Optimal Ossification

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Abstract

One of the dirtiest words in administrative law is "ossification"—the term used for the notion that procedural requirements force agencies to spend a long time on rulemakings. Ossification, however, is misunderstood. Even leaving aside the other benefits of procedures, delay itself can be valuable. For instance, procedural delay can operate as a credible commitment mechanism against change, thereby encouraging increased private participation in the regulatory scheme at a lower cost for the agency. Moreover, for the most significant rules, delay gives the public time to respond. When law changes too quickly, public confidence in it can decrease. To the extent that agencies benefit from public confidence, procedural delay thus can be valuable to the agency. At the same time, of course, delay is not always useful, and in any event, there can be too much of a good thing. Not all schemes need a credible commitment mechanism, and sometimes delay undermines rather than enhances public confidence.

The challenge, therefore, is not to eliminate ossification. Rather, the goal should be to maximize the benefits of delay while minimizing its costs. Hence, when evaluating proposals for reform, it is not enough to simply say "ossification." Instead, one must search for the optimal amount of ossification. This Article begins to sketch what that more complete analysis might look like.

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INTRODUCTION

"Ossification" is misunderstood—quite badly, in fact. When regulatory scholars discuss ossification, they are referring to the common notion that because of administrative law's procedural requirements, it takes agencies a long time to promulgate new regulations.[1] In administrative law circles, ossification is not a nice word. Rather, when legal scholars say "administrative law is ossified," what they usually mean is something like "administrative law is *broken*,"[2] or perhaps, resignedly, "it is too bad that rulemaking has become so procedurally burdensome, but at least the benefits of hard look review and the like are worth it in terms of the quality of the resulting regulations."[3] Sometimes, of course, those who dislike a particular rule or agency might say "thank goodness for ossification," on the theory that anything that makes it harder for the agency to act must be good.[4] But essentially no one says "administrative law is ossified—that's good news because delay itself can benefit agencies."

Yet that last position is the one I will defend. For purposes of this Article, "ossification" refers to the significant delay[5] that some say

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1 *See, e.g.*, Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 686 (2015) (although noting that its prevalence may be overstated, defining "ossification" as elements of administrative law like "hard look review" that are said to cause "excessive legal drag on agencies' ability to update policies with changing circumstances").

2 *See, e.g.*, Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 528 (1997) (lamenting that the ossification of the informal rulemaking system is undermining the system's efficiency); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1386 (1992) [hereinafter McGarity, *Some Thoughts*] (stating that ossification "is one of the most serious problems currently facing regulatory agencies"); Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to* Testing the Ossification Thesis, 80 GEO. WASH. L. REV. 1493, 1494 (2012) ("Ossification is a real problem that has a wide variety of serious adverse effects.").

3 *See, e.g.*, Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 489 (1997) ("Although I agree with the general thrust of the literature that the rulemaking process has become unnecessarily cumbersome, I fear that many of the proposed solutions will do more harm than good. In looking for solutions to the ossification of rulemaking, commentators have given short shrift to the original concerns that prompted the administrative law doctrines that they would abandon.").

4 *See, e.g.*, Michael A. Livermore, *Reviving Environmental Protection: Preference-Directed Regulation and Regulatory Ossification*, 25 VA. ENVTL. L.J. 311, 356 (2007) ("The one case where ossification is favored is when government is promoting a bad end . . . . [So] measures that slow down government and make it less effective will make people better off.").

5 *See, e.g.*, *supra* note 2. I do not define "ossification" as *too much* delay. By definition, if there is "too much" of something, we do not want more of it. Many who use the word "ossification" of course do think there is too much delay, which is why they use a disparaging term. Because "ossification" is so common in the literature, however, I choose to use it. Likewise, some question whether regulatory procedures, in fact, cause *significant* delay. *See infra* note 45

now characterizes at least some types of rules promulgated through informal rulemaking.[6] My position is straightforward: even leaving aside the important point that the procedural requirements that are said to cause ossification may be valuable enough in their own right to justify delay,[7] delay *itself* sometimes has proregulatory benefits. Indeed, I can think of at least two such benefits, each of which complicates the "ossification is altogether bad" story.

First, ossification can help agencies accomplish long-term objectives. I have explained elsewhere that because of procedural delay, agencies can lock in (or at least lock in to a greater extent) a regulatory scheme.[8] Because it is hard to change regulations (due to ossification), once a regulation has been "put on the books" through the rulemaking process, the associated policy is less likely to be changed than a policy that has not gone through that process.[9] This operates as a credible commitment mechanism against change, which in turn encourages greater public confidence in the scheme's durability—to the *agency's* potential benefit.[10] Agencies, after all, sometimes lean on private parties to accomplish regulatory goals.[11]

Even if an agency creates a robust incentive scheme, rational actors will be wary of investing capital if, for instance, the costs of such investment will not be recouped for a decade or more, but there is a risk that those incentives will disappear in, say, four years, when the next administration comes to town. Without ossification, the public must place a "discount factor"[12] on benefits that depend on the rule's long-term durability, which, at the margins, reduces some of the conduct the government hopes to encourage. Likewise, the larger that "discount factor" is, the more generous an agency's incentives must be to spur the same amount of participation.[13] Thus, the less trust there is in the durability of an agency scheme, the more the agency must sur-

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and accompanying text. The answer to that empirical question does not undermine my analysis. *See infra* note 50 and accompanying text.

6 *See, e.g.*, Pierce, *supra* note 2.

7 *See, e.g.*, Seidenfeld, *supra* note 3, at 521 ("In short, the direct effect of easing the standard of review would likely be not only decreased ossification, but also increased agency sloppiness. Increasing the overall level of deference that courts give to agencies can only relieve ossification at the expense of assurances of careful agency deliberation.").

8 *See* Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 116–17, 128–33 (2018).

9 *See, e.g.*, *id.* at 128–33.

10 *See, e.g.*, *id.* at 117.

11 *See* Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1038–43 (2007).

12 *See, e.g.*, Nielson, *supra* note 8, at 91.

13 *See, e.g.*, *id.* at 120–23.

render to induce the same amount of desired participation; for instance, the agency might pledge not to use its authority in certain ways if regulated parties act in agency-favored ways. In other words, in a world without ossification, there would be a category of rules that would not be as effective as they are in a world with ossification, at least not at the same price for the agency.

Second, and admittedly more ethereal, delay is valuable because it can enhance public acceptance of regulatory actions—in other words, agency "legitimacy."[14] For instance, ossification allows the public time to more fully understand what is happening and respond.[15] A moment's reflection confirms that knowledge is unevenly distributed across society; some people know more about certain things than others. Such specialized knowledge is useful when trying to understand regulatory proposals. To those steeped in the details of a policy, delay sometimes can be frustrating—why not benefit from a good policy as quickly as possible? (Of course, sometimes those steeped in the details are also most opposed to a policy.) Unfortunately, many people are not steeped in those details. It takes time for the public to understand what is happening, and it takes time to prepare political opposition or support, or to begin the process of adapting. Ossification can facilitate this process. In a related context, the Constitution, by design, requires a cumbersome process to enact legislation; checkpoints and veto gates along the way inherently slow everything down.[16] But that cumbersome process, hopefully, also helps foster better outcomes,[17] including perhaps outcomes with greater legitimacy. Through ossification, this "slower can be better" idea may have been inadvertently replicated, in a sense, in the administrative process. This particular benefit of delay may be especially potent, moreover, because, some claim, ossification likely only affects the most significant

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14 *See, e.g.*, Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005) ("[A] constitutional regime, governmental institution, or official decision possesses legitimacy in a *strong* sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.").

15 *See* Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 282 (2014).

16 *See, e.g.*, John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2d 191, 204 (2007) ("Article I, Section 7's design manifestly places value upon cumbersomeness, high transaction costs, and even (to some extent) gridlock.").

17 *See generally, e.g.*, John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2010) (arguing that effective supermajority requirements, which inherently delay the process, create better policy).

rules.[18] Yet those are the very rules that the public presumably cares most about.

Of course, ossification has downsides too. Credible commitment mechanisms do not benefit all rules; an agency, for instance, might just want some conduct to stop. Yet the same procedures that are said to cause ossification may also apply to them. Moreover, some commitment mechanisms might be *too* credible. An agency might want to encourage some activity, but it may turn out afterwards that the activity, in fact, is not especially useful. In this scenario, ossification may hinder beneficial recalibration.[19] Furthermore, the idea that delay can enhance public acceptance of agency action can also be taken too far; although it is a good thing for the public to learn about government proposals and have time to meaningfully engage in the process, there must be a stopping point. Otherwise, nothing will *ever* get done.[20]

Regulations, in other words, have costs and benefits, and the procedures agencies use to create regulations also have costs and benefits. Ossification, i.e., delay, is generally considered to be one of the costs of regulatory procedure. Yet, in fact, ossification has both benefits and costs of its own. Hence, this Article's key argument is that analytically, in evaluating the costs and benefits of regulatory procedures (both individually and collectively), another category of costs and benefits to consider concerns the delay those procedures produce. And once one considers the full range of costs and benefits (i.e., the traditional costs and benefits of regulatory procedures relating to, for instance, scientific accuracy, *plus* the costs and benefits associated with delay in its own right), the true challenge of ossification emerges. The goal should not necessarily be to *reduce* ossification but rather to *optimize* it. Sometimes there may be too much delay; when all the costs and benefits are added up and netted out, a quicker, more streamlined process may be turn out to be better. Sometimes, too, there may be the right amount of delay. And in other situations, there may not be

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18 *See, e.g.*, Pierce, *supra* note 2, at 1498 ("Ossification is a problem only in the context of the much smaller number of rulemakings that raise controversial issues where the stakes are high.").

19 *Cf.* Fernandez-Vargas v. Gonzales, 548 U.S. 30, 46 (2006) ("But '[i]f every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.'" (alteration in original) (quoting LON L. FULLER, THE MORALITY OF LAW 60 (1964))).

20 *Cf., e.g.*, Michael J. Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107, 2108 (2013) ("After all, the framers did not design a constitution in which gridlock was the objective. The Constitution makes gridlock both possible and inevitable, but the purpose of the Constitution is not merely to allow gridlock. In fact, the Constitution makes federal lawmaking difficult but not impossible.").

enough delay, in which case perhaps we should consider adding additional procedures. Moreover, within the total mix of procedures that cause ossification, some individual procedures may be more or less optimal (and thus more or less valuable); if so, those procedures should be the focus of regulatory reform.

This Article accordingly urges an optimizing approach to ossification. It also begins to sketch what that optimization might look like, though, to be sure, the task is difficult because we do not have enough data to begin to fine-tune the analysis. Finding optimal ossification almost certainly will involve targeted experimentation.

I. BACKGROUND

The ossification story has been told before—and so will be discussed here only briefly.[21] The basic gist is that informal rulemaking nowadays has become time consuming because too many procedures have been added to the rulemaking process.[22] To understand this view, it is useful to evaluate the procedures that now characterize informal rulemaking. It is also important to understand that the ossification thesis is contested; although it is true that agencies must jump many hoops, it is unclear how much delay those hoops really impose.

A. Ossification's Conventional Story

The conventional ossification story goes something like this: When the Administrative Procedure Act ("APA")[23] was enacted in 1946, informal rulemaking was created as a fast and easy way for agencies to make policy.[24] Despite that hope, informal rulemaking has

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21 For a more detailed explanation of the procedures that are said to cause ossification, see Nielson, *supra* note 8, at 87–88. For a more fulsome discussion of the history leading up to the current system and how the various pieces fit together, see Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 757, 761–88 (2015).

22 This Article repeats this conventional account without necessarily adopting it. For instance, some rules currently promulgated through informal rulemaking arguably should have to go through formal rulemaking if the original understanding of the Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.), was followed. Formal rulemaking requires much more onerous procedures. *See, e.g.*, Nielson, *supra* note 15, at 239; *see also* 5 U.S.C. §§ 556–557 (2012) (listing the procedures). This Article is not the place to delve too deeply into whether the procedures that agencies must satisfy are legally justified, a question made more difficult in any event by stare decisis.

23 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

24 *See, e.g.*, Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look,"* 92 NOTRE DAME L. REV. 331, 336–37 (2016) (arguing that "Notice-and-Comment Rulemaking Was So Easy When the APA Was Young").

become slow and difficult because additional procedures—like barnacles on a ship—have grown up around this tool.[25] The result is that the streamlined approach that the APA's text seems to contemplate does not match the way that informal rulemaking occurs now.

Looking at the APA's text, all an agency must do to employ informal rulemaking is publish a notice of a proposed rulemaking ("NPRM") with "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."[26] Next, the agency must "give interested persons an opportunity to participate . . . through submission of written data, views, or arguments."[27] After considering "the relevant matter presented," the agency must publish the rule with "a concise general statement of [its] basis and purpose."[28] And once that process is over, the APA prescribes a deferential form of judicial review for discretionary decisions: for policy questions, the agency will only lose if its choice was "arbitrary, capricious, [or] an abuse of discretion,"[29] which does not sounds like an especially demanding standard.[30]

Yet, the story goes, over time that quick and painless process has become, well, slow and sore. Every step along the way has become more complicated—and so more time consuming. The result, many believe, is that now it can take agencies years to promulgate regulations.[31]

For instance, today, under what has come to be known as the *Portland Cement*[32] doctrine, an NPRM not only must identify the subject matter the agency wishes to regulate, but must also turn over the data or formulas that the agency intends to use.[33] Likewise, because it

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25 *See, e.g.*, *id.* at 338 (explaining that the notice-and-comment rulemaking transformed in the 1960s).

26 5 U.S.C. § 553(b).

27 *Id.* § 553(c).

28 *Id.*

29 *Id.* § 706(2)(A).

30 *See* Shapiro & Murphy, *supra* note 25, at 337 ("The APA instructs courts to review the factual and policy underpinnings of informal rules for arbitrariness. In 1946, this standard of review was understood to be extremely deferential.") (citing 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.4 (5th ed. 2010)). The standard of review set out in the APA for law questions is a more complicated subject. *See generally* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 985–90 (2017).

31 *See, e.g.*, Shapiro & Murphy, *supra* note 25, at 333.

32 Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973).

33 *See* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 237 (D.C. Cir. 2008) ("It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgat-

must ensure that the final rule is a "logical outgrowth" of the proposed rule, an agency must anticipate in advance what the final rule may require, and tell the public in the NPRM.[34] Both of these steps are designed to encourage more meaningful public comments—after all, it is hard to comment without knowing the data supporting an agency's decision or what the agency proposes to do with some specificity. But these steps also increase the procedural burdens on an agency. Likewise, after members of the public comment on an NPRM, the agency must respond to all "material" or "significant" comments.[35] This facilitates public involvement, but also delays the regulatory process or at least makes it more burdensome on the agency.

Because of post-APA statutory enactments and various executive orders, moreover, often before a particularly important or costly rule can be finalized, the agency may have to conduct a cost-benefit analysis that is subject to review by the White House's Office of Information and Regulatory Affairs ("OIRA").[36] Similarly, Congress has required other analyses through acts such as the Paperwork Reduction Act[37] and the National Environmental Policy Act,[38] among others.[39] Although there may be good reasons for these requirements in terms of achieving high-quality, nonarbitrary rules that do not impose unnecessary costs on the public, each requirement also increases the procedural duties of agencies. Only after completing all of these steps may the agency promulgate a final rule.

Then comes judicial review. The agency's policy choices usually will be reviewed through the "hard look" doctrine, under which a

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ing a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment."); *Portland Cement*, 486 F.2d at 393 ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency.").

34 *See, e.g.*, Nielson, *supra* note 8, at 97–98 (citing Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213 (1996)).

35 *See id.* at 97 (citing City of Portland v. EPA, 507 F.3d 706, 714–15 (D.C. Cir. 2007)). How seriously agencies take comments is disputed. *See, e.g.*, Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 514–15 (2002) (suggesting that some responses to comments may be pro forma because, in those particular instances, the results are "preordained"). But even if the agency is not carefully considering all material comments, it still requires time to respond.

36 *See, e.g.*, Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1845–47 (2013).

37 Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501–3520 (2012)).

38 National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified in scattered sections of 42 U.S.C.).

39 *See, e.g.*, Nielson, *supra* note 8, at 101.

court will carefully evaluate (i.e., take a hard look at) the reasonableness of the agency's decision.[40] Hard look review is how the Supreme Court often implements the APA's "arbitrary and capricious" standard. And "[b]ecause agencies know that this hard-look review is waiting for them, they are forced to take a large number of procedural steps beforehand to prevent invalidation of their rules,"[41] including preparing a fulsome explanation of their reasoning. This also takes time.

Concluding the conventional story, because the requirements of informal rulemaking have become more burdensome over the decades, many now believe that agencies do not promulgate as many regulations as they should (and as they would in a world without all of these procedures), but instead either give up on regulating altogether or resort to other, less procedurally demanding mechanisms like guidance documents.[42] Accordingly, many argue that the regulatory process has become too difficult and so should be reformed to enable quicker promulgation of rules.[43] In response, others argue that *despite* the delay they cause, these procedures may sometimes be justified (or at least potentially justified), for instance, because they help ensure higher quality regulations.[44]

B. Ossification's Contested Empirics

Whether this conventional account of informal rulemaking is accurate is contested. The most comprehensive study to date, for instance, says that "'evidence that ossification is either a serious or widespread problem is mixed and relatively weak' and that there is reason to think that 'agencies remain able to propose and promulgate historically large numbers of regulations, and to do so relatively quickly.'"[45] Other studies have reached similar conclusions.[46]

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40 *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (explaining that "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

41 Nielson, *supra* note 8, at 98–99.

42 *See* Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 166–67 (2000).

43 *See, e.g.*, *infra* note 56 and accompanying text.

44 *See* Seidenfeld, *supra* note 3, at 521, 524.

45 Nielson, *supra* note 8, at 103 (quoting Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1421–22 (2012)).

And it bears noting that agencies sometimes appear to move rapidly. For instance, although some so-called "midnight rulemakings"—in which agencies, at the close of an administration, promulgate rules before the next administration takes over—simply reflect the agency's efforts to hurry up and finish an already long-running process, other such rules appear to be completed quickly from start to finish.[47] So, perhaps, agencies can speed things along if they are motivated to do so.[48]

Some who support the ossification thesis push back against this analysis by arguing it misses the point. Agencies, after all, undertake many rulemakings that are not especially significant. That these less important rulemakings can be completed quickly perhaps does not tell us much about whether "the much smaller number of rulemakings that raise controversial issues" might be ossified.[49] Indeed, Richard Pierce argues that "[e]very study of economically significant rulemakings has found strong evidence of ossification—a decisionmaking process that takes many years to complete and that requires an agency to commit a high proportion of its scarce resources to a single task."[50]

Who has the better of the empirical argument is a question that merits more analysis. Even so, it is safe to say that rulemaking takes longer because of these procedures than it would take without them. It is possible that agencies can promulgate regulations quickly despite having to satisfy procedural requirements. But common sense says they could promulgate regulations even more quickly should those re-

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46 *See id.* at 103 n.90 (citing Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001–2005*, 38 ENVTL. L. 767, 770 (2008); William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 Nw. U. L. REV. 393, 396 (2000)).

47 *See* Nielson, *supra* note 15, at 271; Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 Nw. U. L. REV. 471, 472 (2011) (listing some speedy examples). *But see* Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENVTL. & ADMIN. L. 285, 286, 302–04 (2013) (identifying some rules that were promulgated quickly but suggesting that "it appears that short regulatory processes are the exception rather than the rule, even with regard to midnight rules").

48 Of course, even if this is true, it may simply reflect "triage" by the agency rather than the idea that agencies can always expedite the rulemaking. The agency may be able speed up an individual rule because it has shifted resources away from other rulemakings or agency initiatives to expedite the process. *See, e.g.*, Beermann, *supra* note 47, at 304 (explaining that an agency may "not rush rules through, but rather perform[] multiple steps simultaneously that at other times would [be] performed seriatim").

49 Pierce, *supra* note 2, at 1498.

50 *Id*. (emphasis omitted).

quirements fall away. Hence, so long as informal rulemaking requires a procedural gauntlet, there will be some delay associated with it.

II. Two Overlooked Benefits of Ossification

Even if the procedures that are said to cause ossification may have defenders, ossification itself is almost universally condemned. To be sure, some scholars argue that ossification is "worth the cost," i.e., that the cost of procedural delay is outweighed by the benefits in terms of, say, more scientifically sound rules.[51] But, even under that view, ossification is not itself a *good* thing; it is merely the cost of a good thing. In fact, it often seems that the only even plausible defense of the idea that delay can be good in its own right is that some rules are substantively bad and should be prevented.[52] Yet even then, presumably there are better ways of avoiding bad regulations—including by enacting better statutes.[53]

On this common understanding, there is nothing to optimize when it comes to ossification because delay is altogether bad. If we assume that delay has no upside, then if a regulatory process could be created that would produce equally nonarbitrary and scientifically sound regulations without requiring delay, such a process necessarily must be a better process than the current process.[54] After all, who could be in favor of delay? Similarly, if a regulatory process could create equally nonarbitrary and scientifically sound regulations without requiring as many agency resources, then it too should be preferred.[55] Who could be in favor of waste? Further, under this common view, even if it is not possible to create delay-free procedures that generate equally high-quality rules, it still may be desirable to surrender some quality for increased speed and cost savings.[56]

What if, however, "waiting and waste"—i.e., the very delay caused by regulatory procedures and the costs agencies must expend to move through procedures—sometimes *benefit* the regulatory process? To be clear, the point I am making is not that regulatory procedures like, for example, the *Portland Cement*[57] or material comments

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51 *See, e.g.*, Seidenfeld, *supra* note 3, at 521 (arguing that hard look review, the villain in many ossification stories, may promote careful agency deliberation).

52 *See, e.g.*, Livermore, *supra* note 4, at 356.

53 *See id.*

54 *See, e.g.*, Nielson, *supra* note 8, at 117–18 (explaining the opportunity cost of delay).

55 *See id*. at 88 (describing the significant agency resources required for notice-and-comment rulemaking).

56 *See id*. at 88, 117–18 (discussing opportunity costs of procedural delay).

57 *See* Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973).

doctrines are useful because they help discover errors in an agency's analysis—though they surely do that, too. Rather, the argument I am advancing is that a burdensome procedural process can be valuable even apart from the prospect that it produces higher-quality rules in terms of characteristics like scientific accuracy. In other words, the fact that rulemaking takes a long time and costs resources sometimes may be a feature rather than a bug. In fact, perhaps there are times that we should want *more* delay, even if it affirmatively costs resources to generate it. These counterintuitive claims may be true—at least sometimes—for two separate reasons.

A. Ossification as Commitment Mechanism

The first benefit of "ossification *qua* ossification" is straightforward:

- Ossification makes change more difficult; because of administrative law's procedures, it takes agencies more time and effort to change the regulatory environment than would be the case absent those procedures. Procedural requirements slow a project down or at least require the agency to shift resources from other projects, resulting in those other projects being slowed down or perhaps even abandoned.
- When it is more difficult for agencies to make regulatory change, there is less change, which is another way of saying that regulated parties can have relatively greater confidence that regulations that now exist will continue to exist than would be reasonable to expect in an ossification-free world. This is especially true because often the procedures that slow change are enforced by parties external to the agency, such as courts or OIRA. Accordingly, regulated parties know that an agency cannot simply change the procedures if they become too burdensome. Regulated parties thus can have more confidence that the agency-created scheme will be durable.
- When regulated parties have confidence in a scheme's durability, there are scenarios under which they are more likely to act as the agency would prefer them to act. For instance, if it costs a regulated party millions of dollars in capital investment to do what is necessary to obtain an agency-created incentive and the regulated party knows upfront that it will not be able to recoup that investment unless the incentive remains in place for a considerable length of time, then the regulated party is more likely to make that investment if it reasonably believes that the incentive will remain in place long enough for recoupment to occur. By contrast, if the

regulated party knows that the incentive will not remain long enough for recoupment to occur, it will not invest. To the extent that the regulated party is uncertain whether the incentive will remain, it will put a "discount factor" reflecting the risk that the incentive will be eliminated before recoupment can occur into its internal cost-benefit analysis. The more durable the scheme is, however, the smaller the discount factor the party will use, and so the greater the likelihood that the party will invest.

- Hence, there are situations in which ossification, by creating greater regulatory stability, enhances an agency's ability to encourage regulated parties to act in ways that the agency believes are best.

Each step in this analysis merits a brief explanation.[58]

The first step is obvious; it is the conventional account of ossification. Of course, as discussed above, this conventional account is contested; it is not certain that regulatory procedures, in fact, impose meaningful burdens on agencies, although there is reason to think that they do at least sometimes.[59] But in any event, even if some of the claims made about ossification are overstated and agencies can proceed quickly, it is impossible to deny that regulatory procedures impose *some* burdens (and so delay) on agencies; by definition agencies must do more to promulgate rules when there are procedures that must be undertaken than when there are no such procedures.

The second step should also be fairly obvious. Although there are rare counterexamples, when the cost of something increases, the amount of that thing demanded decreases.[60] By parity of reasoning, when it becomes more difficult for agencies to effectuate regulatory change—in other words, when change becomes "costlier"—there will be less change. Agencies, working with a budget (broadly defined), do not always have the resources necessary to satisfy these higher costs. The flipside of that observation is that in a world with ossification, the public, including regulated parties (i.e., those who fall within the scope of the regulatory scheme), can expect less legal change than there would be in a world without ossification. After all, because ossification slows things down and demands agency resources, agencies have less ability to revisit regulations than they would in a world in which change was quick and easy.

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58 *See* Nielson, *supra* note 8, at 116–25 (discussing each step in greater detail).

59 *See, e.g.*, Pierce, *supra* note 2, at 1494.

60 *See, e.g.*, RICHARD A. IPPOLITO, ECONOMICS FOR LAWYERS 129, 132 (2005); Nielson, *supra* note 8, at 121–22.

It is the third step that is less obvious. Agencies sometimes benefit from the fact that regulated parties expect less change in a world with ossification. Especially for agencies that focus on encouraging innovation, the fact that it is hard to change a regulation means that the agency can leverage the benefits of stability to achieve objectives otherwise unavailable to the agency. An example concerns the development of new, agency-favored technologies. It may cost tens of millions of dollars and require extensive private sector expertise to develop a new technology. Agencies generally do not have the resources to undertake that research and development themselves, or, even if they did, they almost certainly lack the technical sophistication to do so.[61] Agencies thus may want to encourage certain types of investments by the private sector. An obvious way to do this is by creating incentives.[62] For instance, if regulated parties do what the agency wants, certain regulatory requirements may be set aside.[63]

Merely creating an incentive, however, often will not be enough. If it will cost the regulated party a lot of money or other resources to do what is necessary to obtain that incentive, common sense says that the party will want to know how long the incentive will be available. Otherwise, it may not be able to recoup its capital expenditure.[64] For instance, if a new plant that will cost $10,000,000 is necessary to obtain the incentive and that plant is only valuable if the incentive is paid, but the incentive is only worth $1,000,000 a year, the party needs to feel confident that the incentive will be around for at least a decade.[65] If the agency is free to quickly change the scheme, *including that incentive*, at any time, then a regulated party must put a significant "discount factor" on the scheme before deciding whether to invest

61 *See* Nielson, *supra* note 8, at 117.

62 *See id.* at 109–10.

63 *See id*. Whether agencies *should* be able to create such incentives, or at least do so as often as they do, is a tricky question. Agencies may not always be especially adept at picking the best long-run investments. *See, e.g.*, Michael Abramowicz, *Perfecting Patent Prizes*, 56 VAND. L. REV. 115, 218 (2003) ("Government has a poor record picking 'winners' in industrial policy, and if there is reason to suspect that an agency systematically will pursue an agenda instead of rewarding innovation, that suspicion will distort investment." (footnote omitted)).

64 *See* Nielson, *supra* note 8, at 115–16.

65 Longer, actually, given the time value of money; a dollar today is worth more than a dollar tomorrow, because a dollar today can generate interest. *See* PAMELA P. DRAKE & FRANK J. FABOZZI, FOUNDATIONS AND APPLICATIONS OF THE TIME VALUE OF MONEY 3–4 (2009). But to be simple, this example ignores interest.

because the potential reward for participation may be not actually be available.[66] Increased risk, of course, dissuades investment.

Ossification, however, makes the agency's long-term commitment to the scheme more credible.[67] Even if the agency were to change its mind about the wisdom of the incentive, it could not quickly eliminate or change that incentive. After all, doing so would require the agency to jump through all the procedural hoops that ossification's detractors so often bemoan. The durability of the scheme is enhanced, moreover, because external actors like courts and OIRA often enforce regulatory procedures.[68] Hence, it does not matter whether an agency thinks of a procedural requirement; if the agency does not comply, a court or OIRA will be there to enforce compliance.

The upshot is that although ossification does not make it impossible for the agency to change course, it does make such a change less likely—especially rapid change. Therefore, in a world with ossification, a regulated party can use a lower discount factor when it decides whether to invest in the agency's scheme, resulting in greater participation in the scheme.[69] In this way, ossification sometimes may expand rather than contract an agency's regulatory menu, especially if the agency is focused on long-run objectives that require substantial capital investments. Likewise, to the extent that regulated parties can use a lower discount rate, the agency does not need to be as generous with its incentive.[70] Obviously, this example is highly stylized, but if it is ninety percent certain that the incentive will still be there in ten years, the incentive can be smaller than if it is only fifty percent certain that it will be there in ten years. If it is only ten percent certain that the incentive will be there in a decade, the agency will have to be

66 *See, e.g.*, W. Kip Viscusi, *Rational Discounting for Regulatory Analysis*, 74 U. CHI. L. REV. 209, 216–17 (2007) (explaining why discounting is essential).

67 In theory, there could be other commitment mechanisms. For instance, once a court has interpreted a statute, the law could say that an agency could not turn around and adopt a different interpretation. Likewise, the burden on an agency changing a scheme could be greater than the burden on an agency creating a new scheme. The Supreme Court, however, has rejected both of those approaches. *See* Nielson, *supra* note 8, at 90–92 (discussing *FCC v. Fox Television Stations*, 556 U.S. 502 (2009), and *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)). To be sure, there may be other constraints on an agency's ability to change policy, but they may not always be effective. *See id.* at 115 (discussing the possibility that repeat-player dynamics may dissuade agencies from changing policy too quickly).

68 *See, e.g.*, Bus. Roundtable v. SEC, 647 F.3d 1144, 1154 (D.C. Cir. 2011) (vacating rule because the agency "failed adequately" to meet certain requirements); Exec. Order No. 12,866, 3 C.F.R. § 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 802–06 (2012) (defining the scope of OIRA's authority to oversee and regulate other federal agencies).

69 *See supra* text accompanying note 66 (explaining "discount factors").

70 *See supra* text accompanying notes 62–65 (discussing incentives).

very generous indeed with its incentive. Because incentives are not costless to the agency (the agency must surrender *something*), presumably agencies would, all else being equal, prefer to achieve the same amount of hoped-for conduct by means of smaller incentives.

It thus follows that there may be situations where ossification is beneficial to the agency, even apart from whether the procedures that cause ossification actually prevent scientific errors or arbitrary outcomes. The very delay those procedures cause helps the agency credibly commit to stability, which in turn results in greater participation by regulated parties (perhaps at a lesser cost to the agency) in an agency-created scheme.

An example may help. Imagine that in a given time period, an agency promulgates a rule. And imagine further that in a later period, a new administration comes into power and concludes that the rule is bad policy. It thus seeks to eliminate the rule and, while doing so, stays it so that regulated parties do not have to comply with it. Yet soon afterwards, a reviewing court decides that the rule nonetheless must go into effect—even though the current agency leadership does not want the regulation, and even though the regulation, if it were proposed as legislation, certainly would not be enacted by the current Congress. After all, once a rule is on the books, it is law until rescinded. In such a world, should we not expect regulated parties to have more confidence that a rule that has gone through notice-and-comment rulemaking will remain than they would have in a world in which the current administration's view immediately becomes operative?

This example, of course, is not a hypothetical; it happened recently. This is a simplified version of the story regarding the Environmental Protection Agency's ("EPA") approach to methane gas. When President Obama was in office, the EPA engaged in notice-and-comment rulemaking to create new requirements—called "performance standards"—for methane.[71] When President Trump came into office, the EPA reversed course and concluded that the regulation merited reconsideration.[72] All the while, it is unlikely that any congressional effort to enact new restrictions on methane via legislation will get off the ground. In fact, the House of Representatives enacted legislation

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71 *See* 40 C.F.R. §§ 60.5360–.5430, 60.5360a–.5432a (2017).

72 *See* Clean Air Council v. Pruitt, 862 F.3d 1, 5 (D.C. Cir. 2017) (citing Letter from E. Scott Pruitt, Adm'r, EPA, to Howard J. Feldman, Am. Petroleum Inst., Shannon S. Broome, James D. Elliott & Matt Hite 2 (Apr. 18, 2017)).

to eliminate a related methane rule,[73] and the Senate fell one vote short of doing the same.[74] The Trump EPA decided to rescind the regulation and to stay its effective date.[75]

The D.C. Circuit, however, in a divided opinion, concluded that the effort to stay the rule was unlawful.[76] Although the agency has authority to stay regulations when reconsideration is sought,[77] the panel read that statutory authority to only apply to a narrow category of "mandatory" reconsiderations.[78] This rule did not fall within that category. Hence, if the EPA wants to prevent the methane rule from operating, it must engage in another round of rulemaking.[79]

Whatever one thinks of the D.C. Circuit's analysis,[80] the effect of this sort of ossification-causing decision is to increase confidence that once a rule has gone through notice and comment, it cannot disappear at the snap of a finger.[81] If you were deciding whether to invest in a competing technology (i.e., one that did not produce as much methane), such increased certainty could be valuable, especially because, presumably, it is capital-intensive to create that competing technology. No doubt, there is a good chance that the Trump Administration will try to substantially revise the methane regulation, but it will take a while to do so, even if the effort succeeds. Hence, the "discount factor" used to decide whether to invest will be relatively lower.[82]

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73 *See, e.g.*, Devin Henry, *House Votes to Overturn Obama Drilling Rule*, HILL (Feb. 3, 2017, 10:36 AM), http://thehill.com/policy/energy-environment/317739-house-votes-to-overturn-obama-oil-and-gas-rule [https://perma.cc/95Q4-T6RA].

74 *See, e.g.*, Jeremy Dillon et al., *McCain the Maverick Re-Emerges to Help Stop Methane Rule Repeal*, CQ ROLL CALL (May 10, 2017, 4:45 PM), https://www.rollcall.com/news/politics/maverick-mccain-re-emerges-methane-vote [https://perma.cc/22ND-VP7Y].

75 Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay, 82 Fed. Reg. 25,730 (June 5, 2017).

76 *See Clean Air Council*, 862 F.3d at 14.

77 42 U.S.C. § 7607(d)(7)(B) (2012) (decreeing a "rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months").

78 *See Clean Air Council*, 862 F.3d at 14 ("Because it was thus not 'impracticable' for industry groups to have raised such objections during the notice and comment period, CAA section 307(d)(7)(B) did not require reconsideration and did not authorize the stay.").

79 *See id.*

80 The dissent, for instance, argued with some force that the majority was wrong to say that a stay is a "final agency action," a prerequisite for review, because "[a] temporary stay facilitates reconsidering these discrete issues; it does not resolve them." *Id.* at 15 (Brown, J., dissenting). Who has the better of the argument, as well as the merits of the underlying policy, is irrelevant; the point of this example is to illustrate how delay increases confidence. The ability to increase private sector confidence in a regulatory scheme is a tool that may benefit agencies. How and when the tool should be used is not the issue here.

81 *See* McGarity, *Some Thoughts*, *supra* note 2, at 1460.

82 *See supra* note 66 and accompanying text (explaining the "discount factor").

There are other examples of this dynamic. Recognizing the value of final regulations, for instance, administrations often race to finish rules before they leave power.[83] One explanation for this is that they realize that finished rules have staying power; the next administration cannot simply eliminate them, even if future officials fundamentally oppose their predecessor's rules. Yet, once one recognizes this dynamic, it is easy to see how regulated parties will be more willing to invest in reliance on regulatory decisions in a world with ossification than in one without it.

As this analysis also suggests, however, there may be other situations in which ossification is not especially valuable because the agency does not need a credible commitment mechanism to encourage private sector behavior. The agency, for example, may want to act immediately to stop private sector behavior—for instance, an "emerging" practice that it believes is dangerous. (E.g., it believes that a certain chemical is harming the public.[84]) Yet (generally[85]) the same rulemaking procedures may apply in both scenarios. Of course, the benefits of error reduction and the like may *still* justify a gauntlet of procedures, but that point is distinct from the benefits of a credible commitment mechanism. Similarly, just because ossification may be valuable when it comes to future-orientated thinking, it does not follow that ossification is always valuable *enough* to outweigh the costs it takes to obtain it. But the larger point still stands. Ossification sometimes expands an agency's menu of regulatory options.[86]

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83 *See* O'Connell, *supra* note 47, at 471–72. *See generally* Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441 (2005).

84 *See, e.g.*, Matthew T. Wansley, *Regulation of Emerging Risks*, 69 VAND. L. REV. 401, 409 (2016) (discussing emerging risks). On the other hand, this point should not be overstated. Allowing agencies to regulate with incomplete knowledge is itself dangerous, especially in a world of potential rent seeking and pretextual decisionmaking. *Cf.* JAMES M. BUCHANAN & GORDON TULLOCH, THE CALCULUS OF CONSENT 292 (1962) ("First, activities may be approved which cause benefits to accrue to selected individuals and groups but which impose costs generally on all members of the community."); Mark Green & Ralph Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871, 879 (1973) ("Agencies appear to be far more restrictive toward entrants than they need be."). Pondering all the risks, of course, is too big a bite for this Article.

85 There may be a "good cause" argument in some situations, depending on the facts. *See* 5 U.S.C. § 553(b)(3)(B) (2012) (explaining that many of the APA requirements do not apply "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.").

86 One objection someone might offer to this analysis is that agencies do not always support ossification. I have addressed this point elsewhere. *See, e.g.*, Nielson, *supra* note 8, at 90. One explanation may be that regulators have not recognized the value of ossification, but they

B. Ossification as Source of Agency Legitimacy

The second benefit of ossification is harder to assess because legitimacy is not a concept with hard edges. Here, however, is the theory.[87]

- Because information is not uniformly spread across society,[88] many people do not understand what an agency is proposing, much less *why* the agency is doing so. This sometimes may create distrust, or at least wariness,[89] especially because administrative law is increasingly the battlefield for controversial policies.[90]
- A lack of trust can create a legitimacy problem.[91] To the extent that the public is wary of what agencies do and why they do it, they are less likely to cooperate with agencies or to approve proposals to task agencies with new or expanded missions.[92]
- Delay, however, sometimes may help alleviate that legitimacy problem. By giving "information intermediaries"[93] time to act, members of the public have more opportunities to learn what is afoot. When agency decisions are delayed, there is a better chance

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would miss it if it were gone. Another explanation is that agencies who benefit less from ossification speak louder than those who benefit more.

87 I tentatively sketched a version of this theory a few years ago. *See, e.g.*, Nielson, *supra* note 15, at 279.

88 *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 524–25 (1945), *reprinted in* 1 N.Y.U. J.L. & LIBERTY 5 (2005).

89 *See, e.g.*, Russell Hardin, *Distrust*, 81 B.U. L. REV. 495, 496 (2001) ("I could be in a state of such ignorance about you, however, that I neither trust nor distrust you. I may therefore be wary of you until I have better information about you.").

90 *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332 (2001); *see also, e.g.*, United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (mem.) (per curiam) (dividing four to four regarding a challenge to immigration reform attempted without a new statute); West Virginia v. EPA, 136 S. Ct. 1000, 1000 (2016) (mem.) (staying the so-called "Clean Power Plan" regulations); King v. Burwell, 135 S. Ct. 2480, 2496 (2015) (upholding regulations involving tax credits for health insurance exchanges); NLRB v. Noel Canning, 134 S. Ct. 2550, 2557 (2014) (invalidating aggressive use of the Recess Appointment power to appoint labor regulators); Bus. Roundtable v. SEC, 647 F.3d 1144, 1146 (D.C. Cir. 2011) (rejecting regulations of proxy contests).

91 *See, e.g.*, Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87, 117 (2016) ("Legitimacy is a normative view of institutional authority premised on fairness or trust.").

92 *See, e.g.*, Fallon, *supra* note 14, at 1795.

93 *See, e.g.*, Peter M. Shane, *Democratic Information Communities*, 6 I/S: J.L. & POL'Y FOR INFO. SOC'Y 95, 104 (2010) ("Individuals and organizations . . . all rely on a host of formal and informal 'information intermediaries,' people and institutions that create information, identify its relevance, sort out the important details, contextualize its significance to us, and offer their evaluations. Family, friends, and co-workers all play this function, as do government, the institutions of civil society, and a host of formal 'media' institutions, including print, broadcast, satellite, cable, and online venues.").

that nonspecialists will be able to understand what the agency is doing and the reason for it, and thus to express agreement or disagreement, or to begin to adapt. Such meaningful understanding increases agency legitimacy.[94]

- Hence, there are situations in which ossification, by slowing things down, allows information to spread across society, thereby enhancing an agency's legitimacy and so its ability to regulate.

Again, this analysis merits a brief explanation.

Consider the first two steps together. It is not a secret that many Americans are sometimes distrustful of agencies.[95] Why? It is hard to say for certain, but here is my theory: "What agencies do is (1) important; (2) complicated; (3) unfamiliar; and, sadly, (4) sometimes unfair and even abusive."[96] Mix all of that together and wariness results. The questions addressed by administrative law, while important, can be technical and difficult to understand.[97] When it comes to establishing, say, a regulatory regime for energy use, what an agency does will af-

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94 *Cf., e.g.*, Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) ("While procedural justice is concerned with the benefits of accuracy and the costs of adjudication, it is not solely concerned with those costs and benefits. Rather, procedural justice is deeply entwined with the old and powerful idea that a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms. Meaningful participation requires notice and opportunity to be heard, and it requires a reasonable balance between cost and accuracy." (emphasis omitted)).

95 *See, e.g.*, Nielson, *supra* note 15, at 279–80 ("As Friendly recognized nearly forty years ago, '[d]istrust of the bureaucracy is surely one reason for the clamor for adversary proceedings in the United States.' There is little reason to think that administrative law's public relations problem has improved in the intervening decades." (alteration in original) (quoting Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1279–80 (1975))).

96 Aaron Nielson, *D.C. Circuit Review—Reviewed: Why Regulation is a Dirty Word*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 7, 2015), http://yalejreg.com/nc/d-c-circuit-review-reviewed-why-regulation-is-a-dirty-word-by-aaron-nielson/ [https://perma.cc/RHL8-3D92].

97 Even for those steeped in administrative law, often what an agency does is anything but clear to all but the most specialized experts. Consider this sentence from a recent D.C. Circuit opinion:

> Charges for energy imbalance shall be based on the deviation bands as follows: (i) deviations within +/- 1.5 percent (with a minimum of 2 [megawatts]) of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the Transmission Customer's scheduled transaction(s) will be netted on a monthly basis and settled financially, at the end of the month, at 100 percent of incremental or decremental cost; (ii) deviations greater than +/- 1.5 percent up to 7.5 percent (or greater than 2 [megawatts] up to 10 [megawatts]) of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the Transmission Customer's scheduled transaction(s) will be settled financially, at the end of each month, at 110 percent of incremental cost or 90 percent of decremental cost, and (iii) deviations greater than +/- 7.5 percent (or 10 [megawatts]) of the scheduled transaction to be applied hourly to any energy imbalance that occurs as a result of the Transmission Customer's scheduled transaction(s) will be settled

fect nonspecialists, but nonspecialists will not be able to fully understand it, including the tradeoffs the agency is making. And nonspecialists know that although agencies no doubt *generally* do well, at least *sometimes* they don't.[98]

Yet nonspecialists (i.e., all of us, at least sometimes) also are not well equipped to personally evaluate individual agency decisions, especially because it can be difficult to understand what is happening, much less why it is happening, and much, *much* less whether what is happening makes sense on net. Against that backdrop, some wariness is hardly surprising.

Now imagine a world in which many agencies, perhaps even dozens, could promulgate major regulations—each worth hundreds of millions of dollars or more—with no meaningful delay. Even today, millions of Americans are skeptical of the bureaucracy.[99] How much more worry would there be in a world in which agencies could act quickly!

Next, consider step three. If there is even *some* truth to the above analysis, then delay can be a good thing in its own right because it provides more opportunities for members of the public to understand their government, even apart from all of the other benefits associated with regulatory procedures. Delay allows society's information intermediaries to work. By means of newspapers, television shows, Facebook posts, barbeques, clubs, political parties, and the like, information can be shared with the stakeholders and spread across the general population. To be sure, these intermediaries are imperfect; sometimes false claims are amplified.[100] Yet over time, the hope is that

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> financially, at the end of each month, at 125 percent of incremental cost or 75 percent of decremental cost.

Seminole Elec. Coop., Inc. v. FERC, 861 F.3d 230, 232 n.1 (D.C. Cir. 2017). Got it?

98 *See, e.g.*, Sackett v. EPA, 566 U.S. 120, 130–31 (2012) (discussing the risk of "strong-arming of regulated parties into 'voluntary compliance'"); True the Vote, Inc. v. IRS, 831 F.3d 551, 559–62 (D.C. Cir. 2016) (criticizing an agency for persistent misconduct).

99 *See, e.g.*, Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1305–06 (2017) ("Still, the anti-administration meme has deep roots in American political culture, and as the 2016 presidential election cycle illustrates, retains political salience. Attacking federal agencies, in addition to the regulations they produce, is popular." (footnote omitted) (citing Jeremy Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 718–22 (2016) (book review))); William C. Adams & Donna L. Infeld, *Analysis: Trust in Federal Workers Hits New Low*, GOV'T EXECUTIVE (Sept. 24, 2013), http://www.govexec.com/management/2013/09/analysis-trust-federal-workers-hits-new-low/70700/ [https://perma.cc/CJL8-H5B7].

100 *See, e.g.*, CASS SUNSTEIN, REPUBLIC.COM (2001) (worrying whether modern technology reduces meaningful exchanges); David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L. 1, 12 (2017) (discussing "fake news").

the best option will win out in the battle of ideas.[101] If that is a false hope, we have much bigger things to worry about than regulatory ossification.

Hence, step four. Delay can be good for agency legitimacy. Granted, allowing time for this process to function can be frustrating. Because information is not evenly distributed, those with earlier access to it may want to see prompt action (or perhaps not; it depends on the issue). Even so, delay may be the lesser of evils. Over the long run, if the public is to trust its government, there must be time for people to understand what the government is doing and why. If the rulemaking process moves too quickly, the public would have greater reason to worry. Not only would false information (either in favor or opposed to the agency proposal) spread without time for rebuttal, but the fog of uncertainty would hang over everything. In a world like that, it is easy to surmise that voters would be reluctant to allow agencies to wield authority. If so, then does it not follow that agency legitimacy sometimes can be bolstered by delay, because delay allows information to spread, giving nonspecialists an opportunity to understand and react through the electoral and rulemaking process (either for or against), personal adjustment (preparing for change, physically and mentally, takes time), or some combination of the two?

This point may have special force if it is true, as Richard Pierce has argued, that ossification only affects the most significant regulations.[102] Presumably these are the sorts of regulations for which public awareness is most important. If an agency, exercising delegated authority, is going to make important social changes, there is value for the agency in ensuring that the public has enough time to understand. Indeed, there may be constitutional overtones to this. The Constitution, by design, makes it difficult to enact legislation.[103] Bicameralism-and-presentment requires legislation to withstand many veto points, thus often essentially ensuring that new laws command supermajoritarian support.[104] One of the consequences of that cumbersome process is that lawmaking is not often a quick process. Yet

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101 *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.").

102 *See, e.g.*, Pierce, *supra* note 2, at 1498.

103 *See, e.g.*, Manning, *supra* note 16, at 198–99.

104 *See* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 712–13 (2002) ("That is, a bicameral legislature in which each house employs a majority-voting rule functions like a unicameral legislature with a supermajority rule.").

that delay is not a bad thing. The political process can be more meaningful (and so accepted) when there is time for society to engage. Why wouldn't a similar point apply to rulemaking?[105]

There are significant limits, of course, to this analysis. At some point, if the nation is going to have rulemaking at all (and essentially no one is against *all* rulemaking[106]), the agency must be able to act eventually. Delay cannot go on forever. (To return to the legislative analogy, there would be even more delay if every piece of legislation required unanimous approval, but surely no one thinks that would be a better system.) There never will be a day when perfect information is spread across all of society and everyone has had a chance to have their say. And if agencies were forced to wait until a supermajority of the public fully understood regulatory proposals, agencies would lose credibility because voters would give up on the idea that agencies could accomplish anything. Hence, although delay can help provide legitimacy to agency initiatives under some circumstances, like most good things, there can be overdoses of it.[107] In short, delay—but not *too much* delay—can be good for purposes of legitimacy.[108] Where exactly to draw the line is difficult. But for purposes here, it is enough see that there is a line.

III. Optimal Ossification

Now comes this Article's key argument: in designing and evaluating regulatory procedures, the goal should not be to eliminate delay. Rather, because delay itself sometimes has benefits of its own, the goal should be to find the optimal amount of ossification, which requires considering all the traditional costs and benefits of procedure (e.g., their ability to ensure higher-quality regulations in terms of scientific accuracy and nonarbitrariness) *and* the costs and benefits of delay in its own right. This Part will discuss why optimizing ossification is important, offer a preliminary sketch of what sorts of procedures might enable optimal ossification, and urge experimentation.

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105 Of course, this point may suggest that Congress—for constitutional and prudential reasons—should play a more important role in policymaking; why create a cumbersome process for agencies when the Constitution already creates a bicameralism-and-presentment process for Congress? This is an important question, but, alas, one for another day.

106 *See, e.g.*, Aaron L. Nielson, *Confessions of an "Anti-Administrativist*," 131 Harv. L. Rev. F. 1, 3 (2017) (explaining that even prominent critics of the administrative state "accept agency action *sometimes*").

107 *See supra* notes 14–20 and accompanying text.

108 *See supra* notes 14–20 and accompanying text.

A. The Need for Optimal Ossification

Creating the optimal procedural system for administrative law requires striking the right balance. On one hand, procedures often have benefits.[109] In a world with no opportunity costs, it would be hard to object to the idea that agencies should be required to anticipate what the final regulation will look like so that that the public has the opportunity to provide meaningful comments, just as it would be hard to object to requiring agencies to provide the data that they intend to use and to meaningfully respond to comments. Because agencies do not have perfect information and can make mistakes, these sorts of procedures have obvious benefits.

But we do not live in a world without opportunity costs. The time and effort that agencies spend satisfying the logical outgrowth, *Portland Cement*, and material comment doctrines, for instance, are resources that agencies cannot spend on other things. The same is true for every regulatory procedure. Even if such procedures are good because they help prevent errors and the like, one must ask whether they are cost-justified in light of the opportunity costs they carry with them. Because tradeoffs are important, Adrian Vermeule urges that there is an optimal amount of illegality in administrative law.[110] After all, hunting down every unlawful or impudent act would be extraordinarily—indeed, infinitely—expensive. The need for optimization also explains why perfectly clear regulations are impossible.[111] At some point, opportunity costs become too significant. In short, when there are benefits and costs on all sides, the right approach is find the optimal amount of something rather than to eliminate it outright or expand it indefinitely.

That insight can and should be applied to ossification. The goal should not be to eliminate or even necessarily reduce ossification but instead to find the optimal amount of it. Even apart from the costs and benefits of the underlying procedures that are said to cause ossification in terms of accuracy and nonarbitrariness, the very delay that constitutes ossification itself has its own costs and benefits. Accord-

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109 To be sure, some might argue that certain procedures do more harm than good in terms of scientific accuracy, if, for instance, generalist courts cause more problems than they solve on an aggregate basis. For what it is worth, I doubt it is true. Agencies sometimes make mistakes and presumably would make even more mistakes without meaningful review.

110 *See* Vermeule, *supra* note 1, at 678 ("[G]iven positive costs of enforcing constitutional rules, and competing uses for the relevant resources, some level of official abuse of power will be inevitable.").

111 *See, e.g.*, Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 72, 98 (1983) (rejecting argument that perfect clarity should be the goal).

ingly, when evaluating whether procedures are justified, the delay that those procedures create should be incorporated into the analysis—and not strictly on the costs side. And because delay can be valuable, some procedures may be more or less attractive than they initially seem *because* of the delay that they create.

For instance, perhaps procedure X—analytically, it does not matter what X is—appears to do little in terms of creating better policy, at least when it comes to the quality of regulations in terms of scientific accuracy. Yet X also generates a great deal of delay. If one subscribes to the traditional view that ossification is a problem, X should be eliminated. But once one realizes that delay can be valuable, the analysis and potentially the outcome should change. It might turn out that X, in fact, is worthwhile because it causes the delay in those situations for which delay is valuable, i.e., where the agency benefits from a credible commitment mechanism or where public awareness is especially significant. By contrast, another procedure—call it Y—might appear to be more useful than X in terms of creating higher-quality regulations. Yet Y may also generate lots of delay, but, unlike X, in situations for which the agency does not benefit from long-term credibility or for which public acceptance is a marginal concern because public awareness is unimportant. In a world in which we optimize ossification, Y may not be justified. Finally, consider Z. Z does not generate much delay but can be used to accomplish the same sorts of ends as X. If delay is a cost to reduce rather than a potential benefit to embrace, choosing Z over X is an easy call. But when the goal is to optimize, rather than eliminate, ossification, X might be better than Z. Further complicating all of this analysis, moreover, is the fact that X, Y, and Z each has costs independent of delay. Logically, the best approach is to take all of these considerations into account and then find the optimal mix.

To be sure, optimizing ossification may be easier to explain in concept than to implement in practice. It is difficult to fully measure the costs and benefits of regulatory procedures, including delay. And it may be especially difficult to put a measurable value on the benefits and costs that delay imparts on legitimacy; indeed, legitimacy is so fuzzy a concept that it is doubtful whether anyone can measure it well. All of this is conceded. Even so, at least conceptually, an optimizing goal is useful. As Vermeule has explained in an analogous context, "none of this is to deny the coherence of the optimizing enterprise. It

is just to say that optimizing under conditions of uncertainty is difficult. The problem is informational, not conceptual."[112]

B. What Optimal Ossification Might Look Like in Practice

Although precision is impossible, we may be able to approximate—at least roughly—what optimal ossification might look like. Here, this Article begins to sketch, as a policy matter, what procedural mix may generate the highest net benefit to society. Hopefully when Congress debates procedural reform, this analysis will be useful.

To begin, however, before discussing individual procedures, a cross-cutting question needs to be answered: should regulatory procedures be uniform (i.e., one set of rulemaking procedures that applies to all agencies and all rules) or should the types of procedures vary (i.e., different agencies use different procedures or some rules are promulgated using specialized procedures)? In other words, in the parlance of civil procedure scholarship, do we want "transsubstantive" administrative procedure?[113]

Of course, we do not have perfectly uniform procedures now. Certain agencies must use specialized procedures either across the board or for specific types of rulemakings.[114] Likewise, certain types of rulemakings will play out differently than others because of the nature of the subject matter. And because different agencies have different internal structures and cultures, what are nominally uniform requirements may, in practice, be applied quite differently at different agen-

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112 Vermeule, *supra* note 1, at 693. In mathematical terms, optimal ossification can be determined by solving what is known as an "optimization problem." The idea would be to maximize net social benefits as a function of agency resource investment subject to the constraints imposed by each of the potentially competing dynamics set out in this Article. Deriving the mathematical formula is challenging, especially because it is presumably nonlinear. Hence, a mathematical model lies beyond the scope of this Article.

113 *See, e.g.*, Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 378 (2010) ("By transsubstantive, I mean two things: the notion that the same procedural rules should be available for all civil law suits: (1) regardless of the substantive law underlying the claims, or 'case-type' transsubstantivity; and (2) regardless of the size of the litigation or the stakes involved, or 'case-size' transsubstantivity.").

114 The Federal Trade Commission, for instance, has unique "hybrid" rulemaking requirements. *See, e.g.*, Nielson, *supra* note 8, at 100–01 (citing Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1982–84 (2015); William D. Dixon, *Rulemaking and the Myth of Cross-Examination*, 34 ADMIN. L. REV. 389, 423–38 (1982)). Likewise, Congress sometimes requires different procedures for different types of rulemaking, even within a single agency. *See* Nielson, *supra* note 8, at 101 (explaining that "the Clean Air Act sometimes requires hybrid rulemaking"). And agencies have discretion to add procedures beyond the baseline of the APA. *See, e.g.*, Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).

cies or even different offices or sections of the same agency.[115] Nonetheless, there is a great deal of procedural uniformity in administrative law. The APA is a default set of procedures, and it applies broadly. And the APA, with few exceptions, draws no distinctions about types of substantive rules. Under the APA, so long as formal rulemaking is not required (and it essentially never is anymore) and so long as some exception does not apply, all legislative rules must go through the same procedural steps. The question is whether this uniformity is good or bad if the goal is to maximize the benefits of rulemaking procedure.

Unfortunately, the answer is probably some of both. There are sound reasons for uniform procedures,[116] just like there may be sound reasons for uniform rules of statutory interpretation[117] or uniform technological standards.[118] When there are uniform procedures, knowledge is more readily transferrable across otherwise discrete agency decisions. If someone understands how the APA works, she can speak intelligently about the rulemaking process at multiple agencies.[119] Judicial review is also easier because generalist judges can more readily understand and evaluate what the agency has done, plus there is less litigation about what procedure to use.[120] The upshot therefore may be that having uniform procedures might be cost-justified, even though uniform procedures are under- and overinclusive.[121]

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115 *Cf.* United States v. Mead Corp., 533 U.S. 218 (2001) ("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting."); Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58 (2016) (explaining the regional divergence in approaches, even when the procedures themselves appear uniform).

116 *See, e.g.*, Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1656–57 (2017) (explaining the rise of "transsubstantive principle[s]" in civil procedure).

117 *See, e.g.*, Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. Rev. 209, 211 (2015) (citing Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1767 (2010)) (explaining the benefits of uniform interpretative rules).

118 *See, e.g.*, Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889, 1896–97 (2002).

119 *See, e.g.*, Subrin, *supra* note 113, at 387 (explaining that a transsubstantive system "does not require learning large numbers of different procedural rules").

120 *See, e.g.*, *id.* (nonuniform procedures generate litigation about those procedures).

121 It is important to recall that bright-line rules sometimes *are* optimal in practice, even though bright-line rules are over- and underinclusive. *See* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 31 (2015) ("Bright-line rules tend to provide clear guidance to firms subject to those rules and to limit the transaction costs associated with enforcement, while unstructured standards tend to reduce errors (whether false positives or false negatives) by permitting a more careful assessment of business practices' competitive effects."). It can be too costly to recreate the system

Yet at the same time, sometimes specialization makes sense *despite* its costs.[122] There are times where the benefits of a targeted approach are so substantial that they outweigh the loss of uniformity.

My intuition is tentative, but I suspect there is room for more specialized procedures within administrative law—although there should be a strong presumption in favor of transsubstantivity. At the same time, the triggers for specialized procedures should be clear. Because clear dividing lines are important, a procedural system in which one set of procedures applies to "important" issues while another system applies to "unimportant" ones seems like a bad system. Not only would such a trigger for heightened procedures be confusing, it also would be susceptible to gamesmanship.[123]

For example, if we want to encourage agencies to be able to make credible commitments, and further, assuming that ossification is a good way to create such credible commitments, then several options are available. We could (1) keep the procedures we have now for those categories of rulemakings that are especially benefited by credible commitments while streamlining some procedures for other types of rulemakings where the value of credible commitments is not significant;[124] (2) keep the procedure we have now for those other types of rulemakings while increasing the procedures for those categories of rulemakings that are especially benefited by credible commitments; or (3) increase the procedures for categories of rulemakings that benefit from credible commitments while reducing the procedures for those categories that do not so benefit. Picking between Options 1, 2, and 3 is difficult without having a better (i.e., more empirical) sense of costs and benefits. But the overarching principle would be that rulemaking procedures should vary depending on whether the rule at issue falls in one of the categories for which credible commitments are especially valuable.

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anew too often. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("There are times when even a bad rule is better than no rule at all.").

122 *See, e.g.*, Stancil, *supra* note 116, at 1684–85 (advocating retaining some transsubstantivity but modifying it where the benefits are outweighed by the costs, specifically in situations in which "economic incentives present in a class of cases differ significantly from the paradigm baseline characteristic of the federal civil docket").

123 *Cf.* Nielson, *supra* note 15, at 286 (observing that if formal rulemaking were required, agencies might shift away from rulemaking altogether).

124 Of course, if there are procedures that as a category are not cost-justified in terms of their ability to produce more sound and less arbitrary rules, then we should reform those procedures unless they are especially valuable in terms of creating beneficial delay (i.e., delay that helps create a useful commitment mechanism or that bolsters legitimacy).

For purposes here, assume that the optimizing answer is Option 2 or 3. If so, how does one draw an administrable line between those types of rules that benefit from heightened procedures and those that do not? There are different ways to try to draw the line. The line, for instance, could be based on either the character of the *rulemaking* or the character of the *agency*. If there is an efficient way to identify types of rules that benefit from credible commitment mechanisms, presumably that would be best because the tailoring could be narrower. Because agencies generally do not only promulgate rules that are benefited (or not benefited) by credible commitment mechanisms, it would be useful if we could tailor regulatory procedure to the character of a particular rule. If it is not possible to draw a clean line between types of rules, however, then perhaps we can identify agencies that, on net, are most benefited by credible commitment mechanisms, and require those agencies to use ossification-causing procedures, even if not everything that those agencies do benefits from delay.

Unfortunately, neither of these lines seems easy to draw. The types of regulations that benefit the most from delay are those for which the agency benefits from private sector participation, especially in contexts for which a large amount of capital expenditures are necessary for a private actor to do what the agency wants done. An easy example of this sort of regulation is an incentive program. When an agency creates an incentive, it plainly wants to encourage a certain type of activity. But incentives are not the only type of regulation that may benefit from a credible commitment mechanism. An agency may want a certain type of activity to continue into the future, but not other types of activities, and so create regulations to push regulated parties in that direction. By contrast, the type of regulation that is least benefited by a credible commitment mechanism is one that is targeted towards an immediate danger. The agency has little to no interest in encouraging long-term capital investment; it just wants some activity to stop. Yet it can be difficult to draw clean lines between these types of regulations. At the extremes, it is easy to see the differences. But in application, there are many marginal cases, especially because a single rulemaking can contain multiple provisions with different purposes. That said, my instinct is that it may be easier to draw a line between types of regulations than one between types of agencies—indeed, arguably, the APA already draws this sort of line

through its "good cause" exception, which allows an agency to use expedited procedures when there is a real danger.[125]

The same sorts of questions apply if we want to find the optimal amount of delay to enhance agency legitimacy. Delay presumably most benefits those rules that are politically contentious (e.g., economically significant, culturally significant). So, assuming that those sorts of rules should be the focus, is there a good way to identify them? And if not, does it make sense to draw lines on an agency-by-agency basis, realizing that no agency promulgates *only* contentious rules?

My sense is that, again, an agency-by-agency approach makes less sense. Although some agencies are more politically divisive than others, virtually all agencies have the potential to touch the public nerve. Thus, presumably the better line is targeted at types of rulemakings. One potentially bright-line approach worth considering is to require additional procedures for especially *expensive* regulations, which already is a line that administrative law sometimes draws. For instance, the Congressional Review Act[126] requires a special process for "major" rules, which are defined as those costing over $100 million.[127] Executive Order 12,866 draws a similar line regarding "significant" regulatory actions.[128] That sort of line would be both over- and underinclusive (for instance, some culturally sensitive issues may not cross the threshold), but still may be the most administrable one. Again, however, experimentation makes sense.

Agency evasion must also be accounted for. It is no secret that many experts bemoan ossification. What I have found, however, is that when ossification is explained as a commitment mechanism, that explanation has some force. To be sure, these experts point out, rightly, that not all rules need a credible commitment mechanism. But they recognize that regulated parties value stability.[129] By contrast, the

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125 *See* JARED P. COLE, CONG. RESEARCH SERV., R44365, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION (2016) (discussing 5 U.S.C. § 553(b)(3)(B), (d) (2012)).

126 5 U.S.C. §§ 801–808 (2012).

127 *See id.* § 804.

128 *See* Exec. Order No. 12,866, 3 C.F.R. § 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 802–06 (2012).

129 *See* McGarity, *Some Thoughts*, *supra* note 2, at 1460. One possible solution would be to allow agencies to decide whether a particular rule would benefit from a credible commitment mechanism and then be able to create a credible commitment mechanism for that specific rule. *Cf.* Masur, *supra* note 11, at 1062–63 (suggesting that perhaps agencies should be able to promulgate irrevocable regulations). This may merit experimentation. As explained above, however, there is special reason to doubt such an agency-driven solution when it comes to solving legiti-

idea that delay may be beneficial for legitimacy purposes is much more contested. Yet if I am right that one of the drivers of suspicion of the regulatory process is information asymmetry, then one would expect agency officials and other experts to give less weight to legitimacy. Agency officials and the like are the ultimate insiders. Once someone is accustomed to being an insider, it is hard to remember what life was like without that understanding. And because the benefits of legitimacy can be abstract while immediate objectives are concrete, delay for legitimacy's sake may frustrate regulators.[130] Accordingly, the risk of evasion presumably is stronger when the benefit being pursued is agency legitimacy. Building on that thought, one danger of a line based on dollar value is that the agency will simply divide regulations into smaller rules.[131] There is no perfect answer for this danger—preventing agency evasion can be a game of cat and mouse.

Put all of this together and the following picture emerges: a regulatory system that optimizes ossification will, all else being equal, require more procedures for regulations that benefit from a credible commitment mechanism or for which the subject is especially contentious than for other regulations. This is so because whatever the optimal procedural mix is, it should account for the fact that only certain types of rules benefit from delay. Likewise, tentatively, line drawing should be done at the regulation rather than agency level. And finally, especially for contentious rules, the scheme should be designed to minimize agency evasion.

If the optimizing answer is to require greater procedures for certain types of rulemakings than what we currently use (which may be the case, especially if the ossification hypothesis, in fact, is overstated), the next question is what types of heightened procedures make sense? That is a hard question, especially because we do not have good data

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macy problems. Agencies may not be sensitive to such concerns, especially if the concerns arise from the fact that those outside the agency lack specialized knowledge.

130 *See, e.g.*, Nielson, *supra* note 15, at 288. This is not to say that experts always know best. Specialists, for instance, can sometimes suffer from myopia; they cannot always prudently balance the issue they care about with other concerns.

131 *See, e.g.*, Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1792 (2013) ("Reports from former OIRA officials, for example, suggest that agencies may avoid determinations of economic significance by splitting rules into parts, each of which falls beneath the $100 million threshold. So, for example, an economically significant rule with an expected impact of $150 million in a given year could be split into two separate rules, each of which is expected to cost $75 million in that year. Neither of these rules would now be designated as economically significant, thus effectively lowering the scrutiny of review." (footnotes omitted)).

about the costs and benefits of even the procedures that are commonly used now, much less about those procedures that are uncommon or untried. Elsewhere, I have defended the value of cross-examination in the regulatory process.[132] Perhaps for the most expensive regulations, more targeted questioning of agency experts would prudent. Similarly, perhaps more comprehensive cost-benefit analysis by OIRA, reviewable by courts, also might make sense for certain types of rules; such analysis not only could improve the quality of the rules, but it also could further slow things down in contexts for which that would be useful. By contrast, if the optimizing answer is to require fewer procedures even for regulations that benefit from ossification, then perhaps agencies should have greater flexibility to not respond to comments, especially if (as some suggest) the comment process sometimes is kabuki theater in high-profile matters.[133] These are just tentative ideas, but they may reflect the type of thinking that would assist in the optimization process.

C. The Need for Experimentation

So far, this analysis has been theoretical—because delay has costs and benefits, regulatory procedures should be designed to maximize benefits while minimizing costs, including the costs and benefits of delay. Reform, however, often works better on a whiteboard than in the real world. The more complicated a system is, the more likely it is that change will have unintended consequences.[134] And administrative law is certainly a complex system. Chasing optimal ossification therefore should be done carefully. Experimentation is called for.[135]

One of the problems with designing an optimal procedural system is that we do not have much data. Because it is unclear just how ossified the rulemaking process even is (which is a pretty basic question), it is hard to begin designing a system based on identifying the optimal amount of ossification. In a perfect world, we would know not only how ossified the system is in aggregate, but also how much each indi-

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132 *See* Nielson, *supra* note 15, at 260.

133 *See, e.g.*, Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 290 (2017) (noting "the judicial conceit that agencies must keep an open mind during the notice-and-comment period"). For what it is worth, I do not think it makes sense to eliminate the requirement, even if it sometimes may be kabuki theater (which is surely not *always* the case). For the most material comments, the agency's response is key for purposes of judicial review.

134 *See, e.g.*, Nielson, *supra* note 15, at 291.

135 *See, e.g.*, Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 533, 553 (2008) (urging greater use of experimentation, including regarding regulatory procedure).

vidual procedure contributes to that ossification. We would also know if and how the data vary across agencies and type of rule, as well as how often agencies hope to encourage long-term investment. We also would know with much greater specificity how information spreads across society and how long it takes to do so. And finally, we would know how valuable each procedure is in terms of the traditional considerations we use to evaluate procedure, e.g., in improving scientific accuracy or preventing arbitrariness. Unfortunately, in our very imperfect world, we do not have *any* of this information. So where to begin?

The first step is to try to obtain better information. There is a lot of theory in administrative law scholarship, but, unfortunately, not a lot of data. The second step, which may be used to augment the first step, is to try targeted experiments. As I have explained elsewhere:

> Congress, for instance, could consider "trial runs" of formal rulemaking. Under such an experiment, Congress could order that half of the proposed rules from select agencies worth more than a certain sum or of a certain type be randomly assigned to a formal rulemaking track, while the others remain in the informal rulemaking track. Such a proposal would be open to gamesmanship, but it would at least create something concrete to examine.[136]

The administrative state is so large and varied that experimentation should be possible. Of course, experimentation is not easy; the design of the experiment will be important, the data will have to be interpreted, and the process will not be costless. But just as regulation often makes sense despite these same problems, experimentation does too.

Conclusion

Ossification is a dirty word in administrative law. When someone says rulemaking is ossified, it is not a compliment. Rather, that person means delay is a problem. On this account, if agencies could equally avoid errors through less burdensome procedures, they should be free to do so.

Delay, however, has underappreciated benefits. As this Article explains, the delay that results from administrative law's procedures can act as a credible commitment mechanism against rapid change, thus encouraging more robust participation by the private sector.[137]

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136 Nielson, *supra* note 15, at 292.

137 *See supra* Part II.A.

Likewise, delay may enable information intermediaries to inform the public of what agencies are trying to accomplish, which can enhance agency legitimacy.[138] These are benefits, even apart from the value that procedures have to help agencies avoid errors. Unfortunately, there can also be too much delay. Agencies do not always need a credible commitment mechanism, and not every regulatory decision is likely to affect agency legitimacy.

Hence, the takeaway from this Article: Ossification is neither altogether bad nor altogether good. The challenge, therefore, is to find the right amount of ossification. Doing that will not be easy. But the goal should be optimal ossification, not no ossification at all.

138 *See supra* Part II.B.