Negotiation as a Form of Public Participation, in FAIRNESS AND COMPETENCE IN CITIZEN PARTICIPATION: EVALUATING MODELS FOR ENVIRONMENTAL DISCOURSE 223, 232 (Ortwin Renn et al. eds., 1995) ("Although negotiation may not take more time overall than a conventional rulemaking, the time demands are more concentrated.").
ry save the agency the time and resources it takes to litigate or settle a legal challenge.\footnote{132} As I showed in Part I, the goal of reducing litigation was a driving force behind the Negotiated Rulemaking Act.\footnote{133} According to some, negotiated rulemaking has achieved this goal. Former EPA Administrator Lee Thomas asserted that at his agency "[r]egulatory negotiation has reduced litigation."\footnote{134} The National Performance Review reported a reduction in the 80 percent rate at which EPA rules are challenged to a rate of 20 percent following the introduction of negotiated rulemaking.\footnote{135} The former research director of ACUS has written that agencies developing rules through negotiation have succeeded in "dramatically reducing the rate of litigation over those rules."\footnote{136}

As NPR's own report makes clear, rules promulgated following a regulatory negotiation are far from immune from legal challenge.\footnote{137} The EPA's visibility rule for the Grand Canyon area is

\begin{footnotes}
\footnote{132} See, e.g., Pritzker, supra note 29, at 51 (noting "[l]ong-term savings from reduced litigation").
\footnote{133} See supra notes 26-61 and accompanying text.
\footnote{134} Thomas, supra note 29, at 1, 3.
\footnote{135} See IMPROVING REGULATORY SYSTEMS, supra note 3, at 32 n.7.
\footnote{136} Lubbers, supra note 29, at 1172. Other government officials agree that negotiated rulemaking has reduced litigation. See, e.g., The Comprehensive Regulatory Reform Act of 1995: Hearings on S. 343 Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary, 104th Cong. 11-14 (1995) (statement of ACUS Chairperson Thomasina V. Rogers) (stating that negotiated rulemaking "has produced rules that have engendered much less litigation than conventional rulemaking processes"); Implementation of the Clean Air Act Amendments of 1990: Hearings Before the Senate Comm. on Env't & Pub. Works, 103d Cong. 53 (1993) (statement of EPA Administrator Carol M. Browner) (noting that regulatory negotiations "reduce chances of legal challenge"); Notice of Final Alternative Dispute Resolution Policy and Opportunity for Comment, 61 Fed. Reg. 40,424, 40,425 (1996) (Department of Interior) (stating that negotiated rulemaking can "reduce the high rate of litigation"); U.S. GENERAL ACCOUNTING OFFICE, CLEAN AIR RULEMAKING 5 (1995) (relating report of EPA officials that negotiated rulemaking can save time by "minimizing the likelihood of litigation after promulgation"). Academic researchers have reached similar conclusions. In its recent report on risk decisionmaking, the National Research Council noted that "litigation is reported to be less likely" following a negotiated rulemaking process. NATIONAL RESEARCH COUNCIL, supra note 13, at 202. Professor Cornelius Kerwin has written (somewhat tautologically) that "when the process works well all current indications are that litigation rates are quite low." KERWIN, supra note 18, at 191.
\footnote{137} As a matter of law, the mere fact that an agency secured the "consensus" of a negotiated rulemaking committee on a rule does not make that rule immune from judicial challenge. See 5 U.S.C. § 570 (1994) ("Nothing in this section shall bar judicial review of a rule if such judicial review is otherwise provided by law."). A recurring issue in legal literature is whether negotiated rules should nevertheless be afforded greater
a notable example. Although not conducted under the auspices of the Negotiated Rulemaking Act, this visibility rule has been cited as a prominent illustration of the regulatory negotiation process' potential.\(^{138}\) Beginning in the early 1980s, the EPA, in an attempt to improve visibility in the Grand Canyon National Park, confronted the question of emissions controls for the Navah\fontstyle{}o Generating Station (NGS), a coal-fired power plant located in northern Arizona. The issue pitted high control costs imposed on the power facility against aesthetic protection of one of the nation's most cherished natural wonders. After years of evaluation, in 1991, the EPA issued a proposed rule that would have required a seventy percent reduction in sulfur emissions based on thirty-day averages.\(^{139}\) The proposed rule would have required an estimated \$2 billion in compliance costs for NGS, but it still fell short of environmental groups' goal of a ninety percent reduction based on three-hour averages.\(^{140}\) The EPA subsequently facilitated a negotiation process involving the environmental groups and the NGS owners for the purpose of developing other possible approaches.\(^{141}\) Because the agency had already staked out a position that

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\(^{138}\) The EPA does not include the Grand Canyon visibility rules on its list of negotiated rulemakings conducted by the agency, nor does ACUS list it as a negotiated rulemaking in its reports. See Negotiated Rulemaking at EPA, supra note 118; ACUS, BUILDING CONSENSUS, supra note 12, at 55-63; 1995 SOURCEBOOK, supra note 30, at 387-95. The EPA did not invoke the procedures of the Negotiated Rulemaking Act in this rulemaking. The process of negotiation occurred after, rather than before, the publication of a proposed rule and the close of the comment period on that proposal. \(^{139}\) See Revision of the Visibility FIP for Arizona, 56 Fed. Reg. 5173, 5178 (1991) (to be codified at 40 C.F.R. pt. 52) (proposed Feb. 8, 1991) (EPA). \(^{140}\) See Rappoport & Cooney, supra note 17, at 632. \(^{141}\) See Revision of the Visibility FIP for Arizona, 56 Fed. Reg. 38,399 (1991) (to be codified at 40 C.F.R. pt. 52) (EPA). The agency made no commitment to implement any approach agreed to by the participants, but instead said it would treat an agreement as
did not fully reflect either side's interests, each side had a reason to see if something better could be negotiated. After two months of intense negotiations, the participants reached an agreement that would yield a ninety percent reduction based on full year averages. The EPA published a revised proposal based on the participants' recommendations and then promulgated the rule in a highly publicized ceremony with President Bush at the Grand Canyon.

The Grand Canyon visibility rulemaking has been described "as a prototype 'win-win' solution of an environmental problem and a model for other regulatory negotiations." The process was featured prominently in a front-page New York Times article on EPA's use of negotiation as an alternative to "the lawsuit system." Yet what has not been reported is that, notwithstanding the "virtually unprecedented cooperation between the governmental agency and the directly affected parties," the Grand Canyon visibility rule still ended up in federal court. The rule was challenged not by participants to the negotiation, but by outsiders to the negotiated rulemaking process: the Central Arizona Water Conservation District and four other irrigation districts that purchased electricity from NGS, each claiming the visibility rule would increase their energy costs.

simply a recommendation. See id. at 38,401.

142. The participants reportedly agreed not to challenge the agency's final rule if it reflected a negotiated compromise. See Rappoport & Cooney, supra note 17, at 634.

143. See id.


145. Rappoport & Cooney, supra note 17, at 627.


148. See id. at 1533.

149. The United States Court of Appeals for the Ninth Circuit ultimately upheld the rule in a 15 page opinion issued a year and a half after the promulgation of EPA's final
The same New York Times article that hailed the visibility rule also referred to EPA's reformulated gasoline rule as a model of a successful negotiated rulemaking. The 1990 Clean Air Act required the EPA to issue a rule mandating the use of oxygenated fuel to reduce urban smog in nonattainment areas. The EPA chose to use a formal negotiated rulemaking process to develop a proposal for this rule. The EPA selected representatives from the automobile, petroleum, and renewable fuel industries, as well as from the environmental community. After arduous and fragile negotiations, the parties reached what one report described as a "nearly litigation-proof agreement." 

Yet in terms of avoiding litigation and eliminating conflict, the reformulated gasoline rule has turned out to be anything but successful. Within ten days of the publication of the final reformulated gasoline rule in the Federal Register, both the American Petroleum Institute (API) and Texaco, Inc. filed petitions for judicial review, objecting to a provision in the final rule in which EPA would publish refiners' individual baseline standards instead of keeping this information confidential. The American Automobile Manufacturers Association, the Association of International Automobile Manufacturers, and the Renewable Fuels Association intervened in these actions. Following settlement discussions

rule. See id. at 1545.


153. See American Petroleum Inst. v. EPA, No. 94-1138 (D.C. Cir. filed Feb. 24, 1994); Texaco, Inc. v. EPA, No. 94-1143 (D.C. Cir. filed Feb. 25, 1994). The Texaco petition was jointly filed by Star Enterprise. See id. All of the petitions reported in notes 153, 156, 158, 161 and the accompanying text specifically challenged the reformulated gasoline rule cited in note 152.


Two other petroleum companies filed petitions raising objections to the reformulated gasoline rule. First, Fina Oil and Chemical Company objected to the individual baseline assigned to it in the rule.\footnote{156}{See Fina Oil and Chem. Co. v. EPA, No. 94-1142 (D.C. Cir. filed Feb. 25, 1994).} In response, EPA agreed to adjust Fina's baseline in an administrative proceeding.\footnote{157}{See Status Report of Respondent Environmental Protection Agency at 2, American Petroleum Inst. v. EPA, No. 94-1138 (D.C. Cir. Sept. 22, 1995) (status report for consolidated cases including No. 94-1142).}

Second, Amerada Hess Corporation filed a judicial review petition objecting to the limits EPA placed on fuel parameters.\footnote{158}{See Amerada Hess Corp. v. EPA, No. 94-1319 (D.C. Cir. filed Apr. 15, 1994).} The final rule relied on both a "simple model" and a "complex model" to establish fuel parameters. Amerada Hess argued that the limits EPA placed under the "simple model" were inconsistent with those under the "complex model."\footnote{159}{See Statement of Issues to be Raised on Appeal at 1, Amerada Hess Corp. v. EPA, No. 94-1319 (D.C. Cir. filed May 25, 1994).} EPA acknowledged the error and issued a direct final rule amending portions of the reformulated gasoline rule to address these concerns.\footnote{160}{See Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline, 59 Fed. Reg. 36,944 (1994) (codified at 40 C.F.R. pt. 80) (EPA).}

Although both of these petroleum companies were in theory represented on the Clean Fuel Negotiated Rulemaking Committee by other petroleum companies and by API, one petitioner challenging the reformulated gasoline rule had no direct or indirect representative on the committee. The National Tank Truck Carriers (NTTC), a trade association representing about 200 common carrier fuel transporters, also filed a petition for review against EPA.\footnote{161}{See National Tank Truck Carriers, Inc. v. EPA, No. 94-1323 (D.C. Cir. filed Apr. 18, 1994).} NTTC objected to provisions of the final reformulated gasoline rule that held common carrier tank truck companies liable
if fuel they transported for refiners did not meet the standards set out in the rule.\textsuperscript{162} NTTC argued that the Clean Air Act granted EPA the authority to establish fuel standards but not the authority to regulate the transportation of reformulated fuels.\textsuperscript{163} It also argued that the final rule denied common carriers' equal protection rights because it left private carriers and jobbers immune from liability without any rational basis.\textsuperscript{164} Following the submittal of NTTC's brief but before EPA submitted its response, both parties reached a settlement agreement under which the EPA would revise the final reformulated gasoline rule.\textsuperscript{165} The judicial proceedings have been held in abeyance pending the implementation of the settlement agreement. As of early 1997, these revisions were still undergoing the intra-agency review process before being proposed in the \textit{Federal Register}.\textsuperscript{166}

The litigation challenging the reformulated gasoline rule was only one manifestation of the persistence of conflict, notwithstanding the agency's efforts to secure consensus. The reformulated gasoline rule also distinguished itself by prompting intense public criticism. While few EPA regulations receive attention in the popular media (even in elite papers such as the \textit{New York Times}),\textsuperscript{167} the reformulated gasoline rule splashed across the papers following the introduction of the new fuel.\textsuperscript{168} Citizens reported headaches and dizziness associated with methyl tertiary butyl ether (MTBE),

\begin{itemize}
\item 162. \textit{See Brief of Petitioner at 1–5, National Tank Truck Carriers, Inc. v. EPA, No. 94–1323 (D.C. Cir. June 1, 1995).}
\item 163. \textit{See id. at 11–33.}
\item 164. \textit{See id. at 33–39.}
\item 165. \textit{See Joint Motion to Vacate the Briefing Schedule and Stay Proceedings at 2, National Tank Truck Carriers, Inc. v. EPA, No. 94–1323 (D.C. Cir. July 13, 1995).}
\end{itemize}
the additive used to comply with the new standards. Others complained about higher fuel prices. To this day, press reports about the rule continue, though now they focus on cases of groundwater contamination with MTBE, a substance which is reported to be a possible carcinogen.\textsuperscript{169}

The API also subsequently challenged the final reformulated gasoline rule in an administrative action. It argued that the second phase of nitrogen oxide restrictions in the reformulated gasoline was inconsistent with the negotiated agreement and the Clean Air Act.\textsuperscript{170} Although EPA claimed that only the first phase restrictions were addressed by the negotiated rulemaking committee, it responded to API’s petition by soliciting further comments on that portion of the rule.\textsuperscript{171} Eventually, EPA rejected API’s administrative motion arguing that the second phase restrictions were ruled out by neither the negotiated agreement nor the Clean Air Act.\textsuperscript{172}

Finally, the reformulated gasoline rule also earned the distinction of being the first U.S. regulation struck down by the World Trade Organization. Venezuela and Brazil successfully challenged the foreign refiner baseline provisions in the reformulated gasoline rule as discriminatory and in violation of trade rules.\textsuperscript{173} The

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EPA was forced to revisit issues in the reformulated gasoline rule again, issuing a revised rule more than three years after publishing its original final rule. A rule that has been heralded as one of negotiated rulemaking's success stories demonstrates instead that the achievement of an initial consensus by no means guarantees the elimination of controversy.

The reformulated gasoline rule and the Grand Canyon visibility rule are but two illustrations that negotiated rulemaking is no panacea for conflict in the regulatory process. In addition to the challenges filed against EPA rules, several of the Department of Education's negotiated rules have ended up in court. Student loan regulations, promulgated using negotiated rulemaking, have been challenged at both the district and appellate court levels.


175. All of the petitions for review discussed in the text accompanying notes 153-74 challenged the reformulated gasoline rule and were therefore distinct from petitions filed against the EPA's accompanying renewable oxygenates rule—a rule which was ultimately struck down by the D.C. Circuit. See American Petroleum Inst. v. EPA, 52 F.3d 1113, 1115 (D.C. Cir. 1995). The American Petroleum Institute (API) successfully argued that the agency's 30% mandate for ethanol contravened the Clean Air Act. See id. at 1119. The court subsequently awarded API $237,997.03 in attorneys fees. See American Petroleum Inst. v. EPA, 72 F.3d 907, 910 (D.C. Cir. 1996).

176. Cf. Harter, supra note 21, at 489 (“Consensual rulemaking is certainly not a panacea.”). A negotiated rulemaking process also failed to stop a legal proceeding against the EPA in Pennsylvania. After EPA rejected the State of Pennsylvania's water standards, Pennsylvania established a negotiated rulemaking process to develop new standards that would meet EPA's approval. However, the Raymond Proffitt Foundation, a Pennsylvania advocacy group, proceeded with a citizen suit it had filed seeking to compel the EPA to issue federal standards. A month after Pennsylvania said the reg neg process would conclude (but still before the state issued any final standards), the district court ordered EPA to set its own standards "immediately and without further delay." Raymond Proffitt Found. v. EPA, 930 F. Supp. 1088, 1105 (E.D. Pa. 1996).

In contrast to the conventional view that negotiated rulemaking has eliminated legal challenges to federal regulations, it is plain that such challenges still arise even after an agency has used a negotiated rulemaking procedure.

Of course, the fact that groups have challenged some negotiated rules does not fully respond to the claim that a consensus-based approach reduces the frequency of litigation. To determine whether the litigation rate for negotiated rules is notably lower than that for conventional rules, as the NPR report suggested, it is first necessary to determine the actual litigation rate for

178. See, e.g., John Dunlop, The Emergence of Alternative Dispute Resolution (ADR) and Negotiated Rule-Making 84 (Feb. 6, 1997) (unpublished book chapter on file with the Duke Law Journal) ("The experience in agencies that have utilized negotiations to formulate regulations is that subsequent litigation over the rules is almost eliminated.").

179. That negotiated rules engender any litigation at all is certainly surprising given the intuitive and statutory meaning of “consensus,” as well as the overwhelming purpose of negotiated rulemaking found in the scholarly literature and legislative history. Interestingly, the individual most instrumental in the development of negotiated rulemaking, Philip Harter, might not be surprised that litigation has occurred over negotiated rules. Although in his seminal article Harter did speculate that “negotiations may reduce judicial challenges” to agency rules, Harter, supra note 12, at 102, he argued that “the prime benefit of direct negotiations is that it enables the participants to focus squarely on their respective interests,” id. at 29. Harter accurately predicted that “[s]ome parties, of course, would seek judicial review of rules developed through a regulatory negotiation process.” Id. at 102. Several years later, he again observed that even though he knew of no negotiated rules that had been challenged at that time, “that surely will not continue forever.” Harter, supra note 137, at 54. More recently, though, Harter has shifted his tone in a way that contributes to the mistaken belief that negotiated rules avoid litigation. In a 1993 article he co-authored, Harter described the negotiated rulemaking process as a means of “preventing lawsuits down the road,” and stated that “[t]o date . . . no rule crafted in this manner has been subjected to court action.” Philip Harter & Daniel Finkelstein, The Coke Ovens’ Regulatory Negotiation: From Choking Controversy to Consensus Relief, 2 J. ENVTL. PERMITTING 343, 345 (1993). Several years later, Harter offered a carefully crafted statement in support of negotiated rulemaking in testimony before Congress: “As further indication of the success of the process, there has never been a judicial challenge to a negotiated rule that was issued by the agency intact.” 1996 Reauthorization Hearings, supra note 81, at 69 (statement of Philip Harter on behalf of the American Bar Association). In that same congressional testimony, Harter seemed to imply that negotiated rulemaking has reduced litigation when he asserted that negotiated rules result in cost savings, despite the up-front resources they demand: “Considering the costs of litigation for both the regulated community and the government, these savings are considerable.” Id. at 68. Of course, Harter’s recent statements, even in their more careful formulation, are not accurate because outside parties have challenged negotiated rules that participants in the regulatory negotiations found acceptable. See supra text accompanying notes 149, 161 and infra note 233 and accompanying text.
conventional rules. Since the EPA has often been used as the benchmark, I use the EPA for purposes of my analysis as well.

It has been widely believed that interest groups challenge virtually every EPA regulation in court. In arguing that judicial review has imposed undesirable costs on agency management, for example, political scientist James Q. Wilson emphasized that "[o]ver 80 percent of the three hundred or so regulations EPA issues each year wind up in the courts." Making a similar argument, Philip Howard invoked this statistic in his best-selling critique of the modern regulatory state. As Appendix D shows, the belief that 80 percent of EPA rules get challenged in court has woven its way into an exhaustive body of work by journalists, governmental officials, and scholars.

The original source of the 80 percent statistic has remained largely obscure. The statistic, which originated in speeches given by William Ruckelshaus, has been attributed at different

180. See Kay Lehman Schlozman & John T. Tierney, Organized Interests and American Democracy 367 (1986) ("[V]irtually every regulation issued by such agencies as the Environmental Protection Agency and the Occupational Safety and Health Administration is challenged in court either by environmental and consumer groups or by industry.").
182. See Philip K. Howard, The Death of Common Sense: How Law Is Suffocating America 87 (1994) ("[M]ost decisions are appealed in the courts, including 80 percent of the EPA's decisions . . . .").
183. Ordinarily, it would suffice to cite a few sources here to illustrate that others have stated that 80 percent of EPA's regulations end up in court. Yet doing so would fail to convey the full extent to which the belief in an 80% litigation rate has permeated the literature. The pervasiveness of this belief—and its persistence over time—can hardly be overstated. Accordingly, Appendix D provides a bibliography of many, but by no means all, of the sources which advance the claim that outside groups challenge the overwhelming majority of EPA regulations. Additional references to the 80% litigation rate can be found throughout the legislative history of the Negotiated Rulemaking Act. See supra notes 45, 48, 49, 54 and accompanying text.
184. See Kerwin, supra note 18, at 120 n.55 ("The origins of this statistic are obscure, but it has been quoted extensively in EPA training manuals.").
185. See William D. Ruckelshaus, Environmental Protection: A Brief History of the Environmental Movement in America and the Implications Abroad, 15 ENVTL L. 455, 463 (1984–85) ("Eighty percent of what the agency does is finally decided either in a negotiated or formal court decision."); William D. Ruckelshaus, Environmental Risks and Liabilities—Identification, Assessment and Management, 24 HOUS. L. REV. 11, 19 (1987) ("Eighty percent" of EPA's "decisions, rules, regulations, and judgments" end up in court). More recently Ruckelshaus noted:

As is well known, nearly every major EPA decision ends up in the judicial system . . . . The result has been that most of the environmental protections that are actually (rather than theoretically) put into place are the result not of
times to at least two other EPA administrators: Lee Thomas and William Reilly. Part of the ambiguity of the 80 percent statistic stems from confusion about precisely what it means. In some accounts the 80 percent figure purports to be the litigation rate for all EPA "decisions;" in others it is the rate for all EPA "rules" or "regulations;" and in still others it represents the litigation rate for all "nonroutine" or "major" rules. Sometimes the 80 percent rate has even been inflated to 85 percent.

Amazingly, no EPA analyses underlay the origin of this statistic, even though it has taken on a life of its own. In order to

the deliberations of scientists or engineers or elected representatives or responsible appointed officials, but of consent decrees handed down by judges. William D. Ruckelshaus, Stopping the Pendulum, ENVT. F., Nov.-Dec. 1995, at 25, 27.

186. Thomas, supra note 29, at 3 ("We found that over three-quarters of our regulations once promulgated were litigated."); see also Miller, supra note 29, at 20 (quoting Thomas that "[f]ully 80% of the rules EPA issues are challenged.")

187. See, e.g., ROSEMARY O'LEARY, ENVIRONMENTAL CHANGE: FEDERAL COURTS AND THE EPA 17 (1993) ("Reilly once estimated that 80 percent of his decisions were appealed to the courts."); Jeffrey M. Berry, Citizen Groups and the Changing Nature of Interest Group Politics in America, 528 ANNALS AM. ACAD. OF POL. & SOC. SCI. 30, 38 (1993) (quoting Reilly that four out of five decisions he makes end up in court); Wald, supra note 146, at A1 (quoting Reilly as stating that "[f]our of every five decisions I make are contested in court.").

188. See Douglas J. Amy, Environmental Dispute Resolution: The Promise and the Pitfalls, in ENVIRONMENTAL POLICY IN THE 1990S 211, 216 (Norman J. Vig & Michael E. Kraft eds., 1990) ("80 percent of environmental regulatory decisions are appealed in court."); GEORGE HOBERG, PLURALISM BY DESIGN: ENVIRONMENTAL POLICY AND THE AMERICAN REGULATORY STATE 199 (1992) ("[F]ully 80% of EPA's final decisions are the subject of judicial appeal").

189. See, e.g., KERWIN, supra note 18, at 116 ("The Environmental Protection Agency has estimated that some 80 percent of its rules stimulate lawsuits by dissatisfied parties."); Robert Glicksman & Christopher H. Schroeder, EPA and the Courts: Twenty Years of Law and Politics, LAW & CONTEMP. PROBS., Autumn 1991, at 249, 249 n.2 ("[O]ver 80% of EPA's regulations are challenged in court.").

190. See, e.g., Patricia M. Wald, Regulation at Risk: Are Courts Part of the Solution or Most of the Problem, 67 S. CAL. L. REV. 621, 624 (1994) ("Eighty percent of all major Environmental Protection Agency ('EPA') rules are litigated in court."); Richard J. Lazarus, The Tragedy of Distrust in the Implementation of Federal Environmental Law, LAW & CONTEMP. PROBS., Autumn 1991, at 311, 324 (stating that EPA "has had 80 to 85 percent of its major regulations challenged in court.").

191. See, e.g., KERWIN, supra note 18, at 264 ("The Office of General Counsel at the Environmental Protection Agency estimates that 85 percent of the hundreds of nonroutine rules issued by the EPA each year are challenged in court."); COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY: THE SIXTEENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 3 (1985) ("Fully 85 percent of EPA's regulations result in litigation."); WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY 110 (quoting William Ruckelshaus that "85 percent of the decisions made by the EPA administrator that are appealable were appealed").

192. Interviews with EPA staff members who served under Administrator Ruckelshaus
test the validity of the statistic, I collected data from the EPA’s litigation docket as well as from the dockets at the U.S. Court of Appeals for the District of Columbia Circuit. The EPA dockets included litigation filed against the agency in any federal court during 1987–1991. During this time, the EPA issued 1568 rules and was named as a defendant in 411 cases in the U.S. Courts of Appeals, where rule challenges must be filed. The major environmental statutes typically require that petitions for judicial review be filed within a few months after the EPA promulgates a rule, so most petitions for review of a rule are filed in the year when the rule is published. Some small portion of suits are not filed in the same year as the rule, but aggregating the entire five-year period minimizes any error due to such a time lag.

The litigation rate for rules issued during the 1987–1991 period covered by the EPA docket, even conservatively calculated, turned out to be much lower than widely believed: only 26 percent of rules issued were challenged. In calculating this rate, I have used what I take to be the most realistic estimate for EPA rules. I have relied on a computer search of the Federal Register which specifically excluded those rules that were minor corrections, technical amendments, or clarifications of other rules. When confirmed that no systematic analysis underlay this claim. Rather, it was based on a ballpark estimate of the number of rules published in the agency’s regulatory agenda and a similar estimate of the number of petitions for review handled by the Office of General Counsel. To ensure candor, I conducted all interviews on a not-for-attribution basis.


My most restrictive search of the Fedreg file in LEXIS, which excluded corrections and technical amendments, yielded 1568 rules for the years 1987–1991. In comparison, my broadest LEXIS search, which retrieved all final actions which could be challenged in court, yielded 1964 rules (a litigation rate of 20.9%). Although corrections or technical amendments could be independently challenged, these were excluded because
other available estimates of the total number of EPA rules were used, the litigation rate dropped even lower. For instance, using Office of Management and Budget (OMB) data on the number of final EPA rules promulgated during the same time period, the litigation rate amounted to only 19 percent—precisely the opposite of the rate widely assumed.197

As is sometimes acknowledged, the 80 percent figure was not originally intended to describe the rate at which all EPA rules were litigated, but only those rules significant enough to be published in the EPA’s semiannual Regulatory Agenda.198 Since the rules appearing in the Regulatory Agenda are by definition more significant,199 the litigation rate can be expected to be higher than that for all EPA rules. Unfortunately, the EPA docket data do not permit one to distinguish between suits involving those rules that are listed in the Regulatory Agenda and those that are not. Therefore I used court records from the D.C. Circuit to de-

197. Adding together the data reported annually in Exhibit 19 to Appendix IV of the OMB’s annual Regulatory Program of the United States, EPA issued 2162 rules during this period. In addition, a search of another leading electronic source of Federal Register documents, the Legi-Slate database, revealed a total of 2212 final rules (for a rate of 18.6 percent). Thus, my restrictive LEXIS search yields the least number of rules and the highest litigation rate.

198. See supra note 192.

199. Listings in the Regulatory Agenda include rules that have an annual economic impact of $100 million or more or are considered economically significant. See Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,196–97 (1981) (revoke by Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (1994) (not significantly altering economic impact guidelines)). They also include rules that are otherwise considered “significant” by the agencies. For the EPA, “significant” rules are those expected to have important economic or environmental impacts, or to present difficult administrative tasks for the agency. See Thomas O. McGarity, The Internal Structure of EPA Rulemaking, LAW & CONTEMP. PROBS., Autumn 1991, at 57, 72 n.44. The definition of “significant regulatory action” includes actions that have an economic impact of $100 million or more or adversely affect the economy in a material way. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994). The only rules excluded are: “specialized categories of action (such as EPA approvals of state plans and other actions that do not apply nationally) [and] routine actions (such as pesticide tolerances and minor amendments to existing regulations).” Regulatory Agenda, 47 Fed. Reg. 15,702, 15,702 (1982). EPA managers do not consider using negotiated rulemaking for such minor or routine rules, but instead they select among the kinds of significant rules that would be listed in the regulatory agenda, the more appropriate comparison group for negotiated rules.
termine the rate of litigation for significant EPA regulations pro-
mulgated under two major statutes, the Resource Conservation
and Recovery Act (RCRA) and the Clean Air Act, for the period
1980–1991. Any suits challenging significant, national rules un-
der these statutes must be filed in the United States Court of
Appeals for the District of Columbia Circuit. A total of 220
nationally-applicable significant RCRA and Clean Air Act rules
were completed from 1980 to 1991. Of these, petitions for review
were filed against 77, yielding an aggregate litigation rate of 35
percent. As Table 4 shows, Clean Air Act regulations were chal-
lenged less frequently (31%) than RCRA rules (43%) over this
time period.

Table 4. Litigation of Significant Clean Air Act and Resource

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<th>CAA</th>
<th>RCRA</th>
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<tr>
<td>Rules</td>
<td>141</td>
<td>79</td>
<td>220</td>
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<tr>
<td>Challenges</td>
<td>43</td>
<td>34</td>
<td>77</td>
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<tr>
<td>Litigation Rate</td>
<td>31%</td>
<td>43%</td>
<td>35%</td>
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Note: The “Rules” row lists the totals of all nationally-applicable rules that the EPA
considered significant enough to merit listing in its semi-annual regulatory agendas.
These totals include those rules classified as “major” under Executive Order 12,291 as
well as other non-minor and non-routine rules. The “Challenges” row lists the subset of
rules over which one or more affected parties filed a petition for review in the United
States Court of Appeals for the D.C. Circuit. Since not all petitions for review reach an
appellate panel for a decision which can be reported, data on filings were obtained from
the docket records at the D.C. Circuit.

Although conventional wisdom and the legislative history of
the Negotiated Rulemaking Act suggest that only a minority of
EPA rules escape litigation, a closer look at the available data

200. Even though my sample includes rules issued under only two of EPA’s dozen or
so statutes, these rules made up about a third of all significant EPA rules published dur-
ing the same time period.

indicates that the prevailing view has things backwards. The majority of EPA rules escape litigation, with petitions for review filed for at most about a quarter of them. The litigation rate for significant rules under two major statutes is somewhat higher—35 percent—but still well under the 80 percent rate that scholars have previously cited. More than previously thought, litigation over EPA rules occurs selectively, if not infrequently.202

How does EPA's track record for negotiated rules compare with its track record for rules overall? The National Performance Review's 20 percent litigation rate was based on an incomplete review of the first ten negotiated rulemakings finalized by EPA.203 However, when all twelve of these rules are included, and when a more complete search of court records is made, the actual litigation rate is much higher. On the basis of my review of records at the D.C. Circuit Court of Appeals, at least six of EPA's twelve finalized rules developed using negotiated rulemaking have been subject to petitions for judicial review filed in federal court.204 The challenged regulations include those addressing: 1)
asbestos in school buildings;\textsuperscript{205} 2) the underground injection of hazardous wastes;\textsuperscript{206} 3) reformulated fuels;\textsuperscript{207} 4) chemical equipment emissions leaks;\textsuperscript{208} 5) wood furniture coatings;\textsuperscript{209} and 6) the collection of information on disinfectant byproducts.\textsuperscript{210}

I have already discussed the judicial challenges filed against the EPA's reformulated gasoline rule, challenges which involved both participants in the negotiated rulemaking process, such as the American Petroleum Institute, as well as outsiders like the National Tank Truck Carriers.\textsuperscript{211} The additional challenged reg negs show that a similar set of actors filed petitions for review. Many petitioners have been participants in the negotiated rulemaking proceedings. However, sometimes the petitioners were not members of the rulemaking committee, as with the Grand Canyon visibility rule and reformulated gasoline rule. One additional rule—the wood furniture coating regulation—drew petitions from trade associations that were not represented on the negotiated rulemaking committee.\textsuperscript{212} A brief review of these additional challenges demonstrates the range of petitions filed over negotiated rules.

\textbullet \ \textit{Asbestos in School Buildings}. The EPA used negotiated rulemaking to establish methods for public schools to follow in identifying and mitigating asbestos exposure.\textsuperscript{213} After the EPA

\textsuperscript{206} See Natural Resources Defense Council v. EPA, 907 F.2d 1146, 1149 (D.C. Cir. 1990).
\textsuperscript{210} See American Water Works Ass'n v. EPA, No. 96–1208 (D.C. Cir. filed June 21, 1996).
\textsuperscript{211} See supra notes 153–66 and accompanying text.
\textsuperscript{212} See infra notes 231–34 and accompanying text.
promulgated its final rule, the Safe Buildings Alliance (an asbestos industry trade association), two building products manufacturers, and two individuals filed petitions for review.214 A third building products company, GAF Corporation, intervened in the case, as did the American Association of School Administrators and various state attorneys general.215 Although the Safe Buildings Alliance had signed the limited consensus statement which concluded the negotiated rulemaking,216 the industry nevertheless challenged the rationality of EPA's action, specifically objecting to its failure to define a safe level of asbestos exposure and arguing that its decision to allow the removal of asbestos would raise the level of asbestos fibers in the air.217 The arguments were briefed and presented to a panel of the D.C. Circuit Court, which in the end upheld the rule against all the challenges.218

• Underground Injection of Hazardous Wastes. The EPA's underground injection rule established standards for the use of underground methods for disposing of and storing hazardous wastes.219 After EPA completed the rulemaking, five petitions were filed by interests represented in the negotiated rulemaking, including the waste treatment industry, the chemical industry, and an environmental group.220 These petitions were consolidated and three major trade associations—the American Petroleum Institute, the American Iron and Steel Institute, and the Institute for Chemical Waste Management—intervened in the case.221

The chemical industry challenged the rule's permitting process, its application of the statute's "no migration" standard, and the agency definition of "no migration," which included even the migration of hazardous constituents of hazardous wastes.222 The

215. See id.
217. See Safe Bldgs. Alliance, 846 F.2d at 83, 84.
218. See id. at 80, 85.
221. See id.
222. See id. at 1153–58.
Natural Resources Defense Council and the Hazardous Waste Treatment Council also challenged the EPA's application of the "no migration" standard, arguing that it should apply to the seepage of hazardous constituents from otherwise non-hazardous waste. Petitioners also challenged the rule's definition of "injection zone" and its standards for injection into salt domes, underground mines, and caves. A panel of the D.C. Circuit upheld the rule against all but one of the challenges, remanding the standards for salt domes, mines, and caves for a finding that these standards satisfied the statutory requirements.

**Chemical Equipment Leaks.** The equipment leaks rule was designed to control releases of hazardous emissions from valves, flanges, and other connecting points in chemical manufacturing facilities. Through a series of negotiation sessions, the participating chemical companies and environmental groups reached an agreement on procedures for monitoring leaks. Before the agency could promulgate the rule, Congress passed amendments to the Clean Air Act and the EPA incorporated the negotiated agreement into a broader set of national emissions standards for hazardous air pollutants (NESHAP) generated by the chemical industry. The final rule, known as the Hazardous Organic NESHAP, or HON rule for short, regulated releases from heat exchange systems, wastewater streams, process vents, and storage vessels, as well as from equipment leaks. The equipment leaks portion of the rule remained largely as the negotiated rulemaking committee had agreed.

Following the promulgation of the final rule, the Chemical Manufacturers Association and Dow Chemical Company, both of whom were represented in the negotiated rulemaking, filed petitions for review challenging numerous aspects of the HON rule. Although most of their objections were leveled at aspects

223. See id. at 1152, 1159–62.
224. See id. at 1162–65.
225. See id. at 1165–66.
227. See id.
228. See Chemical Mfrs. Ass'n v. EPA, No. 94–1463 (D.C. Cir. filed June 21, 1994); Dow Chem. Co. v. EPA, No. 94–1465 (D.C. Cir. filed June 21, 1994). These cases were consolidated by order of the court on Oct. 24, 1994. The American Forest & Paper Association, a trade association from outside the chemical industry and not a member of
of the rule which were not subject to the negotiated rulemaking, they also raised concerns about certain parts of subpart H, the equipment leaks portion of the final rule. The petitioners and the EPA entered settlement discussions within a few months and eventually reached an agreement on dozens of changes to the final rule.\textsuperscript{229} The agency subsequently promulgated revisions to subpart H of the rule, including changes to the control options for leaks from compressors, an issue that had been overlooked by the chemical industry during the negotiations.\textsuperscript{230}

- \textit{Wood Furniture Coatings.} Like the HON rule, the wood furniture coatings rule established national emissions standards for hazardous air pollutants.\textsuperscript{231} The negotiated rulemaking process brought together representatives from the wood furniture industry, suppliers of wood coatings, and environmental groups. During these negotiations, environmental representatives expressed concern that the furniture industry might substitute other potentially hazardous chemicals not specifically covered under the rule. The parties subsequently agreed to incorporate into the rule a list of other chemicals (not currently used by the wood coatings industry) labeled as "of potential concern."\textsuperscript{232} After EPA promulgated the final rule, three chemical industry trade associations not represented in the negotiations filed petitions for review challenging the listing of additional chemicals as "of potential concern."\textsuperscript{233} As of November, 1996, the EPA was engaged in settlement discussions with the Chemical Manufacturers Association, the Halogenated Solvents Industry Alliance, and the Society of Plastics Industry over this issue.\textsuperscript{234}
• *Disinfectant Byproducts.* The most recently challenged negotiated monitoring requirements that allow the EPA to collect data on drinking water quality. To control microbial contamination, water suppliers treat drinking water with disinfectants. Responding to concerns about the chemical byproducts created when disinfectants react with chemicals already in the water, the EPA convened a negotiated rulemaking proceeding to develop enhanced standards for microbials and new standards for disinfectant byproducts. The negotiations resulted in two proposed rules on disinfectant byproducts and water treatment, and a final rule governing the collection of information the agency needs before finalizing the two proposed rules.

Following EPA's promulgation of the information collection rule, the American Water Works Association (AWWA), a member of the rulemaking committee, reported that it "was surprised and disappointed by some significant provisions of the regulation." AWWA argued that the EPA established a statistically unreliable monitoring procedure in its final rule which was not included in the proposed rule. Faced with a limited statutory deadline for filing a petition for judicial review, AWWA filed a petition in the D.C. Circuit Court challenging the information collection rule. AWWA objected to the time period for water suppliers to complete the required monitoring, as well as to the specific monitoring tests required under the final rule.
After several months of discussions with the EPA, AWWA decided to withdraw its petition. AWWA reported that some of the issues related to the compliance schedule had been resolved, and that the EPA was inclined to consider its concerns about the testing procedure. Following the filing of AWWA's petition, for example, EPA's Science Advisory Board's Drinking Water Committee met to examine the reliability of the new monitoring requirements imposed by the agency. Given the ongoing nature of the EPA's actions on microbials and disinfectant byproducts, AWWA decided to pursue its "fundamental disagreement" with the EPA outside of court and in the context of ongoing discussions with the agency and other organizations over the final substantive standards. These ongoing discussions with participants in the negotiated rulemaking have sometimes engendered disagreement over what the parties actually agreed to in their negotiations over the substantive drinking water standards.

As this review of the several challenged EPA rules demonstrates, negotiated rules are vulnerable to a variety of legal objections. Participants file judicial petitions when they believe the final rule is inconsistent with the negotiated agreement or when it contains adverse provisions not addressed by the negotiation. Nonparticipants also file petitions when a final rule adversely affects their interests. In each of these examples, petitioners challenged EPA rules notwithstanding the fact that the rules had been developed using the negotiated rulemaking process.

242. See Motion for Voluntary Dismissal of Petition for Review at 1, American Water Works Ass'n v. EPA, No. 96-1208 (D.C. Cir. Nov. 6, 1996); Water Utility Organization Withdraws Suit on EPA Information Collection Rule, 27 Env't Rep. (BNA) 1465 (Nov. 15, 1996) [hereinafter AWWA Withdraws Suit].
244. See AWWA Withdraws Suit, supra note 242, at 1465. AWWA acted as many parties have in filing so-called "protective petitions" against EPA rules. Given the jurisdictional deadlines for filing petitions for review under statutes such as the Safe Drinking Water Act, organizations concerned about the content of a final rule often file a petition just to ensure their right to proceed further if ongoing discussions with agency staff prove unproductive. See Coglianese, supra note 21, at 761-62 (discussing the filing of "protective petitions").
246. Some might mistakenly interpose that the petitioners in the reformulated gasoline
Although only two of the six challenged rules reached an appellate panel for a decision, this relatively small number of adjudicated cases is typical of the overall pattern of judicial review challenges. For all challenges to EPA rules filed in the D.C. Circuit between 1979–1990, only 29% were resolved through adjudication before an appellate panel. Negotiation and settlement discussions typically follow the filing of challenges to any EPA rule, making the process of litigation over regulations compatible with ongoing cooperation between representatives of litigating organizations and EPA staff. In the aggregate, negotiated rulemaking has not generated any substantial difference in the way that legal challenges get resolved.

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247. During the period 1979–1990, 969 petitions for review challenging EPA rules were filed in the D.C. Circuit. These were consolidated into 322 cases, of which 93 (29%) were resolved through adjudication, 47 (15%) were summarily dismissed by the court prior to any briefing or argument, 152 (47%) were voluntarily dismissed by the parties, and 29 (9%) were either pending or their outcomes could not be determined due to missing court records. See Coglianese, supra note 193, at 136.

248. See Coglianese, supra note 21, at 754.

249. Although only two challenges to EPA’s negotiated rules have been resolved through a decision by a judicial panel, between these cases there is no evidence that
For years, proponents of negotiated rulemaking have touted it as the solution to a perceived problem of excessive litigation challenging federal regulations. Yet the prevailing perception of this problem has been overdrawn. The actual level of litigation over EPA rules is dramatically lower than has been widely believed, and litigation itself often provides a forum for continued negotiation in the rulemaking process. Just as the extent of the supposed problem of litigation has been overstated, so too has the effectiveness of negotiated rulemaking as a means of reducing litigation over federal regulations. The experience so far has been that legal challenges persist, and at a noticeably higher rate at the EPA, even after the agency has employed the negotiated rulemaking procedure. As a means of reducing litigation, negotiated rulemaking has yet to show any demonstrable success.

III. ASSESSING CONSENSUS-BASED RULEMAKING

If negotiated rulemaking were living up to the theoretical advantages others have attributed to it—that is, if it really saved agencies substantial time and avoided litigation—overworked agency officials might well be expected to use it extensively. Yet even though the number of negotiated rulemakings has increased somewhat in the past few years, the practice remains confined to the tiniest fraction of all federal regulations. In light of the outcomes negotiated rulemaking has achieved in terms of its two main goals, such infrequent reliance on negotiated rulemaking would seem to make sense. Negotiated rulemaking saves no appreciable amount of time nor reduces the rate of litigation. In fact, at

negotiated rulemaking made the EPA rule more likely to be upheld. One decision remanded the rule to the EPA, giving petitioners some relief. See Natural Resources Defense Council v. EPA, 907 F.2d 1146 (D.C. Cir. 1990). The other upheld the EPA rule entirely. See Safe Bldgs. Alliance v. EPA, 846 F.2d 79 (D.C. Cir. 1988). This 50 percent "approval" rate for adjudicated challenges to negotiated rules mirrors the results of adjudicated challenges more generally. Of the 93 adjudicated EPA cases filed in the D.C. Circuit from 1979 to 1990, 51 percent affirmed the rule entirely, while 49 percent granted the petitioners some relief on at least one issue (as in the underground injection case). See Coglianese, supra note 193, at 167; see also Wald, supra note 190, at 636–39 (reporting that the agency rule is upheld entirely in over 50 percent of the rulemaking reviews decided by the D.C. Circuit).

250. Even if the three pending EPA reg negs managed to escape judicial challenges, the litigation rate for negotiated rulemakings at the agency would still not be any lower than that for significant EPA rules overall.

251. See supra text accompanying note 101.
the EPA, negotiated rulemaking most likely demands a greater total amount of time and has resulted in a higher rate of legal filings than would otherwise be expected.

Given the extensive support negotiated rulemaking has garnered in the Congress, White House, and legal community, these findings will undoubtedly seem surprising. Although the results reported here do challenge conventional wisdom, they are not derived from any unconventional research methods. In assessing the impact of negotiated rulemaking, I have simply sought to assess the claims that negotiated rules will reduce time and litigation when compared with rules developed through informal rulemaking. Like those who have claimed to demonstrate the success of negotiated rulemaking, I have compared its outcomes with those of conventional rulemaking.\textsuperscript{252} The main difference between my research and past research is that past research has generally been based on partial data and unsubstantiated beliefs about prevailing litigation rates. The surprising results reported here have resulted from a much more comprehensive effort to document the outcomes of both negotiated rulemakings and informal rulemakings.

The implications my findings hold for the future use of negotiated rulemaking may seem obvious. Before addressing them, however, I want to address criticisms which might be made of this comparative analysis. In the following section, I discuss the potential limitations inherent in any analysis of the impact of a policy or procedural intervention. I show why in this case we can be reasonably assured that any such limitations tend to exaggerate negotiated rulemaking's success in reducing time and litigation—not its failure. The findings from my analysis are telling, I

\textsuperscript{252} See, e.g., \textsc{Improving Regulatory Systems}, supra note 3, at 32 n.7 (purporting to compare the litigation rate for negotiated rules with the litigation rate for all EPA rules). In response to an earlier version of this Article, Edward Weber argued that a focus on the percentage of rules that groups challenge is too limited. My analysis would be stronger, he suggested, if I "investigated the number of lawsuits filed for each rule, rather than the frequency with which lawsuits are filed against individual rules." Weber, supra note 150, at 325-26 n.219. Such an investigation does indeed strengthen my analysis. Among those challenges to EPA rules filed in the D.C. Circuit from 1979 to 1990, the average case consisted of 3.0 petitions for review. See \textsc{Coglianese}, supra note 193, at 132-33 (reporting 969 petitions consolidated into 322 cases). In contrast, the challenges to EPA's negotiated rules consisted of an average of 3.7 petitions per case. Only one of the six challenges to EPA's negotiated rules (the disinfectants byproducts rule) consisted of fewer than 3 petitions. See \textsc{supra} notes 153-66, 213-46 and accompanying text.
subsequently suggest, in what they reveal about regulatory policymaking as well as about the wisdom of investing further resources in the quest for consensus. I explain why negotiated rulemaking has so far failed to meet proponents’ expectations and draw out the implications this study holds for future reliance on formal procedures that depend on the achievement and maintenance of consensus in the regulatory process.

A. Assessing This Assessment of Negotiated Rulemaking

To determine whether negotiated rulemaking has had any discernible effect in reducing either rulemaking time or litigation, it has been necessary to compare the results of the negotiated rulemaking process with the likely results if a conventional rulemaking process had been used instead. Of course, we can never know with absolute certainty how long the rules selected for negotiated rulemaking would have taken in the absence of negotiated rulemaking, or whether they would have been litigated. We can only infer what the outcome would have been in the absence of negotiated rulemaking.253

The best way to infer what would have happened in the absence of negotiated rulemaking is to compare rules selected for negotiated rulemaking with those that were not. Ideally, the comparison group would be comprised of rules that had, on average, the same probability of being challenged in court or the same average time demands. If a sufficiently large number of rules were randomly assigned to negotiated rulemaking and to informal rulemaking, we could ensure that extraneous variables associated with timeliness and litigation would be randomly distributed, leaving the presence or absence of negotiated rulemaking as the only remaining difference.254 Any differences in outcomes could then

253. The need to draw inferences about this counterfactual outcome is inherent in any effort to evaluate the impact of a policy or procedural intervention. See LAWRENCE B. MOHR, IMPACT ANALYSIS FOR PROGRAM EVALUATION 3-4 (2d ed. 1995).

254. Even if we could randomly assign rules to negotiated rulemaking, doing so would only allow us to analyze the impact of a different kind of negotiated rulemaking than EPA currently employs—namely a kind where formal negotiation is required or imposed on agency managers. Congress has mandated the use of negotiated rulemaking at the Department of Education and other agencies. See supra note 75 and accompanying text. In contrast, EPA’s voluntary selection process probably creates some bias in favor of the success of negotiated rulemaking. Rules selected by the agency for formal negotiation presumably have the kind of support that would tend to make negotiated rulemaking
be tested to determine whether they resulted from the use of negotiated rulemaking.\footnote{255}

Of course, agency rules were not randomly selected for negotiated rulemaking. Instead, rules were purposely selected in most cases by the very same agency managers who conducted or oversaw the rulemaking proceedings.\footnote{256} As with any \textit{ex post} evaluation of a policy intervention, an analysis of the impact of negotiated rulemaking must unavoidably face the possibility of selection bias.\footnote{257} In other words, the nonrandom assignment of rules to negotiated rulemaking introduces the possibility that the rules chosen for negotiated rulemaking were ones that already had either a greater or lesser need for time, or a greater or lesser propensity to be litigated, at least when compared with the average rule implemented through informal rulemaking.\footnote{258}

more, not less, successful. This source of bias could be minimized if agencies assigned rules randomly to negotiated rulemaking from among a pool of rules nominated by agency staff for the procedure (but no agency has done this). For a discussion of the potential threats to validity associated with voluntary selection, see Mohr, \textit{supra} note 253, at 232–54.

With a sample of negotiated rules considerably larger than the 12 EPA rules completed to date, it would be possible to use multivariate statistical techniques to control for other factors that might affect timeliness or litigation.

Moreover, not only do the agencies self-select the rules for negotiation, they also control whether to continue a negotiation process once started. As Appendix A shows, a number of agencies have withdrawn either rulemakings or negotiated proceedings even after publishing a notice of intent to use negotiated rulemaking. Searching the \textit{Federal Register}, I found two rules that EPA has promulgated for which it either abandoned or rejected negotiated rulemaking earlier in the rulemaking process. \textit{See} Fuel and Fuel Additives Registration Regulations, 59 Fed. Reg. 33,042, 33,043 (1994) (rejecting negotiated rulemaking at the outset due to "insufficient support . . . among a number of key parties"); Nitrogen Oxide Emission Reduction Program, 59 Fed. Reg. 13,538 (1994) (abandoning the negotiated rulemaking process and promulgating a final rule pursuant to traditional notice-and-comment procedures). Both of these rules later resulted in the filing of petitions for judicial review. \textit{See} Ethyl Corp. v. Browner, 67 F.3d 941, 946 (D.C. Cir. 1995) (challenging the fuel and fuel additives rule); Alabama Power Co. v. EPA, 40 F.3d 450, 451 (D.C. Cir. 1994) (challenging the nitrogen oxides rule). The outcomes in these rulemakings suggest that agencies avoid selecting rules for formal negotiation when they are more likely to be challenged, an issue I discuss explicitly later in this Article. See infra notes 253–93 and accompanying text.

In this case, selection bias would mean that the sample of negotiated rules was, in some relevant sense, not representative of the sample of conventional rules against which it is compared. \textit{See}, e.g., King \textit{et al.}, \textit{supra} note 120, at 128–38 (discussing selection bias); Mohr, \textit{supra} note 253, at 163–84 (discussing various types of potential biases in impact analysis).

Even if the agency were selecting rules at random (something which would go a long way toward addressing the possibility of selection bias), the fact that such a small number of formally negotiated rules have been promulgated could mean that the average
The ever-present possibility of selection bias in *ex post* evaluations need not paralyze us from drawing reasonable inferences from the available evidence. It is necessary to be mindful of the possibility of selection bias, but it is equally important to consider whether the possibility of such bias affects our ability to draw inferences from the accumulated data. In the case of negotiated rulemaking, there is good reason to believe that any overall selection bias tends in the direction of shorter rulemaking time and less litigation, not the other way around.

To assess the direction of any selection bias, it is helpful to consider other independent variables which are likely to be correlated with rulemaking time and subsequent litigation. One such variable related to both rulemaking time and litigation is the overall significance of a rule as classified by the agency. With respect to rulemaking time, Kerwin and Furlong have found that rulemaking takes more time for major and significant rules than for minor rules. With respect to litigation, it is generally thought that disputes having a greater impact on parties' interests outcomes associated with these rules were affected by other variables or by chance rather than by the presence or absence of negotiated rulemaking. While small sample sizes make it difficult to draw inferences with confidence using standard statistical measures, in this case the observed effects (namely, noticeably more litigation rather than less) are so contrary to expectations that it is reasonable to conclude that negotiated rulemaking has not achieved its goals. The limitations of a small sample size would present more of a problem if negotiated rulemaking *did* appear to save time or reduce litigation. For example, when the National Performance Review (NPR) claimed a lower litigation rate for ten of EPA's negotiated rules, see *supra* note 135, the sample size made it extremely difficult to reject the conventional null hypothesis of no impact and conclude that negotiated rulemaking caused the asserted reduction in litigation. As it turns out, the NPR failed to consider that more rules had been challenged. The full record makes it even more reasonable to infer that negotiated rulemaking has not had its intended impact.


are more likely to end up in court.\textsuperscript{261} Empirical research tends to confirm this tendency for disputes over agency regulations.\textsuperscript{262} As noted in Part II of this Article, the litigation rate for significant EPA rules is higher than that for EPA rules generally.\textsuperscript{263} More importantly, the litigation rate for major rules is higher still. As shown in Table 4, the litigation rate for significant RCRA and Clean Air Act rules completed during 1980–1991 was 35 percent; the rate for major RCRA and Clean Air Act rules during a similar period, 1983–1991, was 57 percent.\textsuperscript{264}

Since rulemaking time and the prospects for litigation increase with the overall significance of EPA rules, it is helpful to determine whether the findings reported in Part II derive from a bias in the level of significance of the rules selected for negotiated rulemaking. If rules selected for formal negotiation disproportionately tended to be the major rules issued by an agency, it would be more appropriate to compare these rules with the outcomes for major rules established without negotiated rulemaking.\textsuperscript{265} Upon examination, though, negotiated rules do not appear to have taken up a disproportionate share of major rules. Out of the thirty-five negotiated rules that federal agencies have promulgated over the past decade and a half, only five have had estimated annual costs in excess of $100 million.\textsuperscript{266} In contrast, from 1983 to 1990 federal agencies promulgated an average of 39 major rules each year.\textsuperscript{267}

\textsuperscript{261} See, e.g., Robert D. Cooter & Daniel L. Rubenfeld, Economic Analysis of Legal Disputes and Their Resolution, 27 J. ECON. LITERATURE 1067 (1989) (discussing the incentives to litigate); Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4 (1983) (reviewing literature on disputing behavior).

\textsuperscript{262} See Coglianese, supra note 21, at 742–43 n.3.

\textsuperscript{263} See supra text accompanying notes 199–201.

\textsuperscript{264} See Coglianese, supra note 193, at 95–96. This subset of major rules under these two statutes contained about one-third of all major EPA rules completed during the period. See id. at 96 n.42.

\textsuperscript{265} Even if one made this kind of a comparison for litigation, the 50% litigation rate for EPA’s 12 negotiated rules would still not be appreciably lower than the litigation rate for all the major rules under RCRA and the Clean Air Act. See supra note 264 and accompanying text.


\textsuperscript{267} See OMB, REGULATORY PROGRAM, supra note 97, at 706 (Exhibit 4).
With respect to the EPA, four of its twelve completed negotiated rulemakings were classified as major, even though one of these imposed no net costs on the economy. The proportion of EPA negotiated rulemakings considered major (33%) is only modestly higher than the proportion considered major among the significant rules analyzed by Kerwin and Furlong in their study of EPA rulemaking (29%). Moreover, it should be evident that the EPA has not relied on negotiated rulemaking to develop most of its major rules. The four major rules subject to negotiated rulemaking amounted to only a small fraction of all the major rules issued by the EPA during the same time period. These data confirm that it is reasonable to compare, as I have done in this analysis, the performance of negotiated rules with the performance of significant EPA rules promulgated through conventional notice-and-comment procedures.


269. Fifteen of the fifty-one major and significant rules studied by Kerwin and Furlong were major, or 29%. Kerwin & Furlong, supra note 113, at 123.


271. The comparison with the entire population of significant rules is more reliable than selecting only a nonrandom sample of these rules. If I selected a sample of informal rules, as Kerwin and Langbein have done in the second phase of their study, I would introduce the possibility of bias in the control group as well as the treatment group. For a brief description of the Kerwin and Langbein study, see supra notes 91-92 and accom-
Although the EPA has not negotiated a disproportionate number of major rules, the outcomes of the agency's negotiated rules could still be checked against the outcomes of its major rules. Even then, negotiated rulemaking does not appear to have had any notable effect of decreasing time or litigation. The average time it took the EPA to complete its dozen negotiated rules (1013 days)\textsuperscript{272} exceeded the average time for major rules issued by three of the four program offices studied by Kerwin and Furlong.\textsuperscript{273} Moreover, the average time for the three major negotiated rules issued under the Clean Air Act (1225 days) substantially exceeded the average time for major air rules reported by Kerwin and Furlong.\textsuperscript{274}

A similar pattern holds for litigation rates. Although petitioners challenged somewhat more than half of all major rules under RCRA and the Clean Air Act (57%), they have challenged three out of the four major negotiated rules (75%). When major rules are taken out of the sample of significant rules, the litigation rate for the remaining conventional rules is 30 percent while the litigation rate for the remaining negotiated rules is still higher at 37.5

\textsuperscript{272} For an explanation of how I calculated this average, see supra text accompanying notes 118-19.

\textsuperscript{273} \textit{See Kerwin & Furlong, supra} note 113, at 136 app. B.

\textsuperscript{274} Kerwin and Furlong report a start-to-finish average of 648 days for the four major air rules in their sample. \textit{See id.} One of these major rules was the woodstoves rule for which EPA used negotiated rulemaking. The average time for the three air regs (woodstoves, equipment leaks, and reformulated gasoline) came out to 1225 days—over a year and a half longer. In responding to an earlier version of this Article, Philip Harter argued that the reformulated gasoline rule took an "astonishingly short" amount of time but that the equipment leaks rule took much longer because it was merged into a larger conventional rulemaking. \textit{See Harter, supra} note 119, app. B, at 1425. Yet even if we assume that the equipment leaks rule was finalized on the day when the last notice of an open meeting of the committee was published in the \textit{Federal Register}, July 5, 1990, there is still no measurable time savings for these major rules from negotiated rulemaking. \textit{See} Open Meeting of the Negotiated Rulemaking Advisory Committee; Fugitive Emissions From Equipment Leaks Rule, 55 Fed. Reg. 27,680 (1990). Even using this patently unrealistic assumption (which creates a heavy bias in favor of finding a time savings) the time for major negotiated air rules is still 763 days, or about 3.5 months longer than the average time it took to promulgate the four major air rules included in the Kerwin and Furlong study. \textit{See Kerwin & Furlong, supra} note 113, at 136 app. B. Those significant, but non-major, negotiated rules do fare better compared with the significant conventional rules for three out of the five categories reported by Kerwin and Furlong, \textit{see id.}, but it should be kept in mind that my time data for negotiated rules understates the full rulemaking time measured by Kerwin and Furlong. \textit{See supra} text accompanying note 119.
percent. Although the number of rules in these subsets is small, these data support the conclusion that negotiated rulemaking has not achieved its goal of reducing litigation.

This analysis strongly suggests that selection bias has not set negotiated rules up to fail in terms of time and litigation. If any selection bias does exist in the types of rules selected for negotiated rulemaking, it has undoubtedly tended in the opposite direction—in favor of time savings and litigation avoidance. Although agencies have little reason to use negotiated rulemaking for their most routine rules, in choosing among their significant regulatory actions it appears that agencies have chosen those rules that would have had less of a tendency for time delays or litigation.

There is good reason to believe they have made these choices purposefully. From the seminal work of Philip Harter to the present, the prescriptive literature on negotiated rulemaking repeatedly suggests that negotiated rulemaking only be used under limited circumstances when its success can be most assured. In his original article on negotiated rulemaking, Harter highlighted what he called the “conditions that improve the likelihood of success” of negotiated rulemaking and urged agencies to select rules for negotiation with these conditions in mind. The Negotiated Rulemaking Act incorporated some of these conditions and now requires agencies to determine if a rule meets the stated conditions for success before convening a negotiated rulemaking.

One such condition is the presence of only a limited number of affected parties. Harter specifically stated that “negotiation

275. See, e.g., Harter, supra note 12, at 42–52 (discussing “conditions that improve the likelihood of successful negotiations”); Perritt, supra note 17, at 1642–46 (outlining criteria for selecting appropriate rulemakings for negotiation); Susskind & McMahon, supra note 17, at 138–40, 151–57 (examining preconditions for successful negotiated rulemaking); 1995 SOURCEBOOK, supra note 30, at 37–40 (listing factors that should be considered before selecting appropriate rules for negotiation).


277. See 5 U.S.C. § 563 (1994) (listing criteria for agencies to consider when determining if there is a need for negotiated rulemaking). As early as 1982, the Administrative Conference recommended that agency conveners should “conduct a preliminary inquiry to determine whether a regulatory negotiating group should be empaneled,” expressly considering factors related to its success and proceeding with the negotiation only if is determined to be “appropriate.” ACUS Recommendation No. 82–4, supra note 32, at ¶ 4, reprinted in 1995 SOURCEBOOK, supra note 30, at 11, 12. Agencies conducted pre-negotiation screenings of rules even before the practice was essentially required by the Negotiated Rulemaking Act. See 1995 SOURCEBOOK, supra note 30, at 40, 45–47; Eisner, supra note 17, at 374.
would not work” when “an environmental regulation may apply generally to all industry, and yet affect each industrial sector differently enough so that even several individuals could not represent the interests of all of the sectors.” The Negotiated Rulemaking Act specifically directs agencies to consider whether the rule affects only “a limited number of identifiable interests,” and the EPA recommends formal negotiation only when the parties are “reasonably few in number.”

Not surprisingly, the EPA rules that affect the broadest number of organizations have never been selected for negotiated rulemaking. For example, the EPA did not use negotiated rulemaking to develop its revisions to the National Ambient Air Quality Standards for particulates and ozone. The agency also avoided negotiated rulemaking for its major programmatic rules under RCRA, including those regulating the land disposal of hazardous wastes and establishing criteria for toxicity characteristics. Each of these programmatic rules affected a wide range of interests and seemed more likely from the outset to elicit petitions for judicial review. In contrast, EPA’s negotiated rules

278. Harter, supra note 12, at 46.
279. 5 U.S.C. § 583 (a)(2) (1994); see also ACUS Recommendation No. 82-4, supra note 32, at ¶ 4c, reprinted in 1995 SOURCEBOOK, supra note 30, at 11, 12 (“[T]here should be a limited number of interests that will be significantly affected by the rule and therefore represented in the negotiations.”).
284. See American Petroleum Inst. v. EPA, 906 F.2d 729 (D.C. Cir. 1990) (addressing challenges to EPA’s first third rule); Chemical Mfrs. Ass’n v. EPA, No. 89-1531 (D.C. Cir. filed Sept. 5, 1989) (challenging the second third scheduled wastes rule); Chemical Waste Management, Inc. v. EPA, 976 F.2d 2 (D.C. Cir. 1992) (addressing challenges to EPA’s third third rule); Edison Electric Inst. v. EPA, 2 F.3d 438 (D.C. Cir. 1993) (addressing challenges to EPA’s toxicity characteristics rule); American Trucking Ass’ns, Inc. v. EPA, No. 97-1440 (D.C. Cir. filed July 18, 1997) (challenging the particulate NAAQS revisions); American Trucking Ass’ns, Inc. v. EPA, No. 97-1441 (D.C. Cir. filed July 18, 1997) (challenging the ozone NAAQS revisions).
have stood at least a notch below the agency's large programmatic rules in terms of their scope and importance. Each of the negotiated rules has affected only a limited number of parties, at times just a single industry, precisely as the agency's own guidelines suggest.285 Instead of selecting the most challenging rules, the agency has used negotiated rulemaking for what an earlier EPA report called "second-tier' rules," or those rules "affecting program implementation—rather than rules establishing program structure."286

To the extent that the EPA has accepted other criteria long prescribed for selecting rules for formal negotiation, it has systematically chosen to negotiate rules that are less likely to take a long time and that are less likely to result in litigation. These additional criteria, some of which are codified in the Negotiated Rulemaking Act, include:

- "[a] legislative or judicially imposed deadline or some other mechanism forcing publication of a rule in the near term;"287

285. The Negotiated Rulemaking Act recommends limiting a rulemaking committee to 25 members. See 5 U.S.C. § 555 (1994). Even a committee of this size could not purport to represent all the interests affected by the varied sectors affected by EPA's programmatic rules, such as those mentioned at supra notes 281–83 and accompanying text. EPA's negotiated rules have instead targeted specific industries, such as woodstove manufacturers, the chemical industry, petroleum refiners, and automobile manufacturers. See infra Appendices A, B, and C. They have also focused on single substances in limited realms, such as asbestos in public schools or disinfectant byproducts in drinking water. See supra notes 213, 236 and accompanying text. These rules are by no means routine, but neither are they the agency's most foundational rules that have implications for multiple industrial sectors across the country.

286. U.S. ENVTL. PROTECTION AGENCY, supra note 130, at 12, reprinted in 1995 SOURCEBOOK, supra note 30, at 34; see also Daniel J. Fiorino, Regulatory Negotiation as a Policy Process, 48 PUB. ADMIN. REV. 764, 770 (1988) ("[T]he negotiation process is more reliable and legitimate when it is applied to the resolution of 'how to' rather than 'what' decisions.").

287. Regulatory Negotiation Project Notice, 48 Fed. Reg. 7494, 7495 (1983) (EPA); see also ACUS Recommendation No. 82–4, supra note 32, at ¶ 4(a), reprinted in 1995 SOURCEBOOK, supra note 30, at 12 (recommending the establishment of a "relatively fixed time frame" within which decisions on a rule should be made); Harter, supra note 12, at 47 (suggesting that negotiations work best in a climate of urgency, generated by the inevitability or imminence of a decision); Perritt, supra note 17, at 1644 (arguing that effective negotiation requires deadline pressure to force people to make concessions); Susskind & McMahon, supra note 17, at 140 (arguing that parties may purposefully delay the settlement of a negotiation without the pressure of a deadline).
• "[a] reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;"\textsuperscript{288}

• a determination that "the negotiated rulemaking will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;"\textsuperscript{289}

• a finding that "some or all of the parties have common positions on one or more of the issues to be resolved that might serve as a basis for additional agreements;"\textsuperscript{290}

• a willingness by "[t]he participants in the negotiations . . . to negotiate in good faith;"\textsuperscript{291}

• a set of regulatory issues for which "no party will have to compromise a fundamental value;"\textsuperscript{292} and

• a determination that "the parties are likely to participate in negotiations as an alternative to litigation."\textsuperscript{293}

Rules satisfying these additional criteria would also seem to fall well within a second-tier of an agency’s otherwise significant rules.

Although selection bias is a potential concern in any impact analysis, the data reveal no discernible bias of negotiated rules toward the most significant rules. Moreover, the selection criteria established by EPA show that any remaining bias tends to make it more likely that negotiated rulemaking will succeed. The small fraction of significant and major rules that agencies choose to negotiate are not likely to be the most irresolvable rules. When only about 35 percent of the EPA’s most significant rules ordinari-


\textsuperscript{290} Regulatory Negotiation Project Notice, 48 Fed. Reg. at 7495; see also Chris Kirtz, Regulatory Negotiation: The New Way to Develop Negotiations?, 1 J. ENVTL. PERMIIING 269, 272 (1992) (stating that parties should have common goals and positions).

\textsuperscript{291} ACUS Recommendation No. 82-4, supra note 32, at ¶ 4(f), reprinted in 1995 SOURCEBOOK, supra note 30, at 12.

\textsuperscript{292} 1995 SOURCEBOOK, supra note 30, at 11; see also ACUS Recommendation No. 82-4, supra note 32, at ¶ 4b, reprinted in 1995 SOURCEBOOK, supra note 29, at 11 (stating that negotiations should not require participants "to compromise their fundamental tenets"); Harter, supra note 12, at 49 ("Competing interests cannot negotiate an agreement if the disputed issue concerns fundamental values."); Perritt, supra note 17, at 1645 (stating that negotiated rulemakings should not raise fundamental value conflicts); Susskind & McMahon, supra note 17, at 152 ("[P]arties are unlikely to make the necessary concessions to reach consensus if the only way to reach agreement is to compromise fundamental values or beliefs.").

\textsuperscript{293} Regulatory Negotiation Project Notice, 48 Fed. Reg. at 7495.
ly end up in court, it is reasonable to conclude that those rules which meet the various conditions for a successful reg neg would probably be more likely at the outset to fall within the 65 percent of rules that do not elicit any litigation. We can also expect that such rules would have a tendency to take less time than other significant rules. That negotiated rulemaking should nevertheless fail to reduce time or litigation is all the more striking given the criteria agencies have articulated for selecting rules for negotiation.

B. Reevaluating Negotiated Rulemaking

Why has negotiated rulemaking failed to achieve its principal objectives? At least three reasons can explain why the performance of negotiated rulemaking has failed to surpass the performance of conventional rulemaking. First, negotiated rulemaking actually creates new sources of potential conflict in the regulatory process, even though it is ostensibly designed to reduce conflict. Second, the structure of the regulatory process provides numerous opportunities to disrupt the consensus on which negotiated rulemaking depends. Third, conventional rulemaking has been more effective than previously thought, particularly in avoiding litigation. In this section, I explore these reasons and conclude that negotiated rulemaking, distinguished by its search for consensus, has been an oversold solution to an overstated problem.

At the outset, proponents of negotiated rulemaking might seek to explain negotiated rulemaking’s performance differently by trying to shift some of the “blame.” They might argue, for example, that in some cases negotiated rulemaking did not cause litigation, but that litigation came about because of unclear or inefficient statutes.294 They might also argue that delays have not been caused by the negotiations themselves—which have sometimes

294. Some have suggested that the subsequent controversy over the reformulated gasoline rule stemmed not from the negotiated rulemaking process but from problems in the 1990 Clean Air Act Amendments. See Harter, supra note 119, app. B, at 1425; Weber, supra note 150, at 355–56 n.371. Of course, problems do arise in statutes, thereby giving parties incentives to seek judicial interpretations. Yet even though these problems can occur with negotiated rules, they most certainly also arise with rules adopted through conventional rulemaking. Thus, one cannot seek to exclude such “statutory challenges” from the set of negotiated rules that groups have challenged without also excluding those same kinds of challenges from the set of litigated rules adopted using conventional rulemaking.
been concluded over several months' time—but from delays within the agency after the negotiations have ended.\footnote{In a similar vein, proponents of negotiated rulemaking might argue that negotiated rulemaking has failed not because of anything intrinsic to it as an administrative procedure, but rather because of the manner in which agencies have implemented the procedure. Although this argument may have some surface appeal, it demands a clear showing of what exactly administrators could have done differently in these cases, given the many pressures on them from inside and outside government. If negotiated rulemaking's success ultimately hinges on the existence of some Herculean administrator, reg neg cannot be considered a realistic means of hastening rulemaking or preventing litigation.} Whatever the merits of these claims, such attempts to deflect the responsibility for litigation or time delays away from the negotiated rulemaking process ultimately miss the point. Although there is good reason to think that negotiated rulemaking does create additional conflicts in the administrative process, the underlying issue to which my analysis speaks is not whether negotiated rulemaking causes lawsuits or time delays. Rather, the issue is whether it prevents them.\footnote{If all of negotiated rulemaking's failings can be attributed to other aspects of the regulatory process, that would by no means constitute an endorsement of negotiated rulemaking as a solution to the supposed problems of the regulatory process. On the contrary, that would simply amount to an admission that negotiated rulemaking has not addressed those aspects of the regulatory process that lead, in some cases, to time delays and litigation. Of course, it may well be the case that nothing else could have prevented delays or litigation. As Susan Rose-Ackerman has suggested, in some instances of statutory ambiguity, no form of administrative process will deter parties from seeking a judicial interpretation of a statute. See Rose-Ackerman, supra note 19, at 1220. Even though using negotiated rulemaking in such instances might not create the incentives to seek judicial review, neither would it eliminate them.} Despite the many hopes for negotiated rulemaking, it has shown itself incapable of preventing the conflict that leads to regulatory delays and petitions for review.

1. \textit{Sources of Conflict Introduced by Negotiated Rulemaking.} In seeking consensus over the substance of regulations, negotiated rulemaking has long been considered a means of reducing conflict in the regulatory process. Yet formal negotiation can actually foster conflict. It adds three new sources of conflict stemming from decisions about membership on negotiated rulemaking committees; the consistency of final rules with negotiated agreements; and the potential for an overall heightened sensitivity to adverse aspects of rules.

The first of these new sources of conflict stems from agency decisions about membership on negotiated rulemaking committees. As discussed above, the criteria for negotiated rulemaking have
led agencies to prefer rules that affect a limited range of parties. Even with this tendency, agencies have sometimes still not been able to include all the organizations who feel they will be affected by a rule. Although the Negotiated Rulemaking Act insulates the agency from judicial review of its decisions about membership on negotiated rulemaking committees, the exclusion of groups from membership on the committees adds a source of discontentment not otherwise present in notice-and-comment rulemaking. The decision to use a select committee whose representatives will develop a draft rule apparently attracts even closer scrutiny by organizations not represented at the negotiating table.

Not surprisingly, the EPA has been criticized by parties who were not invited to participate on the agency's negotiation committees. In the asbestos rule, for example, the negotiations were temporarily disrupted while additional parties sought to participate in the negotiations. In the disinfectant byproducts negotiation, the chlorine industry complained that it had been "unfairly excluded" from full participation in the negotiated rulemaking. As I have already shown, the reformulated gasoline rule elicited a legal challenge from a tank truck trade association which was not represented on the negotiated rulemaking committee, as well as trade challenges from two countries not included on the committee. The negotiations over the Grand Canyon visibility rule and the wood furniture coatings rule also prompted litigation by groups not participating on the negotiation committee.

One organization alone is capable of upsetting a consensus built on unanimity or filing a petition for judicial review. Consequently, even a small number of excluded parties can pose a threat to the effectiveness of negotiated rulemaking. In Kerwin and Langbein's study, twelve percent of the respondents reported that they had to "press" the EPA to let them participate.

297. See supra notes 278–86 and accompanying text.  
299. See Participants and Facilitators Discuss Negotiation of EPA's Proposed Rule on Asbestos in Schools, supra note 216, at 154.  
301. See supra note 161 and accompanying text.  
302. See supra note 173 and accompanying text.  
303. See supra notes 149, 233 and accompanying text.  
304. See KERWIN & LANGBEIN, supra note 89, at 11.
Thirty-five percent of those same respondents reported that at least one affected interest was not represented at the negotiating table, a noteworthy finding considering that it is based on responses by those who were represented. The likelihood that an agency excludes even one organization from a negotiated rulemaking committee poses an inherent threat to the effectiveness of a procedure that depends on consensus to foreclose litigation.

In addition to conflict over committee membership, negotiated rulemaking adds conflict over the meaning of any consensus and the extent to which an agency's decision reflects that meaning. Sometimes conflicts arise simply between participants over what each thinks a negotiated agreement means. In the disinfectant byproducts rule, for example, a representative from the Natural Resources Defense Council reportedly criticized the American Water Works Association for subsequently urging EPA to set action levels rather than the more stringent maximum contaminant levels NRDC supported in the negotiation. AWWA thought its position was consistent with the negotiations because it only agreed to support maximum contaminant levels once the agency could provide adequate microbial data.

Conflicts can also arise over what was not agreed to in the negotiated agreement—what might be termed expressio unius disputes. These disputes center on whether a negotiated agreement's silence on an issue reflects an agreement that the agency take no action. In the reformulated gasoline case, the American Petroleum Institute charged that EPA's decision to impose second phase nitrogen oxide standards contravened the agreement because the agreement did not address second phase standards. The EPA rejected API's administrative petition, concluding that the agreement's silence allowed the agency to proceed without retreating from the consensus.

305. See id.
307. See id.
308. Sometimes the silence may simply reflect an oversight, as the issue of compressor issue standards apparently did in the equipment leaks negotiation. See supra note 246 and text accompanying notes 226–30.
309. See supra note 170 and accompanying text.
310. See supra note 172 and accompanying text.
More notably, conflicts arise over the extent to which the agency has adhered to the stated terms of the negotiated agreement. For example, in the reformulated gasoline case, the petroleum industry felt betrayed by the EPA's subsequent decision to issue a separate rule favorable to the ethanol industry.\(^\text{311}\) Similarly, in the Department of Education's student loan rulemaking, loan servicers charged that the Department breached commitments it made during the negotiated rulemaking.\(^\text{312}\) More recently, the petroleum industry criticized the Department of Interior's Minerals Management Service when it decided to reopen the comment period over its natural gas royalties rulemaking.\(^\text{313}\) Without an attempt at negotiated rulemaking, these conflicts over the commitment of the agency to a negotiated agreement could not arise.

The third way negotiated rulemaking can add conflict is by heightening the sensitivity of the parties to adverse portions of a rule. Negotiated agreements raise expectations. When the agency does not follow the negotiated agreement, the existence of the agreement itself stirs up dissatisfaction. For example, consider a conventional rulemaking in which an agency fails to follow the input provided by an affected organization. In that case, the organization has mainly to complain about how adversely the rule affects its interests and how its comments were not accepted. If the agency were to enact the very same rule in contravention of a negotiated agreement, the organization would suffer both the adverse effects of the rule as well as the impression that it had been "sandbagged."\(^\text{314}\) Such a reaction in this latter case would seem even more likely if the organization had compromised on other portions of the rule in order to secure gains on the portion subsequently undercut by the agency. Even if the underlying rule were the same in both cases, we would expect the organization to perceive its interests to be more severely aggrieved in the latter case.\(^\text{315}\) Similarly, we might expect representatives of organiza-


\(^{312}\) See USA Group Loan Servs., Inc. v. Riley, 82 F.3d 708, 714 (7th Cir. 1996).


\(^{314}\) Id. at 26 (reporting an oil industry representative's response to the Mineral Management Service's action to reopen the comment period on negotiated rule).

\(^{315}\) Prospect theory suggests that negotiators would ascribe additional negative value to the "loss" of a more preferable outcome they thought they had already secured. See Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under
tions excluded from a negotiation committee to react more acutely to an adverse portion of a rule if they knew the rule was developed in explicit consultation with other organizations having potentially divergent interests.

In a more general sense, we can expect negotiated rulemaking to heighten conflict simply because of the intensity with which groups scrutinize the rules that are the subject of negotiations. One side benefit often attributed to negotiated rulemaking is that it facilitates learning, both by agency staff and interest group representatives. The additional time and resources groups devote to discussing rules developed through negotiation provides greater awareness of the issues underlying the rule. When groups invest these additional resources in negotiation, their representatives presumably also learn more about how aspects of the rule may adversely affect their group interests. Groups may also find that the more time they invest in a rulemaking proceeding, the less willing

Risk, 47 ECONOMETRICA 263 (1979). In addition, procedural justice theory would suggest that negotiators would view the fairness of the negotiating procedure at least as importantly as the outcome. See E. ALLEN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

316. See, e.g., Fiornio, supra note 286, at 768 (“[Negotiated rulemaking is] described as educational, as offering a forum for presenting arguments and evidence, as a way of understanding another side's point of view, and as a chance to generate new ideas and options.”)

317. Participation in negotiated rulemaking demands much from all participants, including agencies, industry groups, and citizen groups. See, e.g., U.S. ENVTL. PROTECTION AGENCY, COSTS OF REGULATORY NEGOTIATIONS TO DATE (1987), reprinted in 1995 SOURCEBOOK, supra note 30, at 273–74 (indicating that the EPA’s first seven negotiated rulemakings imposed over $650,000 in additional costs on the agency); KERWIN & LANGBEIN, supra note 89, at 36 (showing that industry groups spent an average of nearly $700,000 per rulemaking to collect information and participate in formal negotiations); REGULATORY NEGOTIATION: FOUR PERSPECTIVES, DR FORUM (National Inst. Disp. Resol.), Jan. 1986, reprinted in 1995 SOURCEBOOK, supra note 30, at 858 (quoting statement by David Doniger, attorney for the Natural Resources Defense Council, that “regulatory negotiation takes about 10 times as much of our resources as commenting on a rule”); see also Owen Olpin et al., APPLYING ALTERNATIVE DISPUTE RESOLUTION TO RULEMAKING, 1 ADMIN. L.J. 575, 579 (1987) (providing a statement by David Doniger that he “put in 30 full days on the woodstove rule . . . and by contrast . . . probably would have put in three days writing comments on the draft rule for traditional rulemaking”). Preliminary results from the second phase of the study by Cornelius Kerwin and Laura Langbein indicated that participants in negotiated rulemakings spent an average of six times as much professional staff time than did participants in the conventional rulemakings included in their study. See Kerwin & Langbein, supra note 92, at 24–25. In addition, Kerwin and Langbein have found that “negotiated rulemaking participants were three times as likely (30% vs. 9%) to volunteer that the process required ‘too much’ time, effort, money, or other resource[s].” Id. at 29.
they are to overlook imperfections in the rule. In these ways, the quest for consensus unintentionally contributes new sources of conflict to the regulatory process that can limit negotiated rulemaking's ability to reduce rulemaking time and litigation.

2. The Fragility of Consensus. Even if a search for consensus could avoid creating new kinds of conflicts, negotiated rulemaking still would have a difficult time succeeding in many cases for another reason altogether. Any procedure that depends for its success on the maintenance of a consensus is, given the realities of the federal regulatory process, fighting uphill.\(^{318}\) A consensus forged at the earliest stages of the rulemaking process is inherently fragile because the structure of the American administrative state provides numerous opportunities for that consensus to unravel.

Even if all the participants in the negotiated rulemaking reach a consensus, the agency must still prepare a preamble to a proposed rule and provide an opportunity for public comment on that proposal.\(^{319}\) If the public comment period is to be meaningful, the agency must consider changing the proposed rule in light of any negative comments it receives on a proposal, even if such a change entails a retreat from a consensus.\(^{320}\) In addition, during the development of the proposed and final rule, the agency receives input from the Office of Management and Budget (and sometimes other executive branch officials) which may lead the agency to modify features of a rule.\(^{321}\) Members of Congress

\(^{318}\) Cf. Rose-Ackerman, supra note 19, at 1209 ("A regulatory negotiation is not analogous to a therapy session or a friendly, disinterested discussion of policy options.").

\(^{319}\) The procedures authorized by the Negotiated Rulemaking Act of 1990 only supplement the rulemaking procedures under the Administrative Procedure Act. See 5 U.S.C. § 581 (1994). Some of the added detail the agency gives to the preamble or the rule during the notice-and-comment period may depart from what the parties thought they had agreed to in the negotiation.

\(^{320}\) See, e.g., Crow, supra note 313, at 320 (describing how the comment period was reopened in response to criticisms of the Mineral Management Service's negotiated proposal).

\(^{321}\) Both the Bush and Clinton administrations, for example, took close interest in the reformulated gasoline rule, prompting the agency to issue the companion renewable oxygenates requirement which arguably breached the negotiated agreement. See Ethanol Mandate Raises Question: Can Reg-Neg Process be Trusted?, AIR & WATER POLLUTION REP. ENVT' Wk., July 4, 1994, at 219; see also EPA's Proposed Renewable Oxygenate Standard: Hearing Before the Senate Comm. on Energy and Natural Resources, 103d Cong. 29 (1994) (statement of Mary Nichols, Assistant Administrator for Air and Radia-
may step in and attempt to pressure the agency or change the underlying statute in such a way as to disrupt the consensus.\textsuperscript{322} As we have seen, other interest groups may also challenge the rule in court, which can lead an agency to change the rule further.\textsuperscript{323} Finally, even if a consensus reached during the early stages of rulemaking could remain intact through all the subsequent stages, the agency can decide at a later time to revise the rule.\textsuperscript{324}

Theories predicting the success of negotiated rulemaking are based on the assumption that everyone who could ever conceivably take an interest in a rule will come to a complete and stable agreement on every particular aspect of that rule. If that could happen throughout government as well as throughout the interest group community, a rule could theoretically sail undisturbed through the entire rulemaking process. Yet what is theoretically possible is different than what is realistically probable. The intervention by a few well-placed agency managers, or by OMB, the White House, or Congress, can lead to modifications that begin the unravelling of a consensus. It only takes one interest group excluded from the negotiation, or one included but defecting group, to begin unravelling the consensus from outside government.\textsuperscript{325} Any heightened sensitivities created by the process of reaching a consensus may serve to accelerate the breakdown of consensus. In practice, the fact that agencies are embedded within a dynamic political environment makes maintaining consensus a bit like building a house of cards.\textsuperscript{326}

\textsuperscript{322} For example, congressional debate over the reauthorization of the Safe Drinking Water Act followed closely behind the conclusion of the disinfectant byproducts negotiated rulemaking, and at least one affected group succeeded in having legislation introduced which would have undermined the negotiation process. \textit{See} \textit{National Research Council, supra} note 13, at 187.

\textsuperscript{323} \textit{See supra} notes 149, 161, 233 and accompanying text.

\textsuperscript{324} The Department of Education has made subsequent changes to rules that emerged from negotiated rulemaking. \textit{See} William D. Ford Federal Direct Loan Program, 60 Fed. Reg. 61,790 (1995) (making changes to origination criteria in direct loan regulations); William D. Ford Federal Direct Loan Program, 60 Fed. Reg. 61,820 (1995) (making changes to direct loan program's income contingent repayment plan).

\textsuperscript{325} \textit{See} \textit{National Research Council, supra} note 13, at 187-88.

\textsuperscript{326} \textit{Cf.} \textit{Kenneth J. Arrow, Social Choice and Individual Values} (2d ed.
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Of course, negotiated rulemaking is not really even like a house of cards, but rather like the addition of an extra room to a house with an unsteady foundation. Negotiated rulemaking adds an early attempt at consensus-building to a regulatory process designed to make it difficult to sustain interest group bargains. The existing regulatory structure in the United States, with its multiple decisionmakers and avenues of input, surely contributes to rulemaking time and increases the possibility of litigation, at least when compared to imagined alternatives lacking these multiple avenues. This regulatory structure also impedes efforts that depend on consensus by providing multiple steps at which consensus might break down. We could conceive of ways to fix the inherent fragility of consensus, and thereby provide conditions for which negotiated rulemaking could succeed, but such efforts would lead to a vastly different administrative process.\footnote{327}

From this perspective, it is not surprising that negotiated rulemaking has failed to achieve its principal objectives. Negotiated rulemaking does not change at all the features that make the regulatory process lengthy at times and susceptible to the pursuit of judicial redress. Moreover, these same features, namely the multiple avenues of input, tend to work against the maintenance of consensus, which is the touchstone of negotiated rulemaking. In this sense, negotiated rulemaking raises unrealistic expectations about what can be accomplished in a governmental process characterized by "endless bargaining."\footnote{328}

In pointing out that the process of rulemaking makes it difficult to sustain a consensus achieved at the early stages of rulemaking, I do not mean to imply that the rulemaking process is necessarily dysfunctional. On the contrary, it can be thought highly desirable to have a process that makes it harder for interest group deals to stick. As Peter Strauss has written, "[t]he embeddedness

\footnote{327. See Funk, supra note 21, at 89-97. The agreements of negotiated rulemaking committees could be more easily sustained if these committees, and only these committees, possessed unreviewable lawmaking authority. Yet if such a dramatic change were to be implemented, and no proponent of negotiated rulemaking has suggested that it ought to be, we might just as easily (if not more easily) reduce rulemaking time and litigation by vesting unreviewable lawmaking authority in the agency itself and eliminating the opportunity for public comment and judicial review. I am not proposing that we make these changes, but merely pointing out the limits in the U.S. administrative state of any consensus-based solution to the problems of regulatory delays and litigation.}

\footnote{328. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 150 (1956).}
of the EPA, its focus and its relations with multiple, organizationally superior overseers, gives us practical assurance that it will not run out of control."329 This same "embeddedness" that helps keep EPA and other regulatory agencies under control also makes it more difficult for these agencies to sustain agreements reached through negotiated rulemaking.

3. The Success of Conventional Rulemaking. Although the embeddedness of rulemaking makes it difficult to sustain a formal negotiated agreement, it does not appear to keep agencies from achieving closure on most of their other regulatory decisions. Those features of the regulatory process that make it difficult to sustain an explicit, pre-proposal consensus do not make conflict and litigation inevitable in the usual course of rulemaking. As my findings show, conventional rulemaking works far better in avoiding litigated conflict than has been widely believed. The final reason why negotiated rulemaking has failed to achieve its goals therefore hinges on the comparative success of conventional rulemaking.

Agencies and interest groups seem quite capable of working with each other in the context of conventional rulemaking.330 If discussions about agency capture, revolving doors, and policy networks over the years have had any truth to them at all, regulators have always kept in touch with affected organizations and their representatives.331 Cornelius Kerwin reports that nearly three quarters of the interest groups he surveyed either regularly, very frequently, or always had informal communications with agency staff before and after the agency proposed a regulation that affected the group.332 The alternative to negotiated rulemaking is cer-

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330. Cf. Coglianese, supra note 21, at 748-51 (discussing the ongoing relationships that develop in the regulatory process).
332. See KERWIN, supra note 18, at 202. Scott Furlong found a similar pattern in his study of interest group involvement in the regulatory process. See Scott Furlong, Interest Group Influence on Regulatory Policy 126-27 (Dec. 9, 1992) (unpublished Ph.D. dissertation, American University) (on file with author) (reporting that three-fourths of the groups surveyed used informal contact with agency staff as their method of participation
tainly not, and never has been, an agency that completely locks itself up in a room to settle on a rule. Indeed, the term “conventional” rulemaking is itself a misnomer because agencies use a wide array of procedures short of negotiated rulemaking for involving the public in the rulemaking process.333

The failure of negotiated rulemaking—with its quest for consensus—by no means implies a failure of negotiation in the regulatory process. Negotiated rulemaking shows weak results in large part because of the strength of agencies in using less intensive methods of negotiation and public input in the context of conventional rulemaking. These methods, which include individual meetings, public hearings, and ongoing advisory committees, provide agencies with information about technical aspects of regulation as well as the interests of affected parties.

The aggregation of interests has sometimes been considered a primary purpose of administrative law.334 Negotiated rulemaking has specifically been presented as an optimal means for revealing interests because participants can make tradeoffs on various issues.335 While formal negotiation does allow for tradeoffs, it by no means guarantees against bluffing and posturing. Since negotiated rulemaking encourages a give-and-take mentality among its participants, representatives on negotiated rulemaking committees have little incentive not to take positions on issues that they might otherwise consider minor in conventional rulemaking. In contrast, conventional rulemaking can provide agencies with clearer information about the intensities of various groups’ interests.336 Conventional rulemaking allows organizations to participate as actively

in agency rulemaking more than 50 percent of the time). The preliminary results from the second phase of the study by Cornelius Kerwin and Laura Langbein further support this pattern. See Kerwin & Langbein, supra note 92, at 24 (finding conventional rulemaking “as equally receptive and responsive to public involvement” as negotiated rulemaking).

333. See, e.g., Kerwin, supra note 18, at 171–73 (discussing “diversification” in the forms of rulemaking participation); Keystone Center, Discussion on the Use of Consultation and Consensus-Building Processes for Implementing the Clean Air Act of 1990 3 (1992), reprinted in 1995 Sourcebook, supra note 30, at 48, 50 (outlining a “Spectrum of Consultation and Consensus-Building Approaches”).


335. See, e.g., Harter, supra note 21, at 476 (arguing that negotiated rulemaking affords participants an opportunity to rank issues and make tradeoffs).

or inactively as they like.\textsuperscript{337} Their level of participation, taking into account the organization's budgetary constraints, gives the agency additional information about the importance of the rule to the organization, information that can get truncated when an entire rulemaking proceeds by committee.

Negotiated rulemaking has long been regarded as necessary to avoid litigation and conflict.\textsuperscript{338} My analysis shows that this is not the case. Litigation is not the inevitable product of agency rulemaking. Many agencies, after all, do not face much conflict between interest groups.\textsuperscript{339} Among those agencies that do face conflicting interest groups, public managers appear much more adept than ordinarily assumed at anticipating interests and managing conflict in the normal rulemaking process.\textsuperscript{340}

When conventional rulemaking works better than we thought and negotiated rulemaking fares worse, there seems little reason to continue to pursue negotiated rulemaking. Of course, it may be argued that even if negotiated rulemaking fails to reduce time and litigation, it still allows participants to learn from each other.\textsuperscript{341} It would not be surprising if negotiated rulemaking did foster

\textsuperscript{337} Since conventional rulemaking is not organized around a series of fixed meetings with the agency, affected groups can decide how much effort to put into drafting comments, contacting agency officials, mobilizing supporters in Congress, and building coalitions.

\textsuperscript{338} See supra notes 26-61 and accompanying text.

\textsuperscript{339} See James Q. Wilson, \textit{The Politics of Regulation}, in \textit{The Politics of Regulation} 357, 365 (James Q. Wilson ed., 1980); John E. Chubb, \textit{Interest Groups and the Bureaucracy: The Politics of Energy} 78 (1983). As a staff member of a financial regulatory agency said to me in a background interview, “We simply don’t have any adverse groups. It’s just the securities industry... and there’s usually not much opposition.”

\textsuperscript{340} For example, among the 36 significant hazardous waste rules that EPA issued under the Resource Conservation and Recovery Act from 1988 to 1991, both environmental and industry groups filed comments in only 53 percent. In nearly half the cases, EPA apparently succeeded in avoiding conflict between at least these two kinds of groups.

\textsuperscript{341} See Kerwin & Langbein, supra note 89, at 13 (“Participants generally report that they learned a great deal during the course of a negotiated rulemaking.”). Similar, though somewhat more mixed, findings emerged from the second phase of the Kerwin and Langbein study. Compared to participants in conventional rulemakings, participants in negotiated rulemakings were more likely to report that they learned something about scientific and technical issues, the positions of other participants, and how to negotiate. See Kerwin & Langbein, supra note 92, at 14, tbl.8. On the other hand, a significantly larger portion of participants in conventional rulemakings than in negotiated rulemakings learned something about the rule, the law, EPA, or “other” issues related to the rulemaking. See id.
learning. After all, anyone who participates in a series of intensive sessions focused on a regulation typically will come away having learned more than if he had not attended at all. Participants devote a substantial amount of their time and resources to studying the issues. Kerwin and Langbein find that during negotiations organizations spend an average of 26 percent of all their available resources on the negotiations, with environmental groups reporting the highest proportion (50%). Kerwin and Langbein also report that "big business" spends an average of $432,000 for research expenses and over $250,000 for consultants and lawyers. With investments as large as these, we should hope that participants are learning something.

Yet since negotiated rulemaking is characterized by a quest for consensus, we should ask whether learning depends on that quest. In other words, do we need negotiated rulemaking for learning to take place? Or can it be equally well achieved with discussion-oriented sessions that do not seek the achievement of a consensus? To show that learning and information exchange result from a quest for consensus, we would need to compare negotiated rulemaking with other equally intensive agency workshops. Proceedings that negotiation consultants like to call "facilitated joint brainstorming," and which agencies call roundtables, workshops, and "enhanced participatory rulemakings," also aim at

342. Of course, the information participants learn may still not be adequate, unbiased, or equally understood. See Polkinghorn, supra note 88, at 29 (citing limitations in the learning potential of negotiated rulemaking).
343. See supra note 127 and accompanying text.
344. See Kerwin & Langbein, supra note 89, at 36.
345. See id.; see also supra note 317 and accompanying text (illustrating negotiated rulemaking's demand on the time and financial resources of all participants). These resource commitments should be compared with the cost of challenging a major EPA rule, which typically amounts to $150,000 to $250,000 for industry groups. See Coglianese, supra note 193, at 112; American Petroleum Inst. v. EPA, 72 F. 3d 907, 910 (D.C. Cir. 1996).
347. See The Administrative Dispute Resolution Act of 1995: Hearing Before the Subcomm. on Government Management and the District of Columbia of the Senate Comm. on Governmental Affairs, 104th Cong. 161 (1996) (enclosure to letter from Shirley Ann Jackson, Chair, Nuclear Regulatory Commission) (noting that the objective of an "enhanced participatory rulemaking" is to provide stakeholders with "an early opportunity to discuss actively the rulemaking issues, as opposed to the objective of attempting to reach a consensus on how those issues should be addressed, as is the case with a negotiated
information exchange and learning, but without the quest for consensus. Such proceedings may well achieve comparable gains in terms of information exchange without generating the same level of position-taking as negotiated rulemaking and without raising unrealistic expectations about what participants will receive from their investment of time.

The quest for consensus has been the hallmark of negotiated rulemaking. In Philip Harter's words, "it is precisely the ability to reach closure on critical issues that separates it from a mere advisory committee or other consultative process." Through the difficult task of finding and maintaining a consensus, negotiated rulemaking offers agencies the hope of closure, reduced rulemaking time, and lessened litigation. Yet in the negotiated rulemakings that agencies have thus far completed, closure has been more difficult to sustain than ever anticipated. Despite the many aspirations for negotiated rulemaking, agencies' investment in it has yet to yield any demonstrable dividends in terms of saving time or reducing litigation. The quest for consensus has produced less closure than has the more practiced style of rulemaking on which agencies ordinarily rely.

CONCLUSION

Negotiated rulemaking's promise has been an alluring one. Policymakers and scholars have increasingly looked to negotiated rulemaking to minimize delays and conflict in the regulatory process. In exchange for an up-front investment in the pursuit of consensus early in the rulemaking process, agencies have been promised attractive dividends, namely shortened rulemaking time and reduced litigation over agency rules. Advocates have claimed other benefits from negotiated rulemaking, sometimes seeming to offer the potential for creating nearly flawless regulations if only agencies would affirm decisions reached by interest group representatives. Yet these other purported benefits of negotiated rulemaking—among them better information, shared learning, or heightened feelings of community—have over the years been side attractions to the main event, as they do not depend on a quest for consensus. Policymakers and scholars have focused most of

rulemaking.").

their attention on negotiated rulemaking's potential to reduce litigation and shorten rulemaking time, benefits that necessarily depend on the successful maintenance of consensus.

Although this quest for consensus has held out the promise of a faster and less conflictual regulatory process, experience has so far shown otherwise. Negotiated rulemaking does not appear any more capable of limiting regulatory time or avoiding litigation than do the rulemaking procedures ordinarily used by agencies. The agency that has used negotiated rulemaking the most, the EPA, has not seen its negotiated rules emerge in final form any sooner than rules not subject to formal negotiation. Once promulgated, negotiated rules still find themselves subject to legal challenge. The litigation rate for negotiated rules issued by the EPA has actually been higher than that for other significant EPA rules. These results will no doubt seem surprising in light of the enthusiastic support negotiated rulemaking has received over the years. They are only all the more surprising considering that agencies have deliberately selected rules for formal negotiation in order to ensure the procedure's success.

On reflection, negotiated rulemaking's weak results should not be as surprising as they may at first seem. While negotiated rulemaking seeks to eliminate conflict, it also adds new sources of conflict and raises unrealistic expectations about what participants can gain from their participation. To meet negotiated rulemaking's instrumental goals, agencies must secure and maintain a consensus, something which is not easy to sustain throughout the entire regulatory process. The multiple avenues of input and oversight in the regulatory process increase the likelihood of policy changes that depart from an early agreement made by a select group of negotiators. Despite these multiple avenues of influence in the regulatory process (or perhaps in part because of them), agencies are ordinarily more effective in crafting rules that avoid litigation without formal negotiation. Agency staff members appear better capable of avoiding litigation when they use the input provided in conventional rulemaking to listen to competing views, balance concerns, and make their best decisions.

The analysis provided in this Article shows that negotiated rulemaking has not lived up to its promising potential to save regulatory time or prevent litigation. From this perspective, it is understandable that agencies have so infrequently relied on negotiated rulemaking and it is inadvisable that Congress and the Pres-
ident would direct agencies to do otherwise. As has long been recognized, negotiated rulemaking demands a considerable investment of time, resources, and energy from all who participate in the process. Such investments might once have been thought sound in light of the benefits promised from a speedier, less contested regulatory process. In the absence of these promised benefits, agencies’ continued reliance on public participation methods which do not depend on consensus would appear the more sensible approach to making regulatory decisions.
APPENDIX A:
Abandoned Negotiated Rulemakings

APPENDIX B:
Pending Negotiated Rulemakings

61,860 (1992) (Department of Labor).
APPENDIX C:
Final Negotiated Rulemakings

Provision of Nonvoice Low Earth Orbit Satellite Services, 58 Fed.
APPENDIX D:  
Selected References to the Apocryphal 80% Litigation Rate for EPA Rules

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, NEGOTIATED RULEMAKING SOURCEBOOK xv (David M. Pritzker & Deborah S. Dalton eds., 1990) ("All too frequently, government agencies and the public find that agency issuance of a final rule . . . is simply the opening round in the inevitable courtroom litigation to follow . . . . [O]ne agency resulted in some 80% of all rules being challenged in court.").

Douglas J. Amy, Environmental Dispute Resolution: The Promise and the Pitfalls, in ENVIRONMENTAL POLICY IN THE 1990S 211, 216 (Norman J. Vig & Michael E. Kraft eds., 1990) ("It has been estimated that 80 percent of environmental regulatory decisions are appealed in court, either by industries that believe the rules are too stringent or by environmental groups that believe them to be too lax." (footnote omitted)).

Peter Brimelow & Leslie Spencer, You Can't Get There From Here, FORBES, July 6, 1992, at 59 ("[O]f every five major decisions made by [EPA Administrator William K.] Reilly, four are litigated.").

GARY C. BRYNER, BLUE SKIES, GREEN POLITICS: THE CLEAN AIR ACT OF 1990 AND ITS IMPLEMENTATION 211 (1995) ("[V]irtually every major EPA regulation has been challenged in federal courts.").

GARY C. BRYNER, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES 117 (1987) ("Former administrator William Ruckelshaus estimated that 80 percent of all rules issued by the EPA were subsequently challenged in federal courts . . . .").

CARNEGIE COMM’N ON SCIENCE, TECH., & GOV’T, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 109 (1993) ("In some agencies, 80 percent of major rules are appealed.").

Don R. Clay, New Environmentalism: A Cooperative Strategy, F. FOR APPLIED RES. & PUB. POL., Spring 1993, at 125, 126 ("Currently, four out of five EPA decisions are challenged in
court. Consensus-building should reduce the number of cases that go to court.”).

COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY: THE SIXTEENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 3 (1985) (“Fully 85 percent of EPA’s regulations result in litigation.”).

Cynthia Croce, Negotiation Instead of Confrontation, EPA J., Apr. 1985, at 23, 23 (“80 percent of the time, EPA’s final rules are challenged in court!”).

J. Patrick Dobel, Managerial Leadership in Divided Times: William Ruckelshaus and the Paradoxes of Independence, 26 ADMIN. & SOC’Y 488, 492 (1995) (“More than 80% of all environmental regulations end up in court.” (citation omitted)).

John P. Dwyer, Contentiousness and Cooperation in Environmental Regulation, 35 AM. J. COMP. L. 809, 809 n.1, 819 (1987) (“80% of EPA’s regulations are challenged in court [and] most parties . . . challenge virtually every regulation in order to preserve their rights.”).

Daniel J. Fiorino & Chris Kirtz, Breaking Down Walls: Negotiated Rulemaking at EPA, 4 TEMP. ENVTL. L. & TECH. J. 29, 29 (1985) (“As many as 80% of EPA’s final rules are challenged . . . often by both sides of an issue.”).

DANIEL J. FIORINO, MAKING ENVIRONMENTAL POLICY 56 (1995) (“A near certainty for most important final rules is a court challenge.”).

Robert Glicksman & Christopher H. Schroeder, EPA and the Courts: Twenty Years of Law and Politics, LAW & CONTEMP. PROBS., Autumn 1991, at 249, 249 n.2 (“[O]ver 80% of EPA’s regulations are challenged in court.”).

WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY 110 (1992) (“[Ruckelshaus] asked the [EPA] general counsel to study it and he found that 85 percent of the decisions made by the EPA administrator that are appealable were appealed.”).

MICHAEL GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW 92 (1996) (“At any given time, some 80 percent of the EPA’s rulemaking proceedings are tied up in litigation.”).

KATHRYN HARRISON & GEORGE HOBERG, RISK, SCIENCE & POLITICS 13 (1994) (“80 percent of the Environmental Protection Agency’s regulations have ended up in court.”).
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GEORGE HOBBERG, PLURALISM BY DESIGN: ENVIRONMENTAL POLICY AND THE AMERICAN REGULATORY STATE 199 (1992) ("By one count, fully 80% of EPA's final decisions are the subject of judicial appeal." (citation omitted)).

PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUCCOTASH AMERICA 87 (1994) ("[M]ost decisions are appealed in the courts, including 80 percent of the EPA's decisions . . . .").

Robert A. Kagan, Adversarial Legalism and American Government, 10 J. POL'Y ANALYSIS & MGMT. 369, 371 (1991) ("An administrator of the U.S. Environmental Protection Agency estimated that more than 80 percent of EPA's regulations have been challenged in court.").

CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 264 (1994) ("85 percent of the hundreds of nonroutine rules issued by the EPA each year are challenged in court.").

Chris Kirtz, Environmental Protection Agency's Regulatory Negotiation Project, NAT'L INST. OF JUST. REP., May 1985, at 9, 9 ("As many as 80 percent of the U.S. Environmental Protection Agency's regulations are challenged in court.").

Chris Kirtz, Regulatory Negotiation: The New Way to Develop Regulations?, 1 J. ENVTL. PERMITTING 269, 269 (1992) ("Almost before the ink was dry—in over 80 percent of our 'major' regulations—we were sued.").

Marianne Lavelle, 'Reg-Neg' Revving Up in D.C., NAT'L L.J., Mar. 21, 1988, at 1, 21 ("Of the 200 to 300 final rules the agency publishes each year, about 80 percent are challenged in court.").

Richard J. Lazarus, The Tragedy of Distrust in the Implementation of Federal Environmental Law, LAW & CONTEMP. PROBS., Autumn 1991, at 311, 324 (stating that EPA "has had 80 to 85 percent of its major regulations challenged in court.").

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