ESSAY

"Good Cause" Is Cause for Concern

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ABSTRACT

The Administrative Procedure Act ("APA") generally requires that all federal administrative rules undergo public "notice and comment." The "good cause" exception allows an agency to bypass this requirement where it would be "impracticable, unnecessary, or contrary to the public interest." In recent years, good cause has been increasingly used to excuse "major" rules, or those that have an economic impact of $100 million or more. In some cases, good cause excuses notice and comment altogether. In other cases, it excuses prepromulgation notice and comment in favor of postpromulgation notice and comment.

This Essay argues that either result is unacceptable and that the APA should be amended to require prepromulgation notice and comment for all major rules. Excusing rules from APA procedures deprives them of the democratizing effects of public participation. The remedies created to address improper invocations of good cause each have problems of their own. Specifically, they promote bias in favor of the agency's position, even where that position is subject to postpromulgation notice and comment. An amendment requiring notice and comment better aligns the APA with executive and legislative treatment of major rules, which reflect an understanding that major rules deserve major attention. Mandated procedures increase oversight for

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rules with the broadest societal impact and ensure that the public participates in the administrative state when it matters most.

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Introduction

Presidential transitions routinely engage in elaborate games of administrative ping pong. The outgoing administration rushes to promulgate rules that align with its party before leaving office—known as "midnight rules."[1] The successors quickly attempt to unwind those rules and policies, only to later adopt their predecessor's strategy and

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[1] Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 Mich. J. Envtl. & Admin. L. 285, 287 (2013).

rush to promulgate rules before the end of their term.[2] Both pass on an administrative state stuffed with last-minute rules and no good way to undo them, metaphorically hitting the ball back over the net.[3] This game, although comical in theory, is controversial in practice.[4] And it is even more controversial when "major" rules are involved—that is, rules with an economic impact of at least $100 million.[5]

President Obama's administration promulgated more than 3,800 rules in 2016—a nearly thirteen-percent increase from 2015.[6] One hundred eighteen of these rules were major rules.[7] Many rules, major and nonmajor, were promulgated without using the notice-and-comment ("N&C") requirements of the Administrative Procedure Act ("APA").[8] And many were midnight rules promulgated in Obama's final months.[9] One popular justification for exempting rules from N&C during Obama's presidency was the "good cause" exception.

President Trump is now tasked with recalibrating the administrative state to fit his policy goals. Upon taking office, Trump's Chief of Staff Reince Priebus issued a memorandum to all executive agencies requesting that they delay or revoke various regulations.[10] Shortly thereafter, the D.C. Circuit shined a light on Trump's delay efforts when it struck down an EPA stay of an Obama-era regulation.[11] Trump is now simultaneously instructing his agencies to adhere to APA procedures[12] and delaying rules by means familiar to his predecessor: the good cause exception.[13] Along with the D.C. Circuit's decision, this invocation of good cause has triggered a needed review of

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2 *Id.* at 300, 335–36.

3 *Id.* at 287, 353–54.

4 *Id.* at 287.

5 5 U.S.C. § 804(2) (2012) (defining "major rule").

6 OFFICE OF THE FED. REGISTER, FEDERAL REGISTER & CFR PUBLICATIONS STATISTICS, https://www.federalregister.gov/uploads/2017/04/stats2016Fedreg.pdf [https://perma.cc/Q5H4-Q6MM].

7 Sam Batkins, *Deregulation Under Obama and Trump*, AM. ACTION F. (June 28, 2017), https://www.americanactionforum.org/insight/deregulation-obama-trump [https://perma.cc/PQ49-RRFH] (providing the number of major rules the Obama administration issued in 2016).

8 *See infra* notes 65–67 and accompanying text.

9 Beermann, *supra* note 1, at 294.

10 *See* Memorandum for the Heads of Executive Departments and Agencies: Regulatory Freeze Pending Review, 82 Fed. Reg. 8,346 (Jan. 20, 2017) [hereinafter Priebus Memo].

11 *See* Clean Air Council v. Pruitt, 862 F.3d 1 (D.C. Cir. 2017).

12 *See* Memorandum from the Attorney Gen. to Dep't of Justice Components, Prohibition on Improper Guidance Documents (Nov. 16, 2017), https://www.justice.gov/opa/press-release/file/1012271/download [https://perma.cc/N4FT-HM64].

13 *See, e.g.*, Jill Family, *Keeping Up with Immigration Law*, YALE J. REG.: NOTICE & COMMENT (Oct. 1, 2017), http://yalejreg.com/nc/keeping-up-with-immigration-law [https://perma.cc/5HJF-2E85].

the exception and its use to excuse major and nonmajor rules from N&C.

This Essay argues that the risk of foregoing prepromulgation N&C is simply too great when dealing with major rules. Major rules are singled out for increased oversight and, as such, deserve the full extent of available procedures. Part I describes the relevant provisions of the APA. Part II explains the traditionally narrow understanding of the good cause exception and describes the increased judicial application of the doctrine. Part III summarizes empirical data outlining the increase in good cause invocations, with a particular focus on major rules. Part IV briefly describes the current remedies available to courts and the executive branch for dealing with good cause invocations. It then highlights the major policy concerns that each of these remedies share. Part V suggests that judicial and executive remedies are insufficient, and an amendment to the APA is the best way to address these concerns. It proposes that all major rules be required to undergo prepromulgation N&C and that the failure to do so should be prejudicial error. The proposed amendment aligns rulemaking with the policy interests represented in recent executive orders.

I. The Administrative Procedure Act and the "Good Cause" Exception

The APA imposes three N&C requirements on agencies "formulating, amending, or repealing" rules.[14] First, pursuant to section 553 of the APA, agencies must publish a notice of proposed rulemaking in the *Federal Register*.[15] This notice must identify the legal authority under which the agency is promulgating the rule and provide a brief description of the substance of the rule and the subjects involved.[16] Second, the agency must offer interested persons the opportunity to comment on the proposed rule.[17] Third, final regulations must include a "concise general statement of their basis and purpose."[18] That statement, which must respond adequately to all well-supported, critical comments, is the basis for judicial review.[19]

The APA also provides exceptions to N&C.[20] Relevant here is the exception where "the agency for good cause finds (and incorporates

14 *See* 5 U.S.C. §§ 551(5), 553(b) (2012).

15 *See id.* § 553(b).

16 *See id.*

17 *See id.* § 553(c).

18 *Id.*

19 *See* United States v. N.S. Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977).

20 *See* 5 U.S.C. § 553(b)(A)–(B).

the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[21] As discussed below, this provision was traditionally understood as a narrow exception justified in only the rarest of circumstances. But agencies have increasingly used it to avoid the APA's time-consuming and expensive procedures.

Notwithstanding its exceptions, N&C is preferred because of the benefits it endows upon agencies and regulated parties. N&C democratizes rulemaking in an administrative system in which decisions go relatively unchecked by the public.[22] These procedures legitimize executive rulemaking and increase accountability.[23] They also reflect a legislative judgment that prepromulgation participation produces better rules[24] and furthers the idea of fundamental fairness to regulated parties.[25] It follows that rules promulgated outside of these procedures, through countermajoritarian mechanisms, are inferior to rules promulgated pursuant to them. In light of this disparity, it is necessary to revisit the basics of the good cause exception.

II. Good Cause: Increase in Popularity and Success

A. *Historically Narrow Understanding but Increasingly Broad Application*

The good cause exception was intended to be rarely used. It only applies where N&C would be "impracticable, unnecessary, or contrary to the public interest."[26] The exception is justified as a means of balancing the desire for public participation with the societal interest in efficient operation of government agencies.[27] Legislative history supports this proposition and provides two more central tenets:

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21 *Id.* § 553(b)(B).

22 *See* Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 Yale L.J. 359, 369 (1972).

23 *See* Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 Admin. L. Rev. 113, 116–17 (1984).

24 *See id.* at 116.

25 *See* Chrysler Corp. v. Brown, 441 U.S. 281, 316 (1979) ("In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment.").

26 5 U.S.C. § 553(b)(B).

27 *See* Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking 53 (5th ed. 2012); *see also* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (finding that the APA's exceptions "preserve agency flexibility in dealing with limited situations where substantive rights are not at stake").

(1) "good cause" should be narrowly construed, and (2) its application depends upon an individualized and circumstantial analysis.[28] The Senate Judiciary Committee that proposed the APA provided in its committee report insight into the few circumstances in which good cause should apply:

> "Impracticable" means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. "Unnecessary" means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. "Public interest" supplements the terms "impracticable" or "unnecessary"; it requires that public rule-making procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure.[29]

The Attorney General's APA manual also endorsed these narrow definitions.[30]

Courts approach these factors in different ways. Some view them as distinct bases for finding good cause.[31] Others take a more holistic approach, considering them all together without trying to assign a justification to any one particular category.[32] Good cause was never intended to serve as an "escape clause" from N&C.[33] However, the application of good cause has expanded over time, arguably past its intended reach.

B. *Broad Application of Good Cause*

While courts claim the good cause exception is "narrowly construed and only reluctantly countenanced,"[34] they apply it inconsis-

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28 *See* Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 333–34, 334 n.69 (1989). For cases affirming such legislative intent, see *id.* at 333 n.66 (collecting cases applying a narrow construction of the good cause exemption).

29 S. REP. NO. 79-752, at 14 (1945).

30 *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30–31 (1947).

31 *See* Lavilla, *supra* note 28, at 350–52.

32 *See infra* Part III.

33 *See* CURTIS W. COPELAND, CONG. RESEARCH SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 6 (2011).

34 Jifry v. FAA, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (quoting Tenn. Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1144 (D.C. Cir. 1992)).

tently and in ever-increasing circumstances. It is difficult to identify a neutral good cause principle because it is an "adjustable parameter," dependent upon the circumstances and facts in which it arises.[35] Good cause is now applied to a variety of different rules, in a variety of different contexts, considering a variety of different factors.

Good cause is used to justify both direct final rules[36] and interim final rules.[37] Further, it is used in several different contexts: suspension of the thirty-day APA delay for final rules;[38] congressional waiver of N&C;[39] responses to a court order;[40] stays pending judicial review;[41] emergency rules;[42] minor typographical changes;[43] and economically significant rules.[44] Courts also weigh several factors in finding good cause, summarized by Connor Raso:

- Whether the agency was acting pursuant to a statutory deadline
- The potential harm from providing advance notice of the rule
- The degree of economic harm created by delay to complete the notice-and-comment process
- The degree of harm to public safety created by delay to complete the notice-and-comment process
- Whether the agency accepted and responded to post-promulgation public comment
- Whether the agency issued the rule on a routine basis
- Whether the rule was limited in scope
- Whether the rule implicated significant reliance interests
- Whether the agency issued the rule pursuant to an injunction
- Whether the agency revised the rule in response to a court order

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35 Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1122–25 (2009).

36 *See* Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 1–3 (1995).

37 *See* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 704 (1999).

38 JARED P. COLE, Cong. Research Serv., R44356, The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action 2 (2016).

39 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-21, FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 7 (2012) [hereinafter GAO 2012 REPORT] (finding no N&C needed if "statutes . . . have authorized or required agencies to issue rules without notice and comment").

40 *See, e.g.*, AFL-CIO v. Chao, 496 F. Supp. 2d 76, 85–86 (D.D.C. 2007) (collecting cases).

41 *See, e.g.*, Sierra Club v. Jackson, 833 F. Supp. 2d 11, 28–29 (D.D.C. 2012).

42 *E.g.*, Jifry v. FAA, 370 F.3d 1174, 1179 (D.C. Cir. 2004).

43 *See, e.g.*, Zhang v. Slattery, 55 F.3d 732, 746–47 (2d Cir. 1995).

44 *See, e.g.*, Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

- Whether the agency provided a contemporaneous justification for invoking good cause[45]

In some ways, the increased popularity of this exception makes sense. It is popular because it provides flexibility and allows agencies to avoid cumbersome procedures.[46] But the desire for flexibility does not justify an unlimited use of the exception. The good cause exception was not intended to apply so broadly: the "exception exists principally to give agencies flexibility in dealing with emergencies and typographical errors, *plus the occasional situation in which advance notice would be counterproductive*."[47] This is not an open door. Rather, it is a pinhole, and designedly so. Congress, in other words, does not "hide elephants in mouseholes."[48]

In light of this, courts have refused to find good cause in some cases. Good cause, however, does arise in a variety of circumstances, although it is difficult to generalize a judicial approach to the exception. Obama used the good cause exception with great success, and Trump's success is yet to be seen.[49] It cannot be disputed that in the last twenty years, agencies have increased the number of rules they promulgate pursuant to good cause.[50] The concerns traditionally associated with the exception are magnified when applied to major rules with an economic impact of $100 million or more.[51] Thus, a closer look at this application is warranted.

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45 Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 88–89 (2015) (footnotes omitted).

46 *See* Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401, 414–15 (1999) ("[C]ourts struggle to guard against the overuse of this attractive short-cut for fear of losing the benefits associated with informal rulemaking procedures.").

47 Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1782 (2007) (emphasis added); *see also* United States v. Valverde, 628 F.3d 1159, 1165 (9th Cir. 2010) ("[T]he good cause exception is essentially an emergency procedure." (quoting Buschmann v. Schweiker, 676 F.2d 352, 357 (9th Cir. 1982))).

48 Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001). The Court in *Whitman* declared that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Id.* This proposition stands for the idea that Congress and federal agencies may not expand statutory provisions beyond the text.

49 *See* GAO 2012 REPORT, *supra* note 39, at 37.

50 *See infra* Part III.

51 *See* MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE FEDERAL REGISTER 7–14 (2016). "Major rules" are slightly different from "significant" rules and "economically significant" rules. *See id.* at 7–11. This Essay refers to "major" rules exclusively.

III. Empirical Studies and Analysis

There have only been three empirical studies of the use of the good cause exception, in 1989,[52] 1998,[53] and 2012.[54] These studies and their accompanying legal commentary shed light on the application and success of the good cause exception as applied to major and nonmajor rules.

A. Early Studies

Professor Juan Lavilla's 1989 study was the first empirical review of the good cause exception. That study found that in the first six months of 1989, about twenty-five percent of all rules we4re exempted from N&C through an express finding of good cause.[55] Lavilla did not empirically analyze the exception's application to major rules specifically.[56]

A 1998 GAO study did, however, consider major rules. About fifty-one percent of all reviewed rules were published without N&C.[57] About eighteen percent of major rules did not go through N&C—23 out of 122.[58] Of those, fifty-nine percent of all rules and sixty-seven percent of major rules cited good cause.[59] Notable is the eight percent–higher rate of good cause for major rules over the total rules published in that period. The table below and Figure 1 illustrate the frequent use of good cause to excuse rules from N&C.

Rules Exempted from N&C[60]

	All Rules	**Major Rules**
Published without N&C	51%	18%
Citing good cause (out of total published without N&C)	59%	67%

52 Lavilla, *supra* note 28, at 323.

53 U.S. Gov't Accountability Off., GAO-98-126, Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules (1998) [hereinafter GAO 1998 Report].

54 GAO 2012 Report, *supra* note 39.

55 *See* Lavilla, *supra* note 28, at 339 n.86.

56 *See id.* at 378 n.237, 388 n.284 (making only passing remarks on the existence of major rules).

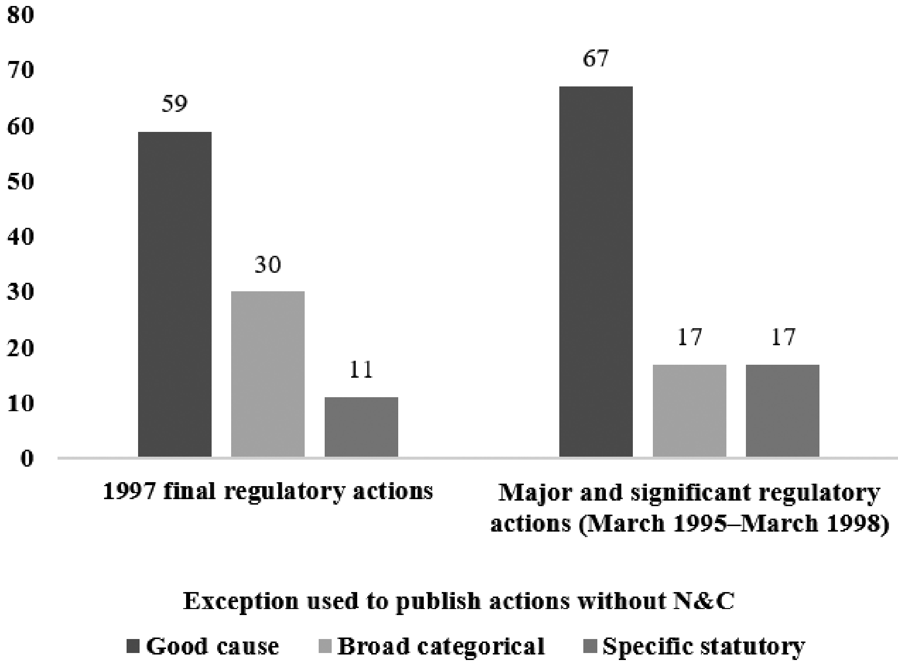
57 *See* GAO 1998 Report, *supra* note 53, at 11.

58 *See id.* at 13.

59 *See id.* at 20.

60 *See id.* at 11, 13, 20.

FIGURE 1. EXCEPTIONS FOR RULES PUBLISHED WITHOUT N&C[61]



B. President Obama: Good Cause Success with Major Rules

The next study, published in a 2012 GAO report, reviewed rules promulgated from 2003 to 2010, including many Obama-era regulations.[62] That study found that forty-four percent of all nonmajor rules and thirty-five percent of all major rules were published without N&C.[63] Agencies cited good cause in sixty-one percent of nonmajor rules and seventy-seven percent of major rules.[64] Notable is the increase in good cause invocations over the 1998 data—ten percent higher for major rules.

The good cause exception, or an extension thereof, was frequently used to exempt major rules from N&C in Obama's early years.[65] Between 2008 and 2010, the Department of Agriculture promulgated fourteen major rules pursuant to the 2008 Farm Bill without public comment.[66] In 2010 alone, the Department of Health

61 GAO 1998 REPORT, *supra* note 53, at 20 fig.3.

62 *See* GAO 2012 REPORT, *supra* note 39, at 3–4.

63 *Id.* at 36.

64 *Id.* at 37.

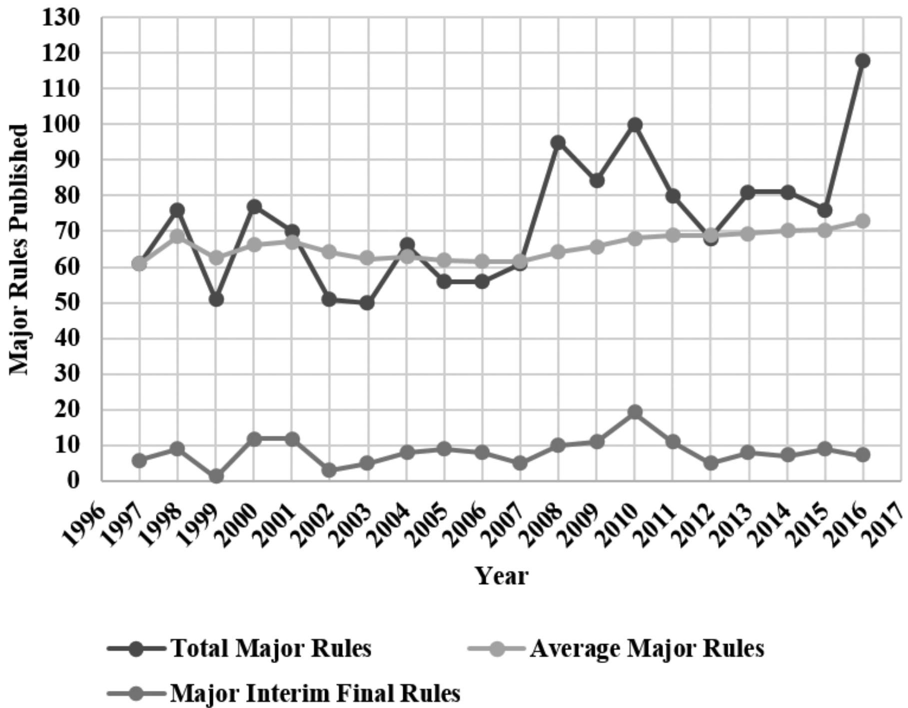
65 Congressional waivers of prepromulgation N&C may be interpreted as an application of good cause. *See* COLE, *supra* note 38, at 7–8.

66 *See* Susan Dudley, *GAO Report: Agencies Circumvent Public Comment on Major Rules*, GEO. WASH. REG. STUD. CTR. 1 (Jan. 28, 2013), https://regulatorystudies.columbian.gwu.edu/

and Human Services promulgated eleven major rules pursuant to the Affordable Care Act without N&C.[67]

While no major study has been conducted since 2012, a few data points help uncover how often major rules are promulgated under the good cause exception. We know how many rules have been promulgated as interim final rules, a unique application of the good cause exception.[68] The GAO's 2012 study explains that agencies did not use nonmajor interim final rules very often—only four percent of the time—but interim rules were used for a much higher percentage of major rules—about fourteen percent.[69] And we know how many times good cause was invoked as part of a major interim final rule ("MIFR"), as Figure 2 illustrates.

FIGURE 2. MAJOR RULES (1997–2016): PUBLISHED VS. INTERIM FINAL RULES[70]



sites/g/files/zaxdzs1866/f/downloads/GAO%20report%20Dudley.pdf [https://perma.cc/CJ8M-8D49].

67 *Id.* at 2.

68 CAREY, *supra* note 51, at 14. Interim final rules are rules excused from prepromulgation procedures for good cause, but subject to postpromulgation N&C.

69 *See* GAO 2012 REPORT, *supra* note 39, at 37.

70 Figure 2 data was collected from the GAO's Congressional Review Act database. *See* U.S. Gov't Accountability Off., *Congressional Review Act*, http://www.gao.gov/legal/congression

This breakdown is revealing. During the four Clinton years in this study, agencies averaged seven MIFRs per year and totaled twenty-eight. In Bush's eight years, agencies averaged eight MIFRs per year and totaled sixty. And in Obama's eight years, agencies averaged ten MIFRs per year, and totaled seventy-seven. The data is clear: more major rules are being exempted from N&C and its democratizing features.

C. *President Trump: Good Cause for Nonmajor Rules*

Upon taking office, Trump delayed, revoked, or placed under review many Obama-era regulations.[71] Within his first six months after taking office, Trump halted fifty-five rules.[72] Incoming presidents often use "regulatory moratoria" like this after seizing control from the opposing political party.[73] One central goal of this action is to curb the impact of "midnight rules" promulgated during the final months of their predecessor's term[74]—and Obama promulgated a lot of midnight rules.[75] But "a new administration cannot in blanket fashion use agency suspensions to provide itself with a clean slate on which to remake regulatory decisions."[76]

Trump's executive agencies cited the good cause exception nineteen times—for about thirty-five percent of the delayed rules—pursuant to the Priebus Memo.[77] Many of these invocations are sus-

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al-review-act/overview [https://perma.cc/5MPG-CYCR]. Much of this data is reflected in Carey, *supra* note 51, at 8.

71 Priebus Memo, *supra* note 10 (freezing regulations).

72 Rena Steinzor & Elise Desiderio, *The Trump Administration's Rulemaking Delays*, Ctr. for Progressive Reform 2 (July 14, 2017), http://www.progressivereform.org/articles/Trump_Rule_Delays_Chart_071917.pdf [https://perma.cc/W2F3-QCAT] (documenting delayed regulations). This number is continually changing as the Trump administration continues to operate. For an often-updated number, see Nadja Popovich et al., *Environmental Rules on the Way Out Under Trump*, N.Y. Times (Jan. 31, 2018), https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html [https://perma.cc/ME3W-HEM8].

73 *See* Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 Nw. U. L. Rev. 471, 471–73, 530–31 (2011) (describing the responses to midnight regulations by Presidents Obama and Bush).

74 "Midnight regulations" are those passed during an exiting president's lame-duck period. Beermann, *supra* note 1, at 286.

75 One source concluded that President Obama issued thirty-eight major rules during his last two months in office. Sam Batkins, *Obama Administration Issued $157 Billion in Midnight Regulation*, Am. Action F. (Jan. 23, 2017), https://www.americanactionforum.org/insight/obama-administration-issued-157-billion-midnight-regulation [https://perma.cc/B6GV-4XKQ].

76 Peter D. Holmes, *Paradise Postponed: Suspensions of Agency Rules*, 65 N.C. L. Rev. 645, 692 (1987).

77 Data was obtained from the Federal Register and independently analyzed by the author. This initial review was based on the collection of halted rules recognized in Steinzor &

pect. Close analysis of some of these delays reveals the use of boilerplate language untethered from the facts,[78] and several cited traditionally illegitimate rationales for delaying regulations using good cause, such as justifying delays because of changes in administrations.[79] In sum, these empirical studies suggest that the good cause exception is being cited with greater frequency for both major and nonmajor rules. Particular attention should be given to its use for excusing major rules from N&C.

IV. Policy Concerns Associated with Good Cause and Its Remedies

N&C is generally desired because it promotes public participation in the regulatory process. The good cause exception to this requirement does have its benefits, though, namely, promoting quick and responsive regulation. But good cause rules also give rise to various policy concerns. The judicial and executive branches have designed remedies to address improper invocations of good cause, but these remedies share many of the same concerns associated with good cause itself. These remedies thus also give cause for concern.

A. Benefits of N&C and Concerns with Good Cause

"The need for, and desirability of, public participation in [administrative rulemaking] is axiomatic."[80] N&C promotes public deliberation and serves to "reconcile agencies' democratic deficit with their

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Desiderio, *supra* note 72. Interestingly, none of the delayed rules citing good cause qualify as "major" or "economically significant." This may suggest that the new Administration is cognizant of the fact that major rules are subject to heightened political scrutiny.

78 *See e.g.*, Roadless Area Conservation; National Forest System Lands in Colorado; Delay of Effective Date, 82 Fed. Reg. 9973, 9974 (Feb. 9, 2017) ("USDA finds that notice and solicitation of comment regarding the brief extension of the effective date for the final regulation are impracticable, unnecessary, and contrary to the public interest pursuant to 5 U.S.C. 553(b)(B). USDA believes that affected entities need to be informed as soon as possible of the extension and its length in order to plan and adjust their implementation process accordingly."); Supplemental Nutrition Assistance Program (SNAP): Eligibility, Certification, and Employment and Training Provisions of the Food, Conservation and Energy Act of 2008; Extension of Effective Dates and Comment Period, 82 Fed. Reg. 11,131, 11,132 (Feb. 21, 2017) (finding the same); *see also* Lavilla, *supra* note 28, at 399–403 (describing the requirement that justifications for good cause be detailed and fact-specific).

79 *See, e.g.*, Energy Conservation Program: Energy Conservation Standards for Ceiling Fans, 82 Fed. Reg. 14,427, 14,427 (Mar. 21, 2017) (delaying "to give the newly appointed Secretary of Energy . . . the opportunity for further review and consideration of new regulations").

80 Gellhorn, *supra* note 22, at 369.

immense power."[81] Public participation procedures thus provide an oversight mechanism for the public and Congress.[82] They lead to better rules by promoting consideration of all available information.[83] And adherence to these procedures furthers the idea of fundamental fairness for regulated parties.[84]

Good cause is a countermajorian mechanism that evades these benefits, albeit sometimes for good reason. The good cause exception provides agencies with the flexibility to promulgate rules quickly and cheaply, but with efficiency comes other risks.

> The risk of error is heightened when an agency acts summarily, and some rules promulgated under the good cause exemption have been based on faulty or inadequate information and have produced unanticipated and undesirable effects. Public participation probably would have led to better decisions in these cases, and it might also have increased interested persons' perceptions of the fairness of the rulemaking process as well as their acceptance of the rule.[85]

Courts have therefore found several situations that may not satisfy good cause, including conclusory emergencies without a concrete threat;[86] claims unsupported by an independent factual basis aside from the agency's opinion;[87] statutory deadlines absent a traditional "exigency";[88] situations where the agency is concerned not for the

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81 Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 260 (2017).

82 *See* Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 442 (1989) ("Administrative procedures . . . forc[e] the agency to move slowly and publicly, giving politicians (informed by their constituents) time to act before the status quo is changed."); *see also* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 497 (5th ed. 2010) (explaining that interested parties have an incentive to provide information, including the cost of compliance, workability, and merits of alternatives during N&C).

83 *See* McCubbins et al., *supra* note 82, at 442.

84 *See* Chrysler Corp. v. Brown, 441 U.S. 281, 316 (1979) ("[N]otions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment.").

85 The "Good Cause" Exemption from APA Rulemaking Requirements (Recommendation No. 83-2), 48 Fed. Reg. 31,180, 31,181 (July 7, 1983).

86 *See, e.g.*, Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 706–07 (D.C. Cir. 2014) (finding no good cause without facts supporting a "threat of impending fiscal peril").

87 *See, e.g.*, Tenn. Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1146 (D.C. Cir. 1992) (finding no good cause where agency failed to provide evidence, beyond its own expertise, that without the interim rule regulated parties would harm the environment).

88 *See, e.g.*, Nat. Res. Def. Council, Inc. v. Evans, 316 F.3d 904, 906 (9th Cir. 2003) ("[G]ood cause requires some showing of exigency beyond generic complexity of data collection and time constraints; notice and comment must interfere with the agency's ability to fulfill its statutory mandate to manage the fishery."); U.S. Steel Corp. v. EPA, 595 F.2d 207, 213 (5th Cir.

health of the regulated industry but only for the health of one regulated entity;[89] and political transitions involving new government actors and policies.[90]

Commentators and courts recognize these downsides. Fortunately, other administrative law doctrines share these same concerns and can improve our understanding of the ramifications of exempting too many rules from N&C.

B. Remedies to Address Good Cause Concerns

A failure to follow APA procedures presumptively warrants vacation of the rule. The executive and judiciary branches, however, have employed and analyzed several remedies that serve to justify invocations of good cause. These remedies include postpromulgation N&C, the harmless error doctrine, remand without vacatur, and a system of retrospective rulemaking.

Each of the purported remedies described in this Essay suffers from one common problem: they run the risk of triggering or promoting bias. Once an agency has promulgated a rule, with or without N&C, both the agency and the regulated parties will be discouraged from changing the rule. Whether it be agency bias or industry bias, there are significant risks to our democratic system where agencies are given a second shot at explaining away N&C or justifying an interim final rule postpromulgation. We may be willing to take this risk for rules with minimal societal impacts, but concern for bias is—or should be—enhanced when applied to major rules. Where rules have at least $100 million in consequences, agencies should not be free to skirt the democratizing procedures envisioned by the APA.

1. Postpromulgation N&C

The first of these remedies is postpromulgation N&C, where the agency provides an opportunity for public comment only after the rule is promulgated.[91] Final rules justified on good cause grounds are often

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1979) (holding that the "mere existence of deadlines for agency action" generally does not meet the good cause standard).

89 *See, e.g.*, Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93–94 (D.C. Cir. 2012) (declining to find good cause because only a lone company faced harm, not "an entire industry and its customers").

90 *See* Chamber of Commerce v. SEC, 443 F.3d 890, 908 (D.C. Cir. 2006) (holding that traditional exigencies "are of a far different nature than the not uncommon circumstance facing commissions when their membership changes during the course of a rulemaking").

91 *See* GAO 2012 REPORT, *supra* note 39, at 3.

exempted from APA procedures.[92] Interim final rules, for example, are exempted from prepromulgation N&C but subjected to post-promulgation N&C.[93] Interim final rules have become popular for major rules, particularly during the Obama administration.[94]

The major concern with interim final rules rests in bias. "Once an agency has publicly staked out a position and given effect to that position, . . . forces like regulatory inertia, status quo bias, confirmation bias, and commitment bias all make it less likely the agency will deviate from its position."[95] This proposition survives even in the face of postpromulgation comments that may call for change. Despite this concern, it is not clear whether postpromulgation N&C renders a good cause regulation unlawful.

Courts are divided on how to treat these rules.[96] On the one hand, the APA's procedures were created to involve the public early in the rulemaking process, and failure to follow these procedures is fatal to the process.[97] Treating postpromulgation N&C as a presumptive cure would "make the provisions of [section] 553 virtually unenforceable" because agencies could simply promulgate the rule and rely on post-promulgation procedures.[98] Scholars have also argued that regulated parties may not take postpromulgation N&C seriously if the rule is

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92 *See* 5 U.S.C. § 553(b)(B) (2012).

93 *See* Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261, 263 (2016).

94 *See infra* Section III.B.

95 Hickman & Thomson, *supra* note 93, at 287 (footnotes omitted); *see also* William E. Kovacic, *Creating a Respected Brand: How Regulatory Agencies Signal Quality*, 22 GEO. MASON L. REV. 237, 253 (2015) (describing safeguards against confirmation bias); Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 142–43 (1997) (describing commitment bias); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 8 (1988) (describing status quo bias); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 504 (2002) (describing confirmation bias).

96 *Compare, e.g.*, Burks v. United States, 633 F.3d 347, 360 n.9 (5th Cir. 2011) ("That the government allowed for notice and comment after the final Regulations were enacted is not an acceptable substitute for pre-promulgation notice and comment."), *with, e.g.*, Salman Ranch, Ltd. v. Comm'r of Internal Revenue, 647 F.3d 929, 940 (10th Cir. 2011) ("While . . . the temporary regulations were issued without notice and comment, '[n]ow that the regulations have issued in final form [after postpromulgation notice and comment], these arguments are moot.'" (quoting Grapevine Imports, Ltd. v. United States, 636 F.3d 1368, 1380 (Fed. Cir. 2011))). For an extensive discussion, see Hickman & Thomson, *supra* note 93, at 286–93.

97 *See* Bagley, *supra* note 81, at 260.

98 U.S. Steel Corp. v. EPA, 595 F.2d 207, 214–15 (5th Cir. 1979).

already in place.[99] Failure to include the public in early stages of the rulemaking process delegitimizes the rule itself.[100]

On the other hand, courts that accept postpromulgation N&C value the flexibility and practical value of having the exception to the APA procedures.[101] Those on both sides of this debate at least acknowledge that prepromulgation procedures are superior to postpromulgation procedures, but those that approve of postpromulgation N&C resort to the harmless error doctrine to justify foregoing prepromulgation N&C. Permitting postpromulgation N&C encourages bias towards agency positions and risks depriving the public of its say in the matter. It is therefore an imperfect process for rulemaking.

2. *Harmless Error*

Proponents of the "APA-or-bust" view naturally reject the harmless error doctrine, which is the next remedy used by courts. Harmless error applies "when the agency has made a factual mistake of peripheral significance or (more controversially) when the agency's error is serious but the evidence in the record so strongly supports the result that the court is confident the agency would reach the same decision on remand."[102] Error is "prejudicial" where the agency's record and explanation made after postpromulgation N&C is "inadequate" to meet the good cause standards.[103] A procedural error can also be prejudicial error simply for failing to adhere to the APA's N&C requirement, even where the agency undergoes postpomulgation N&C.[104]

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99 *See* Hickman & Thomson, *supra* note 93, at 288; *cf.* Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 620–30 (2002) (discussing similar bias toward a proposed rule prior to formal N&C).

100 *See* Hickman & Thomson, *supra* note 93, at 288.

101 *See, e.g.*, *Salman Ranch*, 647 F.3d at 940. For a deeper discussion of the benefits of postpromulgation N&C, see Hickman & Thomson, *supra* note 93, at 291–92. Hickman and Thomson have also identified a potential mechanism to solve the problems that arise when only postpromulgation N&C is required. They call it the "open mind standard," which "place[s] the burden on the agency, requiring a 'compelling showing' of open-mindedness by the agency to overcome a presumption that an agency did not meaningfully consider postpromulgation comments." Hickman & Thomson, *supra* note 93, at 294 (citing Advocates for Highway & Auto Safety v. Fed. Highway Admin., 28 F.3d 1288, 1292 (D.C. Cir. 1994)).

102 Bagley, *supra* note 81, at 304 (footnotes omitted). This is not an exclusive list of instances in which harmless error applies, but, according to Professor Bagley, these are the two most common scenarios. *See id.*

103 *See* Hickman & Thomson, *supra* note 93, at 266; *see also* 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 1675 (5th ed. 2010) ("In most cases, successful prosecution of a review proceeding yields instead a judicial decision setting aside the agency action and remanding the proceeding for further agency action not inconsistent with the decision of the reviewing court.").

104 *See* Hickman & Thomson, *supra* note 93, at 267.

The harmless error doctrine may excuse an agency's improper use of the good cause exception.[105] But harmless error is not without its own policy concerns. The concerns voiced by the "APA-or-bust" position about postpromulgation N&C apply equally here. The harmless error doctrine incentivizes agencies to ignore APA procedures and rely on the prospect of postpromulgation N&C. Harmless error therefore encourages agencies to circumvent the APA and promotes bias in favor of already-enacted rules. It gives agencies the peace of mind that even if they make a mistake, the court may save them under this doctrine.

One way to ensure that agencies follow the APA procedures for major rules, and avoid the policy concerns described above, would be for a court to hold that any failure to follow section 553 procedures is presumptively prejudicial error. This option may draw criticism as running into *Vermont Yankee*[106] concerns—i.e., it would effectively require agencies to follow more procedures than required by the APA.[107] But this is not an improper legislative option, and Congress should amend the APA to codify this presumption. The harmless error doctrine is thus inadequate to protect against the problems created by foregoing prepromulgation N&C.

3. *Remand Without Vacatur*

A related remedy is remand without vacatur ("RWV"). When a court finds an invocation of good cause invalid it has two options: (1) vacate the rule or (2) remand back to the agency without vacating the rule.[108] The good cause exception and RWV share many policy considerations, as explained below. RWV has been largely rejected in the interim final rule context, but that rejection itself lends support to the argument that good cause procedural defects warrant increased scrutiny.

RWV has been praised on the grounds that it "enhances stability in the regulatory regime . . . , protects reliance interests, avoids regulatory gaps, allows agencies to continue collecting user fees, and ensures continued provision of public benefits (including the benefits of regu-

105 *See id.*

106 Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978).

107 *See id.* at 519–20. Whether this is, in fact, prohibited is unclear. Courts have discretion to determine when foregoing N&C is harmless error, so treating avoidance of N&C as prejudicial error may be lawful. *See id.*

108 For a detailed discussion of this remedy, see Bagley, *supra* note 81.

lation)."[109] Proponents claim it does this while "facilitat[ing] judicial minimalism and . . . reduc[ing] agency burdens by allowing them to revisit prior decisions rather than start from scratch."[110] This agency-friendly procedure aims to protect against agency "ossification," or slowdown of agency behavior.[111] This theoretically protects against status quo bias—bias in favor of the prepromulgation rule.[112]

So too with good cause. The good cause exception provides a flexible mechanism for agencies to regulate without undertaking the arduous N&C process. Flexibility incentivizes agencies to promulgate new rules when new rules are due, effectively rejecting status quo bias, so long as the agency can meet the section 553 standard.

RWV is not without its drawbacks. Use of RWV is particularly suspect where it is used to enact policies favored by a new administration that venture further away from the agency's statutory mandate—a context relevant after any administration change.[113] Opponents also claim that RWV can promote agency status quo bias. RWV can "dissuade[] agency compliance with waived legal requirements" and allow the agency to deviate from congressional directives.[114]

It can also promote industry status quo bias because it "reduces incentives to challenge improper or poorly reasoned agency behavior."[115] Where regulated parties do not believe they will be freed of the unlawful regulation, they are deterred from challenging it in the first place and encouraged to adapt despite objections. Consider *Michigan v. EPA*,[116] in which electric utilities argued that an EPA rule was unlawful. The utilities lost in the Supreme Court, and the case was remanded to the D.C. Circuit without vacatur.[117] When the case was reargued before the D.C. Circuit, however, the utilities fought *against* vacating the rule.[118] The parties had already complied with the rule as

109 Stephanie J. Tatham, Admin. Conference of the U.S., Advisory Report on The Unusual Remedy of Remand Without Vacatur 15 (2014).

110 *Id.* (citing Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 373 (1999)).

111 *See* Sunstein, *supra* note 110, at 370–72.

112 *See id.* at 372–73.

113 *See* Tatham, *supra* note 109, at 15–16 (summarizing arguments); *see also* Boris Bershteyn, Note, *An Article I, Section 7 Perspective on Administrative Law Remedies*, 114 Yale L.J. 359, 382–86 (2004).

114 Tatham, *supra* note 109, at 15.

115 *Id.*

116 135 S. Ct. 2699 (2015).

117 *Id.* at 2712.

118 *See* White Stallion Energy Ctr., LLC v. EPA, No. 12-1100, 2015 WL 11051103, at *1 (D.C. Cir. Dec. 15, 2015) (per curiam) (case renamed on remand).

it existed preremand, and an alteration by the D.C. Circuit would mean they would owe backpay for government-issued funds to comply with the EPA regulations.[119] The parties adapted to the rule as it stood preremand.[120]

This idea applies with equal force to rules reviewed by the agency after the fact. Regulated parties begin relying on the rule—be it an interim final rule, direct final rule, or any other type of rule—as soon as it is promulgated, regardless of whether it is subject to subsequent review. They do so out of fear that no remedy will be awarded even if the rule is found to be unlawful.

RWV has not been applied to interim final rules since the early 1980s, and courts have instead favored the harmless error or immediate vacatur route when the court is reviewing a postpromulgation explanation.[121]

4. *Retrospective Rulemaking*

The final related administrative remedy that shares policy issues with good cause is retrospective rulemaking. Retrospective rulemaking is an executive branch solution that provides for regular review of an agency's existing regulations.[122] Scholars have praised and criticized retrospective rulemaking.[123] Two major concerns are reflected in the literature: (1) agencies are invested in their existing rules, and (2) agencies lack sufficient resources to continually review and revise rules.[124] This Section will focus only on the first of these concerns.

The first concern draws directly from the remedies described above. Agencies tasked with reviewing rules—or, in the case of good cause, affirming through postpromulgation N&C—often lack incen-

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119 *See id.*

120 *See id.*

121 Where error is procedural in nature, vacatur is favored. *See* Bagley, *supra* note 81, at 284–85. Where the agency fails to adequately explain its rationale, courts may refer to harmless error. *See id.* at 286–87.

122 *See* Retrospective Review of Agency Rules (Recommendation 2014-5), 79 Fed. Reg. 75,114 (Dec. 17, 2014).

123 *Compare* Cass R. Sunstein, Simpler: The Future of Government 180–84 (2013) (praising retrospective rulemaking), *with* Michael Mandel & Diana G. Carew, Progressive Policy Inst., Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform 13 (2013), http://www.progressivepolicy.org/wp-content/uploads/2013/05/05.2013-Mandel-Carew_Regulatory-Improvement-Commission_A-Politically-Viable-Approach-to-US-Regulatory-Reform.pdf [https://perma.cc/7UKP-CFY2] (criticizing retrospective rulemaking).

124 Reeve T. Bull, *Building a Framework for Governance: Retrospective Review and Rulemaking Petitions*, 67 Admin. L. Rev. 265, 280–82 (2015).

tives to alter existing rules.[125] Such a change "may be perceived as a tacit admission that the agency erred in issuing the rule."[126] And, as with postpromulgation N&C, agency officials are likely to maintain a presumption in favor of their already-existing rules (i.e., status quo bias) because agency officials attach to "ideas of their own origination"[127] and "are likely to see the benefits of such a project far more clearly than the costs."[128]

Agency officials are also subject to political pressure when reevaluating agency positions. This danger exists when engaging in postpromulgation N&C as well. Several commentators have proposed creating independent bodies tasked with reviewing existing regulations to eliminate political pressures.[129] These authors argue that removing the agency from the review process eliminates concerns of status quo bias or other forms of bias in favor of the agency's position.[130] Again, these pressures exist in the good cause context, specifically where an agency must reconsider its interim final rule in postpromulgation N&C. Retrospective rulemaking is thus inadequate to address the bias concerns present where an agency fails to undertake prepromulgation N&C, particularly where the rule has a large societal impact.

V. Structural Changes Are Needed for Major Rules and Good Cause

What do we learn from each of these judicial and executive "solutions"? That they are all inadequate. Exempting rules for good cause, and then relying on the agency's justification after the fact, extends too much latitude to the agency. It allows the agency to create rationales favoring its settled position. This power is immense when applied to major rules, but these fears are alleviated when the regulated community and the agency justify the rule *prior to* promulgation. The risk of foregoing prepromulgation N&C and suffering from agency or industry bias is simply too great when dealing with major rules. Con-

125 *Id.* at 280.

126 *Id.*

127 *See id.* at 281.

128 Michael Greenstone, *Toward a Culture of Persistent Regulatory Experimentation and Evaluation*, *in* New Perspectives on Regulation 111, 119–21 (David Moss & John Cisternino eds., 2009).

129 *See, e.g.*, Mandel & Carew, *supra* note 123, at 14 (arguing that an independent commission tasked with reviewing already-existing regulations avoids political pressure); Greenstone, *supra* note 128, at 119–21.

130 *See* Mandel & Carew, *supra* note 123, at 14; Greenstone, *supra* note 128, at 119–21.

gress is the only branch left, and it has the power to amend the APA and ensure that democratizing procedures are followed for all major rules.

A. *Executive Orders and Legislative Acts Suggest That Major Rules Warrant Greater Protections*

Rules that impose economic costs of at least $100 million are subject to increased scrutiny because they have a greater impact on society. President Reagan first increased oversight of major rules in part to "provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations."[131] President Clinton reaffirmed Reagan's position but "shifted the emphasis of oversight from a goal of maximizing net benefits to society . . . to a preference for negotiated rulemaking and involvement of interested parties."[132] Central to this goal was creating a system in which the Office of Information and Regulatory Affairs reviewed "significant regulations" before publication.[133]

Obama echoed these goals in Executive Order 13,563[134] and added new principles to guide rulemaking. This Order declared that agencies "must allow for public participation" to provide an "open exchange of information and perspectives among . . . affected stakeholders in the private sector, and the public as a whole."[135] This serves to "promote transparency and comment . . . *before* rulemaking is initiated."[136]

This greater oversight is reinforced in the Congressional Review Act ("CRA"),[137] which requires that Congress review major rules.[138] The CRA gives Congress the right to reject any of these rules by joint resolution.[139] Although the CRA is focused on major rules, it is supplemented by the Paperwork Reduction Act,[140] the Regulatory Flexi-

131 Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

132 Susan E. Dudley & Angela Antonelli, *Congress and the Clinton OMB: Unwilling Partners in Regulatory Oversight?*, REGULATION, Fall 1997, at 17; *see* Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

133 CAREY, *supra* note 51, at 1.

134 3 C.F.R. 215 (2012).

135 *Id.*

136 *FAQ*, OFF. OF INFO & REG. AFF., https://www.reginfo.gov/public/jsp/Utilities/faq.jsp [https://perma.cc/LFA4-JKZG] (emphasis added).

137 Congressional Review Act, Pub. L. No. 104-121, 110 Stat. 868 (1996).

138 *Id.* § 251, 110 Stat. at 868–874 (codified as amended at 5 U.S.C. §§ 801–808 (2012)).

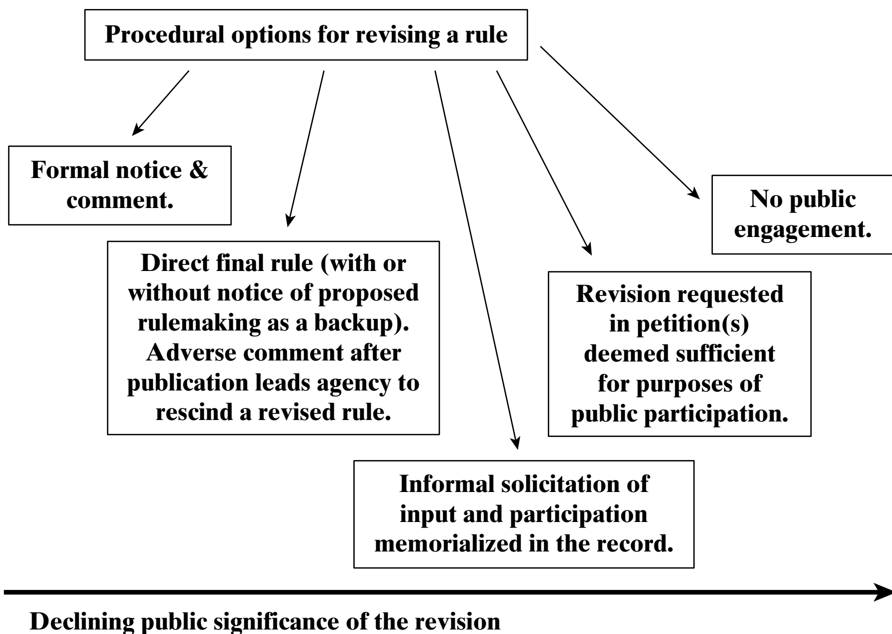
139 *See id.*

140 *See* Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified as amended at 44 U.S.C. §§ 3501–3520 (2012)).

bility Act,[141] and the Unfunded Mandates Reform Act.[142] Major rules are thus subject to greater congressional oversight and pressure in addition to that imposed by the executive branch.

Again, the fundamental principle underlying increased oversight of major rules is that they are subject to greater scrutiny because they have a more significant societal impact. Figure 3 (adopted from the retrospective rulemaking context) outlines the appropriate balance between public significance and warranted public participation.

FIGURE 3. GENERAL OPTIONS FOR ENGAGING THE PUBLIC IN THE REVISION OF A RULE[143]



The more significant the rule, the more important it is that it go through prepromulgation N&C. In the case of major rules, which are socially and economically significant, prepromulgation N&C is important and warranted. Coupled with the increased application of good cause to major rules, we should be wary of the potential adverse impacts of failing to comply with the APA procedures for major rules.

141 *See* Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601–612 (2012)).

142 *See* Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified as amended at 2 U.S.C. §§ 1532–1538 (2012)).

143 This diagram is modeled after that in Wendy Wagner et al., *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183, 209 fig.5 (2017). While this diagram was presented in the context of revising a rule, the same approach applies when subjecting a rule to prepromulgation N&C.

B. *Legislative Action: Adopt Structural Changes Over Definitional Changes*

Judicial intervention, including in the form of a presumption of prejudice, is probably out of the question.[144] In light of the increased attention granted to major rules, Congress should protect against the executive branch's countermajoritarian use of good cause and amend the APA. This amendment should require agencies to undergo N&C for major rules and prohibit exception by good cause unless (1) to address an immediate emergency to the public health, safety, or public welfare; or (2) N&C is unnecessary (e.g., typographical errors). Section 553 should be amended to include the following language:

> (1) All major rules, as defined by the Congressional Review Act, must undergo prepromulgation procedures as described in section 553 unless—
>
> (A) the rule addresses an immediate emergency or risk of emergency to public health, safety, or welfare; or
>
> (B) where notice and comment would be unnecessary and does not substantially affect the rights of regulated parties.
>
> (2) Exemption from section 553 procedures must be justified by the agency in a concise but detailed statement articulating—
>
> (A) the grounds upon which exemption is justified; and
>
> (B) how prepromulgation procedures would frustrate an identifiable, measurable, and substantial harm to public health, safety, or welfare.
>
> (3) Failure to follow section 553 procedures is presumptively prejudicial error.

Three characteristics of this proposed amendment are particularly important. First, this language incorporates proposals by other commentators calling for clearer statutory language and a stricter "brief statement" standard.[145] Second, this proposal reflects the view that efforts should be made to improve agency transparency and further involve the public in rulemaking.[146] Third, and most important, where

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144 *See supra* Section IV.B.

145 *See, e.g.*, James Kim, Comment, *For a Good Cause: Reforming the Good Cause Exception to Notice and Comment Rulemaking Under the Administrative Procedure Act*, 18 GEO. MASON L. REV. 1045, 1071–72 (2011) (clarifying the meaning of good cause with respect to emergencies); Nathanael Paynter, Comment, *Flexibility and Public Participation: Refining the Administrative Procedure Act's Good Cause Exception*, 2011 U. CHI. LEGAL F. 397, 417–19 (calling for stricter "brief statement" standard).

146 *See generally* GAO 2012 REPORT, *supra* note 39; COLE, supra note 38, at 2 (outlining

this proposal differs from other proposals is its textual distinction between major and nonmajor rules—a distinction familiar to administrative law insiders but often described only as a "best practice."[147]

Prior proposals focus on defining the terms of the good cause exception.[148] But that solution can only take us so far. Defining statutory terms leaves the door open for smart lawyers to operate around those terms. Professor Adrian Vermeule describes this as a statutory "black hole," where agencies are free to operate outside APA standards so long as they can navigate its terms.[149] This proposed amendment does not allow agencies to exempt major rules from the APA's democratizing procedures by maneuvering around definitions. This more fundamental structural modification of the APA ensures that major rules are given the increased oversight they deserve. Prior proposals also suggest requiring postpromulgation procedures for all good cause determinations.[150] But, as discussed above, this only exacerbates the problem because it encourages bias, without recognizing that post-promulgation N&C is insufficient.[151]

This proposed amendment also provides three key benefits. First, treating major rules differently from nonmajor rules reflects a legislative judgment that Congress, like the executive branch, believes that rules having a significant economic impact warrant increased scrutiny. This modification would align the two branches, as well as signal to the judiciary that such scrutiny is warranted, incentivizing judges to look more closely at exempted major rules.

Second, requiring prepromulgation N&C addresses concerns associated with status quo bias and agency or industry bias. No longer would agencies be free to avoid N&C, promulgate a rule, and then reverse engineer their explanations after the fact to maintain the status quo. Instead, agencies would be required to justify their decisions at the outset. The public would have a better "opportunity to participate in and influence agency decision making at an early stage, when

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legislative proposals); William M. Jack, Note, *Taking Care That Presidential Oversight of the Regulatory Process Is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum*, 54 ADMIN. L. REV. 1479, 1511–17 (2002).

147 Adoption of Recommendations, 76 Fed. Reg. 48,789, 48,791 (Aug. 9, 2011); *see* A.B.A. RESOLUTION 106B (2016); A.B.A. RESOLUTION 106B REPORT (2016).

148 *See* Kim, *supra* note 145, at 1071–72; Paynter, *supra* note 145, at 417–18.

149 *See* Vermeule, *supra* note 35, at 1096.

150 *See* The "Good Cause" Exemption from APA Rulemaking Requirements (Recommendation No. 83-2), 48 Fed. Reg. 31,180, 31,181 (July 7, 1983); Kim, *supra* note 145, at 1075–76 (requiring "posteffective opportunity for comment" for good cause rules is "an acceptable compromise").

151 *See supra* Section IV.B.1.

the agency is more likely to give real consideration to alternative ideas."[152] As noted throughout this Essay, the value of increased participation in rulemaking is even greater when the rule has such sweeping economic implications.

Finally, this is an apolitical solution. Amending the language of the APA to require N&C takes the decision out of any one judge's hands. Harmless error as applied to major rules would no longer be in dispute, for it would be presumptively prejudicial.

CONCLUSION

The increased use of the good cause exception has far-reaching effects. The exception undermines our democratic system because it permits agencies to issue rules without public participation. Previous presidents have used this mechanism to promulgate rules, none with more success than Obama. Now Trump is using it to try to unravel the rules Obama implemented before leaving office. This game of administrative ping pong threatens the legitimacy of our administrative state. It allows agencies to regulate without public participation and encourages abuse during administration changes.

Invocations of good cause are currently treated by several supposed remedies. Each of these remedies runs the risk of biasing the agency in favor of its rule as it stands before N&C. Though good cause has many benefits and is justified in many circumstances, N&C should not be foregone for rules with more than $100 million in economic impact. The significance of these rules is far too great to excuse the public from their drafting and development. The APA must be amended to ensure public participation in these huge rules.

Both Democrats and Republicans can agree that public participation in the administrative state is of the utmost importance. Without it, the executive branch is free to regulate as it wishes without the APA's preferred democratic check. This concern is most compelling where executive action has wide-ranging consequences. Thus, a change must be made. And that change must be big. Requiring prepromulgation N&C for major rules will help ensure that regulations with the broadest impact will be subject to public debate, satisfying the APA's core mandate.

152 U.S. Steel Corp. v. EPA, 595 F.2d 207, 214–15 (5th Cir. 1979).