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Regulatory Explosion: Observations on Understanding Utah Administrative Rules

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I. INTRODUCTION

The purpose of this article is straightforward and simple: to provide some understanding and underscore the importance of state administrative rules in Utah. This understanding is important because government regulation, largely the province of state agency rules, is often misunderstood and therefore mistrusted. Understanding is also important to attorneys in administrative practice and to public administrators because in a mere fifteen years state administrative rules have grown—no, exploded—into a body of law that exceeds the volume produced by the legislature in the past 92 years.[1] Yet, probably few attorneys can correctly define "administrative rule" and only a minority of Utah judges and state administrators can accurately describe the place of rules in the hierarchy of law. Rules today—and predictably tomorrow—govern much of our economic, social, and political life and affect the legal rights and privileges of every citizen of this state. While a complete dissertation on rules and rulemaking is beyond the scope of this article, an introduction to state administrative rules will be of benefit as an opening to discussion of a relatively new field of Utah law.

Before turning to the origins, impact, relevant features of and reasons for administrative rules, some clarification of the subject is necessary, particularly because many readers may have never knowingly encountered an "administrative rule." Administrative rules are those laws enacted by state executive branch agencies under the procedures of the Utah Administrative Rulemaking Act, Title 63, Chapter 46a of the Utah Code. By definition, rules affect the legal rights and privileges of the public or other state agencies. They are the state equivalent of federal regulations enacted under the Federal Administrative Procedure Act (the "APA") and incorporate by reference a portion of the *Code of*

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1. Set in the same type-face, the Code Co. editions of the Utah statutes and the Utah Administrative Code have 3,063 and 3,512 pages of text, respectively.

Federal Regulations. Utah rules are codified in the *Utah Administrative Code* which first appeared in print in January 1987.[2]

II. Rapid Growth Nationwide

The reasons for the growth in state administrative rules, and their consequent impact on law, are obvious enough to require no lengthy explanation. While some might claim the regulatory explosion is evidence of some nefarious plot, most political scientists would probably agree that most of the expansion of rulemaking is simply government's attempted practical response to the astounding increase in complexity of American society over the last generation. While population has grown rapidly, and the variety of businesses, social organizations, technological innovations, and consequent societal impacts, have grown geometrically, the number of legislative lawmakers and lawmaking units (states, counties, etc.) have remained relatively static. Regulation of society, needed in some degree for its functioning, therefore, has increasingly become—for good or ill—the province of executive branch agencies. In effect, the "regulatory explosion" is largely due to the technological revolution and the compounding impact it has had, and continues to have, on our economy, society, and government.

In exploring this proposition further, it should be noted that the rapid growth in administrative rules began in earnest with the New Deal of the 1930's when an overwhelmed Congress began to delegate lawmaking powers to federal agencies on a vastly greater scale than before. The 1946 Federal Administrative Procedure Act formalized the process of agency rulemaking.[3] The resulting effects and present pervasiveness of federal agency regulation need no elucidation. Similarly to their federal counterpart, state legislatures also discovered they could not keep up with regulatory demand using the ponderous legislative process. They too began to delegate lawmaking power and enacted state administrative procedure acts. In recent years, federal transfer of many regulatory functions to states has accelerated state rulemaking.[4] And today, the larger volume of codified state law is rules, not statutes.[5]

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2. The state equivalent of the *Federal Register* is the *Utah State Bulletin*, which appears semi-monthly and carries all proposed rules, notices of effective date, and other legal notices. Under Utah law, in conformity with federal usage, "rulemaking" is written as a single word. Also, "rule" refers to state administrative rules and the noun "regulation" denotes federal regulations. *See* Division of Administrative Rules, Rulewriting Manual for Utah 5, 29 (1987).

3. 5 U.S.C. §§ 551-559 (1982). Undoubtedly the sponsors of the Act never would have foreseen today's Code of Federal Regulations expanding to 103,000 pages.

4. A. Bonfield, State Administrative Rule Making 3-4, 16-19 (1986).

5. The California administrative code, for example, contains some 35,000 pages.

A result of the legislative branch's transfer of power to agencies has been an almost unnoticed dichotomy of lawmaking. Perhaps unconsciously, legislators began to recognize they had neither the time nor expertise to provide highly complex or technologically sophisticated standards and procedures for their programs and requirements. They could not remain constantly in session to meet rapidly changing conditions and emergencies. Even if legislatures had the time and resources, reaching consensus on the specific criteria of statute application often proved an impossible or politically unrewarding task. Legislators, therefore, presumably concluded that they would provide the policy, the guidelines, and the limits by statute while the executive branch agencies, staffed by full-time administrators and experts, would fill in the details through rulemaking. However, exceptions to this dichotomy between legislative statute and executive branch rule abound. Few legislators feel comfortable with this transfer of power, or what some consider an abdication of responsibility. Nevertheless, most realize the necessity of agency lawmaking to avoid the cost, inefficiencies, and political consequences of a full-time, professional legislature.

III. Rapid Growth In Utah

Rulemaking is relatively new to Utah because our economy and social needs have not been as diversified as in larger states. Although the legislature delegated some rulemaking powers to agencies earlier, only in 1973 did lawmakers formalize the process with the Utah Administrative Rulemaking Act (Act).[6] Based on the 1961 Model State Rulemaking Act (MSAPA), the Utah Act provided for publication of proposed rules, a 30-day public comment period, publication of the adopted rule, and a 20-day waiting period before implementation. Because the Act required rules whenever agency activity affected public functions, agencies quickly discovered extensive rulewriting was necessary to comply with the law. The Public Service Commission needed rules to regulate utilities, the Tax Commission to specify filing and appeals procedures, and Social Services to provide standards for assistance payments. The State Auditor needed rules for local government audits and the Lt. Governor for elections. Even internal service agencies, like the Divisions of Finance and Personnel Management, required rules to regulate state employee travel and hiring practices. As the public or special interest groups demanded more regulation to meet new needs, agencies required more rules. Without listing all rule categories, suffice it to say that nearly every state agency found itself re-

6. Utah Code Ann. §§ 63-46a-1 to 63-46a-16 (Supp. 1987).

sponsible for regulating through rulemaking some aspect of nearly every Utah citizen's, or other state agency's affairs.

By 1973, the regulatory explosion had already affected state government, within six months agencies had filed 233 rules. The number of filings increased to an average of 632 per year, or nearly 2.5 per working day.[7] In 1985, attempting to keep up with the deluge of filings, the legislature reduced the requirements to one publication and a single 30-day comment period.[8] By 1986, the state had accumulated 17,400 single-spaced pages of rules, a massive, unmanageable volume of material enacted by 126 agencies.[9] A large portion of this material was not properly administrative rules. Procedural and content errors created vast potential for state legal liability. No compilation or readily accessible source for researching rules existed, either for agencies or the public. In short, Utah administrative rules were massive, pervasive, confusing, and inaccessible.

IV. The Response of State Government

In 1983, legislators became concerned enough with the expansion of state rulemaking to begin applying restraints. They suspected, sometimes with reason, that agency rules did not always carry out the intent of the authorizing statute. Consequent amendments to the Act established a "sunset" provision requiring review and re-enactment of rules after five years, and created a legislative Administrative Rules Review Committee to exercise oversight.[10]

These changes did not end legislators' worries. In 1987 a bill passed permitting the Review Committee to delay the effective date of rules pending consideration by the full legislature.[11] The governor vetoed the bill as a violation of constitutional separation of powers. In 1988 the legislature will consider a bill requiring rules to be approved annually by the full body of legislators as well as a proposed constitutional amendment similar to the 1987 bill.[12] These measures are forms

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7. In one two-week period in November 1987, agencies filed 115 rules and amendments. "Filing" includes amendments, repeals, temporary ("emergency") rules, as well as new rules.

8. H.B. 217, 46th Leg., Gen. Sess., 1985 Utah Laws 279.

9. Office of Administrative Rules, Report on the Administrative Code Project Pursuant to Governor's Executive Order of February 3, 1986, (February 5, 1987) [Hereinafter Report].

10. H.B. 25, 44th Leg., Gen. Sess., 1983 Utah Laws 1163. The legislature overrode a gubernatorial veto.

11. H.B. 178, 48th Leg., Gen. Sess., 1987 Utah Laws —.

12. H.B. 44, 49th Leg., Gen. Sess., 1988 Utah Laws —, and H.J. Res. 9, 47th Leg., Gen. Sess., 1988 Utah Laws —, prefiled for the 1988 General Session. (Postscript: both bills failed to pass.)

of a legislative veto over administrative rules, and demonstrate the belief of many legislators that the regulatory explosion has gone too far.

Another outgrowth of legislative concern over administrative rules was the creation in 1985 of the Office (later "Division") of Administrative Rules in the Department of Administrative Services. Prior to 1985, State Archives had been responsible for recording and publication of rules. The Administrative Rules Review Committee, in particular, was not satisfied that Archives adequately policed or provided access to rules. Therefore, over some executive branch resistance, the legislature established a separate office to provide rules with more "visibility and accountability."[13] The Division registers publishes and compiles agency rules, and generally administers the Act. While the Division has editing powers similar to those of legislative staff, it has no authority, unlike many states' offices of administrative law, to review rules for content or legal conformity.[14]

Lack of any kind of rule compilation, and the consequent public difficulty in learning what rules affected them also concerned legislators. Therefore, in 1985, the legislature mandated and funded development of Utah's first administrative code; and, in 1987, the legislature provided a statutory mechanism for periodic recodification of rules.[15] Since its creation, a primary objective of the Division of Administrative Rules has been to organize rules in an indexed and computerized code.

In 1986, the governor responded to the legislative initiative by ordering agencies to review and revise their rules using the Division's format, and prepare them as word processing documents for the new code.[16] Agencies reduced 17,400 pages to approximately 7500 (a 61 percent reduction), by eliminating archaic, redundant, and inappropriate material.[17] On July 1, 1987, the Division repealed all existing rules and enacted the first *Utah Administrative Code.*[18] The code resides on a continuously-updated computer data base and is printed in a four-volume paperbound set. Therefore, through concern over the growth of administrative rules, the legislature and the governor have provided a

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13. The words are those of the Committee Senate Chairman during the hearing on location of the administrative rules function within the state organization, December 4, 1984. The Governor did not sign House Bill 27 (which made Administrative Rules a Division) of the 1987 General Session.

14. *See* UTAH CODE ANN. § 63-46a-9.5, 10, 10.5 (Supp. 1987).

15. Authorized in H.B. 217, 46th Leg., Gen. Sess., 1985 Utah Laws 279, and H.B. 27, 48th Leg., Gen. Sess., 1987 Utah Laws —, respectively. *See* UTAH CODE ANN. §§ 63-46a-1, *et al.* and § 63-46a-10.5.

16. Governor's Executive Order of February 3, 1986.

17. REPORT, *supra* note 9, at 1-3.

18. STATE OF UTAH, UTAH ADMINISTRATIVE CODE 1987-1988 (1987).

new accessibility to rules for the expressed purpose of a more open, accountable, and efficient state government.

V. Understanding What An Administrative Rule Is

Notwithstanding the efforts of state government to reduce rules, make them more visible and accessible, and increase efficiency and accuracy in rulemaking, there remain confusion and misunderstanding about rules among the public, and more alarming, within the legal community. Just as many of our attorneys and public administrators enter practice with little or no training in administrative law, even more deficient is their knowledge of administrative rules. Any knowledge they may have about rulemaking is usually federal, not state. Yet, if they enter a practice in state or local public service, it will be state rules they are most likely to research, write, and follow from day to day, not federal regulations. These reasons warrant a closer scrutiny of what administrative rules are.

An administrative rule is a law enacted by an agency exercising its administrative—some say "legislative"—powers. A rule implements a legislative mandate by providing interpretation, standards, or procedures with which to apply the mandate. In effect, a rule is an extension of a statute, supplying those details of application not provided by the legislature. Unfortunately, the concept of an administrative rule provided by the 1973 Utah Administrative Rule-making Act was quite broad and vague and led to confusion in its application. Revisions of the Act in 1985 and 1987 have narrowed and specified the meaning and use of administrative rules.

By definition, an administrative rule must conform to four general criteria. A rule must (1) be "explicitly or implicitly required by state or federal statute, or other applicable law;" (2) have "the effect of law;" (3) "implement or interpret a state or federal legal mandate;" and (4) apply "to a class of persons or another agency."[19] Additionally and more specifically, rules are required when an agency's action "authorizes, requires, or prohibits an action," and "provides or prohibits a material benefit."[20] Rules are not broad policy guidelines, agency orders, adjudicative decisions dealing with specific persons and situations, nor internal management policies governing enrolled students, persons in state custody, or agency employees.

The key terms for understanding administrative rules are: "Implement or interpret," "class of persons," "material benefit" and "autho-

19. *Id.* at § 63-46a-2(13).
20. *Id.* at § 63-46a-3(2).

rizes, requires, or prohibits." Rules require preceding law, usually a statute, or possibly a constitutional provision or court order. The rule then *implements or interprets* this preceding law. Rules are therefore *dependent* on other laws and may not be created or exist in a vacuum. Rules part company with adjudicative actions and agency orders because they apply to a *class of persons,* not a specific plaintiff, applicant, or institution. "Class" is usually indicated by the term "all," as in "all applicants," "all refineries," or "all trucks over two tons." Furthermore, rules are confined to those governmental actions that have some significant or *material* effect, that *authorize, require or prohibit* activity. Rules are not purely advisory, informative, or descriptive; they are laws which substantively affect the public's legal rights and privileges.

Despite efforts to make the definition of "administrative rule" clear and precise, knowing when rules are necessary is still a delicate exercise for most state agencies. Frequently the legislature makes the choice simple by including in the governing statute the phrases "by rule" or "shall make rules." More often, the legislature mandates a function without mention of the word "rule," and the agency must turn to the Act to determine what rules, if any, are necessary to carry out that activity. The Act has the effect of providing a broad mandate—and therefore authority or power—to an agency to make rules whenever any of its activities meets the criteria for rulemaking. The purpose of this grant of authority is to ensure that agencies do not carry on an activity, which affects legal rights or privileges, without giving the public the opportunity to review and comment upon it. Therefore, the Act states that rules are required by law "explicitly or implicitly" to account for the frequent lack of explicit rulemaking authority outside the Act itself.

For example, there may be no reference to a state university's rulemaking authority in its governing statutes; yet the university conducts many statutorily authorized activities clearly requiring some kind of uniform regulation. The university's administrators must therefore look to the Act for guidance on which regulations require rulemaking and which do not. The Act specifically exempts "agency action [applying] only to internal agency management" and "students enrolled in a state education institution."[21] Therefore, the administration's regulation of employee and student conduct is "policy," as defined by the Act, and does not require rulemaking procedure. Admissions, public parking, and public use of facilities, however, involve classes of persons (e.g.,

21. *Id.* at § 653-46a-3(4).

"all applicants") other than enrolled students or employees. Regulation of these "material benefits" for these classes require rulemaking.

Because the range of governmental activity is virtually limitless, no definition of when rulemaking is required is likely to cover all possibilities. Therefore, required rulemaking is often not clear-cut. While the agency may turn to counsel or the Division of Administrative Rules for an opinion, the Act implicitly leaves to agency discretion the decision of when rules are necessary.

However, presuming the legislature's mandate is reasonably clear, and that the statute does not specifically require rules, a question remains: Why have rules? Or, at least, why have the time and resource-consuming requirements of a rulemaking act? Why not leave to agency discretion the proper interpretation and implementation of the will of the legislature? The reasons are several and are central to understanding administrative rules.

VI. WHY HAVE RULES?

A. *Due Process Rights And Administrative Discretion*

One reason for rulemaking is that the courts have long frowned upon unbridled administrative discretion when agency action does, in fact, affect legal rights.[22] While it is again not within the scope of this analysis to discourse exhaustively on a complex issue, the relationship between rulemaking and due process merits examination.

Just as it is a given assumption of this article that rules on elections, business practices, and welfare benefits affect Utah citizens politically, economically, and socially, equally obviously, agency actions subject to rulemaking do, by definition, affect legal rights and privileges. Constitutional due process, therefore, would appear to be reason for rulemaking procedures of publication, comment and hearing. However, courts have been reluctant to impose a general Fourteenth Amendment due process requirement on state rulemaking. A few state courts have imposed rulemaking as a due process requirement in specific situations. Interestingly, the Oregon Supreme Court, while finding rulemaking a necessary prerequisite to agency action for other reasons, ruled in *Megdal v. Oregon State Board of Dental Examiners,*[23] that agency legislative action is not subject to constitutional due process safeguards.

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22. K. DAVIS, 2 ADMINISTRATIVE LAW TREATISE chs. 8, 9 (2 ed. Supp. 1984) (explores extensively the issue of discretion).

23. 288 Or. 293, 605 P.2d 273 (1980). Arthur Bonfield, in his article, *Mandating State Agency Lawmaking by Rule, supra* p. 161 184, discusses this case and others involving the due process issue.

However, even if courts have not uniformly imposed due process on agency regulation, the Utah legislature has, and the courts generally, and the Utah courts specifically, have held agencies strictly accountable for fulfilling the procedural requirements of rulemaking. In a series of cases, culminating in 1986 with *Williams v. the Public Service Commission of Utah,*[24] and *Lane v. Board of Review of the Industrial Commission of Utah,*[25] the Utah Supreme Court overturned agency actions holding, "the rules of an administrative agency are not valid unless the agency complies with the rule-making [sic] procedures prescribed in the Rule Making [sic] Act." Other states' courts have been equally stern in requiring agency compliance with even the smallest detail of rulemaking procedure. One state overturned an agency action simply because the pertaining rule was not properly on file with the Secretary of State.[26]

Other courts have gone further in imposing a strict interpretation of rulemaking requirements for agencies. The New Jersey Supreme Court held that "an agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making [sic] process,"[27] rather than when the agency thinks a rule is necessary. The same court reasoned elsewhere that "the chief function of executive agencies is to implement statutes through the adoption of coherent regulatory schemes,"[28] . . . "the function of promulgating administrative rules and regulations lies at the very heart of the administrative process."[29] The clear message of these cases is that once the legislature has imposed a "due process" requirement on agencies, the courts will strictly enforce it.

Even in the absence of statutorily-mandated rulemaking, the courts' trend seems to be to force a "due process" requirement on agencies by overturning actions judged excessively discretionary. At the federal level, court limitation of administrative discretion reached it apex only one year after rulemaking formally began in Utah in *Morton v. Ruiz.*[30] In this decision, the Supreme Court established that (1) the power to administer a program requires rules, and therefore discretion without a guiding rule can be held invalid; and (2) agency policy is "ineffective" unless embodied in rules. In *Ford Motor Company v.*

24. 720 P.2d 773 (Utah 1986).
25. 727 P.2d 206 (Utah 1986).
26. Cuevas v. Coughlin, 130 A.D. 2d 888, 516 N.Y.S.2d 131 (App. Div. 1987).
27. Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313, 478 A.2d 742 (1984).
28. General Assembly v. Byrne, 90 N.J. 376, 385, 448 A.2d 438, 443 (1982).
29. *Id.* at 376, 448 A.2d at 443.
30. 415 U.S. 199 (1974).

FTC,[31] a federal court ordered the FTC to "change the law" by rulemaking rather than by order whenever the change had "widespread impact." Other circuit and Supreme Court decisions have by no means closely followed *Ruiz* and no consistent federal doctrine on administrative discretion has emerged.

State courts have required rulemaking more regularly while limiting discretion. Because of their lower visibility and for other reasons described at length by Arthur Bonfield, state courts, as in the New York and New Jersey cases cited, appear more ready to equate rulemaking with due process.[32] The trend may well be as one writer, Kenneth Culp Davis, predicts: "the law may be in the early stages of a massive movement toward judicially required rulemaking that will reduce discretion unguided by rules or precedents."[33]

A danger, lies however, in excessive rulemaking—the reaction to court curbs on administrative discretion. Straightjacketing agencies in rules destroys the flexibility necessary to meet constantly-changing circumstances. Overly restrictive rules may create formalism, ritualism, and waste in administration. Fortunately, courts generally decline to substitute their judgment for an agency's on the content of rules, particularly on administrative interpretation of governing statutes.[34] Therefore, within the limits of the Constitution, the statutory definition of rule, and the rulemaking procedures, agencies have retained discretion over the substantive aspects of their mandated functions.

Unlike most state rulemaking acts, the Utah Act addresses directly the issue of due process rights versus administrative discretion. A clause unique to the Utah Act, ensures agency discretionary capability. Section 63-46a-3(8)(a) reads: "This chapter is not intended to inhibit the exercise of agency discretion within the limits prescribed by statute or agency rule." This easily overlooked, somewhat cryptic paragraph is the key to the entire Act and to understanding administrative rules in the state of Utah. It embodies the underlying philosophy of the Act. Its intent is to instruct administrators and the courts alike that agencies shall set boundaries to their actions, to the exercise of their discretionary functions, through administrative rules. The courts in turn shall permit discretion, barring unconstitutional or obviously illegal activity, within the parameters of those rules.

A second paragraph in the Act reinforces the rulemaking (or due process) requirement. Section 63-46a-1(6) requires that agencies "enact

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31. 673 F.2d 1008 (9th Cir. 1981).
32. *See* BONFIELD, *supra* note 4, at 118-23.
33. 2 DAVIS, *supra* note 22, at 128.
34. 2 DAVIS, *supra* note 22, at 421.

rules incorporating the principles of law established by final [administrative] adjudicative decisions" within 90 days.[35] The purpose of the admonition is not to require codification of all adjudicative decisions, but only those establishing "final," rule-like "principles of law" of general applicability. Yet clearly, the intent is to proscribe creation of administrative common law and to require agencies to regulate by rule rather than adjudication.[36] Unequivocally in Utah, administrative activity must be governed by statute or rule.

B. Other Reasons For Rules

To the question "why have rules," then, we have, so far, two answers: because the courts require them through their decisions regarding due process and agency discretion, and because the legislature, through the Utah Act, mandates them.

Additionally, rules serve to protect the interests of the state and its taxpayers. Allowing an administrator to eschew rulemaking is to invite liability for unwarranted agency action and consequent damage in an age of unparalleled tort suits against "deep-pocketed" government. The administrator who overlooks or violates his rules risks, not only the taxpayer's money, but his own—the crumbling bulwark of sovereign immunity and indemnity statutes notwithstanding.[37] In short, as public administrators we have rules for self-protection, for the guidance of our employees, and as a defense against damage suits where an employee may have strayed, unauthorized, beyond the limits of the rule.

Finally, there is a better, simpler, and more positive reason for administrative rules than those listed above. Rules and the rulemaking process open government to the governed. Public comment periods and hearings permit citizen input and participation in government. They open government to new ideas and consideration of consequences that may be otherwise overlooked. Published rules inform the public about the inner workings of government, lifting a sometimes perceived mysterious veil of secrecy. They give people more confidence in and less sus-

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35. After preparation of this article, this section of the Act was amended in the 1988 Legislative Session. 88 Utah State Bulletin 20 (March 15, 1988). Other than changing the time limit to 120 days, the amendment did not substantively affect the clause as discussed in the text.

36. In footnote 166 of his paper prepared for this issue, Arthur Bonfield critiques the Utah provision concluding the requirement is "defective." Ironically, it was at Professor Bonfield's suggestion that the paragraph was inserted in the 1987 amendments to the Rulemaking Act. Unfortunately—from Bonfield's presumed viewpoint—the original language taken from the 1981 MSAPA suffered mutations in drafting, hearings, and a floor amendment—not unexpected of a controversial measure in the legislative process. However arguably, the paragraph still fulfills the purpose of the original model, if perhaps more strictly.

37. P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 144 (1983).

picion about their state institutions. Rules allowing for proper administrative discretion create better-educated and efficient employees, and better-run programs. Rules can help make government activity uniform and equitable, and insure against arbitrary or capricious application of law or bestowal of benefits. Open government is accountable government, more productive and more in tune with public need. Administrative rules, for all the burden and expense they may create for regulators and the regulated alike, may be viewed as a public benefit.

VII. Conclusion

Administrative rules are not intrinsically good or bad. Widespread distrust of agency rules probably has more to do with ignorance of them then their actual merits. The intent of this article has been to inform the reader and, hopefully, remove some of that misunderstanding.

The explosion in administrative regulation is due, after all, to the design of our governmental institutions coupled with the technological revolution and unprecedented growth in social-economic complexity. In Utah, growth in the importance of administrative rules is evidenced by their volume, pervasiveness, and by legislative actions to create procedures and institutions to keep them under control.

Rules are also important because they are laws which substantively effect the public's legal rights and privileges. Utah's statute governing rulemaking attempts to strike a balance between public rights and agency discretion. Our state has rules for essentially four reasons: (1) because the courts require them, (2) because the legislature mandates them through the Rulemaking Act, (3) to protect the state from unwarranted lawsuit, and (4) to provide public access to government.

In evaluating administrative rules, we should not mistake content for form. It may be that some rules handcuff the regulator, oppress the regulated, and subvert the legislative process, yet others protect individual rights, facilitate administration, and open government to the governed. Understanding administrative rules is the first step toward changing the former and promoting the latter in the best interests of the people of Utah.