communicated this policy to the public. The Court held that, while this policy might be a reasonable response to limitations in the program's funding, it could not be implemented through ad hoc decisions; the BIA had to issue valid legislative rules, which would be published in the Federal Register, before it could cut off the claimants' eligibility in this fashion. A relatively systematic approach to dispensing public assistance payments was needed "so as to assure that [the agency's policy] is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries." Many commentators consider *Ruiz* irreconcilable with the *Chenery* line of cases, and the Court did not explain why Ruiz's case differed from [349]

that of many other statutory beneficiaries who might feel that an agency has not sufficiently spelled out the criteria by which it will dispense benefits.

While *Ruiz* is a unique case at the Supreme Court level, it was not without antecedents in administrative law. A handful of cases, decided under the due process clause, have held that an agency must make selections among applicants for scarce governmental benefits on the basis of "ascertainable standards." See Holmes v. New York City Housing Auth., 398 F.2d 262 (2d Cir. 1968) (applications for public housing); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) (applications for retail liquor licenses). As with *Ruiz*, these cases have not attracted much support in recent years.

In summary, agencies have almost complete freedom, in the absence of statutory restrictions, to choose between rules and orders as vehicles for policymaking. A few decisions have required rulemaking in order to ensure that applications for statutory benefits will be handled in a consistent and rational fashion. When *regulated* parties have raised the issue of mandatory rulemaking,

however, the Supreme Court has been entirely unreceptive. (Regulated parties have occasionally prevailed in lower court cases, but these cases have not seriously attempted to distinguish *Bell Aerospace* and probably cannot be reconciled with it. See, e.g., Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981).) Of course, despite the absence of judicial compulsion, most agencies have, as mentioned earlier, expanded their rulemaking activity tremendously during the past 350

two decades. Increasingly, therefore, agencies like the NLRB, which largely confine themselves to adjudicating, are aberrations in the federal administrative system. In fact, since the 1980s, even the NLRB has experimented with using rulemaking to streamline certain functions. The Board won an early confirmation of its power to do so in American Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991), but a recent Board rule requiring employers to post a notice informing employees of their rights under the National Labor Relations Act was held to exceed its regulatory authority. Chamber of Commerce of U.S. v. NLRB, 721 F.3d 152 (4th Cir. 2013).

1. G. PETITIONS FOR RULEMAKING

Section 553(e) of the APA provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." Section 555(e) requires agencies to give "prompt notice" of a denial of petitions "made in connection with any agency proceeding" and also requires "a brief statement of the grounds of the denial." Some major cases on rulemaking and judicial review have been triggered by petitions for rulemaking. E.g., Massachusetts v. EPA, 549 U.S. 497 (2007). Somewhat related to petitions to amend or repeal rules is the process for re-examining existing rules, sometimes referred to as "lookback."

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1. H. CONCLUSION: RULEMAKING IN TRANSITION

One of this chapter's principal themes has been the courts' view that federal agency rulemaking should remain relatively free of procedural complexity. Due to

decisions such as *Florida East Coast*, *Vermont Yankee*, and *Sierra Club v. Costle*, agencies today can almost always develop rules without complying with the procedural expectations associated with trial-type hearings. Despite this trend in the case law, however, a number of prominent scholars have maintained that notice-and-comment rulemaking is in fact becoming increasingly cumbersome and time-consuming. See, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385 (1992). They attribute this development, which they sometimes call the "ossification" of the rulemaking process, to several factors. Both Congress and the White House now require agencies to conduct intensive analyses of the potential effects of significant proposed rules, with cost-benefit analysis becoming a dominant concern in major rulemaking. Both branches have also become very active in reviewing the merits of individual proposed rules. See Chapter 2 supra. In addition, the judicial branch has made rulemaking more difficult by engaging in intrusive review of agency rules on appeal. The rigor of the courts' "hard look" puts pressure on agencies to write lengthy explanatory [352]

statements and build comprehensive records to support new regulations. See pp. 116–119 supra.

These scholars argue that, because of these external forces, agencies are becoming increasingly reluctant to commence rulemaking proceedings in the first place. "Ossification" can cause an agency to rely more frequently on interpretive rules and policy statements (which it can adopt without following APA procedures); or to develop new policies through case-by-case adjudication; or simply to downplay programs that could be pursued only through rulemaking.

To be sure, there are also many observers who support the wide-ranging

analyses that the legislative, executive, and judicial branches have induced agencies to prepare in significant rulemaking proceedings. They see these requirements as a necessary response to deficiencies in the thoroughness and wisdom of agency policymaking. The fundamental problem, then, is to determine how society can maintain adequate controls on the rulemaking process while not interfering unduly with agencies' ability to carry out their assigned missions. The lack of consensus among administrative lawyers on this issue should not be surprising. As the crucible of some of society's most important collective decisions, the administrative rulemaking process has quite naturally emerged as a focal point for major debates over the future of the regulatory state. As our nation's politics have become more polarized, rulemaking procedures have become the focal point for disputes in Congress over the need [353]

for "regulatory reform," with Republicans supporting bills that would call for even more procedural steps and analytical requirements in rulemaking and Democrats resisting them.

[20] A further complication in the *National Advertisers* case was that Congress had directed the FTC to exercise its rulemaking authority through relatively formal procedures, resembling those used in adjudication; nevertheless, the proceeding clearly was designed to produce a rule, not an order, and thus the disqualification test for rulemakers was applicable.

[21] The court was also tolerant of pressures emanating from the legislative branch. See pp. 47–48 supra.