

Mark Seidenfeld

*Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*

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Abstract by Christine Parsadaian

This article suggests that ex-post constraints, if coupled with appropriate judicial review, provide agencies with the necessary flexibility to use their discretion when enacting various regulations. To construct his argument, the author first analyzes ex-ante restraints which he defines as binding rules that substantially limit agency action prior to the agency decision-making. He objectively proposes that the harms of ex-ante restraints are somewhat exaggerated since the agencies still can maintain a fair amount of flexibility in regulating. For example, though the executive and legislative branches tend to micromanage agencies, such micromanagement has not led to a regulatory crisis by itself. In fact, more than the type of external constraints imposed on agencies, the author suggests that an agency's own internal rules create some of its worst constraints.

However, the author also notes that while the elimination of ex-ante restraints may lead to agencies deviating from policy, maintaining ex-ante restraints will create mechanical results and may fail to promote the purpose of various regulations. Thus, he argues that society must strike a delicate balance where agencies have appropriate discretion to best implement policy in individual situations and where their discretion is not overly broad as to contradict the policy of the general polity. He suggests that to reach the delicate balance required for optimal societal regulation the judiciary should impose ex-post constraints by checking the credibility of particular agency decisions after that have been made. Focusing judicial review on an agency's rationale for a decision, the author finds, will mitigate the concern regarding interest group influence, political influence, and other biases associated with the elimination of ex-ante constraints.