ASSESSING CONSENSUS: THE PROMISE AND PERFORMANCE OF NEGOTIATED RULEMAKING

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Executive Summary

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Concerned that the regulatory process has become excessively litigious and adversarial, scholars and policymakers have increasingly urged federal regulators to adopt more consensual methods of creating public policy. Notwithstanding the overwhelming interest in and support for negotiated rulemaking, administrative agencies have only infrequently relied on the formal regulatory negotiation process. Over its thirteen year history, the negotiated rulemaking process has yielded only thirty final administrative rules. By comparison, the federal government publishes over 3,000 final rules *each year* through the ordinary notice-and-comment process. Why have federal agencies relied so little on negotiated rulemaking?

I address this question by assessing the impact of negotiating rulemaking on its two major purposes: (1) reducing overall rulemaking time; and (2) decreasing the amount of litigation over agency rules. Unlike most other studies, I examine the use of negotiated rulemaking by all federal agencies over the past thirteen years. My analysis suggests that the asserted problems used to justify negotiated rulemaking have been overstated. Negotiation ordinarily pervades the rulemaking process, and litigation is vastly less common than previously supposed. Similarly, negotiated rulemaking has been overstated as a viable strategy for gaining consensus and avoiding the occasional lawsuit.

Negotiated rulemaking consumes more resources for agencies and stakeholders than does notice-and-comment rulemaking, and it fails to yield any significant impact on the levels of litigation or controversy which normal rulemaking occasionally engenders. Indeed, 6 out of the 12 negotiated rules adopted by the U.S. Environmental Protection Agency (EPA) have resulted in

court challenges, a litigation rate higher than the overall rate for EPA rules. Ultimately, my findings question the growing call among scholars and policymakers for reforming the regulatory process to rely more extensively on formal negotiated rulemaking. Formal negotiation, it seems, will not eliminate conflict and controversy in the regulatory process any more than it does in the legislative process. Efforts to mandate the use of regulatory negotiation will accomplish little in the way of reducing litigation or promoting more effective regulation and may well serve only to burden regulatory agencies further.

Assessing Consensus:
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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,[1] and it permanently reauthorized the Act in 1996.[2] Over the past few years, the executive branch has visibly supported regulatory negotiation, both through the Clinton Administration's National Performance Review[3] and through specific presidential directives to agency heads.[4] Congress has also begun to mandate the use of negotiated rulemaking by specific agencies in developing specific regulations.[5] As a result of these and other efforts, federal

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1 5 U.S.C. §§561-570.

2 Administrative Dispute Resolution Act of 1996, Pub. L. 104-320, 110 Stat. 3870 (1996).

3 National Performance Review Accompanying Report, Improving Regulatory Systems (September 1993).

4 Executive Order 12,866, § 6(a), September 30, 1993; Memorandum for Executive Departments and Selected Agencies [and the] Administrator of the Office of Information and Regulatory Affairs, 58 Fed. Reg. 52391 (Oct. 7, 1993).

5 Some recent bills introduced in Congress would require specific agencies to use negotiated rulemaking in developing regulations. See, e.g., Native American Housing Assistance and Self-Determination Act of 1996, H.R. 3219 (104th Cong., 2nd Sess. 1996); Electronic Reporting Streamlining Act of 1996, H.R. 3869 (104th Cong., 2nd Sess. 1996); Amendments to the Magnuson Fishery Conservation and Management Act, S. 431 and S. 432; Medicare Preservation Act of 1995, H.R. 2425 (104th Cong, 1st Sess. 1995). One of the more salient legislative debates over a mandate for negotiated rulemaking came in June, 1995 over 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

agencies have begun to initiate the consensus-based process known as negotiated rulemaking.[6]

Negotiated rulemaking supplements the notice-and-comment procedures of the Administrative Procedure Act (APA)[7] with a negotiation process that takes place before an agency issues a proposed regulation. The agency establishes a committee comprised of representatives from regulated firms, trade associations, citizen groups, and other affected organizations, as well as members of the agency staff.[8] The committee meets publicly to negotiate a proposed rule.[9] If the committee reaches consensus,[10] 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.[11] 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[12] and, more

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informal meetings with affected parties. See, e.g., Compromise Reached on Meat-Safety Regulations, New York Times (July 20, 1995); Compromise Reached on USDA's HACCP Rule, BNA Washington Insider (July 20, 1995).

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. §582. Here I sometimes use the term "negotiated rulemaking" interchangably with "regulatory negotiation" (or "reg neg" for short), 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, 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.

7 5 U.S.C. §551-559.

8 See 5 U.S.C. §584-585.

9 Negotiated rulemaking committees must generally meet the applicable requirements for advisory committees, 5 U.S.C. §585, one of which is the Federal Advisory Committee Act's requirement that meetings be open to the public. 5 U.S.C. App. at § 10.

10 By statute, "consensus" is defined as unanimous concurrence or any lesser concurrence if agreed to unanimously by the committee. 5 U.S.C. 582(2).

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. Administrative Procedure Act, 5 U.S.C. §553. See generally DeLong, Informal Rulemaking and the Integration of Law and Policy, 65 Virginia Law Review 257 (1979).

12 See, e.g., Harter, Negotiating Rules: A Cure for the Malaise, 71 Geo. L. J. 1, 30 (1982) (negotiated rulemaking "can reduce the time and cost of developing regulations"); Administrative Conference of the United States, Building Consensus in Agency Rulemaking: Implementing the Negotiated Rulemaking Act (1996) ("reg-neg can improve the quality, acceptability and timeliness of regulations"); D.

notably, reduce or eliminate subsequent judicial challenges.[13]

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 Carl Levin remarked that while in the initial years "there was little evidence that [the] potential benefits of negotiated rulemaking would accrue," there is now "a track record of success" for negotiated rulemaking.[14] The National Performance Review (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."[15] 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.[16]

Such claims notwithstanding, the instrumental value of negotiated rulemakings has more often been asserted rather 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.[17] Yet as the author of a leading text on rulemaking has observed, "[t]he

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Pritzker & D. Dalton, Negotiated Rulemaking Sourcebook (Administrative Conference of the United States 1995) ("The long-term benefits of negotiated rulemaking include: reduced time, money and effort expended on developing and enforcing rules").

13 See, e.g., National Research Council, Understanding Risk: Informing Decisions in a Democratic Society 202 (1996) ("The purpose of regulatory negotiation is to reduce legal challenges to new rules by involving would-be adversaries directly in the rulemaking process and by producing a draft rule that meets legal requirements and is acceptable to a wide array of interested and affected parties."); Wald, Negotiation of Environmental Disputes: A New Role for the Courts?, 10 Columbia Journal of Environmental Law 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 XX, YY.

14 Negotiated Rulemaking Act of 1987: Hearing before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary (H.R. 3052), 100th Cong., 2d Sess. (1988) (statement of Senator Carl Levin). Senator Levin has long supported negotiated rulemaking, introducing among the earliest as well as the most recent pieces of legislation to support the process. See The Regulatory Negotiation Act of 1980, S. 3126 (1980); Administrative Dispute Resolution Act of 1995, S. 1224, 104th Cong. 1st Sess. (1995).

15 National Performance Review, Improving Regulatory Systems 29 (Sept. 1993).

16 Id.

17 See, e.g., Perritt, Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States, 74 Geo. L. J. 1625 (1986); Susskind & McMahon, The Theory and Practice of Negotiated Rulemaking, 3 Yale J. Reg. 133 (1985); Eisner, Regulatory Negotiation: A Real World Experience, 31 Fed. Bar News & J. 371 (1984); Siegler, Regulatory Negotiations: A Practical Perspective, 22 Envtl. L. Rep. 10647 (1992); Rappoport & Cooney, Visibility at the Grand Canyon: Regulatory Negotiations Under the Clean Air Act, 24 Ariz. St. L. J. 627 (1992). Barry Rabe has observed that most of what we know about the use of consensus-building techniques

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."[18] Long lacking has been systematic evidence showing the superior results of negotiated rulemaking. Consequently, at the same time that 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.[19] Even one of negotiated rulemaking's biggest institutional supporters, the now-defunct Administrative Conference of the United States, noted in one of its final reports that "[t]here has been little formal evaluation of the use of negotiated rulemaking."[20]

In an effort to fill this void, this paper presents an empirical assessment of the impact of negotiated rulemaking on two of its principal goals: reducing overall rulemaking time and decreasing the amount of judicial challenges to agency rules.[21] Unlike other

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in the regulatory process has been produced by those individuals already strongly predisposed to its value. Rabe, The Politics of Environmental Dispute Resolution, 16 Policy Studies Journal 585, 591 (1988). The most detailed ethnographic study of the negotiated rulemaking process by an outside researcher is Harrington, Howard Bellman: Using 'Bundles of Input' to Negotiate an Environmental Dispute, in D. Kolb, When Talk Works: Profiles of Mediators (1994).

18 Kerwin, Assessing the Effects of Consensual Processes in Regulatory Programs: Methodological and Policy Issues, 32 The American University Law Review 401, 409 (1983). But see C. Kerwin, Rulemaking: How Government Agencies Write Law and Make Policy 190 (1994) ("Negotiated rulemaking is now a mature concept with a considerable, and largely positive, track record in the development of rules").

19 See Rosemary O'Leary, Environmental Mediation: What Do We Know and How Do We Know It?, in J.W. Blackburn & W.M. Bruce, Mediating Environmental Conflicts: Theory and Practice (Quorum Books 1995); Susan Rose-Ackerman, Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation, Duke Law Journal 43:1206, 1212 (1994); Wolfgang Hoffman-Riem and Irene Lamb, Negotiation and Mediation in the Public Sector -- The German Experience, Public Administration 72:309, 325 (1994).

20 Administrative Conference of the United States, Building Consensus in Agency Rulemaking: Implementing the Negotiated Rulemaking Act (October 1995). 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 note ___ and accompanying text. A systematic evaluation of the main goals of negotiated rulemaking is consistent with the principles underlying the Governmental Performance and Results Act of 1993, P.L. 103-62, 107 Stat. 285 (codified in scattered sections of 5, 31, and 39 U.S.C.).

21 By limiting my focus to these two goals, I do not necessarily endorse them as the only or even the penultimate measures for evaluating negotiated rulemaking or any other rulemaking process. There may well be other instrumental goals that may be relevant, such as information exchange, however difficult they may be to measure. Moreover, notwithstanding the apparent litigation anxiety reflected in much of the literature on negotiated rulemaking, the fact that someone files a petition for review does not mean that the regulatory process was for that reason alone a failure nor even that the process was necessarily all that contentious. Cf. Coglianese, Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process, 30 Law & Soc. Rev. 735 (1996). My purpose in this paper is simply to assess negotiated rulemaking on its own terms, using the standards that have been set for it by those legislators, agency officials, practitioners, and scholars who have advocated its use over the years. The goals of saving time

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 at times to rulemaking at the Environmental Protection Agency (EPA) because it has pursued by far the most negotiated rulemakings to date and 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 rulemaking and the outcomes they have achieved in terms of the two main goals of timeliness and litigation. My findings run counter to the prevailing consensus in favor of negotiated rulemaking and draw into question the continued value of the formal use of negotiated rulemaking for federal agencies. Despite all the postulations about how negotiated rulemaking will save time and eliminate judicial review litigation, the procedure so far shows no demonstrable change over the informal rulemaking that agencies ordinarily use. In Part III, I argue that it is time to reassess the value of full-scale negotiated rulemaking in light of its surprisingly weak track record. I conclude that consensus over public policy is inherently (and perhaps properly) fragile in the American constitutional system and that its pursuit is both fleeting and exceedingly burdensome.

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 more recent initiatives to expand the use of regulatory negotiation. Although there was not a lengthy debate over the 1990 Act, the legislative history does provide insight into the purposes motivating members of Congress to endorse its use. Legislators, agency officials, and scholars have consistently emphasized the promise of both time savings and the reduction in litigation over federal regulations.

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and reducing litigation are by far the most prominent ones invoked in the literature and the legislative history. Of course, the extent to which negotiated rulemaking does or does not achieve its instrumental goals should be understood as relevant to but not dispositive of any assessment of negotiated rulemaking from the standpoint of democratic or constitutional theory. Even if negotiated rulemaking reduced time and litigation substantially, we still might reject it for reasons related to representation and governmental accountability. Cf. Lowi, The End of Liberalism (197_); Fiss, Against Settlement, 93 Yale L. J. 1073 (1984); Funk, When Smoke Gets in Your Eyes: Reg-Neg and the Public Interest -- EPA's Woodstove Standards, 18 Envtl. L. 55 (1987); Harrington, Regulatory Reform: Creating Gaps and Making Markets, 10 L. & Pol. 293 (1988). But cf. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J. L. Econ. & Organiz. 81 (1985); Harter, The Political Legitimacy and Judicial Review of Consensual Rules, 32 Amer. U. L. Rev. 471 (1983).

The idea of involving affected parties in executive branch policymaking dates back at least to the New Deal,[22] but the idea emerged 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 play a greater role in developing those same regulations.[23] Dunlop then 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 resulted in agreement over several hundred policy proposals. Although most of these proposals were never ultimately enacted, the National Coal Policy Project did serve as a model for negotiated rulemaking by showing that it is possible to build consensus across conflicting groups of interests.[24]

Negotiated rulemaking was introduced most prominently in the early 1980's as a way of curing a "malaise" that some thought characterized federal rulemaking practice at the time.[25] This malaise was reflected in complaints about the time and expense of rulemaking, as well as the amount of conflict and litigation over agency rules. According to Philip Harter's seminal report on negotiated rulemaking to the Administrative Conference, 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.[26] 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."[27]

One of the most-cited reasons for using negotiation has been its potential for warding off judicial review challenges by involving affected parties up-front in the development of regulations.[28] Intuitively, rules developed through a process that seeks the

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22 See National Industrial Recovery Act, §3(a), 48 Stat. 195, 196 (1933); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The Federal Trade Commission employed a negotiated process called "trade practice submittals" and "trade practice conferences" as early as the 1920s. Koch & Martin, FTC Rulemaking Through Negotiation, 61 N. Carolina L. Rev. 275, 293-301 (1983). The Fair Labor Standards Act of 1938 also provided for a form of what could be considered as regulatory negotiation by requiring wage orders to be developed through committees composed of employer and employee representatives. See Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Div., 312 U.S. 126 (1941).

23 Dunlop, The Limits of Legal Compulsion, 27 Lab. L. J. 67 (1976). See also Dunlop, The Negotiations Alternative in Dispute Resolution, Villanova L. Rev. 29: 1421 (1983-84).

24 For the most extensive study of the National Coal Policy Project, see Andrew S. McFarland, Cooperative Pluralism: The National Coal Policy Experiment (1993).

25 Reich, Regulation by Confrontation or Negotiation?, Harv. Bus. Rev. 82 (May/June 1981); Harter, Negotiating Regulations: A Cure for Malaise, 71 Georgetown L. J. 1 (1982).

26 Harter, supra note ___.

27 Id. at 101.

28 See, e.g., Lawrence Susskind & Laura VanDam, Squaring Off at the Table, Not in the Courts, 37 Technology Rev. 868 (July 1986); William Miller, Bypassing the Lawyers, Industry Week 20 (July 23, 1986); Cynthia Croce, Negotiations Instead of Confrontation, EPA J. 23 (April 1985); David M. Pritzker,

consensus of affected parties at the outset would seem less likely to generate subsequent conflict and litigation.[29] 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.[30]

Philip Harter's report led the Administrative Conference to issue recommendations that agencies use the negotiated rulemaking process.[31] In 1983, the Federal Aviation Administration (FAA) initiated the first formal negotiated rulemaking.[32] A few other agencies followed the FAA in experimenting with the alternative procedure, the leading agency among them being the Environmental Protection Agency (EPA). Although these early attempts at negotiation were generally considered valuable experiences, by 1990 only five federal agencies had promulgated rules using negotiated rulemaking.[33] Even though the Federal Advisory Committee Act[34] effectively authorized agencies to establish committees that could be used to negotiate rules, agencies were thought reluctant to proceed

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Working Together for Better Regulations, Natural Resources & Environment 29 (Fall 1990); Lee M. Thomas, The Successful Use of Regulatory Negotiation by EPA, 13 Admin. L. News 1, 3 (Fall 1987); Feliciano, Negotiating Regulations: Let's Negotiate, Not Litigate, 10 Current Municipal Problems 217, 222 (1983-84); Lubbers, Better Regulations: The National Performance Review's Regulatory Reform Recommendations, 43 Duke Law Journal 1165, 1171 (1994).

29 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 (Nov. 7, 1986), in Negotiated Rulemaking Sourcebook (D. Pritzker & D. Dalton eds. 1995).

30 See, e.g., Harter, supra note ___, at 59 ("Regulations take an enormously long time to become effective. . .Much of the time involved surely must be attributable to the wrangling and disputes amont the parties through their respective exercises of power in the adversarial process. Regulatory negotiation with agency participation, properly conducted, could provide a forum for more direct reconciliation of those disputes in a less time consuming fashion."); Perritt, Administrative ADR: Development of Negotiated Rulemaking and Other Processes, 14 Pepperdine L. Rev. 863, 906 (1987); Harter, The Political Legitimacy and Judicial Review of Consensual Rules, 32 Amer. Univ. L. Rev. 471, 484-5, 489 (1983).

31 Administrative Conference of the United States, Recommendation 82-4, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.82-4 (19__); Administrative Conference of the United States, Recommendation 85-5, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.85-5 (19__).

32 Flight time, Duty Time, & Rest Requirements for Flight Crewmembers, 48 Fed. Reg. 21,339 (May 12, 1983).

33 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 from these negotiations.

34 5 U.S.C. App. II §1-5 (1994).

in absence of clear congressional guidance specifically approving negotiated rulemaking committees.[35]

As early as 1980, members of Congress began introducing legislation to encourage the use of negotiated rulemaking.[36] From even these early years of consideration in Congress, negotiated rulemaking has been advocated as a means of reducing regulatory delays and avoiding judicial challenges. In joint congressional hearings on negotiated rulemaking in 1980, members of Congress singled out judicial challenges of federal regulations as a problem needing to be fixed. Senator Gaylord Nelson observed that federal regulations frequently found their way into court, dragging out the rulemaking process and increasing costs to the agency.[37] Several other participants in the hearings, including Senator Carl Levin, EPA Deputy Administrator Roy Gamse, and industry representatives Harrison Loesch and Kendall Fleeharty, raised the issue of growing resort to judicial review and the costs created by litigation.[38]

Several years later, in a congressional hearing on the Negotiated Rulemaking Act of 1987, Representative Don Pease observed that "administrative regulations often become the object of protracted litigation."[39] A leading sponsor of negotiated rulemaking legislation, Pease emphasized his point by invoking a statistic that to this day continues to be used as evidence of the value of 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 government ought to be doing what it can to reduce unnecessary and costly litigation."[40]

In the same hearing on the 1987 bill, Senator Carl Levin testified that negotiated rules would be less vulnerable to challenge in court.[41] 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

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35 See, e.g., Administrative Conference of the United States, Recommendation 85-5, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.85-5 (19__) (noting agency "concern about the effect of the Federal Advisory Committee Act on negotiated rulemaking proceedings").

36 The 1982 ACUS recommendation formally called for legislation "explicitly authorizing agencies to conduct rulemaking proceedings" using a negotiated process. 1 CFR §305.82-4.

37 Regulatory Negotiation: Joint Hearings Before the Senate Select Committee on Small Business and the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, 96th Cong., 2d Sess. 2 (1980).

38 Id. at 2-3, 6-8, 89, 128.

39 Negotiated Rulemaking Act of 1987: Hearing Before the Subcommittee on Administrative Law and Government Relations in the House Committee on the Judiciary (H.R. 3052), 100th Cong., 2d Sess. 21 (1988).

40 Id.

41 Id., at 28.

the United States Government's rules."[42] He too cited the 80% litigation rate of EPA rules as evidence of the problem.[43]

A year later, Breger again testified before Congress that over three-quarters of EPA's rules are challenged in court.[44] Both he and Representative Pease subsequently repeated their belief that regulatory negotiation would reduce the number of judicial challenges.[45] Thomas Kelley, the director of EPA's Office of Standards and Regulations, testified that negotiated rulemaking would allow agencies to escape what he termed the "regulate, litigate, regulate, litigate" syndrome.[46] 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 negotiation 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."[47]

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.[48] In hearings on the 1990 legislation, witnesses again cited the 80% litigation rate for EPA rules and claimed that negotiated rulemaking would reduce the level of litigation.[49] During floor debate in the House, Representatives Pease and James indicated that reducing litigation was a major purpose behind 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."[50] In contrast, he argued, negotiated rulemaking "would, hopefully, avoid the litigation which now costs a lot of money and also results in long,

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42 Id. at 35, 41.

43 Id.

44 Regulation Through Negotiation: Hearings Before the Committee on Governmental Affairs of the United States Senate, 100th Cong., __ Sess. 6 (1988).

45 Negotiated Rulemaking Act of 1989: Hearings before the Subcommittee on Administrative Law and Government Relations of the House Committee on the Judiciary, 101st Cong., 1st Sess. 21, 23, 53 (1989).

46 Regulation Through Negotiation: Hearings Before the Committee on Governmental Affairs of the United States Senate, 100th Cong., __ Sess. 6 (1988).

47 Senate Committee on Governmental Affairs, Negotiated Rulemaking Act of 1989 (S. 303), Rep. 101-97, 101st Cong., 1st Sess. 2 (1989).

48 House Committee on the Judiciary, Negotiated Rulemaking Act of 1990 (H.R. 743), Rep. 100-461, 10st Cong., 2d Sess. 8 (1990).

49 See id. at 9, 17.

50 Congressional Record, May 1, 1990, H1855

protracted proceedings before the rule can finally go into effect."[51] 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."[52]

In the fall of 1990, Congress passed the Negotiated Rulemaking Act. In adopting the Act, Congress specifically 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."[53] Negotiated rulemaking, Congress announced in its findings, "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."[54] In his signing statement, President Bush affirmed that the Act would encourage negotiation "as a means of avoiding costly and time-consuming litigation."[55]

The Negotiated Rulemaking Act of 1990 does not require agencies to use formal negotiated procedures for rulemaking. 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 interest, 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."[56]

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 that are likely to be affected by the rule, and a proposed list of persons who will represent these interests on the committee.

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51 Id.

52 Congressional Record, October 22, 1990, H10966-7.

53 The Negotiated Rulemaking Act of 1990, Public Law 101-648, § 2(2).

54 Id. at § 2(5).

55 Statement on Signing the Negotiated Rulemaking Act of 1990, 26 Weekly Comp. Pres. Doc. 1945 (Nov. 29, 1990).

56 5 U.S.C. § 583.

Interested parties have a 30 day period within which to submit comments on the notice and to apply for a seat on the committee.[57]

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."[58]

Once constituted, the committee is to meet in order to reach a consensus on a proposed rule. In these meetings, a designated person or persons from the agency "shall be authorized to represent the agency in the discussions and negotiations of the committee."[59] 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 "reg-neg" process results in a "consensus" among the committee on language for a proposed rule,[60] the committee is required to submit the rule, with an accompanying report, to the agency. The agency, in turn, is supposed to use the committee's rule as the basis for its own proposed rule. The end product is supposed to 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 seven statutes that mandate specific agencies to use negotiated rulemaking in developing certain regulations under these statutes.[61] Affected agencies include the Departments of Education, Health and Human Services, Housing and Urban Development, and Interior, as well as the Nuclear Regulatory Commission.

More recently, the promise of negotiated rulemaking has been visibly promoted by the Clinton Administration. In March, 1993, President Clinton asked Vice President Gore to head a six-month review of the federal executive branch operations. 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

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57 5 U.S.C. § 584.

58 5 U.S.C. § 585.

59 5 U.S.C. § 586.

60 See supra note __.

61 See Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, Public Law 100-297; Price Anderson Amendments Act of 1988, Public Law 100-408, § 19; Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1992, Public Law 101-392, §504; Higher Education Amendments of 1992, Public Law 102-325, §497; Housing and Community Development Act of 1992, Public Law 102-550, §114(b); Student Loan Reform Act of 1993 (as part of the Omnibus Budget Reconciliation Act of 1993), Public Law 103-66; Indian Self-Determination Contract Reform Act of 1994, Public Law 103-413 (title I and title II §407).

relationships" between regulated parties and federal agencies; and "the potential for avoiding litigation."[62]

Following the recommendation that emerged from the NPR, 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."[63] In a memorandum accompanying the executive order, President Clinton specifically directed eighteen executive departments and agencies to identify by the end of 1993 at least one rulemaking that it would develop through negotiated rulemaking in 1994, or to explain why negotiated rulemaking would not be feasible during 1994.[64] (According to a General Accounting Office report, seventeen agencies responded to the order and sixteen identified rules that either "will use, or be considered for, a negotiated rulemaking.")[65] 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."[66] Finally, in a subsequently-released strategy paper for "reinventing" federal environmental regulation, the Clinton Administration specifically directed the Environmental Protection Agency to review all its rules to identify potential candidates for negotiated rulemaking.[67]

In 1996, the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee held hearings on the reauthorization of the Negotiated Rulemaking Act.[68] In testifying before the committee, Assistant Secretary of Labor for Occupational

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62 National Performance Review, Improving Regulatory Systems 30 (1993).

63 Executive Order 12,866, § 6(a), September 30, 1993.

64 Memorandum for Executive Departments and Selected Agencies [and the] Administrator of the Office of Information and Regulatory Affairs, 58 Fed. Reg. 52391 (Oct. 7, 1993).

65 United States General Accounting Office, Management Reform: Implementation of the National Performance Review's Recommendations 519 (1994).

66 President William Clinton, Memorandum for Heads of Departments and Agencies regarding Regulatory Reinvention Initiative, 3 (Mar. 4, 1995).

67 President Bill Clinton and Vice President Al Gore, Reinventing Environmental Regulation (Mar. 16, 1995).

68 Earlier in 1995, the same committee heard testimony from C. Boyden Gray on the reauthorization of the Administrative Conference of the United States in which Gray noted that "negotiated rulemaking. . .is a key building block of regulatory reform because of the elimination of legal challenges to rulemaking." The Reauthorization of the Administrative Conference of the United States: Hearings on Before the Subcomm. on Commercial and Administrative Law of the House Comm. on Judiciary, 104th Cong., 1st Sess. (1995) (statement of C. Boyden Gray, partner, Wilmer, Cutler & Pickering and former general counsel to President George Bush).

Safety and Health, Joseph Dear, reiterated earlier concerns that rulemaking before the 1990 Act fostered antagonism among the parties. "Many times," he testified, "this adversarial relationship resulted in time-consuming, expensive litigation."[69] 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."[70] Philip Harter, testifying on behalf of the American Bar Association, quoted a Carnegie Commission report to the effect that "the use of negotiation often saves EPA a year or two of 'rulemaking' time."[71] In floor discussion, Senator Cohen stated that "[a]gencies and others have discovered that, in many rulemaking situations, negotiation beats confrontation in terms of cost, time, and aggravation, and the ability to develop regulations that parties with very different perspectives can accept."[72] 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.[73]

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 benefits of negotiated rulemaking are reduced rulemaking time and decreased litigation over regulations.[74] With Congress and the President beginning to direct more agencies to use negotiated rulemaking procedures, it

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69 The Reauthorization of the Negotiated Rulemaking Act, 1996: Hearings on Before the Subcomm. on Commercial and Administrative Law of the House Comm. on Judiciary, 104th Cong., 2d Sess. (1996) (statement of Joseph A. Dear, Assistant Secretary for Occupational Safety and Health, Department of Labor). Dear also suggested that "the ramifications associated with litigation [are] reduced by the negotiated rulemaking process." Id.

70 The Reauthorization of the Negotiated Rulemaking Act, 1996: Hearings on Before the Subcomm. on Commercial and Administrative Law of the House Comm. on Judiciary, 104th Cong., 2d Sess. (1996) (statement of Neil Eisner, Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation).

71 The Reauthorization of the Negotiated Rulemaking Act, 1996: Hearings on Before the Subcomm. on Commercial and Administrative Law of the House Comm. on Judiciary, 104th Cong., 2d Sess. (1996) (statement of Philip Harter on behalf of the American Bar Association) (quoting Carnegie Commission on Science, Technology, and Government, Risk and the Environment: Improving Regulatory Decision Making 111 (1996)).

72 142 Cong. Rec., S11849, Sept. 30, 1996.

73 Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 142 Cong. Rec. H12303-12304 (October 19, 1996).

74 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 legal challenges to regulation by encouraging the parties to narrow their differences in advance of the formal rulemaking proceeding." USA Group Loan Services, Inc. v. Riley, 82 F.3d 708, 715 (7th Cir. 1996).

remains to be assessed how effectively negotiated rulemaking has achieved these two purposes.

II. The Performance of Negotiated Rulemaking

Although most research on negotiated rulemaking has drawn on case studies of specific negotiations, in recent years some more systematic research has emerged that attempts to evaluate the negotiated rulemaking process. Much of this work is still underway. Brian Polkinghorn, for example, has conducted extensive interviews with agency staff at the EPA that tend to show how the use of negotiated rulemakings represents a philosophical shift in EPA rulemaking towards incorporating the views of outside groups.[75] Cornelius Kerwin and Laura Langbein have completed the first phase of an evaluation of regulatory negotiation at EPA sponsored by the now-defunct Administrative Conference of the United States and have reported data drawn from interviews with over a hundred individuals involved in EPA negotiated rulemakings.[76] Among their results, they find that the individuals they interviewed who had been involved in EPA regulatory negotiations tended to view the process favorably.[77] As Langbein and Kerwin acknowledge, the findings from this study are tentative in that it is limited only to eight of the negotiations convened by EPA and so far has yielded no reported responses from participants in rulemakings conducted using conventional procedures.[78]

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75 Brian Polkinghorn, The Influence of Regulatory Negotiations on the U.S. Environmental Protection Agency as an Institution (1995) (unpublished paper presented at the 1995 American Political Science Association meeting, Chicago).

76 Cornelius M. Kerwin and Laura Langbein, An Evaluation of Negotiated Rulemaking at the Environmental Protection Agency: Phase I (September 1995) (report prepared for the Administrative Conference of the United States).

77 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 report significantly less satisfaction with the formal negotiation process. Id. at 40. For examples of environmental group dissatisfaction with regulatory negotiation, see Skrzycki, Emission Impossible: The EPA Takes on Lawn Tool Makers, Washington Post, p. D1 (June 21, 1996) ; Citizens Coal Council Declines OSM's Invitation to Join "Reg-Neg," Inside Energy 15 (June 13, 1994).

78 It is not clear from Kerwin and Langbein's first phase report whether the eight rulemakings were selected randomly or using 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 and due to difficulties in locating respondents Kerwin and Langbein dropped from their sample the farmworker protection standard, which also failed to yield a full consensus and has subsequently engendered controversy. 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. It is not clear from the report, however, whether Kerwin and Langbeign conducted their interviews in some cases before the rules were finalized or challenged in court. It is also not indicated how many respondents came from EPA, industry, and

As these studies show, much of the empirical analysis of negotiated rulemaking that is underway is focusing on the Environmental Protection Agency (EPA). EPA has attempted and completed the most negotiated rulemakings,[79] and has figured prominently in past claims about both the need for, and success of, negotiated rulemaking.[80] In order to assess the performance of negotiated rulemaking, it will therefore be unavoidable but to continue to examine negotiated rulemaking at EPA. That said, a better 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.

[Table 1 about here]

Using with searches of Federal Register notices supplemented with listings published by the Administrative Conference, I was able to identify a comprehensive dataset of negotiated rulemakings across all federal agencies.[81] The findings reveal the overall infrequent use of negotiated rulemaking at the federal level. At present, seventeen federal agencies have initiated at least one negotiated rulemaking process (Table 1). Each of these agencies has initiated an average of 4 (or median of 2) negotiated proceedings. Of the seventeen agencies, only twelve have ever issued a final rule based on a regulatory negotiation. As a point of comparison, over sixty regulatory agencies are listed in the most

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environmental groups, categories which Kerwin and Langbein find have significantly different overall ratings of negotiated rulemaking. Despite the termination of the Administrative Conference, Kerwin and Langbein are continuing a second phase of their project, which involves approximately seventy interviews with participants from six informal EPA rulemakings. A written report from Phase II of their study has not yet been released, and a full review of their findings must obviously wait until that time.

79 See infra note __ and accompanying text.

80 See, e.g., National Performance Review, supra note __; Susskind & MacMahon, supra note __. The Administrative Conference 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." Administrative Conference of the United States, Building Consensus in Agency Rulemaking: Implementing the Negotiated Rulemaking Act 16 (1995).

81 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. §584.

recent unified agenda of federal regulations[82] and over fifty agencies regularly have their rules reviewed by the Office of Management and Budget.[83]

Of the sixty-seven negotiated rulemakings that have been announced, in nearly 20 percent (13) the agency abandoned the formal negotiated process before any consensus could develop.[84] Nineteen of the rulemakings remain pending, with a final rule yet to be issued.[85] Since the FAA initiated the first negotiated rulemaking in 1983, federal agencies

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82 The Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions, 61 Fed. Reg. ____-63690 (1996).

83 U.S. Office of Management and Budget, Regulatory Program of the United States Government (1992).

84 By "abandoned," I do not mean those rules that simply failed to reach a consensus. Rather, I mean 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. The following citations refer to the notices of intent to negotiate for this category of "abandoned" negotiations. Interstate Spread of Varroa Mites, 53 Fed. Reg. 45134 (1988) (Department of Agriculture); Ex Parte Regulations, 56 Fed. Reg. 65863 (1991) (Department of Energy); Oil & Gas & Sulphur Operations in the Outer Continental Shelf, __ Fed. Reg. __ (1986) (Department of Interior); Paleontology, Fossil Collection on Federal Lands, 54 Fed. Reg. 48647 (1989) (Department of Interior); Surface Mining, Coal Refuse Disposal, 60 Fed. Reg. 13858 (1995) (Department of Interior); Borrower Defense Regulations, 60 Fed. Reg. 11004 (1995) (Department of Education); Underground Injection Control, Class II Wells, 56 Fed. Reg. 4957 (1991) (Environmental Protection Agency); NOX Emission Reduction Provisions, 56 Fed. Reg. 21348 (1991) (Environmental Protection Agency); Recycling of Lead Acid Batteries, 55 Fed. Reg. 52884 (1990); Mobile Sattelite Serives in the Frequency Bancs Above 1 GHz, 57 Fed. Reg. 39661 (1993) (Federal Communications Commission); Informal Dispute Settlement Procedures, 51 Fed. Reg. 5205 (1991) (Federal Trade Commission); Electronic Tariff Filing, 59 Fed. Reg. 16164 (1994) (Interstate Commerce Commission); Indemnity Agreements with Radiopharmaceutical Licenses, 53 Fed. Reg. 40233 (1988) (Nuclear Regulatory Commission).

85 Marine Mammals, 60 Fed. Reg. 27049 (1995) (Department of Agriculture); Accessibility Guidelines for Play Facilities, 60 Fed. Reg. 66538 (1995) (Architectural & Transportation Barriers Compliance Board); Federal Gas Valuation, 59 Fed. Reg. 28304 (1994) (Department of the Interior); Indian Gas Valuation, 60 Fed. Reg. 6977 (1995) (Department of the Interior); Joint Tribal & Federal Self-Governance, 60 Fed. Reg. 8806 (1995); Department of the Interior Cape Cod National Seashore Off-Road Vehicle Use, 60 Fed. Reg. 26857 (1995) (Department of the Interior); Safety Standards for Erection of Steel Structures, 57 Fed. Reg. 61860 (1992) (Department of Labor); Safety Standards Fire Protection in Shipyard Employment, 61 Fed. Reg. 28824 (1996) (Department of Labor); Qualification of Pipeline Personnel, 61 Fed. Reg. 34410 (1996) (Department of Transportation); Motor Carrier Financial & Operating Data Collection Program, 61 Fed. Reg. 64849 (1996) (Department of Transportation); Headlight Aiming, 60 Fed. Reg. 30506 (1995) (Department of Transportation); Commercial Driver Physical Qualifications as Part of Licensing Process, 61 Fed. Reg. 13338 (1996) (Department of Transportation); Older Workers Benefit Protection Act of 1990, 60 Fed. Reg. 45388 (1995) (Equal Employment Opportunity Commission); Hazardous Waste Manifests, 57 Fed. Reg. 24765 (1992) (Environmental Protection Agency); Architectural and Industrial Maintenance Coatings, 57 Fed. Reg. 1443 (1992) (Environmental Protection Agency); Small Non-Road Engine Regulations, 58 Fed. Reg. 33061 (1993) (Environmental Protection Agency); Local Multipoint Distribution Service and Fixed Satellite Service, 59 Fed. Reg. 7964 (1994) (Federal Communications Commission); Revisions of Wage Index for Medicare Reimbursement (Hospice Services),

have promulgated only thirty-five rules using the alternative procedure, or about 2.7 each year.[86]

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59 Fed. Reg. 52129 (1994) (Department of Health & Human Services); Mortgage Broker Fee Disclosure Rule, 60 Fed. Reg. 47650 (1995) (Department of Housing & Urban Development).

[86] Control of Scrapie, 57 Fed. Reg. 58130 (1992) (Department of Agriculture); Indian Self-Determination, 61 Fed. Reg. 32482 (1996) (Department of the Interior); Occupational Exposure to Benzene, 52 Fed. Reg. 34460 (1987) (Department of Labor); Occupational Exposure to 4,4'-Methylenedianiline, 57 Fed. Reg. 35630(1992) (Department of Labor); Flight Time, Duty Time, & Rest Requirements for Flight Crewmembers, 50 Fed. Reg. 29306 (1985) (Department of Transportation); Nondiscrimination on the Basis of Handicap in Air Travel, 55 Fed. Reg. 8008 (1990) (Department of Transportation); Uniform System for Handicapped Parking, 56 Fed. Reg. 10328 (1991) (Department of Transportation); Oil Spill Vessel Response Plans, 61 Fed. Reg. 1052 (1996) (Department of Transportation); Coast Guard - Chicago Drawbridge Operations, 60 Fed. Reg. 52298 (1995) (Department of Transportation); Transportation for Individuals with Disabilities, 56 Fed. Reg. 45584 (1991) (Department of Transportation); Roadway Worker Protection, 61 Fed. Reg. 65959 (1996) (Department of Transportation); Financial Assistance to Meet Special Educational Needs of Children, 54 Fed. Reg. 21752 (1989) (Department of Education); Carl D. Perkins Vocational & Applied Technology Education Act Amendments of 1990, 57 Fed. Reg. 36720 (1992) (Department of Education); Higher Education Amendments of 1992, 59 Fed. Reg. 22348 (1994) (Department of Education); Direct Student Loan Regulations, 59 Fed. Reg. 61664 (1994) (Department of Education); Guaranty Agency Reserves Regulations, 59 Fed. Reg. 60688 (1994) (Department of Education); Helping Disadvantaged Students Meet High Standards, 60 Fed. Reg. 34800 (1995) (Department of Education); Nonconformance Penalties under 206(g) of CAA, 50 Fed. Reg. 35233 (1985) (Environmental Protection Agency); Emergency Pesticide Exemptions under § 18 of FIFRA, 51 Fed. Reg. 1896 (1986) (Environmental Protection Agency); Worker Protection Standards for the Agricultural Pesticides, 57 Fed. Reg. 38102 (1992) (Environmental Protection Agency); NSPS for Residential Wood Combustion Units, 53 Fed. Reg. 5860 (1988) (Environmental Protection Agency); RCRA Permit Modifications, 53 Fed. Reg. 37912 (1988) (Environmental Protection Agency); Underground Injection of Hazardous Wastes, 53 Fed. Reg. 28118 (1988) (Environmental Protection Agency); Asbestos-Containing Materials in Schools, 52 Fed. Reg. 41826 (1987) (Environmental Protection Agency); Control of Volatile Organic Chemical Equipment Leaks/Hazardous Organic NESHAP, 59 Fed. Reg. 19402 (1994) (Environmental Protection Agency); Clean Fuels (Oxygenated and Reformulated Fuels), 59 Fed. Reg. 7716 (1994) (Environmental Protection Agency); National Emissions Standards for Coke Oven Batteries, 58 Fed. Reg. 57898 (1993) (Environmental Protection Agency); Disinfectant Byproducts in Drinking Water (Information Collection Rule), 61 Fed. Reg. 24354 (1996) (Environmental Protection Agency); Wood Furniture Maunfacturing Regulations, 60 Fed. Reg. 62930 (1995) (Environmental Protection Agency); Assessment and Apportionment of Administrative Expenses, 58 Fed. Reg. 10939 (1993) (Farm Credit Administration); Provision of Non-voice, Low Earth Orbit Satellite Services, 58 Fed. Reg. 68053 (1993); Federal Communications Commission Hearing Aid Compatible Telephones, 61 Fed. Reg. 42181 (1996) (Federal Communications Commission); Indian Self-Determination, 61 Fed. Reg. 32482 (1996) (Department of Health & Human Services); Operating Subsidies for Vacant Public Housing Units, 61 Fed. Reg. 7586 (1996) (Department of Housing & Urban Development); Submission & Management of Records Related to Licensing of a Geologic Waste, 54 Fed. Reg. 14925 (1989) (Nuclear Regulatory Commission); Reportable Events, 61 Fed. Reg. 63988 (1996) (Pension Benefit Guaranty Corporation). One negotiated rulemaking, on Indian self-determination, was jointly convened by both the Department of Interior and the Department of Health and Human Services and is treated as one rulemaking, even though it is counted twice in the breakdown by agency in Table 1. Indian Self-Determination, 61 Fed. Reg. 32482 (1996). Furthermore, I include 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. 59 Fed. Reg. 22,348 (1994). The process was modified in the sense that the Department presented the negotiated

[Figure 1 about here]

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 the final reg neg rules promulgated for 1983-1996. The use of negotiated rulemaking has increased somewhat in recent years, following the 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 that 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.[87] In these terms, negotiated rulemaking certainly is very much still a "novelty in the administrative process," as Judge Richard Posner recently opined.[88]

[Table 2 about here]

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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. 59 Fed. Reg. 22,062 (1994); 59 Fed. Reg. 22,250 (1994); 59 Fed. Reg. 22,324 (1994). By including only one rule, I follow the categorization of the Administrative Conference which lists the process as one negotiated rulemaking proceeding. Administrative Conference of the United States, supra note ___, at 45-46. The findings reported in this paper would not change in any substantial way if the three additional rules were included in the analysis. Finally, I treat 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. Information Collection Rule, 61 Fed. Reg. 24354 (1996). Two additional proposed rules, which would set substantive drinking water standards, remain pending from the disinfectant byproducts negotiation. Disinfectant/Disinfection Byproducts Rule, 59 Fed. Reg. 38668 (1994); Enhanced Surface Water Treatment Regulations, 59 Fed. Reg. 38832 (1994).

87 I would hazard that a similarly low rate would be found among state agencies, notwithstanding recent state statutes that authorize the use of negotiated rulemaking. See 10 Fla. Stat. @ 120.54 (1996); 67 Idaho Code @ 67-5220 (1996); 2 Mont. Code Anno., @ 2-5-101 (1995); 84 R.R.S. Neb. @ 84-921 (1996). For a summary of recent negotiated rulemakings in various states, see Pritzker & Dalton, Negotiated Rulemaking Sourcebook, supra note ___, at 369-374.

88 USA Group Loan Services v. Riley, 82 F.3d 708, 714 (7th Cir. 1996). See also Rushefsky, Reducing Risk Conflict by Regulatory Negotiation: A Preliminary Evaluation, in Systematic Analysis in Dispute Resolution 109, 120 (S. Nagel & M. Mills eds. 1991) ("[N]egotiated rulemaking is in its infancy, an experiment"). But see Harter, First Judicial Review of Reg Neg a Disappointment, 21 Admin. & Reg. L. News 1, 12 (Fall 1996) (Judge Posner's "phrase seems more designed to trivialize the process than any sort of historical description.").

Whatever the purported benefits of negotiated rulemaking, agency staff appear not to perceive them as a singularly motivating factor. Indeed, Polkinghorn reports that "the negotiation process has not been as popular with EPA employees as it was originally anticipated for resolving crucial rulemaking problems."[89] There are certainly any number of possible explanations for the infrequent reliance on negotiated rulemaking, including the inappropriateness of many rules for a formal negotiation process or the difficulties associated with chartering an advisory committee.[90] It may well also be that skepticism on the part of agency staff partly explains why the use of negotiated rulemaking has made only a tiny dent on the overall regulatory process of the federal government. Although a complete explanation for the infrequent use of negotiated rulemaking is beyond the scope of this paper, 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? To assess more carefully the ultimate value of negotiated rulemaking, I next analyze the impact of negotiated rulemaking on its two main instrumental goals: time savings and a reduction in litigation.

A. The Length of Negotiated Rulemaking Proceedings

One advantage formal negotiated rulemaking purportedly holds 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 has remained unclear. In a 1987 article, former EPA Administrator Lee Thomas stated that "[a]s we look back on our experiences with negotiated rules so far, they have saved time. Regulatory negotiation shortened our total process on each one of them."[91] The National Performance Review (NPR) report on the

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89 Brian Polkinghorn, The Influence of Regulatory Negotiations on the U.S. Environmental Protection Agency as an Institution 13 (1995) (unpublished paper presented at the 1995 American Political Science Association meeting, Chicago). But cf. Kerwin & Langbein, supra note __, at 40 (among the participants interviewed, EPA officials gave the highest overall rating to negotiated rulemaking).

90 The statute reauthorizing the Negotiated Rulemaking Act directs the Office of Management and Budget to streamline FACA requirements and make recommendations for further amendments to FACA that will encourage more negotiated rulemaking. Administrative Dispute Resolution Act of 1996, §11(e), Pub. Law No. 104-320 (1996). On the uncertainties and burdens of FACA law more generally, see Croley, Practical Guidance on the Applicability of the Federal Advisory Committee Act, 10 Admin. L. J. Amer. Univ. 111, 121-123 (1996).

91 Thomas, The Successful Use of Regulatory Negotiation by EPA, 13 Admin. L. News 1, 3 (Fall 1987). The final ACUS report on negotiated rulemaking quotes Sheldon M. Guttman, 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." Administrative Conference of the United States, supra note ___, at 27. At that time, the FCC had only finalized one rule through a formal negotiated rulemaking process. Provision of Non-voice, Low Earth Orbit Satellite Services, 58 Fed. Reg. 68053 (Dec. 23, 1993); see also Administrative Conference of the United States, supra note ___, at 63-64 (listing no final rule for the FCC in table of federal negotiated rulemakings).

regulatory process similarly stated that negotiated rulemaking at EPA has saved up to eighteen months compared with informal rulemaking.[92] Despite this purported potential, the NPR authors also interestingly cautioned Congress not to impose "short 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."[93] In at least one instance, a federal agency decided that negotiated rulemaking was not a "practical option" for the development of regulations because of statutorily-imposed time constraints.[94] Negotiated rulemakings may not be sufficiently fast when it is necessary for an agency to meet stringent deadlines, but overall they have been thought to be potential time-savers.[95]

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 develop, 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).[96] 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.[97] The average 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, taking a couple of years to develop negotiated rules may seem short compared with those notorious rulemakings that sometimes seem to last decades, or it may seem

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92 National Performance Review, supra note __, at 31, 32-33 n.8.

93 National Performance Review, supra note __, at 32.

94 Food and Drug Administration Food Labeling Regulations, 56 Fed. Reg. 60394 (1991). Ordinarily, of course, it has been thought that deadlines will help move negotiations along. See supra note __ and accompanying text. It is not known how many agencies rule out the use of negotiated rulemaking due to concern about deadlines. If it could be shown to be many, this finding would itself tend to undermine claims about time savings from negotiated rulemaking.

95 See supra notes __ and accompanying text.

96 60 Fed. Reg. 18061 (1995) (notice of intent to negotiate); 60 Fed. Reg. 52298 (1995) (final rule).

97 50 Fed. Reg. 38030 (1985) (notice of intent); 57 Fed. Reg. 38102 (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 groups have threatened litigation. My findings, of course, do not show that negotiated rulemaking has caused this contentiousness or made the worker protection standards the longest negotiated rulemaking undertaken by any agency. Rather, they show that even with negotiated rulemaking procedures this rule could not be made short, perhaps precisely because negotiation cannot resolve the underlying value conflicts and disputes over scientific evidence. Negotiated rulemaking may have given the agency some information (for it is hard to imagine any conversations with agency staff members will not provide some information), but that information did not make this a short rulemaking.

somewhat long compared with the speed that some might expect the government to use in addressing serious public concerns. What is needed, obviously, is a standard for comparison, a group of comparable rules developed using conventional notice-and-comment procedures.[98]

[Table 3 about here]

The length of a rulemaking process may be affected by any number of variables, including the agency promulgating the rule, the complexity of the rule, and the priority the rule holds for the agency. Establishing what makes two regulations comparable is no easy matter, but Kerwin and Furlong have made an initial attempt in their valuable study of the length of rulemaking at EPA.[99] They compared the time of four negotiated EPA rulemakings with the average time for all EPA rulemakings that entered into the agency's (former) internal regulatory development management system during fiscal years 1987-1990. The latter group amounted roughly to the most substantial 15% of all EPA rules adopted during this period.[100]

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 when it was finalized. They found that the rules in their study took an average of 3.0 years (1,108 days) from start to finish. In contrast, the four negotiated rules initiated during the time period of their study took only an average of 2.1 years (778 days) to complete, a time savings of eleven months.[101] Although Kerwin and Furlong acknowledge that the number of negotiated rules in their study is small, they

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98 Some readers may begin to wonder whether I have chosen the appropriate set of rules for comparison in the analyses to follow. At I make clear in the text, the comparison groups I use in this paper are simply the same ones 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 paper, I examine the issue of the comparison group more closely, paying attention to the possibility of bias in the rules selected for formal negotiation. See infra notes __ and accompanying text. The analysis provided in Part III.A confirms the reasonableness of the comparison groups used in my analysis.

99 Kerwin & Furlong, Time and Rulemaking: An Empirical Test of Theory, 2 J. Pub. Admin. Res. & Theory 113 (1992).

100 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 10/1/86 and 9/30/89. During this same period, EPA issued approximately 1,000 final rules (excluding corrections and technical amendments).

101 Kerwin & Furlong, supra note __, at 134. The median time found by Kerwin and Furlong does not, however, show any notable time savings. The median time for negotiated rules (868 days) was virtually the same as that overall (872 days). Id.

take their data to suggest that negotiated rulemaking is "more expeditious" than conventional rulemaking.[102] Their analysis stands behind the National Performance Review report's claim of the time savings afforded by regulatory negotiation.[103]

Yet if all twelve of EPA's negotiated rules are examined, and not just four, the suggested time saving of negotiated rulemaking could well be different.[104] In calculating the length of all EPA rulemakings, I used the previously described method, subtracting the date the final rule was published in the Federal Register from the date the agency announced its intent to create a negotiated rulemaking committee. Although this method differs from that used by Kerwin and Furlong in that it relies on published government records instead of internal agency files, the difference turns out to be biased in favor of finding a time savings for negotiated rules. For example, using Federal Register postings the average time for the four negotiated rules in the Kerwin and Furlong study is 1.8 years (647 days), over four months less 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, and which precedes the publication of a notice to establish a negotiation committee.

When all twelve of the negotiated rules EPA has promulgated are examined, it turns out that the four negotiated rules in the Kerwin and Furlong are on average rather atypical (taking roughly half as long as the other rules).[105] The average time period for all 12 rules is 2.8 years (1,013 days). In contrast to the eleven months time savings suggested by Kerwin and Furlong, analysis 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

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102 Id. at 124.

103 National Performance Review, supra note __, at 32-33 n.8 (citing Kerwin & Furlong, supra note ___, along with a letter from Chris Kirtz, EPA's Office of Consensus and Dispute Resolution).

104 The twelve negotiated rules are those for which the EPA has promulgated a final rule. See supra note __. All twelve 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. U.S. Environmental Protection Agency, Negotiated Rulemaking at the Environmental Protection Agency (Nov. 18, 1994). See also Administrative Conference of the United States, supra note __, at 55-63 (listing of negotiated rulemaking proceedings at EPA). The only other rulemaking included on EPA's internal list is the lead acid battery recycling rule, which I treat as "abandoned" because the EPA withdrew the entire rulemaking and adjourned the negotiation committee after several meetings. Id.

105 In examining these twelve rules, it should be noted that one of them, the disinfectant byproducts rule, is not really completed. 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. Information Collection Rule (ICR), 61 Fed. Reg. 24354 (1996). Those standards have been proposed but are currently still pending while information is being gathered under the ICR. See Enhanced Surface Water Treatment Regulations, 59 Fed. Reg. 38832 (1994) (proposed rule); Disinfectant/Disinfection Byproducts Rule, 59 Fed. Reg. 38668 (1994) (proposed rule). 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 another deliberate bias in favor of finding a time-savings in rules developed with negotiated rulemaking procedures. Cf. G. King, R. Keohane, & S. Verba, Designing Social Inquiry: Scientific Inference in Qualitative Research (1994).

and Furlong, a difference which could well be accounted for by choices of measurement. When the three negotiated rules currently pending at EPA (for which a final rule has yet to be issued) are added, the time savings between the two procedures altogether disappears.[106] If we were to assume, for sake of estimation, that the EPA had published all three final rules at the end of December, 1996, the average time for promulgating negotiated rules at EPA would increase to 3.1 years (1,129 days), three weeks longer than the average reported in Kerwin and Furlong for all EPA rules.[107]

When the whole of the available evidence on the time span of EPA's negotiated rules is examined, the results stand in marked contrast to the claims of considerable time savings from negotiated rulemaking. Of course, as with any nonrandom comparison of the time it takes to develop rules -- something which may be affected by factors other than just the use or absence of formal negotiated procedures -- this one too could well have its limits.[108] Even though the EPA has conducted the most negotiated rulemakings of any agency, it still has only promulgated 12 rules (and has only three others pending). Yet the experience at EPA seems consistent with the impression of at least one other agency that has completed a number of rules through the negotiated rulemaking process. The Department of Education "has reported that it realized no significant time savings through the use of the process."[109]

The mere counting of chronological time -- from initial proposal to final rule -- probably itself misleadingly understates the amount of time negotiated rulemaking takes. After all, rules that get issued in a shorter amount of "chronological time" may well reflect the expenditure of substantially more "aggregate time" by agency staff and interest group

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106 These three are the Hazardous Waste Manifests Rule, the Architectural and Maintenance Coatings Rule, and the Small Non-Road Engine Rule.

107 Using the median length of rulemaking, the time differences are more mixed. The median time for the twelve completed EPA rules (777 days) is several months shorter than the median for all EPA rules (872 days). However, the median time for all 15 EPA negotiated rules is 1,104 days, notably longer than the median for all EPA rules.

108 One factor delaying promulgation in some cases might be the intervention of governing legislation. In response to an earlier version of this paper, Philip Harter correctly noted that the final promulgation of the volatile organic chemical equipment leaks rule was delayed due to factors outside the negotiation process itself. The equipment leaks negotiations were conducted in the months prior to the passage of the 1990 Clean Air Act amendments, and following passage of the amendments the EPA folded the equipment leaks rule into the larger Hazardous Organic NESHAP (HON) rule. 59 Fed. Reg. 19402 (1994). While the time it took EPA to promulgate this particular negotiated rule may have been delayed by the passage of a statutory amendment, such delays surely occur to rules issued using informal rulemaking procedures as well. Ideally, to account for any time order changes in the length of rulemaking, it would be helpful to replicate the analysis conducted by Kerwin and Furlong and extend it to the present time. Despite the potential limitations inherent in a small, nonexperimental evaluation such as this one necessarily is, the comparisons made here do permit reasonable inferences about the impact of negotiated rulemaking. See infra notes ___ and accompanying text.

109 Administrative Conference of the United States, Building Consensus in Agency Rulemaking: Implementing the Negotiated Rulemaking Act 29 n.38 (1995) (citing memorandum from Ted Sky, Senior Counsel, Department of Education).

representatives. Rules that appear to take a longer time in chronological terms may well do so simply because they largely sit dormant while the agency proceeds with other matters.

Even though in chronological terms negotiated rulemaking at EPA seems to take essentially the same amount of 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.[110] To borrow a phrase from Brian Polkinghorn, negotiated rulemaking is a "time compressor."[111] 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."[112] 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."[113] Once the negotiations are completed, moreover, EPA staff still must spend the additional time associated with, if nothing more, 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.[114] When negotiated rulemaking compresses staff time in this way and still ends up taking about as long as conventional rulemaking, it is impossible to conclude that it has succeeded in increasing the speed of the regulatory process.

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110 See, e.g., C. Kerwin, Rulemaking: How Government Agencies Write Law and Make Policy 190 (1994) (Negotiated rulemaking demands an "extraordinary commitment of time" and "negotiation sessions themselves are demanding activities that can wreak havoc with normal work responsibilities"); Schneider & Tohn, Success in Negotiating Environmental Regulations, 9 Envt. Impact Assessment Rev. 67, 77 (1985) ("Regulatory negotiation is surprisingly resource intensive."); Siegler, Regulatory Negotiations: A Practical Perspective, 22 Environmental Law Reporter (ELI) 10647, 10651 (1992) ("A major disadvantage of the reg-neg process is that it can be extremely resource-intensive and stressful."); Administrative Conference of the United States, supra note __, at 28 (reporting that Department of Agriculture has found negotiated rulemaking to be "expensive"); National Performance Review, supra note __, at 31-32 ("The most significant deterrent to using negotiated rulemaking is its up-front costs...[T]he concentrated investment and expense in the short term may be a serious obstacle.").

111 Brian Polkinghorn, The Influence of Regulatory Negotiations on the U.S. Environmental Protection Agency as an Institution (1995) (unpublished paper presented at the 1995 American Political Science Association meeting).

112 Id.

113 U.S. Environmental Protection Agency, An Assessment of EPA's Negotiated Rulemaking Activities 8 (December 1987).

114 See, e.g., National Performance Review, supra note __, 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. Pub. Policy & Mgt. 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"); Fiorino, Regulatory Negotiation as a Form of Public Participation, in Fairness and Competence in Citizen Participation: Evaluating Models for Environmental Discourse (O. Renn, T. Webler, & P. Wiedemann eds. 1995) ("Although negotiation may not take more time than a conventional rulemaking, the time demands are more concentrated.").

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 theory save the agency the time and resources it takes to litigate or settle a legal challenge.[115] As I showed in Part I, the goal of reducing litigation was a driving force behind the Negotiated Rulemaking Act. According to some, negotiated rulemaking has succeeded in achieving this goal. Former EPA Administrator Lee Thomas asserted that at his agency "[r]egulatory negotiation has reduced litigation."[116] The National Performance Review reported a reduction in the 80 percent litigation rate at EPA to 20 percent following the introduction of negotiated rulemaking.[117] The former research director of the Administrative Conference of the United States has written that agencies developing rules through negotiation have succeeded in "dramatically reducing the rate of litigation over those rules."[118]

As should be clear by the NPR's own calculation of litigation over EPA's negotiated rules, rules promulgated following a regulatory negotiation are far from immune

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115 See, e.g., Pritzker, Working Together for Better Regulations, 5 Natural Resources & Environment 29, 51 (1990).

116 Thomas, The Successful Use of Regulatory Negotiation by EPA, 13 Admin. L. News 1, 3 (Fall 1987).

117 National Performance Review, supra note __, at 32.

118 Lubbers, Better Regulations: The National Performance Review's Regulatory Reform Recommendations, 43 Duke Law Journal 1165, 1171 (1994). 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 Administrative Oversight and the Courts of the Senate Comm. on the Judiciary, 104th Cong, 1st Sess. (Feb. 22, 1995) (statement of Thomasina V. Rogers, Chair, ACUS) (negotiated rulemaking "has produced rules that have engendered much less litigation than conventional rulemaking processes"); Clean Air Act Implementation: Hearings Before the Senate Comm. on Environment and Public Works, 103rd Cong., 1st Sess. (Sept. 23, 1993) (statement of Carol M. Browner, Administrator, EPA) (regulatory negotiations "reduce chances of legal challenge"). See also Department of Interior, Notice of Final Alternative Dispute Resolution Policy and Opportunity for Comment, 61 Fed. Reg. 40424, 40425 (Aug. 2, 1996) (negotiated rulemaking can "reduce the high rate of litigation"); General Accounting Office, Clean Air Rulemaking (GAO/RCED-95-70, Mar. 2, 1995) (EPA officials reported that negotiated rulemaking can save time by "minimizing the likelihood of litigation after promulgation."). Academic researchers have made similar conclusions. In its recent report on risk decision-making, the National Research Council noted that "litigation is reported to be less likely" following a negotiated rulemaking process. National Research Council, Understanding Risk: Informing Decisions in a Democratic Society 202 (1996). Professor Cornelius Kerwin has written (almost tautologically) that "[w]hen the process works well all current indications are that litigation rates are quite low." C. Kerwin, Rulemaking, supra note __, at 191.

from legal challenge.[119] For example, the EPA's visibility regulations for the Grand Canyon, although not conducted under the auspices of the Negotiated Rulemaking Act, have been cited as a prominent illustration of the potential of the regulatory negotiation process.[120] Beginning in the early 1980s, the EPA confronted the question of emissions controls for the Navaho Generating Station (NGS), a coal-fired power plant located in northern Arizona, in an attempt to improve visibility in the Grand Canyon National Park. The issue pitted high control costs imposed on the power facility against aesthetic protection of one of the nation's most cherished natural wonders, all amidst contestation over the scientific record. After years of evaluation, the EPA issued a proposed rule in 1991 that would have required a seventy-percent reduction in sulfur emissions based on thirty-day averages.[121] 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.[122] The EPA subsequently facilitated a negotiation process involving the environmental groups and the NGS owners for the purpose of advising the agency on other possible approaches.[123] Because the agency had already staked out a position in a proposal that reflected neither sides' interests fully, each side had a reason to see if something better could be negotiated. The participants to the negotiation reportedly agreed not to challenge the agency's final rule if it reflected a compromise that they might reach.[124] After two months' of intense negotiations, the participants reached an agreement that would yield a ninety percent reduction based on full year averages.[125] The EPA published a revised proposal based on the participants'

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119 As a matter of law, the mere fact that the agency secured the "consensus" of a negotiated rulemaking committee on a rule does not make that rule immune from judicial challenge. Negotiated Rulemaking Act, 5 U.S.C. § 590 (___) ("Nothing in this section shall bar judicial review of a rule if such judicial review is otherwise provided by law."). A recurring issue in the legal literature is whether negotiated rules should nevertheless be afforded any greater deference by a reviewing court. See Wald, Negotiation of Environmental Disputes, supra note __; Harter, The Role of the Courts in Reg-Neg, supra note __; Note, Judicial Review of Negotiated Rulemaking, 12 Rev. Litig. 467 (1993). The Negotiated Rulemaking Act provides that "[a] rule which is the product of negotiated rulemaking and is subject to judicial review shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures." 5 U.S.C. § 590.

120 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. U.S. Environmental Protection Agency, Negotiated Rulemaking at the Environmental Protection Agency (Nov. 18, 1994); Administrative Conference of the United States, Building Consensus, supra note ___; Pritzker & Dalton, Negotiated Rulemaking Sourcebook, supra note __. The EPA did not invoke the procedures of the Negotiated Rulemaking Act in this rulemaking. The process of negotiation occurred following, rather than before, the publication of a proposed rule and the close of the comment period on that proposal.

121 56 Fed. Reg. 5173.

122 Rappoport & Cooney, supra note __, at 632.

123 56 Fed. Reg. 38,399 (1991). The agency made no commitment to implement any approach agreed to by the participants, but instead said it would treat an agreement as simply a recommendation.

124 Rappoport & Cooney, supra note __, at 632.

125 Id. at 634.

recommendations and then promulgated the rule in a highly publicized ceremony with President Bush at the Grand Canyon.[126]

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."[127] 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."[128] Yet what has not been reported is that, notwithstanding the "virtually unprecedented cooperation between the government agency and the directly affected parties," the Grand Canyon visibility rule still ended up in federal court.[129] The rule was not challenged 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 and that claimed the visibility rule would increase their energy costs.[130]

The same New York Times article that hailed the visibility rulemaking also referred to EPA's reformulated gasoline rule as a model of a successful negotiated rulemaking.[131] The 1990 Clean Air Act required the EPA to issue a rule requiring the use of oxygenated fuel in nonattainment areas in order to reduce urban smog. The EPA chose to use a formal negotiated rulemaking process to develop a proposal for this rule. The EPA selected representatives from the automobile industry, petroleum industry, renewable fuels industry, and environmental community to develop a consensus. After arduous and fragile negotiations, the parties reached what one report described as a "nearly litigation proof agreement."[132]

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126 Approval and Promulgation of Implementation Plans: Revision of the Visibility FIP for Arizona, 56 Fed. Reg. 50,172 (1991).

127 Rappoport & Cooney, supra note __, at 627.

128 Wald, U.S. Agencies Use Negotiations to Pre-Empt Lawsuits Over Rules, New York Times, p. A1, Sept. 23, 1991. More recently, Senator Levin referred to the rule as one of negotiated rulemaking's success stories in a press release issued by his office announcing the signing of the Administrative Dispute Resolution Act, which permanently reauthorized the Negotiated Rulemaking Act. Levin, Clinton Signs Levin's Bill Encouraging Government Innovation, Congressional Press Release (Oct. 21, 1996).

129 Central Arizona Water Conservation District v. U.S., 990 F. 2d 1531 (9th Cir. 1993)

130 The United States Court of Appeals for the Ninth Circuit ultimately upheld the rule in a forty page opinion issued a year and a half after the promulgation of EPA's final rule. Id.

131 Matthew L. Wald, U.S. Agencies Use Negotiations to Pre-Empt Lawsuits Over Rules, New York Times, p. A1, Sept. 23, 1991. Similarly, Professor Edward Weber singles out the reformulated gasoline rule as one of the success stories of the use of "collaborative games" in environmental policymaking in a forthcoming book. E. Weber, Pluralism by the Rules: The Emergence of Collaborative Games in National Pollution Control Politics (Jan. 15, 1997) (unpublished manuscript). See also Weber & Khademian, supra note ___.

132 Traditional Antagonists Agree On Makeup of Cleaner, Reformulated Fuel, 22 Envt. Rptr. (BNA) 1141 (Aug. 23, 1991).

Yet in terms of avoiding litigation and reducing conflict, the reformulated gasoline rule has turned out to be anything but successful. A total of nine corporations and trade associations were involved in legal actions that raised four distinct sets of objections against the rule. The rule has also been the subject of considerable controversy outside the courts.

Within about a week following the publication of the final reformulated gasoline rule in the Federal Register,[133] the American Petroleum Institute (API) and Texaco, Inc. filed petitions for judicial review in the D.C. Circuit Court of Appeals challenging the reformulated gasoline portion of the rule.[134] The American Automobile Manufacturers Association, the Association of International Automobile Manufacturers, and the Renewable Fuels Association intervened in these actions.[135] API and Texaco objected to the final rule's provision under which EPA would not consider confidential certain information about refiners' baseline set of fuel parameter values and would therefore publish individual baseline standards. Following settlement discussions and an out-of-court agreement reached with the petitioners, EPA proposed and promulgated a revision to the final rule under which EPA would release only part of the baseline information and would treat claims of business confidentiality in accordance with the agency's ordinary standards for protecting confidentiality.[136]

Two other petroleum companies filed petitions raising objections over the reformulated gasoline rule. Fina Oil and Chemical Company objected to the individual baseline assigned to it in the rule.[137] In response, EPA agreed to adjust Fina's baseline in an administrative proceeding.[138] Amerada Hess Corporation filed a judicial review petition objecting to the limits EPA placed on fuel parameters.[139] 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."[140] EPA acknowledged the error and issued a direct final rule amending portions of the reformulated gasoline rule to address these concerns.[141]

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133 59 Fed. Reg. 7716 (Feb. 16, 1994).

134 American Petroleum Institute 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. All of the petitions reported in notes ___ and the accompanying text specifically challenged the reformulated gasoline rule. 50 Fed. Reg. 7716.

135 See American Petroleum Institute v. EPA, No, 94-1138 (D.C. Cir. 1994) (clerk's order granting non-party motion to intervene).

136 See 60 Fed. Reg. 40009 (1995); 60 Fed. Reg. 65571 (1995).

137 Fina Oil and Chemical Company v. EPA, No. 94-1142 (D.C. Cir. filed Feb. 25, 1994).

138 See Status Report in No. 94-1142 (9/22/95)

139 Amerada Hess Corporation v. EPA, No. 94-1319 (D.C. Cir. filed Apr. 15, 1994).

140 See Amerada Hess Corporation, No. 94-1319 (D.C. Cir. May 25, 1994) (statement of issues to be raised on appeal).

Although these petroleum companies were in principle represented on the Clean Fuel Negotiated Rulemaking Committee by other petroleum companies and by the American Petroleum Institute, 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.[142] 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.[143] 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.[144] 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.[145] 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.[146] 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 intraagency review process before being proposed in the Federal Register.[147]

Each of these petitions for review were filed against the reformulated gasoline rule. This litigation was distinct from that which was filed over the EPA's accompanying renewable oxygenates rule which was ultimately struck down by the D.C. Circuit.[148] 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 with the intensity with which the public criticized the rule. While most EPA regulations never get noticed in the popular media (even in the New York Times and Washington Post), the reformulated gasoline rule

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141 59 Fed. Reg. 36944 (1994).

142 National Tank Truck Carriers, Inc. v. EPA, No. 94-1323 (D.C. Cir. filed Apr. 18, 1994).

143 See 40 C.F.R. § 80.79.

144 Brief of Petitioner, National Tank Truck Carriers, Inc. v. EPA, No. 94-1323 (D.C. Cir. 1994).

145 Id.

146 Status Report, National Tank Truck Carriers, Inc. v. EPA, No. 94-1323 (Jul. 13, 1995).

147 Status Report, National Tank Truck Carriers, Inc. v. EPA, No. 94-1323 (Jan. 27, 1997).

148 The American Petroleum Institute, along with other groups, also filed petitions challenging the renewable oxygenates portion of the clean fuels program, claiming that the agency's 30% mandate for ethanol contravened the Clean Air Act as well as circumvented the negotiated process. American Petroleum Institute v. EPA, 52 F.3d 1113 (D.C. Cir. 1995). The Court of Appeals also subsequently awarded API $237,000 in attorneys fees payable by EPA.

splashed across the papers following its promulgation.[149] Citizens reported headaches and dizziness associated with the MTBE additive used to comply with the new standards, and some 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.[150]

The American Petroleum Institute 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 were inconsistent with the negotiated agreement and the Clean Air Act. Although EPA claimed that only the first phase restrictions were addressed by the negotiated rulemaking committee, it agreed to respond to API's petition by soliciting further comments on that portion of the rule. Eventually, EPA rejected API's administrative motion arguing that the second phase restrictions were not ruled out by neither the negotiated agreement nor the Clean Air Act.

Finally, the reformulated gasoline rule also earned the distinction of being the first U.S. regulation struck down by the World Trade Organization (WTO). Venezuela and Brazil challenged the reformulated gasoline rule as discriminatory against foreign refiners. The WTO panel decision struck down the rule and a WTO appellate decision affirming the panel's ruling.[151] The EPA is now back revisiting the reformulated gasoline rule again, well over two years after publishing its initial final rule.[152] A rule that has been heralded as

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149 See, e.g., Salpukas, New Gas Arouses Grass-Roots Ire, The New York Times, February 18, 1995, Section 1, page 37, column 3; Ivanovich, "Cleaner" Fuel Sparks Populist Revolt: Woes Over Reformulated Gas, The Houston Chronicle, April 14, 1995, section A, page 1; Jones & Daly, Some Question Safety of "Clean-Air" Gasoline, The Hartford Courant, March 25, 1995, p. A1; Price, Cleaner Fuel May Generate Ill Effects, The Washington Times, March 19, 1995, p. A1; Worthington, In Wisconsin, Cleaner Gasoline Has a Somewhat Soiled Reputation, Feb. 27, 1995, p. 3; New Fuel Mandated by the EPA has Many Motorists Sputtering, The Cincinnati Enquirer, Feb. 24, 1995, p. A10; Reformulated Gas: New Fuel Becoming a "Hot-Button Issue," Greenwire, February 21, 1995 (spotlight story); Talbot, New Gas Formula Smells Different, Prompts Complaints, New Hampshire Sunday News, December 4, 1994, section A, page 8.

150 See Perceived Merits, Demerits of MTBE Still Argued, Oil & Gas Journal 22 (April 17, 1995); Emond, Widespread Health Complaints about RFG, MTBE Raise Concerns over Program's Fate, 87 National Petroleum News 35 (April 1995).

151 World Trade Organization, United States -- Standards for Reformulated Gasoline and Conventional Gasoline, 1996 GATTPD Lexis 3 (Jan. 29, 1996) (WT/DS2/R). See also Kantor Says He's Inclined to Appeal Panel's Ruling in Venezuelan Gas Case, 13 Intl. Trade. Rptr. (BNA) 100 (Jan. 24, 1996); Appellate Body Faults U.S. in Gas Case, But Reverses on Conservation Exception, 13 Intl. Trade Rptr. (BNA) 703 (May 1, 1996); Appellate Body Formally Adopts Ruling Against U.S. Gasoline Rules, 13 Intl. Trade Rptr. (BNA) 833 (May 22, 1996),. See generally Charnovitz, The WTO Panel Decision on U.S. Clean Air Act Regulations, 13 Intl. Trade Rptr. (BNA) 456 (March 13, 1996).

152 World Trade Organization (WTO) Decision on Gasoline Rule, 61 Fed. Reg. 33703 (1996). See also United States Promises WTO Changes in Reformulated Gasoline Rules, 14 Intl. Trade Rptr. (BNA) 548 (Mar. 26, 1997); Options to Meet Clean Air, WTO Goals Sought by EPA After Gas Decision Rule, 13 Intl. Trade Rptr. (BNA) 1143 (July 10, 1996).

one of negotiated rulemaking's success stories instead shows that the achievement of an initial consensus by no means guarantees the elimination of controversy.

The reformulated gasoline rulemaking and the Grand Canyon visibility rule are but two illustrations that negotiated rulemaking is no panacea for conflict in the regulatory process.[153] In addition to the challenges filed against EPA rules, several of the Department of Education's negotiated rulemakings have ended up in court. Student loan regulations, promulgated using negotiated rulemaking, have been challenged in court at both the district and appellate court levels.[154] In contrast to the conventional view that negotiated rulemaking has eliminated legal challenges to federal regulations,[155] it is plain that such challenges still arise even after an agency has used a negotiated rulemaking procedure.

Of course, showing that negotiated rules do get challenged does not fully refute the claim that a consensus-based approach reduces the frequency of litigation.[156] To determine

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153 Cf. Harter, supra note __, at ___. A negotiated rulemaking process also failed to stop another legal proceeding against the EPA. After EPA rejected the State of Pennsylvania's water standards, the state in May 1995 established a negotiated rulemaking process to establish new standards that would meet EPA's approval. A Pennsylvania advocacy group, however, 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 Foundation v. EPA, 930 F. Supp. 1088 (E.D. Penn. 1996).

154 See USA Group Loan Services v. Riley, 82 F.3d 708 (1996); Career College Association v. Riley, 74 F.3d 1265 (1996); Career College Association v. Riley, 1194 U.S. Dist. Lexis 11232 (1994); Career College Association v. Riley, 1994 U.S. Dist. Lexis 10214 (1994).

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

156 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, should not be surprised that litigation has occurred over negotiated rules. Although in his seminal article Philip Harter did speculate that "negotiations may reduce judicial challenges" to agency rules, he argued that "the prime benefit of direct negotiations is that it enables the participants to focus squarely on their respective interests." Harter, supra note __, at 102. 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, The Role of Courts in Regulatory Negotiation -- A Response to Judge Wald, 11 Columbia Journal of Environmental Law 51, 54 (1986). More recently, though, Harter has shifted his tone in a way that probably contributes to the mistaken belief that negotiated rules avoid litigation. In a 1993 article he co-authored, Harter described the negotiated rulemaking porcess and then stated that "[t]o date...no rule crafted in this manner has been subjected to court action." Harter & ____, 2 J. Envtl. Permitting 343, ___ (1993). Several years later, representing the American Bar Association in testimony before Congress, Harter offered a carefully crafted statement in support of negotiated rulemaking: "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." The Reauthorization of the Negotiated Rulemaking Act, 1996: Hearings on Before the Subcomm. on Commercial and Administrative Law of the House Comm. on Judiciary, 104th Cong., 2d

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 conventional rules. Since the EPA has often been used as the benchmark, with it being widely believed that virtually every EPA regulation gets challenged in court by environmental groups or industry organizations,[157] I use the EPA for purposes of my analysis as well.

The belief that most EPA rules get challenged in court has been widely shared among journalists,[158] government staff,[159] and scholars.[160] In arguing that judicial review has imposed undesirable costs on agency management, for example,

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Sess. (1996) (statement of Philip Harter on behalf of the American Bar Association). In that same congressional testimony, Harter seemed to imply that negotiated rulemaking has achieved a reduction in litigation when he asserted that negotiated rules result in cost savings, despite the up-front resources they demand, because "[c]onsidering the costs of litigation for both the regulated community and the government, these savings are considerable." Id. Of course, even Harter's more careful formulation is not quite accurate because, as with the Grand Canyon and reformulated gasoline rules (as well as with the EPA's wood furniture coatings rule), outside parties have challenged parts of negotiated rules that participants in the regulatory negotiation found acceptable. See infra notes ___ and accompanying text.

157 Schlozman and Tierney, Organized Interests and American Democracy (1986), at 367.

158 Brimelow & Spencer, You Can't Get There From Here, Forbes, July 6, 1992, p. 59; Marianne Lavelle, 'Reg-Neg' Revving Up in D.C., National Law Journal, March 21, 1988, p. 21; McGinley, Experimental 'Reg-Negs' Try to Head Off Numerous Attacks on Federal Regulations, Wall Street Journal p. 39 (Nov. 5, 1987); Shabecoff, EPA Drifts in Stalemate, New York Times, Nov. 23, 1986; Stanfield, Resolving Disputes, National Journal, Nov. 15, 1986; Miller, Bypassing the Lawyers, Industry Week 20 (June 23, 1986); W. Greider, Who Will Tell the People: The Betrayal of American Democracy (1992); EPA Negotiates Proposed Rule on Asbestos in Schools, Part of Continuing Reg-Neg Project, 1 Alternative Dispute Resolution Report 133 (July 9, 1987).

159 U.S. Environmental Protection Agency, An Assessment of EPA's Negotiated Rulemaking Activities 1 (December 1987) (reprinted in D. Pritzker & D. Dalton, Negotiated Rulemaking Sourcebook 23 (1995)); Office of Technology Assessment, Industry, Technology, and the Environment: Competitive Challenges and Business Opportunities (OTA-ITE-586) 266 (Washington, DC: US Government Printing Office, Jan. 1994); Council on Environmental Quality, Environmental Quality: 16th Annual Report of the Council on Environmental Quality (1985); Administrative Conference of the United States, Negotiated Rulemaking Sourcebook (1990); National Performance Review, supra note __. See also Clay, New Environmentalism: A Cooperative Strategy, 8 Forum for Applied Research and Public Policy 125, 126 (Spring 1993); Croce, Negotiation Instead of Confrontation, 11 EPA Journal 23 (1985); Keith Schneider, Who's Making the Rules?, New York Times, Feb. 8, 1986, p. 7 (quoting Chris Kirtz, EPA); Chris Kirtz, Environmental Protection Agency's Regulatory Negotiation Project, National Institute of Justice Reports (May 1985); Chris Kirtz, Regulatory Negotiation: The New Way to Develop Regulations?, 1 J. Environmental Permitting 269 (1992); David M. Pritzker, Working Together for Better Regulations, Natural Resources & Environment 29, 30 (Fall 1990). The 80% statistic also appears in non-governmental policy reports. See, e.g., Carnegie Commission on Science, Technology, and Government, Risk and the Environment: Improving Regulatory Decision Making 109 (June 1993); National Environmental Policy Institute, Reinventing the Vehicle for Environmental Management 34 (1995) (First Phase Report).

160 Amy, "Environmental Dispute Resolution: The Promise and the Pitfalls," in Environmental Policy in the 1990s (1990); G. Bryner, Blue Skies, Green Politics: The Clean Air Act of 1990 and Its Implementation 211 (1995); G. Bryner, Bureaucratic Discretion: Law and Policy in Federal Regulatory

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."[161] Making a similar argument, Philip Howard invoked this same statistic in his best-selling critique of the modern regulatory state.[162]

Agencies (1987); Dodel, Managerial Leadership in Divided Times: William Ruckelshaus and the Paradoxes of Independence, 26 Administration & Society 488 (1995); Dwyer, Contentiousness and Cooperation in Environmental Regulation, 35 American Journal of Comparative Law 809, 809 n. 1, 819 (1987); J. Fesler & D. Kettl, The Politics of the Administrative Process (1991); D. Fiorino, Making Environmental Policy 56 (1995); Fiorino and Kirtz, "Breaking Down Walls: Negotiated Rulemaking at EPA," Temple University Environmental Law & Technology Journal (1985); Susskind and McMahon, "The Theory and Practice of Negotiated Rulemaking," Yale Journal on Regulation (1985); Percival, "The Bounds of Consent: Consent Decrees, Settlements, and Federal Environmental Policy Making," University of Chicago Legal Forum (1987); Greve, "Environmentalism and the Rule of Law: Administrative Law and Movement Politics in West Germany and the United States," Ph.D. diss. Cornell University (1987); Glicksman and Schroeder, "EPA and the Courts: Twenty Years of Law and Politics," Law and Contemporary Problems (1991); K. Harrison & G. Hoberg, Risk, Science, & Politics: Regulating Toxic Substance in Canada and the United States 13 (1994); Hoberg, Pluralism by Design: Environmental Policy and the American Regulatory State (1992); Kagan, "Adversarial Legalism and American Government," Journal of Public Policy Analysis and Management (1991); C. Kerwin, Rulemaking: How Government Agencies Write Laws and Make Policy (1994); Kraft, Environmental Gridlock: Searching for Consensus in Congress, in N. Vig & M. Kraft, eds, Environmental Policy in the 1990s (1990); Lazarus, "The Tragedy of Distrust in the Implementation of Federal Environmental Law," Law and Contemporary Problems (1991); Gerard McMahon III, Regulatory Negotiation: A Response to the Crisis of Regulatory Legitimacy, Harvard Law School Program on Negotiation Working Paper 2 (November 1985); O'Leary, Environmental Change: Federal Courts and the EPA (1993); Porter & van der Linde, Toward a New Conception of the Environment-Competitiveness Relationship, Journal of Economic Perspectives 9:97-118 (1995); Rosenbaum, The Clenched Fist and the Open Hand: Into the 1990s at EPA, in Norman Vig & Michael Kraft, Environmental Policy in the 1990s, 2d ed. (1994) p. 122; W. Rosenbaum, Environmental Politics and Policy, 3d ed. p. 15 (1995); Rushefsky, Reducing Risk Conflict by Regulatory Negotiation: A Preliminary Evaluation, in S. Nagel & M. Mills, ed., Systematic Analysis in Dispute Resolution 111 (1991); Ryan, Regulatory Negotiation: Learning from the Experiences at the U.S. Environmental Protection Agency, in J. Walton Blockburn & Willa Marie Bruce, eds., Mediating Environmental Conflicts: Theory and Practice 209 (1995); Schneider & Tohn, Success in Negotiating Environmental Regulations, 9 Envt. Impact Assessment Rev. 67 (1985); Susskind and Van Dam, "Squaring Off at the Table, Not in the Courts," Technology Review (1986); Susskind and Cruikshank, "Breaking the Impasse: Negotiation to Consensus" in Confronting Regional Challenges (1991); Patricia Wald, Regulation at Risk, 67 S. Cal. L.Rev. 621, 624 (1994); Weber & Khademian, "From Agitation to Collaboration in Environmental Policymaking," Taubman Center Annual Report 11 (1994-1995); Weber & Khademian, "From Agitation to Collaboration: 'Clearing the Air' Under Conditions of Uncertainty," paper presented at the Conference on Network Analysis and Innovations in Public Programs, Univ. of Wisconsin-Madison 1 (1994); Edward P. Weber, Pluralism by the Rules: The Emergence of Collaborative Games in National Pollution Control Politics 51 (Jan. 15, 1997) (unpublished book manuscript on file with the author); J. Wondolleck, Public Land Conflict and Resolution: Managing National Forest Disputes 226 (1988).

161 Wilson, Bureaucracy: What Government Agencies Do and Why They Do It (1989), at 283.

162 P. Howard, The Death of Common Sense __ (1994).

The original source of the 80 percent statistic has remained largely obscure.[163] Part of the obscurity of the 80 percent statistic stems from confusion about precisely what it means. The statistic, which originated in speeches given by William Ruckelshaus,[164] has been attributed at different times to two of the other seven EPA administrators: Lee Thomas[165] and William Reilly.[166] Sometimes the 80 percent figure purports to be the litigation rate for all EPA "decisions;"[167] in others it is the rate for all EPA "rules" or "regulations;"[168] and in still others it represents the litigation rate for all "nonroutine" or "major" rules.[169] And sometimes the 80 percent rate has even been inflated to 85 percent.[170]

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163 Kerwin, Rulemaking: How Government Agencies Write Laws and Make Policy (1994), at 120 n. 55.

164 See Ruckelshaus, Environmental Protection: A Brief History of the Environmental Movement in America and the Implications Abroad, __ Environmental Law ___, 463 (1985); Ruckelshaus, Environmental Risks and Liabilities -- Identification, Assessment and Management, 24 Houston L. Rev. 11, 19 (1987). See also Ruckelshaus, Stopping the Pendulum, 12 The Environmental Forum 25, 27 (1995) ("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 the deliberations of scientists or engineers or elected representatives or responsible appointed officials, but of consent decrees handed down by judges.")

165 Thomas, The Successful Use of Regulatory Negotiation by EPA, 13 Admin. L. News 1, 3 (1987) ("We found that over three-quarters of our regulations once promulgated were litigated."). See also Miller, Bypassing the Lawyers, Industry Week 20 (June 23, 1986) (quoting Thomas that "[f]ully 80% of the rules EPA issues are challenged.")

166 R. O'Leary, Environmental Change: Federal Courts and the EPA __ (1993); Berry, Citizen Groups and the Changing Nature of Interest Group Politics in America, Annals of the Amer. Academy of Political and Social Science 30 (July 1993) (quoting Reilly as saying that four out of five decisions he makes end up in court); Wald, U.S. Agencies Use Negotiations to Pre-Empt Lawsuits Over Rules, New York Times, sect. A, p. 1, col. 1 (Sept. 23, 1991) (quoting Reilly: "Four of every five decisions I make are contested in court.").

167 Amy, "Environmental Dispute Resolution: The Promise and the Pitfalls," in Environmental Policy in the 1990s (1990); Hoberg, Pluralism by Design: Environmental Policy and the American Regulatory State (1992).

168 G. Bryner, Bureaucratic Discretion: Law and Policy in Federal Regulatory Agencies ___ (1987).

169 C. Kerwin, Rulemaking: How Government Agencies Write Laws and Make Policy (1994); Glicksman and Schroeder, EPA and the Courts: Twenty Years of Law and Politics, ___ Law and Contemporary Problems ___ (1991); Lazarus, The Tragedy of Distrust in the Implementation of Federal Environmental Law, ___ Law and Contemporary Problems ___ (1991).

170 W. Greider, Who Will Tell the People: The Betrayal of American Democracy ___ (1992); Council on Environmental Quality, Environmental Quality: 16th Annual Report of the Council on Environmental Quality ___ (1985); C. Kerwin, supra note ___, at __.

No EPA analysis underlay the origin of this statistic, but it has taken on a life of its own.[171] In order to document the extent to which EPA rules are challenged, 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.[172] The EPA dockets included litigation filed against the agency in any federal court during 1987-1991. During this time, the EPA issued 1,568 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 60-90 days after the EPA publishes a rule,[173] so most petitions for review of a rule are filed in the same year the rule is published. Some small portion of suits are not filed in the same year as the rule, but by aggregating the entire five-year period any error due such a lag time is minimized.

The litigation rate for rules issued during the 1987-1991 period covered by the EPA docket turned out to be, even conservatively calculated, much lower than widely believed: only 26 percent. In calculating this rate, I have used what I take to be the most realistic estimate for EPA rules, using a Lexis search of the FEDREG database and specifically excluding those rules that were minor corrections, technical amendments, or clarifications of other rules.[174] Although corrections or technical amendments could be independently challenged, these were excluded because any such challenge would likely be consolidated with a challenge to the rule being corrected or amended. In addition to their lack of independent policy importance, corrections and technical amendments are usually actions that resolve problems interest groups have brought to the agency's attention and thus are unlikely to be challenged in the first place. That being said, using other available estimates of the total number of EPA rules, drops the litigation rate even lower. Using Office of Management and Budget (OMB) data on the number of final EPA rules promulgated during the same time period, for example, the litigation rate amounts to only 19 percent -- precisely the opposite of the rate widely assumed.[175]

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171 As part of a larger study, I interviewed EPA staff working for Administrator Ruckelshaus at the time. These interviews confirmed that no systematic analysis underlay this claim, and that it was rather 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.

172 A fuller description of my research methods is contained in Cary Coglianese, Challenging the Rules: Litigation and Bargaining in the Administrative Process (1996) (unpublished manuscript on file with author).

173 See Clean Air Act, 42 U.S.C. § 7607 (b) (60 days); Clean Water Act, 33 U.S.C. § 1369 (b) (1) (120 days); Resource Conservation and Recovery Act, 42 U.S.C. § 6976 (a) (1) (90 days); Safe Drinking Water Act, 42 U.S.C. 300j-7 (45 days); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1276 (60 days); Toxic Substances Control Act, 15 U.S.C. § 2618 (60 days).

174 The most restrictive search, which excludes corrections and technical amendments, yielded 1,568 rules for the 1987-1991. In comparison, the broadest Lexis search -- which retrieved all final actions which could be challenged in court -- yielded 1,964 (a litigation rate of 20.9%).

175 According to the data reported in Exhibit 19 to Appendix IV of the OMB's annual Regulatory Program of the United States, EPA issued 2,162 during this period. In addition, a search of the Legi-Slate database revealed a total of 2,212 final (for a rate of 18.6 percent). The restrictive Lexis search therefore yields the least number of rules and the highest litigation rate.

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 significant rules that are published in the EPA's semiannual Regulatory Agenda.[176] Unfortunately, the EPA docket data do not permit one to distinguish between suits involving those rules listed in the Regulatory Agenda and those that are not. I therefore used court records from the D.C. Circuit to determine the rate of litigation for significant EPA regulations promulgated under two major statutes, RCRA and the Clean Air Act, for the period 1980-1991.[177] Any suits challenging significant, national rules under these statutes must be filed in the D.C. Circuit Court.[178] Since the rules appearing in the Regulatory Agenda are by definition more significant, the litigation rate can be expected to be higher than that for all EPA rules.[179] A total of 220 nationally-applicable significant RCRA and Clean Air Act rules were completed from 1980-1991. 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 challenged less frequently (31%) than RCRA rules (43%) over this time period.

[Table 4 about here]

Although conventional wisdom and the legislative history of the Negotiated Rulemaking Act hold that only a minority of EPA rules escape litigation, a closer look at the available data indicates that the prevailing view has things backwards. The majority of EPA rules escape litigation, with petitions for review filed for at most about 25 percent 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, judicial review litigation over EPA rules occurs selectively, if not even infrequently.[180]

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176 See, e.g., Glickman & Schroeder, supra note __, at __.

177 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 during the same time period.

178 Resource Conservation and Recovery Act, 42 U.S.C. § 7006; Clean Air Act, 42 U.S.C. § 7607.

179 The listings in the semi-annual regulatory agendas include rules that have an economic impact of $100 million annually and are considered "economically significant" or "major." Executive Order 12,291; Executive Order 12,866. They also include rules that are otherwise considered "significant" by the agencies. For the EPA, these are the rules that are expected to have important economic or environmental impacts, or that will likely pose difficult administrative tasks for the agency. See McGarity, The Internal Structure of EPA Rulemaking, 54 L. & Contemp. Probs. 57, 72 n. 44 (1991). Typically excluded are minor or routine rules such as "EPA approvals of state plans," "other actions that do not apply nationally," "pesticide tolerances," and "minor amendments to existing rules." U.S. Environmental Protection Agency Regulatory Agenda, 51 Fed. Reg. 14527 (1986). 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.

180 The findings I report here are consistent with those of other empirical studies of litigation and the regulatory process. Christine Harrington reports aggregate date on administrative appeals showing that "[t]he pace of regulatory litigation has not increased sharply in the last fifteen years nor has judicial support for agency rules weakened." Harrington, Regulatory Reform, supra note __, at 305. In their study of nearly 700 EPA rules issued under RCRA, James Hamilton and Christopher Schroeder found that only 21.8% of the rules had been subject to a court remand or consent decree. Hamilton & Schroeder, Strategic

How does EPA's track record for negotiated rules compare with its track record for rules overall? The 20 percent litigation rate noted by the NPR was based on the first ten negotiated rulemakings finalized by EPA.[181] When all twelve of these rules are included, and a when 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.[182] The challenged regulations include: (1) asbestos in school buildings;[183] (2) underground injection of hazardous wastes;[184] (3) reformulated fuels;[185] (4) control of chemical equipment emissions leaks;[186]

Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste, 57 L. & Contemp. Probs. 111, 153 (1994) (Table 5).

181 National Performance Review, supra note __, at __.

182 Of the other six rules for which I have no evidence of ensuing legal actions, four were issued under the Clean Air Act and the Resource Conservation and Recovery Act, both statutes that require any challenges to nationally-applicable rules to be filed in the D.C. Circuit Court within a defined time period following the publication of the proposed rule. See 42 U.S.C. § 7607 ( ); 42 U.S.C. § 7006 ( ). The remaining two rules were issued under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which vests venue for review of rulemakings in the district courts and which does not impose a time limitation on the filing of a petition for review. 7 U.S.C. § 136n(a). I conducted searches in case reports, relevant looseleaf services, and the docket of the District Court for the District of Columbia, as well as made contact with lawyers who might have filed such cases or have known of such filings. I found no evidence that either of these FIFRA rules had yet been the subject of a petition for judicial review. That said, one of these rulemakings, the worker protection standard, has been subject to considerable controversy following its promulgation. EPA issued a final rule after a failed attempt to achieve full consensus among all the parties to the original negotiated rulemaking committee. That final rule has been met with congressional and presidential intervention, threats of litigation, and numerous agency revisions and proposed revisions.

183 Safe Buildings Alliance v. EPA, 846 F.2d 79 (D.C. Cir. 1988).

184 Natural Resources Defense Council v. EPA, 907 F.2d 1146 (D.C. Cir. 1990).

185 Amerada Hess Corporation v. EPA, No. 94-1319 (D.C. Cir. 1994); American Petroleum Institute v. EPA, No. 94-1138 (D.C. Cir. 1994); Fina Oil & Chemical Co., Inc. v. EPA, No. 94-1142 (D.C. Cir. 1994); Texaco, Inc. v. EPA, No. 94-1143 (D.C. Cir. 1994); National Tank Truck Carriers v. EPA, No. 94-1323 (D.C. Cir. 1994). See supra notes __ and accompanying text.

186 Chemical Manufacturers Association v. EPA, No. 94-1463 (D.C. Cir. 1994); The Dow Chemical Company, No. 94-1465 (D.C. Cir 1994).

(5) wood furniture coatings rule;[187] and (6) disinfectant byproducts information collection rule.[188]

I have already discussed the judicial challenges filed against the EPA's reformulated gasoline rule, 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. The additional challenged "reg-negs" show a that a similar set of actors file petitions for review. Many petitioners have been participants in the negotiated rulemaking proceedings, but as with the Grand Canyon visibility rule and reformulated gasoline rule sometimes the petitioners were not members of the rulemaking committee. One additional rule -- the wood furniture manufacturing regulation -- drew petitions from trade associations that were not represented on the negotiated rulemaking committee. A brief review of these additional challenges demonstrates the range of petitions filed over negotiated rules.

Asbestos in School Buildings. The EPA used negotiated rulemaking to establish standards for public schools to follow in identifying and mitigating asbestos exposure.[189] After EPA promulgated the final rule, the Safe Buildings Alliance (an asbestos industry trade association), two building products manufacturers, and two individuals filed petitions for review.[190] A third building products company, GAF Corporation, intervened in the case, as did the American Association of School Administrators and various states' attorney generals. Although the Safe Buildings Alliance had signed the limited consensus statement which concluded the negotiated rulemaking, the industry nevertheless challenged the rationality of EPA's action, specifically objecting to its failure to define a safe level of asbestos exposure and its decision to allow the removal of asbestos which it argued would raise the level of asbestos fibers in the air. 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.[191]

Underground Injection of Hazardous Wastes. The EPA's underground injection rule established standards for the use of underground methods for disposing and storing hazardous wastes.[192] After EPA completed the rulemaking, five petitions were filed by

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187 Chemical Manufacturers Association v. EPA, No. 96-1031 (D.C. Cir. 1996); Halogenated Solvents Industry Alliance, Inc. v. EPA, No. 96-1036 (D.C. Cir. 1996); The Society of Plastics Industry, Inc. v. EPA, No. 96-1038 (D.C. Cir. 1996).

188 American Water Works Association v. EPA, No. 96-1208 (D.C. Cir. 1996). See also AWWA's Lawsuit Over Data Collection May Delay Major Drinking Water Rules, 34 Air/Water Pollution Report's Environment Week (Oct. 7, 1996).

189 52 Fed. Reg. 41,826 (19__)

190 Safe Buildings Alliance v. EPA, No. 87-1669 (D.C. Cir. 1987); National Gypsum Company v. EPA, No. 87-1670 (D.C. Cir. 1987); United States Gypsum Company v. EPA, No. 87-1676 (D.C. Cir. 1987); K'Tanah v. EPA, No. 88-1015 (D.C. Cir. 1988); Welch v. EPA, No. 88-1016 (D.C. Cir. 1988).

191 Safe Buildings Alliance v. EPA, 846 U.S. 79 (D.C. Cir. 1988).

192 53 Fed. Reg. 28,118 (1988).

interests represented in the negotiated rulemaking, including the waste treatment industry,[193] the chemical industry,[194] and an environmental group.[195] 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.

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" to include even the migration of hazardous constituents of hazardous wastes.[196] The Natural Resources Defense Council (NRDC) and the Hazardous Waste Treatment Council (HWTC) also challenged the EPA's application of the "no migration" standard, arguing that it should apply even to the seepage of hazardous constituents from otherwise non-hazardous waste flows.[197] NRDC and HWTC also challenged the rule's definition of "injection zone" and its standards for injection into salt domes. underground mines, or caves.[198] A panel of the D.C. Circuit upheld the rule against all but one of the challenges, remanding only the standards for salt domes, mines, and caves for a finding that these standards satisfied the statutory requirements.[199]

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 for leaks. Before the agency could promulgate the rule, Congress passed the Clean Air Act amendments and 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 incorporating the agreement, the Hazardous Organic NESHAP or HON rule, regulated releases from heat exchange systems, wastewater, 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

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193 Hazardous Waste Treatment Council v. EPA, No. 88-1758 (D.C. Cir. 1988).

194 E.I. du Pont de Nemours v. EPA, No. 88-1734 (D.C. Cir. 1988); Rubicon, Inc. v. EPA, No. 88-1746 (D.C. Cir. 1988); Chemical Manufacturers Association v. EPA, No. 88-1754 (D.C. Cir. 1988).

195 Natural Resources Defense Council v. EPA, No. 88-1657 (D.C. Cir. 1988).

196 See Natural Resources Defense Council v. EPA, 907 F.2d 1146, 1153-1158 (D.C. Cir. 1990).

197 Id. at 1159-1162.

198 Id. at 1162-1165.

199 Id.

rule. Although most of their objections were leveled at the aspects of the rule which were not subject to the negotiated rulemaking, they also raised concerns about certain aspects of the subtitle H, the equipment leaks portion of the final rule. The petitioners entered settlement discussions with EPA and within a few months had reached an agreement on dozens of changes to the final rule. The agency subsequently proposed at least seven changes to subpart H of the rule, including changes to the control options for compressors, an issue that had been overlooked by the chemical industry during the negotiations.

Wood Furniture Coatings. Like the HON rule, the wood furniture coatings rule established national emissions standards for hazardous air pollutants. The negotiated rulemaking process brought together representatives from the wood furniture industry, suppliers of wood coatings, and environmental groups. In developing the standards for chemicals currently used by the wood furniture industry, environmental representatives expressed concern that the industry not switch to other potentially hazardous chemicals not specifically covered under the rule. The parties agreed to incorporate into the rule a list of other chemicals (not used by the wood coatings industry) labeled as "of potential concern." 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." 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.

Disinfectant Byproducts. The most recently challenged "reg-neg" established monitoring requirements that allow EPA to collect data on drinking water quality. To control microbial contamination, water suppliers treat drinking water with disinfectants. In recent years, concerns have emerged over the possible adverse health effects from 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[200] and a final rule governing the collection of information the agency needs before finalizing the two proposed rules.[201]

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."[202] AWWA argued that EPA established a statistically unreliable monitoring procedure in its final rule which was not included in the proposed rule.[203] Faced with a limited statutory deadline for filing a petition for judicial review,[204] AWWA filed a petition in the D.C.

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200 Enhanced Suface Water Treatment Regulations, 59 Fed. Reg. 38,832 (1994); Disinfectant/Disinfectant Byproducts Rule, 59 Fed. Reg. 38,668 (1994).

201 Information Collection Rule (ICR), 61 Fed. Reg. 24,354 (1996).

202 Future Uncertain for Negotiation Process on Microbials, Disinfection Byproducts, EPA Says, 27 Environment Reporter (BNA) 1194 (Sept. 27, 1996) (quoting a letter from AWWA).

203 Id.

204 42 U.S.C. § 300j-7

Circuit Court challenging the information collection rule.[205] 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.[206]

After several months of discussions with 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.[207] 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.[208] 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.[209] As the EPA proceeds with its information collection, 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 standards for byproducts.[210]

As this rule and the other challenged EPA rules shows, negotiated rules are vulnerable to a variety of legal challenges. 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 these cases, petitioners challenged EPA rules notwithstanding the fact that the rules had been developed using the negotiated rulemaking process.[211]

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205 American Water Works Association v. EPA, No. 96-1208 (D.C. Cir. 1996).

206 American Water Works Association v. EPA, No. 96-1208 (D.C. Cir. July 24, 1996) (petitioner's statement of issues).

207 American Water Works Association v. EPA, No. 96-1208 (D.C. Cir. Nov. 6, 1996) (motion for voluntary dismissal of petition for review).

208 61 Fed. Reg. 33917 (1996).

209 Water Utility Organization Withdraws Suit on EPA Information-Collection Rule, 27 Envt. Rptr. (BNA) 1465 (Nov. 15, 1996). AWWA acted as many parties have in filing so-called "protective petitions" against EPA rules. See Coglianese, supra note __, at 761-62. Given the jurisdictional deadlines for filing petitions for review under statutes like 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.

210 Water Organization Recommends That EPA Proceed With Rules on Microbials, Byproducts, 27 Envt. Rptr. 1576 (Nov. 29, 1996) (reporting concerns by NRDC that AWWA has retreated from its agreement on maximum contaminant levels in the disinfectant byproducts proposal).

211 Some might interpose that the petitioners in the the reformulated gasoline case actually challenged the separate renewable oxygenates rule, and similarly that the petitioners in the chemical equipment leaks

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.[212] Negotiation and settlement discussions typically follow the filing of challenges to any EPA rules, making the process of litigation over regulations compatible with ongoing cooperation between representatives of litigating organizations and EPA staff.[213] In the aggregate, negotiating rulemaking has not generated any substantial difference in the way that legal challenges get resolved.[214]

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 perceptions of this problem have 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

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case actually challenged portions of the HON rule into which the equipment leaks "reg-neg" was merged. Cf. Pritzker & Dalton, supra note __, at 391; Kerwin & Langbein, supra note __, at 34. It is true that the renewable oxygenates rule was challenged and reversed by the D.C. Circuit. American Petroleum Institute v. EPA, 52 F.3d 1113 (D.C. Cir. 1995). It is also true that the petitioners in the equipment leaks case raised numerous challenges to subparts F, G, and I of the hazardous organics NESHAPS rule, which did not pertain to equipment leaks. See 61 Fed. Reg. 43,698 (1996). However, in both instances, petitioners also challenged the very rules or portions of rules which EPA did develop using negotiated rulemaking. In the reformulated gasoline case, one should not confuse the legal challenge to the renewable oxygenates rule with the several distinct petitions filed challenging the reformulated gasoline rule which I have described in the text. See supra notes __ and accompanying text. In the challenge to the HON rule, the petitioners raised at least seven objections to subpart H which pertains to equipment leaks. See Chemical Manufacturers Association v. EPA, No. 94-1463 (D.C. Cir. Aug. 30, 1996 Settlement Agreement). These objections led EPA to amend the equipment leaks portion of the rule in order, among other things, to clarify definitions, allow the use of additional calibration gases, and change the control options for pumps and compressors. 61 Fed. Reg. 43698 (1996). An EPA official involved in the equipment leaks "reg-neg" reported to me in a background interview that he knew during the negotiations that the chemical industry was overlooking the compressors issue, an oversight that the industry subsequently sought to correct with its judicial challenge.

212 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 dismissed by the court summarily 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 Cary Coglianese, Challenging the Rules, supra note ___, at 136.

213 See Coglianese, Litigating Within Relationships, supra note __.

214 Although only two challenges have been resolved through a decision by a judicial panel, even in these cases there is no evidence that negotiated rulemaking made the EPA rule more likely to be upheld. Of the 93 adjudicated cases filed in the D.C. Circuit from 1979 to 1990, 51 percent affirmed the EPA rule entirely (as in the asbestos case), while 49 percent granted the petitioners some relief (as in the underground injection case). Coglianese, Challenging the Rules, supra note __, at __. See also Wald, supra note __, at 636-639 (agency rule upheld entirely in over 50 percent of the rulemaking reviews decided by the D.C. Circuit).

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.[215] As a means of reducing litigation, negotiated rulemaking has yet to show any demonstrable success.

III. Assessing Consensus-Based Rulemaking

If negotiated rulemaking had been living up to the theoretical advantages others have attributed to it, if it really saved agencies substantial time and avoided litigation, overworked agency officials might well be expected to use it quite extensively. Yet even though the number of negotiated rulemakings has increased somewhat in the past few years, the practice remains -- presidential and congressional mandates notwithstanding -- confined to the tiniest fraction of all federal regulations. In light of the outcomes negotiated rulemaking has seen in terms of its two main goals, such infrequent reliance on negotiated rulemaking would seem to make sense. At the agency that has used negotiated rulemaking the most, the evidence to date shows that negotiated rulemaking saves no appreciable time nor reduces the rate of litigation. In fact, negotiated rulemaking most likely consumes a greater total amount of time and has resulted in a higher rate of legal filings than would otherwise be expected.

When viewed against the backdrop of 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 do not derive 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. My research strategy has been entirely consistent with the claims of those who have sought to demonstrate the success of negotiated rulemaking by comparing its outcomes with those of informal rulemaking.[216] The main difference is that past claims of the apparent success of negotiated rulemaking have been based on partial data and unsubstantiated beliefs about prevailing litigation rates. The surprising results reported here have simply resulted from a much more comprehensive effort to assess the comparative claims long made in support of regulatory negotiation by documenting 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 consider potential limitations and criticisms which might be made of this analysis of negotiated rulemaking's impact on

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215 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.

216 See, e.g., National Performance Review, supra note ___.

the regulatory process. In the following section, I discuss the potential threats to the validity of any impact analysis of a policy or procedural intervention. I show why in this case we can be reasonably assured that any potential threats tend to set up negotiated rulemaking to succeed in reducing time and litigation, not fail as it has. The findings from my analysis are telling ones, I subsequently suggest, in what they have to say about the nature of regulatory policymaking in U.S. as well as about the wisdom of investing substantial resources in the quest for consensus. I explain why negotiated rulemaking has so far failed to meet proponents' expectations and conclude by drawing out the implications this study holds for future reliance on formal procedures aimed at the achievement of consensus in the regulatory process.

A. Assessing This Assessment

In this study, I have found that negotiated rulemaking has not had any discernible impact in reducing either rulemaking time or litigation. In making this determination, it was necessary to compare what happened to negotiated rules with what would likely have happened in the absence of the negotiated rulemaking process. 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 resulted in litigation. Since these rules were obviously not promulgated in the absence of negotiated rulemaking, we can only infer what the counterfactual outcome would have been in the absence of negotiated rulemaking. The need to draw inferences about the counterfactual is inherent in any effort to evaluate the impact of a policy or procedural intervention.[217]

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 could be randomly distributed, leaving the only remaining difference between the two that of negotiated rulemaking or its absence.[218] Any difference in outcomes could be

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217 L. Mohr, Impact Analysis for Program Evaluation 3 (1988).

218 Of course, even if we could randomly assign rules to negotiated rulemaking, doing so would only allow us to analyze the impact of a different form of negotiated rulemaking than the kind currently employed at the EPA -- namely a kind where formal negotiation is required or imposed on agency managers. This would certainly be more akin to the use of negotiated rulemaking at the Department of Education and other agencies for which Congress has mandated the use of negotiated rulemaking. See supra note ___. Yet if formal negotiation were randomly assigned, we might expect less support from agency managers assigned to the negotiation process which would presumably decrease the likelihood that the negotiation process was a success. With EPA, the voluntary nature of the selection process probably creates some bias in favor of the success of negotiated rulemaking, when compared with mandated negotiation. Rules that are self-selected for formal negotiation presumably have the kind of support that would tend to make negotiated rulemaking more, not less, successful. To address this source of bias, it would in principle be possible to assign rules randomly to negotiated rulemaking from among those nominated by agency staff for the

easily tested to determine whether it resulted from the intervention of negotiated rulemaking.[219]

Of course, agency rules have not been 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.[220] As with any ex post evaluation of a policy intervention, an analysis of the impact of negotiated rulemaking must unavoidably face the possibility of selection bias, the situation where the sample of negotiated rules is in some relevant sense not representative of the sample of conventional rules against which it is compared.[221] The non-random 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 toward litigation, at least when compared with the average rule implemented through informal rulemaking.[222]

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procedure. For a discussion of the potential threats to validity associated with voluntary selection, see L. Mohr, Impact Analysis for Program Evaluation 170-78 (1988).

219 With 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 be thought to affect timeliness or litigation.

220 Moreover, not only do the agencies self-select the rules for negotiation, they also control whether to continue a negotiation process once started. As Table 1 showed, a number of agencies have withdrawn either rulemakings or negotiated proceedings even after publishing a notice of intent to use negotiated rulemaking. Searching the Federal Register, I could find two rules that EPA has promulgated for which it either abandoned or rejected negotiated rulemaking earlier in the rulemaking process. Fuel & Fuel Additives Registration Regulations, 59 Fed. Reg. 33,042 (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 negotiated rulemaking process after publishing a notice of intent to negotiate). Both of these rules resulted in the filing of petitions for judicial review. Ethyl Corporation v. EPA, No. 94-1516 (D.C. Cir. 1994) (fuel & fuel additives rule); Alabama Power Co. v. EPA, 40 F.3d 450 (D.C. Cir. 1994) (nitrogen oxides rule). The outcomes in these rules the agency chose not to negotiate support the tendency I describe later in the text for agencies to select rules for negotiated rulemaking that are less likely to be challenged.

221 See, e.g., G. King, R. Keohane, & S. Verba Designing Social Inquiry: Scientific Inference in Qualitative Research 128-138 (1994); L. Mohr, Impact Analysis for Program Evaluation 163-184 (1988).

222 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 rules have been promulgated following an attempt to use formal negotiation could mean that the average outcomes associated with these rules were affected by chance rather than by the presence or absence of negotiated rulemaking. While small sample sizes can rule out making confident inferences based 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 owing to a small sample size present would present more of a problem if negotiated rulemaking did appear to reduce time or litigation. For example, when the National Performance Review (NPR) claimed a lower litigation rate for ten of EPA's negotiated rules, supra note __, the sample size made it extremely difficult to reject the conventional null hypothesis and conclude that negotiated rulemaking caused the asserted reduction in litigation. The fact that the NPR claim also failed to take into account missing information, of course, only makes it more reasonable to infer that negotiated rulemaking has not had its intended impact.

Selection bias is a possible limitation of any ex post evaluation, but its potential presence need not paralyze us from drawing reasonable inferences based on the available evidence. In analyzing the impact of negotiated rulemaking on its two main goals, it is necessary to be mindful of the possibility of selection bias but important to consider how the possibility of such bias might affect 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 is it is helpful to consider variables which are likely to be associated 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 for purposes of publishing its regulatory agenda and complying with executive orders requiring OMB review. Although the terminology in the executive order on regulatory review has changed in the Clinton Administration, for ease of reference I treat as "significant" those rules that are published in the semi-annual regulatory agenda. I consider as "major" those significant rules which would be considered as major under the standards of Executive Order 12,291, most notably those rules having an annual economic impact of more than $100 million.[223] With respect to rulemaking time, Kerwin and Furlong have found that rulemaking takes longer for major and significant rules than for minor rules.[224] With respect to litigation, it is generally known that disputes having a greater impact on parties' interests also have a greater tendency to end up in court.[225] Empirical research confirms his tendency for disputes over agency regulations.[226] As noted in Part II of this paper, the litigation rate for significant EPA rules is higher than that for all EPA rules.[227] 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%; the rate for major RCRA and Clean Air Act rules during the similar period 1983-1991 was 57%.[228]

Since rulemaking time and the prospects for litigation increase with the overall significance level of EPA rules, it is helpful to check 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 negotiated disproportionately tended to be the major rules issued by an agency, it would be more appropriate to compare these rules with

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223 E.O. 12291, E.O. 12866.

224 Kerwin & Furlong, supra note __, at 124.

225 See, e.g., Cooter & Rubenfeld, Economic Analysis of Legal Disputes and Their Resolution, 27 J. Economic Literature 1067 (1989).

226 See Coglianese, Litigating within Relationships, supra note __, at 742 n.3.

227 See supra note __ and accompanying text.

228 See Cary Coglianese, Challenging the Rules, supra note __, at 96. This subset of major rules under these two statutes contained about one-third of all major EPA rules completed during the period.

the outcomes for major rules established without negotiated rulemaking. Of course, 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 the major rules under RCRA and the Clean Air Act. Yet such a comparison is not warranted here.

Upon examination, 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.[229] In contrast, during the period 1983-1990 federal agencies promulgated an average of 39 major rules each year.[230] With respect to EPA, four of its 12 completed negotiated rulemakings were classified as major, even though one of these (the woodstoves rule) imposed no net costs on the economy.[231] 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%).[232] Moreover, the four major rules subject to negotiated rulemaking were only a small fraction of the total major rules issued by EPA during the same time period.[233] 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 those most significant rules included in my study of EPA litigation and in Kerwin and Furlong's study of EPA rulemaking time.[234]

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229 Asbestos-Containing Materials in Schools, 52 Fed. Reg. 41826 (1987); Clean Fuels (Oxygenated and Reformulated Fuels), 59 Fed. Reg. 7716 (1991); Transportation for Individuals with Disabilities, 56 Fed Reg. 45584 (1991); Control of Volatile Organic Chemical Leaks/Hazardous Organic NESHAP, 59 Fed. Reg. 19402 (1994); Oil Spill Vessel Response Plans, 61 Fed. Reg. 1052 (1996).

230 Office of Management and Budget, Regulatory Program of the United States Government 706 (1992) (Exhibit 4).

231 Asbestos-Containing Materials in Schools, 52 Fed. Reg. 41826 (1987); Clean Fuels (Oxygenated and Reformulated Fuels), 59 Fed. Reg. 7716 (1991); Control of Volatile Organic Chemical Leaks/Hazardous Organic NESHAP, 59 Fed. Reg. 19402 (1994). The woodstoves rule was also classified as "major" under Executive Order 12,291, but only because the rule had the potential to significantly increase prices for certain stoves or affect the competitive position of certain firms within the woodstoves market. New Source Protection Standards for Residential Wood Combustion Units, 53 Fed. Reg. 5860 (1988). The EPA determined that any increased costs associated with more efficient woodstoves would "be more than offset by cost savings from the need for less firewood and for fewer chimney cleanings." Id.

232 Fifteen of the 51 major and significant rules studied by Kerwin and Furlong were major, or 29 percent. Kerwin and Furlong, supra note __, at 123.

233 OMB reports that EPA has issued an average of six major rules each year.

234 The comparison with the entire population of significant rules is more reliable than selecting only a sample of these rules. Mohr, supra note __, at __. 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 selection bias in the control group as well as the treatment group. For a brief description of the Kerwin and Langbein study, see supra note __.

Even though negotiated rules have not taken up a large share of EPA's major rules, I still checked the outcomes of the agency's negotiated rules with the outcomes of its major rules. Even doing this, however, negotiated rulemaking does not appear to have had any notable effect of decreasing time or litigation. In their study of EPA rulemaking, Kerwin and Furlong report rulemaking time for major rules broken down by four program offices within the agency. The average time it took EPA to complete its dozen negotiated rules (1,013 days) exceeded the average time for major rules issued by three of the four program offices that Kerwin and Furlong studied.[235] Moreover, the average time for the three major negotiated rules issued under the Clean Air Act substantially exceeded the average time for overall major air rules reported by Kerwin and Furlong.[236]

When the litigation rate is broken down separately for major and significant rulemakings, negotiated rulemaking still shows no appreciable impact. 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 percent. Although the number of rules in these subsets declines further when EPA's negotiated rules are divided according to their level of significance, this additional analysis only serves to confirm the conclusion that negotiated rulemaking has not achieved its goals.

These data provide further assurance that selection bias has not set negotiated rules up to fail in terms of time and litigation. Moreover, if any selection bias does exist in the types of rules selected for negotiated rulemaking, it has undoubtedly tended in the opposite direction -- namely 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 which would have had less of a tendency for time delays or litigation. 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

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235 See Kerwin & Furlong, supra note __, at 136 (appendix B).

236 Kerwin and Furlong report a start-to-finish average of 648 days for the four major air rules in their sample. Id. at 136 (appendix B). One of these major rules was the woodstoves rule for which EPA used negotiated rulemaking. The average time for the three air "reg negs" -- woodstoves, equipment leaks, and reformulated gasoline -- came out to 1,225 days (over a year and a half longer). In responding to an earlier version of this paper, 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. 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 Federal Register (July 5, 1990), there is still no measurable time savings for these major rules from negotiated rulemaking. See Open Meeting of the Negotiated Rulemaking Advisory Committee: Fugitive Emissions from Equipment Leaks, 55 Fed. Reg. 27680 (1990). Even using this blatantly 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 time reported by Kerwin and Furlong for major air rules. 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, although it should be kept in mind that my time data for negotiated rules probably understate to some extent the full rulemaking time measured by Kerwin and Furlong. See supra note __ and accompanying text.

when its success can be more assured.[237] 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.[238] The Negotiated Rulemaking Act incorporated some of these conditions and now requires agencies, before convening a negotiated rulemaking process, to determine if a rule meets the stated conditions for success.[239]

One such condition is the presence of only a limited number of affected parties. Harter specifically stated that "negotiation 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."[240] The Negotiated Rulemaking Act specifically directs agencies to consider whether the rule affects only "a limited number of identifiable interests."[241] The EPA recommends formal negotiation only where the parties are "reasonably few in number."[242] Not surprisingly, the EPA rules that affect the broadest number of organizations have never been selected for negotiated rulemaking. The EPA did not use negotiated rulemaking to develop its current proposed revisions to the NAAQS for particulates and ozone.[243] The EPA also avoided negotiated rulemaking for its programmatic rules under RCRA, including those listing hazardous wastes[244] or issuing criteria for toxicity characteristics.[245] Each of these programmatic rules affected a wide range of interests and, perhaps not surprisingly,

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237 See, e.g., Harter, supra note __; Perritt, supra note __, at 1642-1646; Susskind & McMahon, supra note __, at 138-140; Pritzker & Dalton, supra note __, at 37-40.

238 Harter, supra note __, at 42-52.

239 5 U.S.C. § 583. As early as 1982, the Administrative Conference recommended that agency convenors "conduct a preliminary inquiry to determine whether a regulatory negotiating group should be empanelled," expressly considering factors related to its success and proceeding with the negotiation only if is determined to be "appropriate." Administrative Conference of the United States, Recommendation 82-4, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.82-4 (19__). Agencies have conducted a pre-negotiation screening of rules even before the practice was essentially required by the Negotiated Rulemaking Act. See Prizker & Dalton, supra note __, at 40, 45-47; Eisner, supra note __, at 374.

240 Harter, supra note __, at 46.

241 5 U.S.C. § 583 (a)(2). See also Administrative Conference of the United States, Recommendation 82-4, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.82-4 (19__); Administrative Conference of the United States, Recommendation 85-5, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.85-5 (19__).

242 EPA Regulatory Negotiation Project, 48 Fed. Reg. 7494, 7495 (1983).

243 61 Fed. Reg. 65,638 (1996); 61 Fed. Reg. 65716 (1996).

244 53 Fed. Reg. 31,138 (1988); 54 Fed. Reg. 26,594 (1989); 54 Fed. Reg. 48,372 (1989).

245 55 Fed. Reg. 11,798 (1990).

also elicited petitions for judicial review.[246] In contrast, EPA's negotiated rules, while they have certainly presented difficulties of their own, have stood below the agency's large programmatic rules in terms of their scope and importance.[247] Each of the negotiated rules has affected only a limited number of parties, even sometimes just a single industry, precisely as the agency's own guidelines suggest.[248] 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." [249]

Other criteria long prescribed for selecting rules for formal negotiation presumably have a similar effect of making negotiated rules less likely to take a long time and 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;"[250]
- "[A] reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time,"[251]
- A determination that "the negotiated rulemaking will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;"[252]

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246 API v. EPA, 906 F.2d 729 (D.C. Cir. 1990) (1st Third Rule); CMA v. EPA, No. 89-1531 (D.C. Cir. 1989) (2d Third Rule); Chemical Waste Management v. EPA, 976 F2d 2 (D.C. Cir. 1992) (3d Third Rule).

247 The Negotiated Rulemaking Act recommends limiting rulemaking committees to 25 members. 5 U.S.C. § 585. 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 in the text.

248 EPA's negotiated rules have targeted specific industries, such as woodstove manufacturers, the chemical industry, petroleum refiners, and automobile manufacturers. They have also focused on single substances in limited realms, such as asbestos in public schools or disinfectant byproducts in drinking water. 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.

249 U.S. Environmental Protection Agency, An Assessment of EPA's Negotiated Rulemaking Activities 12 (1987). See also Fiorino, Regulatory Negotiation as a Policy Process, 48 Pub. Admin. Rev. 764 (1988) ("[T]he negotiation process is more reliable and legitimate when it is applied to the resolution of 'how to' rather than 'what' decisions.").

250 48 Fed. Reg. 7494, 7495 (1983). See also Administrative Conference of the United States, Recommendation 82-4, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.82-4 (19__); Harter, supra note __, at 47; Perritt, supra note __, at 1644; Susskind & McMahon, supra note __, at 140.

251 5 U.S.C. § 583(a)(4).

252 5 U.S.C. § 583(a)(5).

- "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;"[253]

- "The participants in the negotiations should be willing to negotiate in good faith;"[254]

- "No party will have to compromise a fundamental value;"[255]

- "The parties are likely to participate in negotiations as an alternative to litigation."[256]

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

When only about 35 percent of the EPA's most significant rules ordinarily end up in court, we can reasonably 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. While selection bias is a potential concern in any impact analysis, the data reveal no discernible bias of negotiated rules toward the most significant rules and the selection criteria established by EPA show that any remaining bias within the category of significant rules tends to set negotiated rulemaking up to succeed. 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. Reassessing the Quest for Consensus

Why has negotiated rulemaking failed to achieve its principal objectives? At least three reasons explain why 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, negotiated rulemaking seeks the achievement and maintenance of a

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253 48 Fed. Reg. 7494, 7495 (1983). See also Kirtz, supra note __, at ___.

254 Administrative Conference of the United States, Recommendation 82-4, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.82-4 (19__).

255 Pritzker & Dalton, supra note __, at 38. See also Administrative Conference of the United States, Recommendation 82-4, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.82-4 (19__); Harter, supra note __, at 49-50; Perritt, supra note __, at 1645; Susskind & McMahon, supra note __, at 139.

256 48 Fed. Reg. 7494, 7495 (1983).

consensus which the pluralist politics of the regulatory state can easily disrupt. Third, conventional rulemaking has been more effective than we thought, particularly in avoiding litigation. In this section, I explore these reasons and conclude that over the years negotiated rulemaking has become 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 unclear or ineffectual statutes did.[257] They might also argue that delays have not been caused by the negotiations themselves -- which have sometimes been concluded over several months' time -- but from delays within the agency after the negotiations have ended.[258] Whatever the merits these claims may have on their own terms, such attempts to shift the cause of litigation or time delays away from the negotiated rulemaking process ultimately miss the point. Although there is reason to think that negotiated rulemaking can cause additional conflicts in the administrative process, a matter I explore more fully in this section, 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.[259] If all of negotiated rulemaking's failings can be attributed to other aspects of the regulatory process, that would by no means constitute even a faint 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.

Despite the many hopes for negotiated rulemaking, it has shown itself incapable of preventing conflict underlying regulatory delays and petitions for review. In aiming to

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257 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. Of course, problems do arise in statutes 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 informal rulemaking. Had the Clean Air Act's definition of "source," for instance, been drafted in such a way as to clarify the EPA's discretion over its so-called "bubble policy" (a rule promulgated without a formal negotiated rulemaking process) it is doubtful that the legal challenges that led to the Supreme Court's Chevron decision ever would have ensued. Chevron v. NRDC, 467 U.S. 837 (1984). 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 informal rulemaking.

258 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 how agencies have implemented this procedure in practice. Although this argument may well have some surface appeal, it obviously demands a clear showing of what exactly administrators could have done differently in these cases, keeping in mind the many demands on them from inside and outside government. If negotiated rulemaking's success hinges on the existence of some Herculean administrator, it obviously cannot be considered a realistic means of hastening rulemaking or preventing litigation.

259 Of course, it may well be that sometimes nothing else could have prevented them either. As Susan Rose-Ackerman has suggested, in some instances of statutory incoherence there is no form of administrative process that can eliminate the incentives of parties to seek a judicial interpretation of a statute. See Rose-Ackerman, supra note __, at ___. Even though using negotiated rulemaking in such instances might not create the incentives to seek judicial review, neither would it prevent them either.

achieve consensus over the substance of regulations, negotiated rulemaking has long been considered a means of reducing conflict in the regulatory process. Yet seldom recognized have been the ways in which formal negotiation can actually foster conflict. A complete explanation for the performance of negotiated rulemaking needs to take into account how negotiated rulemaking can contribute to conflict between the agency and outside organizations affected by federal regulations. Negotiated rulemaking's ability to create new sources of conflict necessarily limits its effectiveness. These new sources of conflict stem 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 who will participate as members of 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 see themselves affected by the rule. Although the Negotiated Rulemaking Act insulates the agency from judicial review of its decisions about membership on negotiated rulemaking committees,[260] the exclusion of groups from membership on the committees does add a source of discontent not otherwise present in notice-and-comment rulemaking. The decision to use a select committee whose representatives will develop a draft rule appears to have the effect of attracting even closer scrutiny by organizations not represented at the negotiating table.

Not surprisingly, an agency like EPA has been far from immune from criticism from those who were not invited to participate on the agency's negotiation committees. In the EPA's asbestos rule, the negotiations were temporarily halted while additional parties sought to participate in the negotiations.[261] In the disinfectant byproducts negotiation, the chlorine industry took the position that it had been "unfairly excluded" from full participation in the negotiated rulemaking.[262] As I have already shown, the reformulated gasoline rule elicited legal challenges from a tank truck trade association which was not represented on the negotiated rulemaking committee, [263] as well as trade challenges from two countries not included on the committee.[264] The negotiations over the Grand Canyon visibility rules and the wood furniture manufacturing rule also garnered litigation by groups not participating on the negotiation committee.[265] It only takes one organization to upset a consensus built on unanimity or to file a petition for judicial review. With this in mind, even a small number of excluded parties can pose a threat to the effectiveness of negotiated

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260 5 U.S.C. § 590.

261 See, e.g., Participants and Facilitators Discuss Negotiation of EPA's Proposed Rule on Asbestos in Schools, 1 Alternative Dispute Resolution Report (BNA) 154 (July 23, 1987).

262 Environmental, Industry Groups Clash on Issues in SDWA Reauthorization, 27 Envt. Rptr. (BNA) 266 (May 17, 1996).

263 See supra note __ and accompanying text.

264 See supra note __ and accompanying text.

265 See supra note __ and accompanying text.

rulemaking. Interestingly, 12 percent of the respondents in Kerwin and Langbein's study reported that they had to "press" the EPA to let them participate.[266] 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.[267] 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.

In addition to conflict over committee membership, negotiated rulemaking adds the extent to which the agency's final decision reflects the consensus reached by the parties. Sometimes these conflicts can arise between the parties over what they agreed to in the negotiated agreement. In the disinfectant byproducts rule, for example, the representative from the Natural Resources Defense Council reportedly criticized the American Water Works Association (AWWA) for subsequently urging EPA to set action levels rather than the more stringent maximum contaminant levels. AWWA argued that it was not changing its position since it only agreed to support maximum contaminant levels once the agency could provide adequate microbial data.[268]

At other times, conflicts can arise over what was not agreed to in the negotiated agreement -- what might be termed expressio unius disputes. These disputes raise the issue of whether a negotiated agreement's silence on an issue reflects an agreement for the agency not to take any action.[269] In the reformulated gasoline case, the American Petroleum Institute (API) charged that EPA's decision to impose second phase nitrogen oxide standards contravened the agreement, which was silent on the issue.[270] The EPA rejected API's administrative petition, concluding that the agreement's silence allowed the agency to proceed without retreating from the consensus.[271]

More frequently, conflicts arise over the extent to which the agency has remained committed to the stated terms of the negotiated agreement. 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.[272] In the case of a student loan rulemaking, loan servicers went to court charging that the Department of Education breached its

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266 Kerwin & Langbein, supra note __, at 11.

267 Id.

268 Id.

269 Of course, sometimes the silence is just an oversight, as the compressor issue apparently was in the equipment leaks negotiation.

270 See supra note __.

271 See supra note __.

272 See, e.g., Renewable Fuels to Make Up 30 Percent of Oxygenates in Reformulated Gas Program, 25 Envt. Rptr. (BNA) 462 (July 8, 1994).

commitments made during the negotiated rulemaking.[273] More recently, the Department of Interior's Minerals Management Service received similar complaints when it decided to reopen the comment period over its natural gas royalties rulemaking.[274] These conflicts over the commitment of the agency to a negotiated consensus obviously cannot arise in the absence of negotiated rulemaking.

The third way in which negotiated rulemaking can accentuate conflict is by heightening the sensitivity of the parties to adverse portions of a rule. In one sense, this third source of conflict is related to the first two. Negotiated agreements raise expectations in a way that would not otherwise occur. When the agency does not follow the negotiated agreement, the presence of the agreement adds an additional reason for dissatisfaction. Consider a conventional rulemaking in which an agency fails to adhere to the input provided by an affected organization. In that case, the organization has only to complain about how adversely the rule affects its interests. If the agency were to enact the very same rules, but did so in contravention of part of a negotiated agreement, the organization will confront both the adverse effects of the rule as well as the impression that it has been "sandbagged."[275] Such a response 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 would be the same in both cases, we would expect that the group would perceive its interests to be more severely aggrieved in the second case.[276] Similarly, we might expect groups excluded from a negotiation committee to react more acutely to adverse portions of a rule when they know it has been developed in explicit consultation with other groups having potentially divergent interests.

In a more general sense, we might expect negotiated rulemaking to heighten conflict simply because of the intensity with which group's scrutinize the rules that are the subject of negotiations. One side benefit often attributed to negotiated rulemaking is the learning that it facilitates, both by agency staff and interest group representatives.[277] The learning results from the additional time and resources groups devote to discussing and providing

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273 USA Group Loan Services Inc. v. Riley, 82 F.3d 708, 714 (7th Cir. 1996).

274 Crow, Reg-Neg Regrets, 94 Oil & Gas Journal 26 (May 27, 1996).

275 Id. (quoting an oil industry representative's response to the MMS action to reopen the comment period on negotiated rule).

276 Prospect theory would suggest that negotiators ascribe additional negative value to losses from outcomes they had already secured. See, e.g., Kahneman & Tversky, Prospect Theory: An Analysis of Decision under Risk, 47 Econometrica 263 (1979); D. Kahneman, P. Slovic, & A. Tversky, eds., Judgment under Uncertainty: Heuristics and Biases (1982). In addition, procedural justice theory would suggest that negotiators would view the fairness of the negotiating procedure at least as importantly as they did the resulting outcome. See, e.g., E.A. Lind & T. Tyler, The Social Psychology of Procedural Justice (1988).

277 See, e.g., Fiorino, Regulatory Negotiation as a Policy Process, 48 Public Administration Review 764, 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.").

input on rules developed through negotiation.[278] When groups invest these additional resources into negotiation, it is possible that they will learn about other aspects of the rule that will adversely affect their interests. It is also possible that the more time a group invests in a rulemaking proceeding, the less willing it will be to overlook what it perceives to be the imperfections in the rule.

The quest for consensus has the side effect of contributing new sources of conflict to the regulatory process, which limits negotiated rulemaking's ability to reduce rulemaking time and litigation. Yet even if a search for consensus could avoid creating new kinds of conflicts, it still would have a difficult time succeeding in many cases. Any procedure that depends for its success on the maintenance of a consensus over the development of regulations is, given the realities of the federal regulatory process, fighting the odds.[279] Any consensus developed 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 come undone.

Even if all the participants in the negotiated rulemaking reach a consensus among themselves, the agency must still prepare a preamble to a proposed rule and provide an opportunity for public comment on that proposal.[280] Some of this additional detail may depart from what the parties thought they agreed to in the negotiation. If the public comment period is to be meaningful at all, the agency must consider the possibility of changing the proposed rule in light of any negative comments it receives on a proposal, even if that means retreating somewhat from the consensus.[281] During the development of the proposed and final rule, the agency can also receive input from the Office of Management and Budget or other executive branch officials which may lead it to retreat

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278 Participation in negotiated rulemaking demands much from all participants, including agencies, industry groups, and citizens groups. See, e.g., U.S. Environmental Protection Agency, Costs of Regulatory Negotiations to Date (1987), reprinted in D. Pritzker & D. Dalton, supra note __, at 273-274 (indicating that the average negotiated rulemaking imposes over $200,000 additional costs on the agency); Kerwin & Langbein, supra note __, at 36 (industry groups spent an average of nearly $700,000 to participate); Regulatory Negotiation: Four Perspectives, DR Forum 8, 9 (Jan. 1986), reprinted in D. Pritzker & D. Dalton, supra note __, at 858-861 (statement by environmental attorney David Doniger that participation "in a regulatory negotiation takes about 10 times as much of our resources as commenting on a rule."); Olpin, Doniger, Crohn, Schatzow, Calvani & Eisner, Applying Alternative Dispute Resolution to Rulemaking, 1 Admin. L. J. 575, 579 (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).

279 Cf. Rose-Ackerman, Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation, 43 Duke Law Journal 1206, 1209 (1994) ("A regulatory negotiation is not analogous to a therapy session or a friendly, disinterested discussion of policy options.").

280 The negotiated rulemaking process only supplements the rulemaking procedures under the Administrative Procedure Act. Negotiated Rulemaking Act of 1990, 5 U.S.C. § 581 (19__). 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 agreed to in the negotiation.

281 See, e.g., Crow, supra note __ (reopening of comment period in light of criticisms of the Minerals Management Service's negotiated proposal).

from the consensus.[282] Congress may step in and attempt to pressure the agency or change the underlying statute in such a way as to disrupt the consensus.[283] As we have seen, groups may challenge the rule in court which could lead the agency to change the rule further.[284] Even if a consensus reached during the early stages of rulemaking could remain intact through all these subsequent stages, the agency can always decide at a later time to revise the rule.[285]

Negotiated rulemaking is constructed on the hope that everyone who could ever conceivably take an interest in a rule will come to a complete agreement on every particular. If that could happen across government as well as throughout the interest group community, a rule could theoretically sail through the entire rulemaking process without much fuss. Yet what is theoretically possible here is different than what is realistically possible. It only takes a few well-placed managers higher up in the agency, or a concerned official in OMB, the White House, or Congress, tugging at the consensus before it can begin to unravel. It only takes one interest group excluded from the negotiation, or one included but defecting group, to begin the process of unraveling the consensus from outside government. Any heightened sensitivities created by the process of reaching a consensus may serve to accelerate the process of unraveling further. In practice, maintaining consensus in the administrative process looks a bit like building a house of cards.[286]

Of course, negotiated rulemaking is not quite a house of cards, but more like a the addition of an extra bedroom. It simply adds an early attempt at consensus-building to the preexisting regulatory structure. This existing regulatory structure, with its multiple decision-makers and routes of influence, most assuredly contributes to rulemaking time and

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282 Both the Bush and Clinton Administrations, for example, took a close interest in the reformulated gasoline rule, prompting the companion renewable oxygenates requirement which the petroleum industry viewed as a breach of the negotiated rulemaking process. See, e.g., Ethanol Mandate Raises Question: Can Reg-Neg Process be Trusted?, 27 Air & Water Pollution Report (July 4, 1994); Proposed Market Mandates for Ethanol: Hearings Before the Senate Energy and Natural Resources Committee, 103 Cong., 1st Sess. (1994) (statement of Mary Nichols, Assistant EPA Administrator of Air and Radiation) (stating that President Bush "directed" EPA to propose a renewable oxygenates program). The involvement of the Bush Administration also reportedly led the EPA to abandon negotiated rulemaking for its nitrogen oxides rule. See Lavelle, EPA Calls Off Sessions on Rules, National Law Journal 3, 28 (July 8., 1991). Courts have recognized intra-executive branch input as a legitimate part of the notice-and-comment rulemaking process. See, e.g., Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

283 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. See National Science Research Council, supra note __, at 187.

284 See supra notes ___ and accompanying text.

285 The Department of Education has made subsequent changes to rules that emerged from negotiated rulemaking. See 60 Fed. Reg. 61,790 (1995) (changes to origination criteria in direct loan regulations); 60 Fed. Reg. 61,820 (1995) (changes to direct loan program's income contingent repayment plan).

286 Cf. K. Arrow, Social Choice and Individual Values (2d ed. 1963) (even simple majoritarian decision-making can be unstable).

allows for the possibility of litigation, at least when compared to an alternative with a single, unreviewable decision-maker. This regulatory structure also works against the consensus process itself by providing multiple steps at which consensus might break down. We could imagine a way of fixing the inherent fragility of consensus, and thereby providing conditions for which negotiated rulemaking would succeed, but such a fix would lead to a vastly different governmental system than the one that has evolved under the U.S. constitution.[287] From this perspective, it is not surprising that negotiated rulemaking has failed to achieve its principal objectives. Negotiated rulemaking does not change at all those features of the regulatory process that make it 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 ultimately raises expectations about delivering that which is difficult to achieve in a policy environment long characterized as a process of "endless bargaining."[288]

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 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."[289] 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.

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, by and large, of working with each other in the context of conventional rulemaking.[290] If theories about agency capture,

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287 Funk, supra note __. The agreements of negotiated rulemaking committees could easily be sustained if these committees, and only these committees, possessed unreviewable lawmaking authority. Yet if such a dramatic step could be implemented, and no proponent of negotiated rulemaking of course 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, of course, but merely pointing out the inherent limits in the U.S. administrative state of any consensus-based solution to the purported problems of regulatory delays and litigation.

288 R. Dahl, A Preface to Democratic Theory 150 (1956).

289 Peter L. Strauss, Presidential Rulemaking 25 (April 17, 1997) (unpublished manuscript).

290 Cf. Coglianese, supra note __.

revolving doors, and policy networks over the years have had any truth to them at all, regulators have always held discussions with affected organizations and their representatives.[291] In his text on rulemaking, 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 about which the group was concerned.[292] The alternative to negotiated rulemaking's is certainly not, and never has been, an agency that locks itself up in a room to settle on a rule by itself. Indeed, the term "conventional" rulemaking is itself a misnomer because agencies possess a wide array of procedures for involving the public in the rulemaking process.[293]

The failure of formal negotiated rulemaking -- with its quest for consensus -- by no means speaks of a failure of negotiation writ large. One reason for the failure of negotiated rulemaking is almost certainly the relative degree of success of agency efforts at using less formal means of negotiation and input within the context of conventional rulemaking. These less formal methods provide agencies with information about technical aspects of regulation as well as about the interests of affected parties.

The aggregation of interests has sometimes been considered a guiding purpose of the administrative process.[294] Negotiated rulemaking has specifically been presented as a more congenial forum for identifying interests because participants can make tradeoffs on various issues.[295] While it does allow tradeoffs, it by no means is any guarantee against bluffing and position taking either. Since negotiated rulemaking encourages a give-and-take mentality, 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. Conventional rulemaking allows organizations to participate as actively or inactively as they like. Their level of participation gives the agency additional information about the importance of the rule to the

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291 See, e.g., Heclo, Issue Networks and the Executive Establishment, in A. King, ed., The New American Political System (1978): Meidinger, Regulatory Culture: A Theoretical Outline, 9 Law & Policy 355 (1987); P. Quirk, Industry Influence in Federal Regulatory Agencies (1981); Stigler, The Theory of Economic Regulation, 2 Bell J. Economics & Management Science 3 (1971).

292 C. Kerwin, Rulemaking: How Government Agencies Write Law and Make Policy 202 (1994).

293 See, e.g., C. Kerwin, supra note __, at 171-173 ("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 (March 4, 1992), reprinted in D. Pritzker & D. Dalton, supra note __, at 48, 50 ("Spectrum of Consultation and Consensus-Building Approaches").

294 See Stewart, The Reformation of American Administrative Law, 89 Harv. L. Rev. 1667 (1975).

295 See, e.g., Harter, The Political Legitimacy and Judicial Review of Consensual Rules, 32 Amer. U. L.Rev. 471, 476 (1983); Susskind & McMahon, supra note __, at 139-140.

organization, information that can get truncated when an entire rulemaking proceeds by committee.[296]

For a long time, it has been assumed that without negotiated rulemaking, litigation and conflict over regulation is virtually inevitable.[297] My analysis shows that this is not the case which suggests that agency managers are much more adept at anticipating interests and managing conflict in the normal rulemaking process than ordinarily assumed.[298] If conventional rulemaking works better than we thought but negotiated rulemaking fares worse, there would seem to be little future in negotiated rulemaking. Of course, it may be that negotiated rulemaking offers the possibility of achieving other benefits than the reduction of time and litigation. Negotiated rulemaking holds out the potential for participants to learn from each other and develop a greater civic awareness. There may well be something to this.[299] After all, it is difficult to imagine that anyone who attends intensive sessions focused on a regulation will not come away having learned something. Participants in negotiated rulemaking devote an extraordinary amount of their time and resources into the rule.[300] Kerwin and Langbein find that, during the time of negotiations, organizations spent an average of 26% of all their available resources on the negotiations, with environmental groups reporting the highest proportion (50%).[301] They report that "big business" spent on average $432,000 for research expenses, and over $250,000 for consultants and lawyers.[302] We should hope with investments such as these that participants are learning.

Yet since negotiated rulemaking is characterized by its quest for consensus, we should ask whether any learning depends on that quest. In other words, do we need negotiated rulemaking in order to promote learning? Or can it be equally achieved with discussion-oriented sessions that do not seek the achievement of a consensus? To show that negotiated rulemaking adds these side benefits, we would need to compare it with other equally intensive agency workshops. Proceedings that negotiation consultants like to call

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296 Cf. R. Hall, Participation in Congress 3, 7, 237 (1996) (discussing role of revealed intensities in legislative politics).

297 See supra notes __ and accompanying text.

298 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 which suggests that EPA is able to avoid fostering conflict between at least these groups in many cases.

299 See, e.g., Kerwin & Langbein, supra note ___, at 13 ("Participants generally report that they learned a great deal during the course of a negotiated rulemaking.").

300 See supra note __.

301 Kerwin & Langbein, supra note __, at 36.

302 Id. These resource commitments can be compared with the cost of challenging a major EPA rule which typically amounts to $150,000 to $250,000 for industry groups. Cary Coglianese, Challenging the Rules: Litigation and Bargaining in the Administrative Process, manuscript (1994); American Petroleum Institute v. U.S. EPA, 72 F. 3d 907 (D.C. Cir. 1996)

"facilitated joint brainstorming" proceedings also aim at information exchange and learning, but they do so without the quest for consensus.[303] 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. As Philip Harter has written, "it is precisely the ability to reach closure on critical issues that separates [negotiated rulemaking] from a mere advisory committee or other consultative process."[304] 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 not led to any more closure than has the 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 -- for example, better information, shared learning, or heightened feelings of community -- have over the years been side attractions to the main event. Policymakers and scholars have focused most of their attention on negotiated rulemaking's potential to reduce litigation and shorten rulemaking time, benefits that necessarily depend on the successful maintenance of consensus. The quest for consensus has for many years held out the promise of achieving these two primary benefits.

Experience has so far shown otherwise. Negotiated rulemaking does not appear any more capable of reducing regulatory time and avoiding litigation than does the rulemaking process ordinarily used by agencies. The one 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

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303 Roger Fisher & Landrum Boling, Facilitated Joint Brainstorming, GMG Update (Spring 1995). See also Susskind, Chayes, & Martinez, Parallel Informal Negotiation: A New Kind of International Dialogue, Negotiation Journal 19 (Jan. 1996).

304 Harter, First Judicial Review of Reg Neg a Disappointment, supra note __, at 13.

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 first seem. At the same time 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 easily sustained in the regulatory process. The multiple avenues of input and oversight in the regulatory process increase the likelihood of policy changes that depart from an 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 without formal negotiation in crafting rules that avoid litigation. 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 paper shows that negotiated rulemaking has not lived up to its promising potential to save regulatory time or prevent litigation. From this perspective, it appears sensible that agencies have so infrequently relied on negotiated rulemaking and inadvisable that Congress and the President 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 have once 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 will remain the more sensible approach to making regulatory decisions.

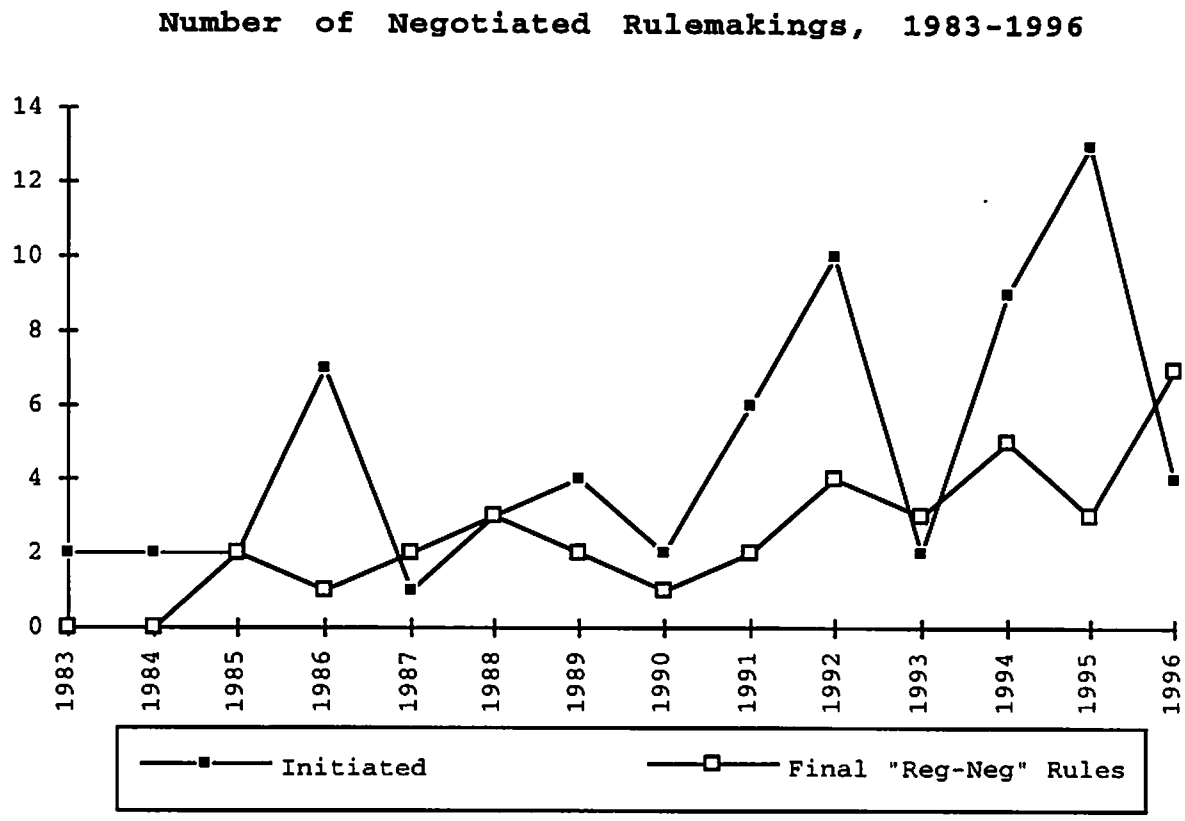
Table 1

Federal Agencies' Use of Negotiated Rulemaking, 1983-1996

	Agency	Abandoned	Pending	Final
1.	Architectural and Transportation Barriers Compliance Board	0	1	0
2.	Department of Agriculture	1	1	1
3.	Department of Education	1	0	6
4.	Department of Energy	1	0	0
5.	Department of Health and Human Services	0	1	1
6.	Department of Housing and Urban Development	0	1	1
7.	Department of Interior	3	4	1
8.	Department of Labor	0	2	2
9.	Department of Transportation	0	4	7
10.	Environmental Protection Agency	3	3	12
11.	Equal Opportunity Employment Commission	0	1	0
12.	Farm Credit Administration	0	0	1
13.	Federal Communications Commission	1	1	2
14.	Federal Trade Commission	1	0	0
15.	Interstate Commerce Commission	1	0	0
16.	Nuclear Regulatory Commission	1	0	1
17.	Pension Benefit Guaranty Corporation	0	0	1

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 the 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 has yet to be promulgated. The category of "final" represents those negotiated rulemakings that have resulted in at least one final rule, notwithstanding subsequent efforts to make further modifications, revisions, or additional rules.

Figure 1



Sources: Federal Register notices and reports of the Administrative Conference of the United States.

Table 2

Negotiated Rulemaking as Percentage of All Final Rules

	Final Rules	Final Negotiated Rules	Percent
1983	3933	0	0.00%
1984	3515	0	0.00%
1985	3351	2	0.06%
1986	3286	1	0.03%
1987	3295	2	0.06%
1988	3442	3	0.09%
1989	3416	2	0.06%
1990	3174	1	0.03%
1991	3184	2	0.06%
1992	3022	4	0.13%
1993	3183	3	0.09%
1994	3567	5	0.14%
1995	3473	3	0.09%
1996	3762	7	0.19%
TOTAL	47603	35	0.07%

Sources: The numbers for final rules were obtained from computer searches conducted by year in the Lexis FEDREG database. The numbers for final negotiated rules were obtained from searches in the Federal Register, supplemented with a review of reports of the Administrative Conference of the United States.

Table 3

Time for Completed Negotiated Rulemakings, 1985-1996

Agency	Negotiated Rulemaking	Date "Reg-Neg" Announced	Date Final Rule Published	Number of Days
Transportation	Flight Time Requirements for Crewmembers	5/12/83	7/18/85	798
Labor	Occupational Exposure to Benzene	7/8/83	9/11/87	1526
EPA	Noncomformance Penalties under 206(g) of CAA	4/24/84	8/30/85	493
EPA	Emergency Pesticide Exemptions under s 18 of FIFRA	8/3/84	1/15/86	530
EPA	Worker Protection Standards for the Agricultural Pesticides	9/19/85	8/21/92	2528
Labor	Occupational Exposure to 4,4'-Methylenedianiline	10/22/85	8/10/92	2484
EPA	NSPS for Residential Wood Combustion Units	2/7/86	2/26/88	749
EPA	Underground Injection of Hazardous Wastes	7/14/86	7/26/88	743
EPA	RCRA Permit Modifications	7/16/86	9/28/88	805
Transportation	Nondiscrimination on the Basis of Handicap in Air Travel	8/22/86	3/6/90	1292
NRC	Submission & Mgt. of Records Related to Waste-Site Licensing	12/18/86	4/14/89	848
EPA	Asbestos-Containing Materials in Schools	1/13/87	10/30/87	290
Education	Financial Assistance to Meet Special Educational Needs	7/12/88	5/19/89	311
EPA	Control of Volatile Organic Chemical Equipment Leaks	4/25/89	4/22/94	1823
Transportation	Uniform System for Handicapped Parking	6/12/89	3/11/91	637
Agriculture	Control of Scrapie	7/13/89	12/9/92	1245
Education	Carl D. Perkins Vocational & Applied Technology Regns.	10/12/90	8/14/92	672
Transportation	Transportation for Individuals with Disabilities	1/11/91	9/6/91	238
EPA	Clean Fuels (Oxygenated and Reformulated Fuels)	2/8/91	2/16/94	1104
Transportation	Oil Spill Vessel Response Plans	11/18/91	1/12/96	1516
EPA	NES for Coke Oven Batteries	1/15/92	10/27/93	651
FCC	Provision of Non-voice, Low Earth Orbit Satellite Services	5/1/92	12/23/93	601
Farm Credit Admin.	Assessment and Apportionment of Administrative Expenses	5/6/92	2/23/93	293
Education	Higher Education Amendments of 1992	8/26/92	4/29/94	611
EPA	Disinfectant Byproducts in Drinking Water	9/15/92	5/14/96	1337
EPA	Wood Furniture Maunfacturing Regulations	11/25/92	12/7/95	1107
Education	Direct Student Loan Regulations	12/28/93	12/1/94	338
Education	Guaranty Agency Reserves Regulations	1/19/94	11/25/94	310
Transportation	Roadway Worker Protection	8/17/94	12/16/96	852
Education	Helping Disadvantaged Students Meet High Standards	10/28/94	7/3/95	248
FCC	Hearing Aid Compatible Telephones	11/23/94	8/14/96	630
HHS/Interior	Indian Self-Determination	12/29/94	6/24/96	543
HUD	Operating Subsidies for Vacant Public Housing Units	1/3/95	2/28/96	421
Transportation	Chicago Drawbridge Operations	4/10/95	10/6/95	179
Pension Benefits Guar. Corp.	Reportable Events	8/11/95	12/2/96	479

Table 4

Litigation Rates for Significant

Clean Air Act and RCRA Rules, 1980-1991

	CAA	RCRA	Total
Rules	141	79	220
Challenges	43	34	77
Litigation Rate	31%	43%	35%

Sources: 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 Agenda. 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 decision which can be reported, data were obtained from the docket records at the D.C. Circuit.