

Abstract

Rulemaking's Promise:

Administrative Law and Legal Culture in the 1960s and 1970s

Reuel E. Schiller

In his most recent article, Professor Schiller provides a thoughtful historical review of the informal rulemaking process over the last quarter century. In so doing, Professor Schiller demonstrates how many of those involved in rulemaking processes heralded the advent of informal rulemaking in the 1960's as providing much anticipated improvements to the then current agency procedures. However, despite this initial anticipation, much of the excitement behind the changes was chilled by stiff judicial review and intervention with regard to those rules promulgated through the new and innovative informal rulemaking process. As Professor Schiller demonstrates, this collision climaxed in the 1970's, as more intense judicial scrutiny became the norm.

In chronicling this collision, Professor Schiller provides a thought provoking look at the opposing forces that existed between the administrative state and judiciary, and how those forces – which often found their basis in the very reforms they sought to achieve – tended to work in opposition to the goals informal rulemaking set to achieve. Professor Schiller comes to the conclusion that it was as a direct result of this collision that informal rulemaking underwent ossification throughout the 1970's, until the Supreme Court stepped in to prevent the further imposition of judicially created rulemaking requirements under the APA. Throughout his analysis, Professor Schiller places considerable emphasis on the actions of the Administrative Conference of the United States and the courts of the District of Columbia Circuit, which provide excellent sources to demonstrate the competing forces that led to the ossification of the informal rulemaking process.