Unorthodox Rulemaking: The New Regulatory Process in Agencies and the Administrative Procedure Act

There's a tale we tell about administrative rulemaking; a tale told to every administrative law class that animates virtually all of the doctrine. But the problem is that this tale simply isn't true. Contemporary rulemaking in administrative agencies has evolved far beyond conventional understandings of agency behavior that dominate doctrine, scholarship, and the Administrative Procedure Act. Put simply, we have reached the point where "unorthodox rulemaking" is, in fact, the norm, and yet everyone still hews to orthodoxy. And while the academy has started to document piecemeal departures from conventional wisdom; until now, no one has offered a cohesive, affirmative account of the new regulatory process.

This project seeks to describe the new regulatory process from start to finish. The tale we tell about administrative rulemaking is so wrongheaded that even straightforward questions like who writes what, and when, have unexpected answers. Five stages of Affordable Care Act implementation illustrate agency departures from the conventional rulemaking account. First, contrary to prevailing notions of *legislative* drafting, agencies authored the text of many of their own delegations in the ACA, and the President often bypassed congressional delegation by commanding agency action through Executive Order. And unexpectedly, agencies were often not the recipients of delegation. The political branches often punted agency regulatory authority to states and private entities; or created opportunities for presidential control by delegating to multiple agencies sharing an overlapping regulatory space.

Second, following ACA enactment, the pre-proposal stage—a phase entirely ignored by the conventional rulemaking account—became the determinative stage for policy development, and the site of extensive White House, intra-agency, and special interest bargaining. Contemporary agencies promulgating politically salient policies became institutionally indistinguishable from the White House—a vision of *Presidential Administration* on steroids. Third, as a result of earlier White House involvement, OIRA review of ACA regulations became a mere formality, especially in instances where agency disbursements of public benefits were ill-suited to cost-benefit analysis. This account stands in stark contrast to conventional visions of rigorous and exacting OIRA review.

Fourth, departures from the conventional rulemaking account also permeated agency choice of regulatory form. In contrast to conventional accounts where agencies pursue regulatory alternatives out of practical necessity, agencies implementing the ACA deployed an arsenal of legal tools to bypass notice-and-comment requirements when it was politically advantageous to do so. Fifth, when agencies engaged in notice-and-comment rulemaking, they segregated political decision-makers from career regulatory drafters, outsourced notice-and-comment requirements to independent contractors, and subjected regulatory outputs to internal clearance with built-in veto points for political appointees. This description diverges sharply from the conventional account of a more technocratic, notice-and-comment process controlled by career staffers in program offices.

But while health reform may seem like an extreme example of agency rulemaking when the legislative process is broken, this project illustrates how the ACA is merely a stand-in for widespread agency practice throughout the Fourth Branch. I demonstrate the astonishing frequency of unorthodoxy across agencies since 2008, arguing that the ACA not only illustrates unorthodox rulemaking, but reflects a permanent restructuring of the regulatory process. Legislative gridlock and the hyper-politicization of policy in the Executive branch have had a hydraulic effect, opening alternative channels that have become permanent and enduring features of the regulatory landscape.

This project concludes with a series of key question of how unorthodox rulemaking should influence the trajectory of administrative law and the Administrative Procedure Act. Conservative commentators portend Chevron's demise, suggesting that expansions of agency authority have exceeded reasonable limits. While some dismiss this argument as partisan gamesmanship, commentators have correctly intuited a broader shift in agency behavior—highly-evolved agencies have outgrown the doctrine and text of the Administrative Procedure Act (APA). And as courts begin to the grapple with the newly-minted products of unorthodox rulemaking, the time is ripe for a reconsideration of our administrative legal framework.

This project identifies three tightly embedded assumptions in current doctrine that reflect a misunderstanding of contemporary agency practice, weighs the harms and benefits in maintaining these legal fictions, and suggests two paths: (1) a series of amendments to the APA that better govern the intensely political character of modern administrative agencies; and (2) a reframing of Chevron and arbitrary and capricious review that realigns administrative law with the new regulatory process. Prospective amendments to the APA include requiring transparency and disclosure in the pre-proposal phase, requiring transparency and disclosure for White House involvement in the notice-and-comment process, limiting White House Coordination over agencies in an overlapping regulatory space, and specifying procedural requirements for alternative regulatory forms.