AGENCY AVOIDANCE OF RULEMAKING PROCEDURES

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This Article analyzes when and why administrative agencies avoid rulemaking procedural requirements such as the Administrative Procedure Act's (APA's) notice-and-comment process. This Article's original empirical analysis shows that agencies invoke statutory exemptions to avoid such rulemaking procedures more frequently as the threat of a lawsuit challenging that avoidance declines. In situations with a low threat of suit, agencies have avoided rulemaking procedures for more than 90% of rules. Such avoidance falls when the threat of suit increases. But even when litigation ensues, courts do not consistently require agencies to comply with rulemaking procedures. This spotty judicial enforcement, along with significant agency avoidance, casts doubt on the claim that rulemaking procedures have significantly burdened the rulemaking process. At the same time, agency avoidance suggests that rulemaking procedures do less than commonly thought to promote public deliberation in the rulemaking process, foster agency expertise, guard against agency arbitrariness, and make agencies accountable to Congress and to the public. This suggests that agency avoidance of rulemaking procedures has some benefits, but also many costs.

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INTRODUCTION

Legal and political science scholarship has long debated the value of requiring federal administrative agencies to follow procedural requirements such as the APA notice-and-comment process before issuing rules.[1] On one hand, a number of influential scholars have argued that such requirements have important virtues, such as promoting public deliberation in the rulemaking process,[2] guarding against agency arbitrariness,[3] making agencies accountable both to the public and to Congress,[4] and providing valuable information.[5] On the other hand, a number of influential scholars

1. For a description of the rulemaking procedures analyzed in this Article, see *infra* notes 39–51 and accompanying text.

2. *See, e.g.*, Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1576 (1992) (arguing that the "administrative state holds the best promise for achieving the civic republican ideal of inclusive and deliberative lawmaking").

3. *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 537–46 (2003).

4. Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 755–56 (1996) (noting that notice-and-comment rulemaking provides notice to the public and entitles all interested parties to participate); Mathew 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."); RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 497 (5th ed. 2010) (A "notice of proposed rulemaking enables citizens who oppose or support the proposal to alert the President and members of Congress to the existence of the proposal and to express their views of the agency's proposal to those politically accountable officials. This, in turn, allows the President and Congress . . . to affect agency resolutions of policy disputes."); KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 65 (1969) ("The procedure of administrative rule-making is . . . one of the greatest inventions of modern government. . . . [A]nyone and everyone is allowed to express himself and to call attention to the impact of various possible policies on his business, activity, or interest"). For a recent judicial expression of concern over agency accountability to Congress and the public, see City of Arlington v. FCC, 133 S. Ct. 1863, 1877, 1879 (2013) (Roberts, C.J., dissenting) ("[T]he citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating.").

5. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1373–74 (1992) (arguing that notice-and-comment encourages agencies to consider additional information before issuing rules); *see also* Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 CHI.-KENT L. REV. 953, 962 (1997) (arguing that "[n]otice and comment must be employed" when the agency needs scientific data); PIERCE, *supra* note 4, at 497 (noting that in a notice-and-comment rulemaking, interested parties have an incentive to provide information including the cost of compliance, the workability, and the merits of alternatives); Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 683 (D.C. Cir. 1973) (stating that "utilizing rule-making procedures opens up the process of agency policy innovation to a

have argued that rulemaking procedures stall the rulemaking process and deplete scarce agency resources.[6] This second group of scholars argues that, in some cases, this burden has become so great that agencies choose to make policy via alternative methods such as adjudication or guidance.[7]

Both of these positions share a key assumption—that agencies frequently subject their rules to rulemaking procedures. This Article questions that assumption, analyzing when and why agencies "avoid" rulemaking procedural requirements. Avoidance here is defined as invoking a statutory exemption to such requirements. This definition of avoidance does not turn on whether the agency provided a valid legal rationale for invoking the exemption.[8]

In brief, this Article shows that each of the rulemaking procedural statutes and the case law interpreting these statutes is vague, leaving significant ambiguity as to when avoidance is permissible. This Article's original empirical analysis shows that agencies seize upon this ambiguity to avoid rulemaking procedures more frequently as the threat of a successful lawsuit challenging that avoidance declines. But even when litigation ensues, courts do not consistently require agencies to comply with rulemaking procedures. The result is frequent agency avoidance of rulemaking procedures. Consider the following evidence of such avoidance between 1995 and 2012:

broad range of criticism, advice and data"). For a seminal discussion of information and agency expertise in the administrative process, see JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

6. For an overview of this issue, which the literature terms the "ossification" of the rulemaking process, see JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 9–25 (1990) (analyzing ossification in the context of the National Highway Traffic Safety Administration); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1449 (1992); Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621 (1994); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); 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 (2012). For further discussion of ossification, see *infra* Part III.

7. *See, e.g.*, McGarity, *supra* note 6, at 1386 (noting that because "[t]he informal rulemaking process of the 1990s is so heavily laden with additional procedures, analytic requirements, and external review mechanisms . . . agencies are beginning to seek out alternative, less participatory regulatory vehicles to circumvent the increasingly stiff and formalized structures of the informal rulemaking process").

8. This definition therefore includes cases where the agency: (1) had a clearly legal rationale for not following the procedural requirement such as validly invoking a statutory exemption; (2) had an arguably valid legal rationale for not following the procedural requirement; (3) had a clearly invalid legal rationale for not following the procedural requirement; and (4) failed to present a legal rationale for not following the procedural requirement.

- Agencies exempted approximately 50% of rules from the APA notice-and-comment process.[9] Although courts have vacated many rules on the grounds that agency avoidance of the notice-and-comment process violated the APA, judicial interpretation and enforcement of the APA provisions that establish the notice-and-comment process framework have been inconsistent, producing an unclear body of case law.

- Agencies exempted over 92% of rules from the Regulatory Flexibility Act (RFA), which ostensibly requires agencies to consider the impact of their rules on small businesses and other small entities.[10] Agencies have rarely been sued under the RFA.[11]

- Agencies exempted over 99% of rules from the Unfunded Mandates Reform Act's (UMRA's)[12] requirement to assess the impact of rules on the private sector and state, local, and tribal governments. Only four federal court opinions have considered challenges to such avoidance, and agencies prevailed in all of these cases.[13]

Existing empirical studies of administrative procedures have analyzed only the subset of rules subjected to APA notice-and-comment, generally limiting the analysis to the impact of comments from business groups and public interest groups on the content of final rules.[14] This Article works to fill an important gap in the literature by analyzing the precursor agency decision[15] of whether to avoid rulemaking procedures by invoking a

9. Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 701–706 (2012).

10. Regulatory Flexibility Act (RPA), 5 U.S.C. §§ 601–605(b) (2012) (requiring agencies to provide a "description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available" and a "description of the steps the agency has taken to minimize the significant economic impact on small entities").

11. *Infra* note 164 (noting that courts have discussed RFA claims against agencies in only seventy-two cases since 1996).

12. Unfunded Mandates Reform Act (UMRA), 2 U.S.C. §§ 1532–1538 (2012); *id.* § 1535 (requiring agencies to "identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule").

13. *Infra* note 202 and accompanying text.

14. *Infra* note 37.

15. For the purposes of this Article, the term "federal agency" is synonymous with the definition of "Executive agency" provided in 5 U.S.C. § 105 (2012) (defining an "Executive

statutory exemption.[16] This Article analyzes agency avoidance of three generally applicable rulemaking procedures that are subject to judicial review: the APA, the RFA, and the UMRA.[17]

Consider an illustrative example. In 2011, a group of six financial regulatory agencies proposed a rule implementing one of the cornerstone Dodd-Frank Act[18] reforms to prevent a recurrence of the 2008 financial crisis. This proposed rule, entitled "Credit Risk Retention," was designed to deter market participants known as "securitizers" from packaging and selling securities backed by low-quality assets such as mortgages with high default risk.[19] To achieve this goal, this proposed rule would generally require securitizers of asset-backed securities to retain at least 5% of the credit risk of the assets collateralizing the asset-backed securities.[20] Securitizers would therefore be forced to incur some of the losses if these asset-backed securities defaulted. This would reduce the informational and

Agency" to encompass "an Executive department, a Government corporation, and an independent establishment").

16. For studies on this subject, see James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, LAW & CONTEMP. PROBS. Spring 1994, at 111, 120–22 (finding when the costs of the APA notice-and-comment process were high, Environmental Protection Agency (EPA) made policy via guidance documents and interpretive rules); 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 (2007) (documenting significant Internal Revenue Service (IRS) avoidance of the APA). Other studies have noted the potential for agency avoidance of procedural requirements but not analyzed the conditions under which such avoidance may occur or the implications of such avoidance. *See, e.g.*, Jeffrey S. Hill & James E. Brazier, *Constraining Administrative Decisions: A Critical Examination of the Structure and Process Hypothesis*, 7 J.L. ECON. & ORG. 373, 390 (1991) ("[T]here must be a means to sanction administrators who ignore [procedural requirements] or follow them in a haphazard manner").

17. For descriptions of these statutes, see *infra* notes 43–49 and accompanying text.

18. 15 U.S.C. § 780-11 (2012).

19. Credit Risk Retention, 76 Fed. Reg. 24,090 (proposed Apr. 29, 2011) (codified at 24 C.F.R. pt. 267). Importantly, the proposed rule would provide an exception from the risk retention requirement if all of the assets collateralizing the asset-backed security are high-quality mortgages, termed "qualified residential mortgages." The mortgage market is arguably the United States' largest market for consumer financial products and services, with approximately $10.3 trillion in loans outstanding. *See* Freddie Mac, *Freddie Mac Update* 17 (2015), http://www.freddiemac.com/investors/pdffiles/investor-presentation.pdf (illustrating U.S. single-family mortgage debt in relation to total value of housing stock from 1990 to 2014). On August 29, 2013, the agencies announced in a joint press release that a revised Notice of Proposed Rulemaking (NPRM) on the Credit Risk Retention Rule had been issued. *See, e.g.*, Press Release, Bd. of Governors of the Fed. Reserve Sys. et al., Agencies Revise Proposed Risk Retention Rule (Aug. 28, 2013), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/20130828a.htm.

20. Credit Risk Retention, 76 Fed. Reg. 24,090.

incentive problems created by securitization that resulted in significant harm to the financial system in 2008.[21] The agencies issuing this rule had to evaluate their obligations under the three rulemaking procedures analyzed in this Article. While none of the agencies avoided the APA notice-and-comment process, all avoided the RFA[22] and the UMRA.[23]

This Article hypothesizes that agencies prefer to avoid rulemaking procedures to increase their policymaking autonomy and to preserve their scarce resources.[24] The key provisions of APA, RFA, and UMRA are all open-ended, creating substantial ambiguity as to when agencies may permissibly avoid these rulemaking procedures. For instance, the APA provides an exemption when notice-and-comment is "impracticable, unnecessary, or contrary to the public interest."[25] The RFA and UMRA are similarly open-ended.[26] Nor has judicial interpretation clarified these ambiguous statutory provisions. This Article argues that agencies seize upon this ambiguity to frequently avoid rulemaking procedures unless they face the threat of punishment for doing so improperly. This Article argues that the most important threat of such punishment is "litigation risk."

This Article defines and draws on original data to measure the following three components of litigation risk. First, agencies are rarely sued under the RFA and UMRA but are sued more frequently under the APA. Second, agencies almost always win the (relatively few) lawsuits brought under the RFA and UMRA but face highly variable odds of winning under the APA given the unclear case law developed under that statute. Third, agencies face slight penalties for the (very few) lawsuits they lose under the RFA and UMRA but face unpredictable penalties under the APA. The net result is that agencies face little litigation risk under the RFA and UMRA. Litigation risk is greater under the APA but highly variable.

This Article measures the outcome variable—the extent of agency avoidance of the APA, RFA, and UMRA—with original analysis of a dataset compiled from the *Unified Agenda*, which is compiled biannually from agency submissions by the Office of Management and Budget (OMB).[27] To help to control for other variables such as congressional or

21. *Id.* at 24,095.

22. *Id.* at 24,143–46.

23. *Id.* at 24,155. Several of the agencies issuing the rule were exempt from the UMRA and therefore did not avoid providing an UMRA analysis. *See infra* note 184.

24. *Infra* notes 52–62and accompanying text.

25. 5 U.S.C. § 553(b)(3)(B) (2012).

26. *Infra* Part II.B.–C.

27. This *Unified Agenda* dataset contains rule-level data, including whether the agency subjected the rule to the RFA and UMRA, the time required to complete the rule, and whether the Office of Management and Budget (OMB) classified the rule as "significant."

executive[28] oversight, this Article analyzes variation in agency avoidance of the APA, RFA, and UMRA within the same sample of rules. By analyzing agency behavior on different rulemaking procedures within the same set of rules, this analysis seeks to control for other variables that vary primarily between rules, such as congressional or White House monitoring.

Agencies aggressively avoided rulemaking procedures that are subject to little litigation risk. Agencies faced little litigation risk under the RFA and the UMRA and avoided each of these requirements for more than 90% of rules issued between 1995 and 2012. Litigation risk under the APA was higher and agency avoidance was lower; agencies avoided the APA in 52% of rules issued from 1995 to 2012, a lower but still substantial fraction. These results suggest that while agency avoidance falls as litigation risk increases, it remains substantial even under the APA. This Article argues that these results have important implications for understanding agency and judicial behavior, administrative law, democratic accountability, and the rule of law.

First, this Article contributes to the debate over the costs and benefits of imposing rulemaking procedures.[29] A number of important studies have asserted that rulemaking procedures have contributed to burdening the rulemaking process such that rulemaking is unduly delayed or discouraged altogether.[30] Agency avoidance of rulemaking procedures suggests that this claim is overstated. Yet agency avoidance also suggests that such rulemaking procedures do less to promote public deliberation in the rulemaking process, to encourage agencies to incorporate information provided by private parties interested in the rule, to guard against agency arbitrariness, and to make agencies accountable to the public. In short, agency avoidance of rulemaking procedures has some benefits, but also many costs. While the results presented in this Article do not indicate whether the costs of rulemaking procedures outweigh the benefits, they do provide important context in which to consider this question.

Second, this Article examines the challenge that courts face in

For a more complete description of this data, see *infra* notes 74–77.

28. The term "executive" is distinct from "White House" as used later in this Article. For simplicity, this Article uses the term "White House" to encompass the White House and the Executive Office of the President.

29. *See* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 707–08 (1999) (discussing the costs and benefits of notice-and-comment and arguing that the process provides agencies with greater information, fosters public participation, and "helps to alleviate the undemocratic character of agency rulemaking and enhances the legitimacy of the process"); Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401 (1999).

30. *Infra* Part III.A. For an overview of this issue, which the literature terms the "ossification" of the rulemaking process, see *infra* note 210 and accompanying text.

interpreting and enforcing rulemaking procedural requirements, which are generally vague. To return to the example noted above, the APA allows agencies to exempt rules if soliciting public comment is "impracticable, unnecessary, or contrary to the public interest"[31] and the courts have done little to clarify these terms, creating, as a result, an unclear body of case law. The case law interpreting such statutory provisions is unclear because courts struggle to anticipate the multiple factual issues and combinations thereof raised in rulemaking procedure cases. These challenges suggest that at best, courts are imperfect enforcers of rulemaking procedures.

Third, this Article contributes to the debate over whether procedural requirements such as rulemaking procedures foster congressional control of the administrative state.[32] Proponents have argued that Congress uses rulemaking procedures to gather information about agency activity, require agencies to examine particular issues, and enable favored interest groups to monitor agencies and report back to Congress.[33] Agency avoidance of administrative procedures undermines each of these purported mechanisms of congressional control. This raises questions about why Congress has not enacted procedural requirements that better deter such avoidance. In brief, this Article argues that the task of writing highly specific procedural requirements is inherently difficult given that such requirements apply to many different fact patterns and combinations thereof. The need to reach political agreement further complicates this task. Congress should therefore consider relying less on general rulemaking procedures in favor of agency-specific requirements, which may be more easily clarified.

Fourth, to date, the White House has not devoted its limited time and resources to monitoring agency avoidance of rulemaking procedures. To the extent that the White House focuses on procedures governing the rulemaking process, it devotes greater attention to review by the Office of Information and Regulatory Affairs (OIRA) of agency cost-benefit analyses. Fifth, analyzing how agencies and courts actually interpret and implement rulemaking procedures sheds light on a more fundamental question: how and to what extent do administrative procedures actually influence bureaucratic and judicial behavior? In this respect, this Article contributes to the longstanding project of analyzing how judges interpret the law in practice, the most current iteration of what has been termed by some scholars as the "New Legal Realism."[34] Relatedly, do internal processes

31. 5 U.S.C. § 553(b)(3)(B) (2012).

32. *Infra* Part III.C (further discussing this debate).

33. *See, e.g.*, Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 255 (1987).

34. For a classic work in the legal realist tradition, see Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). For work analyzing

and norms encourage agencies to implement rulemaking procedures absent external oversight?[35] Finally, rulemaking procedure is worthy of study in its own right given the centrality of rulemaking to the contemporary policymaking process.[36]

I. THEORY: PREDICTING AGENCY AVOIDANCE OF RULEMAKING PROCEDURES

While a number of studies have examined how rulemaking procedures influence the content of final rules,[37] this Article analyzes a key precursor

the relationship between legal realism and contemporary studies of legal decisionmaking, see, for example, Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834 (2008) ("[M]uch of the emerging empirical work on judicial behavior is best understood as a new generation of legal realism"); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997).

35. JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 225–27 (1983).

36. Agencies issue thousands of rules each year that define rights, obligations, and criteria for allocating resources across the entire spectrum of government activity. While some are minor, many have important policy implications in areas ranging from airline safety to water quality to the price of cable television to eligibility for organ transplants, student loans, and low-income housing. From 1996 to 2012, for example, agencies subject to Office of Information & Regulatory Affairs (OIRA) review issued 867 "economically significant" rules, each of which was expected to have an annual impact exceeding $100 million. Gen. Servs. Admin., Regulatory Information Database, WWW.REGINFO.GOV (last visited Jan. 6, 2015) (follow http://www.reginfo.gov/public/do/eAgendaAdvancedSearch; select the years 1996–2012; check "All agencies"; check the box for "Completed" and also box for "Economically significant"); *see also* KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM 260 (4th ed. 2004) ("[S]cholars estimate that well over 90 percent of the laws that regulate our lives, whether at work or at play, are now made by our public administrators, not by our legislators or traditional lawmakers").

37. For examples of studies examining the APA notice-and-comment process and policy outcomes, see Steven J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POL. SCI. REV. 663, 671 (1998) (concluding that despite making policy through the APA notice-and-comment process, the Health Care Financing Administration (HCFA) issued Medicare payment rules that did not advantage the groups favored by Congress); David C. Nixon et al., *With Friends Like These: Rule-Making Comment Submissions to the Securities and Exchange Commission*, 12 J. PUB. ADMIN. RES. & THEORY 59 (2002) (examining the impact of rulemaking comments on final Securities and Exchange Commission (SEC) rules and reporting little evidence that the SEC was disproportionately responsive to dominant organized interests); Jason Webb Yackee & Susan Webb Yackee, *A Bias toward Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006); Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 26 J. PUB. ADMIN. RES. & THEORY 103 (2006); Amy McKay & Susan Webb Yackee, *Interest Group Competition on Federal Agency Rules*, 35 AM. POL. RES. 336, 337 (2007) (testing two hypotheses regarding the level and effects of competitive lobbying during rulemaking).

For work on other procedural requirements, see, for example, Hill & Brazier, *supra* note

question. When issuing rules, how frequently and under what conditions do agencies avoid rulemaking procedures? This Part proceeds in three steps to address this question. First, Section A specifies the scope of this Article. Second, Section B then outlines this Article's central hypothesis: agencies avoid rulemaking procedures when there is little threat of successful litigation challenging such avoidance. Finally, Section C outlines the null hypothesis against which the above hypothesis is tested: litigation risk does not influence the rate at which agencies avoid rulemaking procedures.

A. Scope of Article

This Article analyzes agency avoidance of generally applicable [38] statutory rulemaking procedural requirements that are judicially reviewable. Several points regarding the case selection bear emphasis. First, procedural requirements not subject to judicial review, such as those in the Congressional Review Act, are excluded because this Article is largely devoted to analyzing how courts interpret and enforce rulemaking procedures and the impact of such judicial interpretation and enforcement on the extent of agency avoidance of such procedures.[39] Second, agency-

16, at 392 (predicting when procedural requirements could successfully promote deck stacking); Matthew Potoski & Neal D. Woods, *Designing State Clean Air Agencies: Administrative Procedures and Bureaucratic Autonomy*, 11 J. PUB. ADMIN. RES. & THEORY 203, 218 (2001) (examining state air quality policy and finding support for the hypothesis that administrative procedures may hardwire agencies in favor of the coalition that enacted those procedures); Stuart Shapiro, *Speed Bumps and Roadblocks: Procedural Controls and Regulatory Change*, 12 J. PUB. ADMIN. RES. & THEORY 29 (2002) (analyzing the impact of a number of procedural controls—cost-benefit analysis requirements, legislative review of rules, required interest group participation, and retrospective analysis requirements—on child care regulatory policy in eight U.S. states and concluding that procedural requirements favor current political actors rather than continuing to favor those who originally enacted the procedural requirement); David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413, 444–46 (1999) (noting the difficulty for Congress of designing administrative procedures to favor particular interest groups but reporting that as intended by Congress, the National Environmental Policy Act (NEPA) increased the probability of pro-environmental licensing decision by the Federal Energy Regulatory Commission (FERC)).

38. "Generally applicable" means applying to all or almost all of the non-independent agencies; the term "independent regulatory agency" is defined in the Paperwork Reduction Act, 44 U.S.C. § 3502(5) (2012) (describing what entails independent regulatory agency).

39. Procedural requirements not subject to judicial review include the Paperwork Reduction Act, 44 U.S.C. §§ 3501–3520; Treasury and General Government Appropriations Act § 515, 44 U.S.C. §§ 3504(d), 3516 (2012) (often termed the "Data Quality Act" or the "Information Quality Act"). *See, e.g.*, Congressional Review Act, 5 U.S.C. §§ 801–808 (2012) ("No determination, finding, action, or omission under this

specific procedural requirements are excluded because agency avoidance of such requirements is often influenced by unique dynamics that complicate drawing general inferences. [40] Third, non-mandatory procedural requirements such as the Negotiated Rulemaking Act are beyond the scope of this Article.[41] Therefore, the rulemaking procedures in the following laws satisfy these three conditions: APA, RFA, UMRA, and the National Environmental Policy Act (NEPA). This Article examines each of these in depth except NEPA, for which large-scale data is significantly more difficult to compile.[42]

While few doubt the importance of the APA, the RFA and the UMRA may require further introduction. Both statutes enjoy broad congressional support. Congress passed the RFA with broad support in 1980,[43] a period of bipartisan support for deregulation.[44] The 1996 amendments to expand the RFA also enjoyed broad support.[45] Congress further expanded the RFA in the 2010 Dodd-Frank Wall Street Reform and Consumer

chapter shall be subject to judicial review."); Omnibus Consolidated Appropriations Act § 654, 5 U.S.C. § 601 (2012) (requiring a "Family Policymaking Assessment") ("This section is not intended to create any right or benefit . . . enforceable . . . against the United States."). In addition, requirements imposed by Executive Order are not judicially enforceable. *See also* AMERICAN BAR ASSOCIATION SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 150–51 (John F. Duffy & Michael Herz eds., 2005) (noting that Executive Orders are not judicially enforceable). For an insightful discussion of agency avoidance of the Congressional Review Act, see Sean D. Croston, *Congress and the Courts Close Their Eyes: The Continuing Abdication of the Duty to Review Agencies' Noncompliance with the Congressional Review Act*, 62 ADMIN. L. REV. 907 (2010).

40. *See, e.g.*, 15 U.S.C. § 2058 (2012) (specifying additional rulemaking procedural requirements for the Consumer Product Safety Commission (CPSC)); 29 U.S.C. § 655 (2012) (providing specific requirements for Occupational Safety and Health Administration (OSHA) to issue rules related to occupational safety and health standards); 15 U.S.C. § 57a (2012) (specifying standards for the Federal Trade Commission (FTC) to issue rules with respect to unfair or deceptive acts or practices).

41. *See, e.g.*, Negotiated Rulemaking Act, 5 U.S.C. §§ 561–570a (2012); Federal Advisory Committee Act, 5 U.S.C. App. II (2012).

42. Unlike the other requirements, the *Unified Agenda* does not include data on which rules were accompanied by a NEPA environmental impact statement (EIS). For a description of *Unified Agenda* data, see *infra* notes 74–77. In addition, the publicly available NEPA data of which I am aware does not contain a variable that links EISs to particular rules. *See* Envtl. Prot. Agency, *Environmental Impact Statement (EIS) Database*, http://www.epa.gov/compliance/nepa/eisdata.html (last visited Jan. 6, 2015).

43. For an overview of the debate preceding passage of the RFA, see Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 DUKE L.J. 213, 227–29 (1982).

44. For an overview, see MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION (1985).

45. Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. §§ 601–611 (2012).

Protection Act (Dodd-Frank Act).[46] In a 2011 memorandum to agencies, President Obama stated that "The Regulatory Flexibility Act . . . establishes a deep national commitment to achieving statutory goals without imposing unnecessary burdens on the public."[47] Like the RFA, the UMRA was passed with overwhelming bipartisan support.[48] In 1999, President Clinton issued an Executive Order intended in part to "further the policies of the Unfunded Mandates Reform Act."[49]

This Article examines agency actions that qualify as a "rule" under the APA. The APA defines the term "rule" broadly, encompassing agency statements of general or particular applicability that have future effect.[50] It is important to note that the APA definition of a rule is not restricted to documents listed in the *Unified Agenda*, published in the *Federal Register*, or codified in the *Code of Federal Regulations*. To take one example, a guidance document posted on an agency website may satisfy the APA definition of a rule. As noted in Part II, limitations on data availability cabin much of the empirical analysis to the subset of rules published in the *Unified Agenda*,[51] but the theoretical framework in this Article applies to all rules as defined under the APA.

46. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), § 1100(G), 5 U.S.C. § 609 (2012) (requiring the Consumer Financial Protection Bureau to undertake additional procedures under the RFA).

47. Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies on Regulatory Flexibility, Small Business, and Job Creation, 3 C.F.R. 328 (2012).

48. *See* ROBERT JAY DILGER & RICHARD S. BETH, CONG. RESEARCH SERV., R40957, UNFUNDED MANDATES REFORM ACT: HISTORY, IMPACT, AND ISSUES 47 (2013) (noting that the House passed the UMRA by a margin of 394–28, the Senate passed the UMRA 91–99, and President Clinton signed the UMRA).

49. Exec. Order No. 13,132, 3 C.F.R. 206 (2000).

50. *See* 5 U.S.C. § 551(4) (2012) (defining a "rule"):

> [T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

This Article adopts the APA definition without taking a position as to whether it should be altered to reflect the more common understanding of the term "rule." *See, e.g.*, Ronald Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule,"* 56 ADMIN. L. REV. 1077 (2004) (arguing that the APA definition of rule should turn on the generality rather than prospectivity of the agency action).

51. *Infra* notes 74–77.

B. Hypothesis: Avoidance When Litigation Risk Is Low

Why would agencies prefer to avoid rulemaking procedures? "Agencies" are, of course, composed of people who hold different roles and goals. Before proceeding, it is therefore important to note that when referring to agencies, this Article considers the goals and motivations of agency leaders. This Article assumes that in most cases, agency leaders decide whether to avoid rulemaking procedures.[52]

Agencies may prefer to avoid rulemaking procedures to increase their autonomy, which furthers the pursuit of all the goals listed above.[53] Rulemaking procedures may reduce autonomy.[54] For example, subjecting a rule to the APA notice-and-comment process may spark critical public debate. This was clearly the case with respect to the proposed Credit Risk Retention Rule, which produced such significant criticism and scrutiny that the agencies extended the comment period and later issued a second proposal.[55] Such criticism imposes two costs on the agency. First, the

52. In referring to agency leadership, this Article adopts the description of agency "executives" provided in JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 31–32 (1989) (terming agency leaders as "executives" and line level staff as "operators"). Such agency leaders often include the general counsel and the staff heading the policy office responsible for the rule. This Article assumes that agency leaders are goal-oriented actors who may pursue policy preferences, budgetary resources, career advancement, job security, leisure time, and other goals. *See, e.g.*, ANTHONY DOWNS, INSIDE BUREAUCRACY 84–85 (1967) (noting that general motives of officials include: desire for power; money income; prestige; convenience; security; personal loyalty; and, pride in the proficient performance of one's work); WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 39–42 (1971) (arguing that agency leaders seek to maximize their budgets); WILSON, *supra* note 52, at 154 (describing the goals of the top agency leadership relative to their subordinate middle level managers and line-level employees). An agency may pursue a number of these goals to further the public interest. For example, an agency leader may sincerely believe that pursuing her policy preferences furthers the public interest. Additionally, a number of these goals may be consistent with pursuit of public interest.

53. *See, e.g.*, WILSON, *supra* note 52, at 188. The concept of agency autonomy is closely related to agency "slack," which is generally defined as shielding from external observation. Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 174 (1990). For an examination of how agencies seek to increase autonomy by avoiding OIRA review of their rules, see Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013); Note, *OIRA Avoidance*, 124 HARV. L. REV. 994 (2011).

54. WILSON, *supra* note 52, at 188 (arguing that because agency leaders cannot attain full autonomy, "[t]he best a government executive can do is to minimize the number of rivals and constraints").

55. The proposed Credit Risk Retention Rule generated significant controversy, including congressional hearings and congressional information requests. Most industry groups and some consumer groups argued that the proposed rule was too stringent on a

agency must choose between altering its preferred policy decision and implementing the preferred policy at a higher political cost. Second, the agency must provide a reasoned response to the public criticism, which is subject to additional public criticism and judicial review.[56] Agencies may prefer to skirt these potential infringements on their autonomy by avoiding the notice-and-comment process.

Agencies may also prefer avoidance to save staff time and analytic resources.[57] For example, invoking an exemption to the APA's notice-and-comment process takes far less staff time than issuing a notice of proposed rulemaking (NPRM), reading and responding to the ensuing comments, and modifying the rule as appropriate. Such time and resource limits may be accentuated given the burgeoning number of rulemaking procedures.[58] These limits are even more important because agency leaders typically have a short tenure.[59] To increase accomplishments in such a short time period,

number of issues. The agencies extended the comment period for approximately two months partly in response to these critical comments. For an overview, see MORRISON & FOERSTER, CREDIT RISK RETENTION RULE COMMENT PERIOD EXTENDED (June 10, 2011), http://media.mofo.com/files/Uploads/Images/110610-Credit-Risk-Retention-Rule-Comments.pdf. In August 2013, the agencies issued a second proposal that was largely viewed as responding to the concerns of those who argued the original proposal was too stringent. *See supra* note 19.

56. *See, e.g.*, Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1393–94 n.274 (2010):

> [V]irtually all of the information and analysis requirements are imposed on agencies without protecting them from candid disclosures or litigation-generating admissions against interest. These added analyses are often prepared near the end of the process, when the decision is close to final. As a result, the reports serve in practice only to increase the agency's vulnerability to lawsuits and unwelcome political pressure if the agency slips and includes, in writing, some admissions against interest.

57. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-791, OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REGULATORY REVIEW 7 (2007) (noting that a number of agencies reported "difficulty in devoting the time and staff resources" required to implement the section of the RFA requiring retrospect review of rules).

58. For a complete list of the 110 requirements that may apply to a rulemaking, see Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533, 536–37 (2000). For an overview of delays in rules issued pursuant to the Dodd-Frank Act, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-195, REGULATORS HAVE FACED CHALLENGES FINALIZING KEY REFORMS AND UNADDRESSED AREAS POSE POTENTIAL RISKS (2013) (describing agency delays in issuing Dodd-Frank Act rules).

59. *See* Matthew Dull & Patrick S. Roberts, *Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989–2009*, 39 PRES. STUD. Q. 432, 436 (2009) (reporting a median tenure of 2.5 years for appointees who served in the first Bush or Clinton Administrations); Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913 (2009); B. Dan Wood & Miner P. Marchbanks, III, *What Determines How Long Political Appointees Serve?*, 18 J. PUB. ADMIN. RES. & THEORY 375 (2008) (exploring

agencies may be tempted to save time by avoiding rulemaking procedures. The net result of these forces is that agencies may avoid rulemaking procedures unless they face a credible threat of punishment for doing so.[60]

The entities that have power to levy punishments are Congress, the White House, and the courts. This Article hypothesizes that the White House and members of Congress are unlikely to monitor agency avoidance of rulemaking procedures unless they oppose the rule itself. The White House and Congress may scrutinize agency avoidance when doing so coincides with their broader agenda, but rulemaking procedures alone do not warrant diversion of their scarce time and resources from other issues. Part III offers further discussion of these issues.

The courts are a different matter. This Article hypothesizes that the courts may punish agency avoidance of rulemaking procedures irrespective of whether other issues are implicated. While courts, of course, can only hear cases or controversies and cannot engage in general monitoring of agency avoidance, litigation risk may deter agency avoidance. In almost all agencies, standard practice dictates that the general counsel assess litigation risk for senior agency staff before the agency issues a rule.[61]

As noted above, this Article defines and draws on original data to measure the following three components of litigation risk: (1) the agency must be sued; (2) the agency must lose the suit; and (3) the court must grant the plaintiff a remedy that imposes a cost on the agency.[62] This section now discusses each of these three components of litigation risk.

1. Probability of Agency Facing a Lawsuit

Agencies do not face litigation risk for avoidance unless they are sued. First, a lawsuit requires a plaintiff who is able to bring a lawsuit. A plaintiff is therefore more likely to emerge if the rulemaking procedure grants a

the "determinants of the duration of political appointee service").

60. For a similar analysis in a related context, see Levine & Forrence, *supra* note 53, at 174 ("If monitoring costs are so high as to practically prevent principal A from observing agent B's behavior, then B has no incentive to conform her behavior to A's views.").

61. Of course, agency leaders may misperceive litigation risk for a number of reasons. A substantial literature on misperception of litigation risk with respect to medical malpractice is informative. *See, e.g.*, John F. Dick III et al., *Predictors of Radiologists' Perceived Risk of Malpractice Lawsuits in Breast Imaging*, 192 AM. J. ROENTGENOLOGY 327 (2009) (reporting survey data showing that radiologists significantly overestimate the odds of being sued and explaining that this result was particularly pronounced for radiologists who had previously been sued, knew a doctor who had been sued, or scored high on a measure of anxiety in response to uncertain clinical situations).

62. Mathematically, this is expressed as: Litigation risk = Probability of lawsuit * (Probability lawsuit successful * Expected cost to the agency from losing).

cause of action to a broad constituency. For instance, the APA grants a cause of action to a much broader constituency than the RFA, which is restricted to small entities.[63] Agencies therefore face a greater threat of suit under the APA than the RFA. A plaintiff is also more likely to emerge if the statute grants a relatively long statute of limitations. Again, the APA generally grants a longer statute of limitations than the RFA.[64]

A lawsuit also requires that an eligible plaintiff be willing to incur the considerable time and expense of litigation. This ability and willingness are of course not evenly distributed among parties interested in rules. Well-heeled groups and individuals generally have greater ability. All else equal, a willing plaintiff is more likely to emerge for rules that are important, controversial, and frequently and aggressively enforced by the agency, thereby increasing the likelihood of an as-applied challenge. A plaintiff is also more likely to emerge as the likelihood of success on the merits against the agency increases, a subject that is discussed directly below.

2. Probability of Agency Losing

Agencies face greater litigation risk as their odds of losing a suit increase, conditional on the filing of suit. Agencies look to the statute and to case law interpreting the statute to determine their odds of losing a case challenging avoidance with a rulemaking procedure. All else being equal, agencies' odds of losing increase as the statute and case law define the scope of legally permissible avoidance more narrowly and more clearly.

3. Cost to Agency of Losing

Agencies face greater litigation risk as the cost of losing a suit increases, again conditional on the prior two events. While courts have a number of remedial powers, for present purposes, consider three outcomes in descending order of cost to agencies: (1) the court vacates the rule in its entirety; (2) the court vacates only the portion of the rule implicated by the procedural violation; and (3) the court leaves the rule in effect while the agency remedies the procedural violation (this is often termed "remand without vacatur").[65]

In most cases, vacating a rule entirely imposes a greater cost on the

63. 5 U.S.C. § 611(a) (2012) (restricting judicial review under the RFA to "a small entity that is adversely affected or aggrieved by final agency action").

64. *Infra* Part II.A.—II.B.

65. For an analysis of this practice, see Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599, 600 (2004); *see also* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003).

agency than vacating in part, which in turn imposes a greater cost than leaving the rule in effect on remand. Consider briefly the goals of agencies outlined above. If agencies support the substance of the rule, then vacating the entire rule undermines their policy preferences more than vacating only a portion of the rule or leaving the rule in effect. If agencies seek to conserve scarce staff time, then requiring the agency to reconsider and reenact the entire rule requires more staff time than reenacting only a portion of the rule.

Courts have strong remedial powers for some rulemaking procedures and weak powers for others. Under the APA and the RFA, a court may vacate a rule in full or in part.[66] A court may also enjoin an agency from enforcing a rule. By contrast, the UMRA limits a court to ordering an agency to correct a flawed analysis while leaving the rule in effect.[67]

C. Null Hypothesis: Litigation Risk Does Not Influence the Rate of Agency Avoidance

If litigation risk is either relatively constant across rulemaking procedures or variable but always relatively low, it will fail to influence the rate of agency avoidance. Alternatively, agencies may prefer to follow rulemaking procedures irrespective of the threat of punishment. As Elizabeth Magill notes, agencies may voluntarily follow procedural requirements for a number of reasons.[68] Consider four such reasons. First, procedural requirements may help agency leaders control delegations of authority to their rulemaking staff by generating alternative sources of information to act as a check on staff views.[69] For example, the notice-and-comment process on the proposed Credit Risk Retention Rule generated significant feedback from many sources beyond agency staff.[70] Agency leaders may be

66. For remedies available under the APA, see 5 U.S.C. § 706(2) (providing that "the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . (D) without observance of procedure required by law"). The RFA grants courts all remedies available under the APA, including vacatur. *See* Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 538 (D.C. Cir. 1983) (stating that a failure to comply with the RFA "may be, but does not have to be, grounds for overturning a rule").

67. *Infra* notes 200–201.

68. Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 863 (2009) (defining self-regulation as "voluntarily initiated agency actions that constrain agency discretion when no source of authority requires the agency to act").

69. *Id.* at 885–86; GREGORY A. HUBER, THE CRAFT OF BUREAUCRATIC NEUTRALITY: INTERESTS AND INFLUENCE IN GOVERNMENTAL REGULATION OF OCCUPATIONAL SAFETY (2007) (arguing that the "stark dichotomy between political and bureaucratic understandings of administrative behavior" is false).

70. *Supra* note 55.

more reliant on the views of their staffs without the information conveyed by the notice-and-comment process. Second, agencies may believe that following procedural requirements better entrenches their rules.[71] As the discussion above notes, applying procedural requirements consumes time and agency resources. If an agency applies procedural requirements to create a rule, avoiding the requirements in a subsequent rule (to alter the original rule) may present greater legal risk and greater optical risk. At the margin, this may deter future agency leaders from changing the rule. Third, following procedural requirements may provide a measure of cover from political pressure for unpopular decisions.[72] Finally, agencies may prefer to follow rulemaking procedures for any number of the intrinsic reasons discussed in greater depth below, including gathering useful information.[73] This discussion is not intended to be comprehensive, but rather to provide a sense of the incentives that may motivate agencies to apply procedural requirements voluntarily.

II. ANALYSIS OF AGENCY IMPLEMENTATION OF RULEMAKING PROCEDURES

This Part analyzes agency avoidance of the APA, RFA, and UMRA. This analysis draws on a number of sources, including a database constructed from the *Unified Agenda of Federal Regulatory and Deregulatory Actions*.[74] Executive Order 12,866 requires agencies to submit data regarding their pending and anticipated rulemaking activity twice per year. The Regulatory Information Services Center has compiled much of this information in a publicly available database.[75] This database includes a number of variables, including the dates of key actions in the rulemaking process, whether each rule included a RFA analysis and an UMRA analysis, and whether OIRA classified the rule as significant.[76] While it is a

71. Magill, *supra* note 68, at 888.

72. *Id.* at 889; *see also* WILSON, *supra* note 52, at 130–31 (arguing that agencies may follow rulemaking requirements because compliance is easily observable and thus offers a means by which to demonstrate commitment to a particular value, and illustrating that for instance, it is easier for Congress to observe whether an agency completed a NEPA environmental impact statement than to determine whether an agency issued an environmentally beneficial rule).

73. *Infra* Part III.

74. Thanks to Professor Anne Joseph O'Connell for compiling and sharing this data. For further description of this data, see Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889 (2008).

75. *See Reginfo*, WWW.REGINFO.GOV (last visited Jan. 30, 2015).

76. For further description of the *Unified Agenda* data, see Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 490–93 (2011). *See also* Exec. Order 12,866, 3 C.F.R. 638, 641–42 (1994) (defining a rule as significant if it is likely

largely comprehensive portrait of substantive rulemaking, agencies sometimes fail to report rules to the *Unified Agenda*.[77] In addition to the *Unified Agenda* database, this Part analyzes court cases interpreting the APA, RFA, and UMRA and the rate at which agencies are challenged under these statutes. This Part also draws upon reports from the Government Accountability Office (GAO) and Congressional Research Service (CRS) on agency avoidance of the APA, RFA, and UMRA and previous studies of these statutes.

In examining the relationship between litigation risk and avoidance of procedural requirements, this Article cannot rule out potentially omitted variable bias, a problem that is inherent to most studies using observational data. By failing to control for a variable that is correlated with litigation risk and also influences the rate of agency avoidance, this Article could misstate the impact of litigation risk on the level of agency avoidance. Consider three sources of potentially omitted variable bias.

First, agencies may be more reluctant to avoid the APA, RFA, or UMRA on rules where Congress or White House oversight is heightened. Agency litigation risk may also be heightened for such rules, creating omitted variable bias. To address this problem, this Article analyzes variation in agency avoidance of the APA, RFA, and UMRA within the same sample of rules. Consider that Congress and the White House tend to focus their oversight efforts on particular rules. If Congress or the White House is concerned with a rule, it may investigate an agency's avoidance of all rulemaking procedures. Analyzing variation in agency avoidance of the APA, RFA, and UMRA within the same sample of rules therefore holds constant such efforts to the extent that they are focused on rules.

Second, agencies may be more reluctant to avoid the APA, RFA, or

to "(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."); Congressional Review Act, 5 U.S.C. § 804(2) (2012) (defining a "major rule" as "any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more").

77. *See* Steven J. Balla, *Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking*, J.L. POL'Y INFO. SOC'Y, Winter 2004/2005, at 70 (arguing that the *Unified Agenda* "represents as complete a snapshot as possible"); Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making "Ossified"?*, 20 J. PUB. ADMIN. RES. & THEORY 261, 268 (2010).

UMRA on rules that they expect to aggressively enforce. Avoidance may jeopardize such enforcement by allowing the targets of enforcement actions to raise as-applied challenges to the rules. As with Congress or White House oversight, variation in the degree to which agencies may be concerned with such an as-applied challenge generally occurs at the rule-level. Consider that the target of an enforcement action would be expected to raise any credible arguments against a rule. By analyzing variation in agency avoidance of the APA, RFA, and UMRA within the same sample of rules, this Article holds constant the concern that aggressive agency enforcement of some rules will increase litigation risk by prompting an as-applied challenge.

Third, this Article does not measure the cost savings to the agency of avoiding the APA, RFA, or UMRA. As noted above, the rate of avoidance may increase as the cost savings of avoidance increase because agencies seek to conserve time and staff resources. It is therefore important to consider whether this cost savings may be correlated with litigation risk. This Article argues that to the extent that such a correlation exists, it is likely to be positive. That is, rulemaking procedures with greater litigation risk such as APA notice-and-comment are also more costly to apply, thereby increasing the cost savings from avoidance. If this is true, then failing to control for the cost savings of avoidance biases against finding a relationship between litigation risk and the level of avoidance. If the converse is true, however, then this Article may overstate the relationship between litigation risk and the level of avoidance.

Equilibrium effects may also complicate assessing the impact of litigation risk on agency avoidance. Litigation risk may deter avoidance, thereby reducing the volume of observed litigation.[78] Such observational equivalence may complicate efforts to examine the impact of litigation risk on agency avoidance. To partially address this problem, this Article measures the elements of litigation risk beyond observable litigation such as the legal standards for when avoidance is permissible.

A. APA Notice-and-Comment: Moderate Litigation Risk, Moderate Avoidance

Under the APA notice-and-comment process, agencies typically first publish a NPRM and then provide a period for public comment, which is often thirty or sixty days.[79] Agencies then consider the public comments,

78. *See generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

79. William West, *Administrative Rulemaking: An Old And Emerging Literature*, 65 PUB. ADMIN. REV. 655, 662–63 (2005). Agencies may diverge from this textbook account. For instance, in some cases agencies issue an advance NPRM or a request for information before

revise the NPRM accordingly, and publish a final rule.[80]

The APA section establishing the notice-and-comment process is short and vague in three key respects. First, the APA contains broad and undefined exceptions including: (1) categorical exemptions for issuance of loans, grants, and subsidies and for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," and (2) a "good cause" exemption when notice-and-comment is "impracticable, unnecessary, or contrary to the public interest."[81] Second, the APA requires agencies to publish a NPRM but provides little guidance regarding the required detail of this notice.[82] Third, the APA does not specify the extent to which agencies should consider and incorporate public comments into their final rules.[83] To illustrate the relationship between litigation risk and agency avoidance, this section provides an in-depth analysis of the good cause exemption, which is the most frequent means by which agencies exempt rules from notice-and-comment for both major and non-major rules.[84]

1. Monitoring and Litigation Risk

While it may sometimes focus on particular rules, Congress has devoted relatively little attention to overall agency avoidance of the notice-and-comment process. In cases where Congress has considered amending the APA, it has not focused on changing agency practice with existing APA requirements. Instead, it has considered but not acted upon a proposal to amend the APA.[85] Such proposals include requiring agencies to compile a factual rulemaking record via trial-like procedures,[86] subjecting rulemaking to additional cost-benefit analysis requirements,[87] curbing the ability of

issuing a NPRM. Agencies may also withdraw rules and issue a subsequent NPRM.

80. 5 U.S.C. § 553.

81. *Id.* § 553(b)(3)(B).

82. *Id.* § 553(b).

83. *Id.* § 553(c) ("After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

84. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-21, AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS 15 (2012) (observing that agencies relied on good cause for 77% of major rules exempted from notice-and-comment and for 61% of non-major rules).

85. For a recent example, see Regulatory Accountability Act of 2013, H.R. Rep. No. 113-237 (2013).

86. *See, e.g.*, *Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability: Hearing Before the Subcomm. on Courts, Commercial, & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. (2011).

87. *See, e.g.*, *APA at 65: Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?: Hearing Before the Subcomm. on Courts, Commercial, & Admin. Law of the H. Comm. on the*

agencies to engage in "midnight rulemaking" at the close of a president's term,[88] and requiring Congress to affirmatively approve of rules before they may take effect.[89]

Like Congress, the White House has generally devoted little attention to APA procedural requirements. While the White House is sometimes quite involved in the substantive policy decisions that result from the rulemaking process,[90] it has made little effort to monitor agency avoidance of the APA notice-and-comment process. This observation is consistent with the fact that agencies subject to the OIRA review process submitted rules to notice-and-comment at a very similar rate (52%) to agencies exempt from OIRA review (49%) over the years 1983–2008 (see Table 1).

This leaves the courts. The following discussion considers agency avoidance of the notice-and-comment process (focusing on the good cause exemption) with respect to the litigation risk framework outlined in Part II. The APA creates a broad base of potential plaintiffs. Unlike the RFA and the UMRA, the APA grants a cause of action to any "person suffering [a] legal wrong because of agency action."[91] The APA also permits judicial review of final rules by virtue of authorizing review of all "final agency action."[92] The result is to grant a cause of action to a wide range of plaintiffs to challenge agency avoidance of the notice-and-comment process.

As noted, the APA does not provide a prescriptive definition for when agencies may avoid notice-and-comment. Instead, the APA is vague at key junctures, including the definition of what constitutes good cause, providing only that: "when the agency for good cause finds (and incorporates 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."[93] The courts have not clarified this section of the APA, instead using a contextual approach to "analyze the entire set of circumstances" to determine whether good cause was validly invoked.[94]

Judiciary, 112th Cong. 12 (2011).

88. *See, e.g.*, *Midnight Rulemaking: Shedding Some Light: Hearing Before the Subcomm. on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 23 (2009).

89. Regulations From the Executive in Need of Scrutiny Act of 2013, H.R. 367, 113th Cong. (2013).

90. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

91. 5 U.S.C. § 702 (2012) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

92. *Id.* § 704 ("[F]inal agency action for which there is no other adequate remedy in a court are subject to judicial review.").

93. *Id.* § 553(b)(3)(B).

94. Petry v. Block, 737 F.2d 1193, 1203 (D.C. Cir. 1984); *see also* Natural Res. Def.

Courts frequently note in dicta that they construe the good cause exception narrowly to protect the notice-and-comment process. [95] Notwithstanding such dicta, some good cause cases have been relatively exacting, and others have been relatively lenient. This Article argues that such inconsistency is virtually inevitable given the number of facts that courts consider when determining whether an agency validly invoked good cause. In determining whether an agency had a good cause, courts have considered the following:

- Whether the agency was acting pursuant to a statutory deadline;[96]
- The potential harm from providing advance notice of the rule;[97]
- The degree of economic harm created by delay to complete the notice-and-comment process;[98]
- The degree of harm to public safety created by delay to complete the notice-and-comment process;[99]
- Whether the agency accepted and responded to post-

Council, Inc. v. Evans, 316 F.3d 904, 912 (9th Cir. 2003) (faulting the Department of Commerce for engaging in a "context-specific analysis of the circumstances giving rise to good cause"); Mid-Tex Elec. Coop., Inc. v. FERC, 822 F.2d 1123, 1132 (D.C. Cir. 1987) ("The 'good cause' inquiry is inevitably fact- or context-dependent.").

95. *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 n.66 (1989) (providing cases where courts have found a basis for the principle of narrow construction); *see also* United States v. Reynolds, 710 F.3d 498, 507 (3d Cir. 2013) (collecting cases); Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749 (D.C. Cir. 2001) (rejecting effort of EPA to use good cause exemption to fix mistakes created by clerical error caused by misuse of word processing software); Mobay Chem. Corp. v. Gorsuch, 682 F.2d 419, 426 (3d Cir. 1982) ("In considering whether there was good cause . . . , we are guided by the principle that the exception is to be narrowly construed."); Am. Fed'n of Gov't Emps. v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981); New Jersey v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

96. *E.g.*, Air Transp. Ass'n of Am. v. Dep't of Transp., 900 F.2d 369, 379 (D.C. Cir. 1990) (evaluating the duration of the deadline); Council of the S. Mountains, Inc. v. Donovan, 653 F.2d 573, 581–82 (D.C. Cir. 1981) (evaluating multiple factors including whether the rulemaking delay was due to factors outside of the agency's control and whether the agency made significant effort to satisfy the deadline).

97. *E.g.*, DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974) (allowing good cause for a price freeze so as to avoid price increases in advance of the freeze).

98. *Am. Fed'n of Gov't Emps.*, 655 F.2d at 1157; *see also* Mack Trucks, Inc. v. EPA, 682 F.3d 87, 94 (D.C. Cir. 2012) (surveying recent cases).

99. *See, e.g.*, Haw. Helicopter Operators Ass'n v. Fed. Aviation Admin. (FAA), 51 F.3d 212, 214 (9th Cir. 1995) (approving use of good cause for a rule to prevent a spate of helicopter crashes); Serv. Emps. Int'l Union v. County of San Diego, 60 F.3d 1346, 1352–53 n.3 (9th Cir. 1994) (upholding invocation of good cause because delaying the rule could imperil the fiscal condition of San Diego County and the State of California).

promulgation public comment;[100]

- Whether the agency issued the rule on a routine basis;[101]
- Whether the rule was limited in scope;[102]
- Whether the rule implicated significant reliance interests;[103]
- Whether the agency issued the rule pursuant to an injunction;[104]
- Whether the agency revised the rule in response to a court order;[105] and
- Whether the agency provided a contemporaneous justification for invoking good cause.[106]

Courts frequently confront a number of these issues in tandem. A 2012 GAO study of agency invocation of the good cause exception reported that agencies cited multiple rationales for invoking good cause on 44% of rules.[107] The number of combinations of these issues creates significant complexity. The result is unsurprising: predicting case outcomes is

100. *See* New Jersey v. EPA, 626 F.2d 1038, 1050 (D.C. Cir. 1980) (rejecting the argument that post-promulgation cured lack of opportunity to comment because of "the psychological and bureaucratic realities of *post hoc* comments in rule-making. . . . Congress specified that notice and an opportunity for comment are to *precede* rule-making."). In other cases, however, the courts have concluded that post-promulgation comment cures failure to accept comment absent good cause. *See, e.g.*, Levesque v. Block, 723 F.2d 175, 188 (1st Cir. 1983); Fed. Express Corp. v. Mineta, 373 F.3d 112, 120 (D.C. Cir. 2004) (noting that the agency ultimately accepted and considered comments); *see also* Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113, 133 (1984) ("Although some courts have validated agency substitution of a post-promulgation comment period for the section 553 sequence, most have not.").

101. *See* Natural Res. Def. Council, Inc. v. Evans, 316 F.3d 904, 912 (9th Cir. 2003) (rejecting agency invocation of good cause on a rule that required annual updates and faced predictable delays each year).

102. Some courts have emphasized that the limited scope of a rule alone does not constitute good cause. *See, e.g.*, Mid-Tex Elec. Coop., Inc. v. FERC, 822 F.2d 1123, 1132 (D.C. Cir. 1987) (The "limited nature of the rule cannot in itself justify a failure to follow notice and comment procedures"). This language appears to be in some tension with cases that evaluate whether the rule represents a "'routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public'" when determining whether notice-and-comment is "unnecessary." *Mack Trucks, Inc.*, 682 F.3d at 94; *see also* Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749, 755 (D.C. Cir. 2001); Council of the S. Mountains, Inc. v. Donovan, 653 F.2d 573, 581–82 (D.C. Cir. 1981) (noting that the implications of agency failure are less significant on narrowly tailored rules).

103. *See, e.g.*, *Mid-Tex Elec. Coop., Inc.*, 822 F.2d at 1132–33 (noting reliance interest of regulated entities in affirming FERC's invocation of good cause).

104. *See* Am. Fed'n of Gov't Emps., v. Block, 655 F.2d 1153, 1156–57 (D.C. Cir. 1981).

105. For a discussion of cases taking different views on this issue, see AFL-CIO v. Chao, 496 F. Supp. 2d 76, 85–86 (D.D.C. 2007).

106. *See* Lavilla, *supra* note 95, at 399–401.

107. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 84, at 9.

generally hazardous. This observation is consistent with previous studies of the good cause exemption.[108]

Because this case law is inconsistent, agencies are likely to consider the average rate at which rules are successfully challenged on APA procedural grounds. Little large-scale empirical research has examined this question.[109] To help fill this void, this Article presents an original analysis of all cases from 1995 to 2012 classified by Westlaw as involving a challenge to an agency rule for avoidance.[110] This analysis shows that courts considered challenges to avoidance in 156 cases during this time period.[111] Agencies prevailed in 105 of these cases, or approximately 67%.[112] Agency rules were vacated in at least 45% of these rules.[113]

A few other studies also speak to the level of litigation risk that agencies face for APA avoidance. In an unpublished study, Jody Freeman and Joseph Doherty examined a sample of 282 cases from 1994 to 2004 in which a court reached the merits of a challenge to a rule.[114] This sample is only a subset of the full population of cases considering APA claims during this period. As such, this total is not comparable to the RFA and UMRA totals presented below, which do capture the full population. Of these 282 cases, seventy-two included a challenge on APA procedural grounds.[115]

108. *See* Jordan, *supra* note 100, at 120 (extensively surveying good cause cases and concluding that "[d]ecisions interpreting the good cause provisions of section 553 necessarily have an ad hoc quality. Since the statutory procedure applies to all federal agencies which issue rules, agencies which face different problems and have widely diverse responsibilities will raise the question in vastly different factual settings. . . . [C]ourts have little choice but to examine each claim in context, weighing all the facts and circumstances to decide whether other legitimate interests outweigh the desirability of providing an opportunity for public participation in rulemaking"); Hickman, *supra* note 16, at 1779–81 (concluding that in the IRS context, courts have been inconsistent in a number of respects including whether agencies must explicitly invoke the good cause exception contemporaneously with the final rule, and if so, whether this requires a contemporaneous justification).

109. *But see* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1298–1300 (1997) (reporting that contrary to the conventional wisdom that 80% of EPA rules are challenged in court, only 26% of EPA rules were challenged from 1987 to 1991).

110. *See* NOTICE AND COMMENT, NECESSITY, *available at* Westlaw Keynote 15Ak394k (last visited Sept. 22, 2014). Cases in this Keynote that did not pertain to agency avoidance were excluded, yielding a total of 156 total cases from 1995 to 2012.

111. *Id.*

112. *Id. See also Hearing on the Regulatory Improvement Act of 2007: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 11 (2007) (statement of Jody Freeman) [hereinafter *Freeman Statement*].

113. Further data available from the author upon request.

114. *Freeman Statement*, *supra* note 112, at 11.

115. *Id.* All rules in the dataset were issued pursuant to notice-and-comment, so APA challenges were confined to the adequacy of the notice-and-comment process.

Agencies lost approximately 26% of these APA procedural claims.[116] These results are consistent with Sidney Shapiro and Richard Levy's study of 177 challenges in 1984 and 1985.[117] Shapiro and Levy found that fifty-five of these cases—31%—entailed a procedural challenge and that agencies lost eight of these cases—15% of the cases brought.[118]

Courts have been inconsistent with respect to remedies for APA violations. Again, the APA is vague, merely directing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law [or] . . . (D) without observance of procedure required by law."[119] Some courts prefer to leave the rule in effect pending notice-and-comment, generally reasoning that vacating would create unnecessary disruption.[120] Other courts argue that § 706 of the APA does not authorize remanding without vacating.[121] In other cases, courts have left the rule in effect for all entities except the plaintiffs.[122] In yet other cases, courts do not state clearly whether the rule is vacated pending remand.[123] The result is significant uncertainty.[124]

2. Extent of Agency Avoidance

Agencies avoided the notice-and-comment process on almost 52% of rules on which final action was taken from 1995 to 2012.[125] This fraction

116. *See id.*

117. *See* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 407 n.86 (1987).

118. *Id.*

119. 5 U.S.C. § 706(2) (2012).

120. *See, e.g.*, W. Oil & Gas Ass'n v. EPA, 633 F.2d 803, 813 (9th Cir. 1980); U.S. Steel Corp. v. EPA, 649 F.2d 572, 575 (8th Cir. 1981); *see also* Jordan, *supra* note 100, at 166 (noting that "[e]specially in 'good cause' cases, however, courts are hesitant to [vacate rules]").

121. For a sense of the debate over whether the APA permits remanding without vacating, see Checkosky v. SEC, 23 F.3d 452, 462–66, 490–93 (D.C. Cir. 1994).

122. *See* Jordan, *supra* note 100, at 167.

123. *See* 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, 410 n.88 (2000) (reporting that twenty-eight of the sixty-one D.C. Circuit opinions studied did not clearly specify whether the rule was vacated).

124. *See, e.g.*, *Freeman Statement*, *supra* note 112, at 11–12.

125. A NPRM preceded 12,836 of the 26,683 rules finalized in the *Unified Agenda* from Fall 1995 to Fall 2012. Interestingly, the overall rate of agency avoidance decreased slightly in years after the Supreme Court's decision in United States v. Mead Corp., 533 U.S. 218 (2001), which could reasonably have been expected to incentivize agencies to subject rules to notice-and-comment to receive greater judicial deference to statutory interpretation

fell to 37% for major rules.[126] Good cause was the primary exemption cited by agencies for both major and non-major rules.[127] The GAO studied a stratified random sample of 1,338 rules finalized between 2003 and 2010.[128] Agencies cited the good cause exemption for over 61% of non-major rules and 77% of major rules exempted from notice-and-comment.[129] (*See* Table 2).

Agencies that face greater litigation risk exempt rules from notice-and-comment at a lower rate. Consider the rate at which agencies exempted rules from notice-and-comment from 1995 to 2012.[130] The Environmental Protection Agency (EPA) and the Federal Communications Commission (FCC)—the two agencies with the greatest litigation risk in the Freeman and Doherty study—exempted rules at a rate well below the average.[131] EPA and FCC rules comprised a remarkable 67% of the 282 challenged rules in Freeman and Doherty's study.[132] As Freeman and Doherty's publicly available data aggregate results for all other agencies, agency-level analysis is possible only for FCC and EPA.[133] Both of these agencies faced an APA procedural challenge in a substantial minority of these cases.[134] To

included in the rule. From 1995 through 2002, agencies avoided approximately 54% of all rules. This rate of avoidance fell to 50.4% from 2003 to 2012. *See* General Services Administration, Regulatory Information Database, http://www.reginfo.gov/public/do/eAgendaAdvancedSearch (last visited Jan. 6, 2015) (select the years "1995–2012"; Check "All Agencies"; Check the box for "Completed"). This suggests that *Mead* may have encouraged agencies to avoid less frequently to receive greater judicial deference notwithstanding the decision's ambiguity. For a more complete discussion of this issue, see Lisa Schultz Bressman, *How* Mead *has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005).

126. *Unified Agenda* data show that a NPRM preceded 654 of the 972 rules from Fall 1995 to Fall 2012. This result is consistent with a 2012 Government Accountability Office (GAO) study. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 84, at 9 (reporting that agencies exempted 35% of the 568 major rules issued from 2003 to 2010 from notice-and-comment).

127. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 84, at 3.

128. *Id.* at 4.

129. *Id.* at 16.

130. Because many rules issued without an NPRM are not interim-final rules, this analysis examines a wider range of rules than O'Connell, *see supra* note 74, which restricts analysis to interim-final rules.

131. *Infra* app. tbl. 2. EPA rate is 45.07 percent, FCC rate is 15.33 percent, and the average is 51.65 percent.

132. *Freeman Statement*, *supra* note 112, at 11.

133. *Id.*

134. *See Freeman Statement*, *supra* note 112 (reporting that (1) of the 102 EPA rules challenged, 33% included an APA procedural claim; and, (2) of the 88 Federal Communications Commission (FCC) rules challenged, 19% included an APA procedural claim).

provide a point of reference, consider that these agencies issued only 9% of the rules finalized from 1995 to 2012. The practice of these agencies is therefore consistent with the expectation that agencies avoid procedural requirements less frequently when faced with greater litigation risk.

Agencies with lower litigation risk avoided the notice-and-comment process at much higher rates. For instance, the Department of Defense and State Department likely have strong arguments that their rules qualify for the APA exemption for "a military or foreign affairs function of the United States." [135] Similarly, General Service Administration rules may disproportionately qualify for the exemption for rules "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."[136] Given these exemptions, these agencies therefore face lower litigation risk for avoiding the APA. Importantly, this discussion does not control for the legal merits of whether rules issued by EPA and FCC should have been subjected to notice-and-comment. This analysis is therefore merely suggestive. Notwithstanding these important caveats, these results are consistent with the hypothesis that agency avoidance falls as litigation risk increases.

B. RFA Analyses: Little Litigation Risk, Significant Avoidance

The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[137] requires agencies to assess the impact of their rules on small businesses, small local governments, and small non-profit organizations (collectively termed small entities).[138] Agencies may avoid providing such an RFA analysis by documenting that the rule will not have a "significant economic impact on a substantial number of small entities."[139]

The RFA uses vague language at key points. First, the RFA exempts

135. 5 U.S.C. § 553(a)(1) (2012).

136. *Id.* § 553(a)(2). *See also infra* app. Tbl. 2.

137. Consistent with the scope of this Article, this discussion considers the RFA only after passage of the 1996 SBREFA Amendments, which provided a cause of action for a number of RFA provisions. *See* Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801 (2012); 5 U.S.C. § 611 (2012).

138. *See* 5 U.S.C. § 601(3)–(6) (defining "small entit[ies]" as "small business[es]," "small organization[s]," and "small government jurisdiction," which includes local governments fewer than 50,000 residents). The RFA includes other provisions, such as a requirement to conduct retrospective review of agency rules that have a significant economic impact on small businesses. *See* 5 U.S.C. § 610. For an insightful treatment of the retrospective review requirement, see Yoon-Ho Alex Lee, *An Options Approach to Agency Rulemaking*, 65 ADMIN. L. REV. 881 (2013). Such provisions are beyond the scope of this Article, which is devoted to requirements for agencies to issue rules.

139. 5 U.S.C. § 605(b).

rules that are not subject to the APA notice-and-comment requirement,[140] which is often unclear for the reasons noted in the preceding discussion of the APA. Second, the RFA fails to define the critical phrases "significant economic impact" and "substantial number of small entities." [141] Unsurprisingly, agencies have reached very different interpretations of these phrases.[142] Third, the RFA does not specify whether agencies may exclude provisions of rules that are required by statute and count only discretionary rule provisions when determining whether a rule has a significant economic impact on small entities.[143] This issue can be critical in cases where much of the impact is created by elements of the rule mandated by statute. Fourth, the RFA does not define whether either indirect impacts of rules (i.e., impacts of rules passed on from regulated entities to other entities) or burden-relieving impacts of rules are cognizable in determining whether a rule will have a "significant economic impact on a substantial number of small entities."[144]

1. Monitoring and Litigation Risk

Congress has done little to monitor agency avoidance of the RFA. The House Small Business Committee and the Senate Small Business and

140. *See id.* § 604(a) (requiring agencies to prepare a final regulatory flexibility analysis "after being required . . . to publish a general notice of proposed rulemaking").

141. *See id.* § 601.

142. For instance, the EPA has issued guidance giving staff significant discretion over the metric by which to determine whether a rule has a "significant economic impact" and the appropriate thresholds to apply. ENVTL. PROT. AGENCY, FINAL GUIDANCE FOR EPA RULEWRITERS: REGULATORY FLEXIBILITY ACT 22–24 (2006), *available at* http://www.epa.gov/rfa/documents/Guidance-RegFlexAct.pdf. By contrast, OSHA has provided less discretion, noting that a rule that may exceed costs exceeding 1% of revenues or 5% of profits may be presumed to have a "significant economic impact" on small entities. *See* U.S. DEP'T OF LABOR, OSHA PROCEDURES FOR COMPLIANCE WITH THE REGULATORY DEVELOPMENT AND REVIEW REQUIREMENTS OF THE REGULATORY FLEXIBILITY ACT (2011), *available at* http://www.dol.gov/dol/regs/appendix.htm. In addition, the Small Business Administration (SBA), which generally advocates stringent interpretations of the RFA, has declined to provide definitive advice on this issue. *See* SMALL BUS. ADMIN., OFFICE OF ADVOCACY, A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT 18–22 (2012), *available at* https://www.sba.gov/sites/default/files/advocacy/rfaguide_0512_0.pdf.

143. *See* CURTIS W. COPELAND, CONG. RESEARCH SERV., RL34355, THE REGULATORY FLEXIBILITY ACT: IMPLEMENTATION ISSUES AND PROPOSED REFORMS 5 (2009) (noting that the issue remains unresolved).

144. For instance, the RFA does not specify whether indirect effects of rules are cognizable. The RFA also does not specify whether agencies may consider only negative impacts or must consider positive impacts as well.

Entrepreneurship Committee have jurisdiction over the RFA.[145] These committees have received numerous CRS and GAO reports recommending that Congress amend the RFA to reduce agency avoidance.[146] While these committees have held a handful of hearings investigating agency avoidance, this has not led to legislative change.[147]

At first glance, the White House appears to have done more than Congress to monitor avoidance of the RFA. In 2002, President Bush issued Executive Order 13,272, which requires agencies to establish written policies and procedures to comply with the RFA and tasks the Small Business Administration (SBA) with supporting agency efforts under the RFA.[148] The SBA is also instructed to submit an annual report to OIRA on agency compliance with Executive Order 13,272.[149] Neither OIRA nor other parts of the White House have publicly responded to these reports, much less sought to sanction agency avoidance of the RFA. Critically, OIRA does not monitor agency avoidance of the RFA pursuant to Executive Order 12,866.[150] It is therefore not especially surprising that agencies subject to OIRA review avoided the RFA at a higher rate. Instead, agencies subject to the OIRA review process avoided the RFA at a somewhat higher rate (94%) than agencies exempt from OIRA review (89%) over the years 1983–2008 (see Table 1).

The SBA's Office of Advocacy is charged by statute with monitoring

145. RULES OF THE HOUSE OF REPRESENTATIVES § X(q)(1), 113th Cong. (2013) (establishing a "Committee on Small Business" charged with "[a]ssistance to and protection of small business, including financial aid, regulatory flexibility . . . ."); STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, 113th Cong., § XXV(o)(1) (2013) (establishing a "Committee on Small Business and Entrepreneurship, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the Small Business Administration").

146. For an overview of GAO reports recommending that Congress amend the RFA, see COPELAND, *supra* note 143, at 4:

> GAO has examined the implementation of the RFA many times during the past 20 years, and has consistently concluded that the lack of clear definitions for key terms like 'significant economic impact' and 'substantial number of small entities' have hindered the act's effectiveness. Therefore, GAO has repeatedly recommended that Congress define those terms, or give the Small Business Administration or some other federal agency the authority and responsibility to do so.

147. For an example of such a bill that did not advance beyond the committee stage, see Small Business Regulatory Improvement Act, H.R. 4458, 110th Cong. (2007).

148. Exec. Order No. 13,272, 3 C.F.R. 247 (2003).

149. *Id.* § 6 ("For the purpose of promoting compliance with this order, Advocacy shall submit a report not less than annually to the Director of the Office of Management and Budget on the extent of compliance with this order by agencies.").

150. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

agency avoidance of the RFA,[151] but the SBA's Office of Advocacy lacks authority to administer the RFA. SBA interpretations of the RFA, therefore, hold equal authority to interpretations from all other agencies.[152] The SBA's main function is to monitor and report upon agency avoidance.[153] SBA oversight efforts are somewhat akin to oversight by an inspector general or the GAO with two key differences: (1) the SBA lacks the same authority to require agencies to produce responsive information; and (2) because the SBA's mission is to advocate for small entities, it does not have the same reputation for neutrality, reducing the reputational damage to an agency of a negative SBA report. The following discussion considers the RFA within the litigation risk framework outlined above.

The RFA provides a cause of action only to small entities,[154] creating a much smaller pool of potential litigants than the APA.[155] Partially for this reason, courts have discussed RFA certifications in only seventy-two cases from 1996 to 2012, the period during which the RFA was judicially reviewable. To provide context, these seventy-two cases constituted less than one-third of 1% of the 24,787 finalized rules listed in the *Unified Agenda* during this period.[156] Agencies, therefore, face little risk of a RFA lawsuit.

The courts have exercised their authority to interpret the RFA quite modestly, declining to clarify the ambiguous terms outlined above. Perhaps most importantly, the courts have not provided further clarity regarding what constitutes a "significant economic impact" or a "substantial number

151. Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 612(a) (2012) ("The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees on the Judiciary and Small Business of the Senate and House of Representatives.").

152. *See* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1044 (D.C. Cir. 1999) ("The SBA, however, neither administers nor has any policymaking role under the RFA; at most its role is advisory."). Legislation introduced in 2011 would give the SBA authority to issue binding interpretations of the RFA. *See* Regulatory Flexibility Improvements Act of 2011, H.R. 527, 112th Cong. (2011).

153. *See* 5 U.S.C. § 612.

154. *Id.* § 611(a)(1) ("[A] small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance").

155. This discussion brackets developments in standing, ripeness, finality, and issue exhaustion case law that have prevented some petitioners from challenging agency rules. While these developments are important, they apply to all rulemaking procedures and not only to the RFA.

156. *See* 5 U.S.C. § 611. The SBA compiles a list of cases in which the RFA is discussed. *See* SMALL BUS. ADMIN., OFFICE OF ADVOCACY, ANNUAL REPORT OF THE CHIEF COUNSEL FOR ADVOCACY ON IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 13272 App. A (2014), *available at* http://www.sba.gov/advocacy/823/4798.

of small entities."[157] In addition, the courts have not determined whether agencies must include the impacts of rule provisions mandated by statute when determining whether a rule has a significant impact on small entities.[158] Courts have also not provided guidance as to whether agencies must include burden-relieving impacts.[159] The few cases where an agency has lost on RFA grounds have not provided further guidance on the meaning of these terms.[160] The only notable interpretative work the courts have done with the RFA has restricted its reach.[161] Even setting aside such interpretive questions, courts have held agencies to a relatively low standard under the RFA. Courts have determined that the RFA is subject only to review for either "arbitrariness"[162] or "reasonableness."[163] Under this

157. *See, e.g.*, Washington v. Daley, 173 F.3d 1158, 1171 (9th Cir. 1999) (avoiding the issue by pointing to agreement among the parties).

158. Only one case appears to have addressed this issue. *See* Greater Dall. Home Care Alliance v. United States, 10 F. Supp. 2d 638, 649 n.14 (N.D. Tex. 1998) (approving HCFA's RFA analysis that only incorporated discretionary regulatory requirements).

159. One case may be read to interpret allowing agencies to certify rules with strictly positive impacts, but did not address other contingencies such as cases with both positive and negative impacts. *See* ValueVision Int'l, Inc. v. FCC, 149 F.3d 1204, 1213 (D.C. Cir. 1998) (citations omitted) (rejecting a challenge to the FCC's final regulatory flexibility analysis (FRFA) because the FRFA "concluded that the revised rules would have only a 'positive' effect on [regulated small entities] . . . . This analysis is sufficient to satisfy the obligations of the Regulatory Flexibility Act.").

160. In such cases, courts have typically focused on an agency's failure to analyze all classes of affected small entities or on the agency's use of a flawed risk assessment method. *See* Nat'l Restaurant Ass'n v. Solis, 870 F. Supp. 2d 42, 60 (D.D.C. 2012); Harlan Land Co. v. U.S. Dep't of Agriculture (USDA), 186 F. Supp. 2d 1076, 1097 (E.D. Cal. 2001); Nw. Mining Ass'n v. Babbitt, 5 F. Supp. 2d 9, 15 (D.D.C. 1998); S. Offshore Fishing Ass'n v. Daley, 995 F. Supp. 1411, 1436 (M.D. Fla. 1998); N.C. Fisheries Ass'n v. Daley, 27 F. Supp. 2d 650, 659 (E.D. Va. 1998); N.C. Fisheries Ass'n v. Daley, 16 F. Supp. 2d 647, 652–53 (E.D. Va. 1997).

161. The most prominent such interpretation is the line of cases holding that under the RFA, agencies need only to account for entities that are subject to the legal requirements of the rule and not entities that are indirectly impacted. *See, e.g.*, Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1044 (D.C. Cir. 1999) ("We have consistently interpreted the RFA, based upon these sections, to impose no obligation upon an agency 'to conduct a small entity impact analysis of effects on entities which it does not regulate.'"); Motor & Equip. Mfrs. Ass'n v. Nichols, 142 F.3d 449, 467 (D.C. Cir. 1998) (upholding an EPA RFA analysis that considered the impact on small automobile manufacturers, who were directly subject to the rule, but not unregulated aftermarket resellers on the grounds that "[a]n agency is under 'no obligation to conduct a small entity impact analysis of effects on entities which it does not regulate.'") (quoting United Distrib. Cos. v. FERC, 88 F.3d 1105, 1170 (D.C. Cir. 1996)); Mid-Tex Elec. Coop., Inc. v. FERC, 773 F.2d 327, 343 (D.C. Cir. 1985) ("Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.").

162. *See, e.g.*, Cement Kiln Recycling Coal. v. EPA, 255 F.3d 855, 869 (D.C. Cir. 2001) (concluding that the claim by the plaintiffs was "not persuasive enough to carry [plaintiffs']

standard, agencies have only lost eleven of the seventy-two RFA cases (15%) brought between the 1996 amendments expanding judicial review and the end of 2012.[164] The result is a body of case law that is lenient, undeveloped, and ambiguous on a number of important issues.

In the relatively few cases where the agency has lost on RFA grounds, courts have often granted only modest remedies. This result is not compelled by the RFA, which grants courts all remedial powers available under the APA.[165] Despite this authority, some courts have gone so far as to hold that agency violations of the RFA are deemed harmless because the RFA imposes a purely procedural requirement.[166] In five of the eleven

burden of showing that the agency's analysis was arbitrary and capricious").

163. *See, e.g.*, U.S. Cellular Corp. v. FCC, 254 F.3d 78, 88 (D.C. Cir. 2001) ("RFA section 604 requires nothing more than that the agency file a FRFA demonstrating a 'reasonable, good-faith effort to carry out [RFA's] mandate.'"); Alenco Commc'ns, Inc. v. FCC, 201 F.3d 608, 625 (5th Cir. 2000) (citations omitted) (quoting Associated Fisheries of Me., Inc. v. Daley, 127 F.3d 104, 114 (1st Cir. 1997)) ("In 1996, Congress provided for judicial review of agency compliance with the RFA. We review only to determine whether an agency has made a 'reasonable, good-faith effort' to carry out the mandate of the RFA.").

164. Courts ruled against agencies on RFA claims in the following eleven cases. Am. Fed'n of Labor v. Chertoff, 552 F. Supp. 2d 999, 1003, 1015 (N.D. Cal. 2007) (Department of Homeland Security (DHS) rule providing safe-harbor procedures in the event that an employee's name and Social Security number did not match); Aeronautical Repair Station Ass'n v. FAA, 494 F.3d 161, 178 (D.C. Cir. 2007) (requirement for employees of airlines and airline subcontractors to be drug tested); U.S. Telecomm. Ass'n v. FCC, 400 F.3d 29, 29, 43 (D.C. Cir. 2005) (setting "conditions under which [] telecommunications carriers [must] transfer telephone numbers to wireless carriers"); U.S. Air Tour Ass'n v. FAA, 298 F.3d 997, 1019 (D.C. Cir. 2002) (rule limiting number of air tour operators allowed to fly over Grand Canyon); *Harlan Land Co.*, 186 F. Supp. 2d at 1098–99 (rule allowing importation of various fruits from regions of Argentina); Nat'l Ass'n of Psychiatric Health Sys. v. Shalala, 120 F. Supp. 2d 33, 43–44 (D.D.C. 2000) (rule mandating that doctors evaluate patients within one hour of placing a patient in seclusion or in restraints); S. Offshore Fishing Ass'n v. Daley, 55 F. Supp. 2d 1336, 1346 (M.D. Fla. 1999) (rule reducing quota for shark fishing); *N.C. Fisheries Ass'n*, 27 F. Supp. 2d at 650 (rule altering fishing quota); *Nw. Mining Ass'n*, 5 F. Supp. 2d at 9 (rule imposing a bonding requirement on hardrock mining); *S. Offshore Fishing Ass'n*, 995 F. Supp. At 1411 (rule reducing quota for shark fishing by 50%); *N.C. Fisheries Ass'n*, 16 F. Supp. 2d at 647 (rule altering fishing quota). A list of the sixty-one cases in which the agency prevailed is available upon request from the author.

165. *See* 5 U.S.C. § 611(4) (2012):

> In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to—(A) remanding the rule to the agency, and (B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest;

see also Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 538 (D.C. Cir. 1983) (stating that failure to comply with the RFA "may be, but does not have to be, grounds for overturning a rule").

166. Because the RFA does not require agencies to alter their substantive decisions in

RFA cases that agencies have lost since 1996, courts remanded to the agency to perform the omitted or inadequate RFA analysis without vacating the rule.[167] Courts vacated the rule in the six remaining cases.[168]

These results may have discouraged litigants from bringing cases asserting RFA claims. Courts discussed the RFA in fifty-three cases from 1996 to 2004, or approximately seven cases per year during the first eight years after the expansion of judicial review. This fell to only eighteen cases from 2005 through 2012, or approximately two cases per year. While other explanations are plausible too, it is possible that litigants opted to bring fewer cases as they observed agencies win at a high rate and observed that plaintiffs often received little in the few cases they won.

2. Extent of Agency Avoidance

Agencies frequently avoid the RFA. Agencies prepared RFA analyses on slightly less than 8% (1,926 of the 24,787) of the rules listed in the *Unified Agenda* from Fall 1996 to Fall 2012,[169] the same set of rules analyzed above

response to RFA analyses, courts have invoked the harmless error doctrine more expansively than in the APA context. *See* Hickman, *supra* note 16, at 1791; *see, e.g.*, Envtl. Def. Ctr., Inc. v. EPA, 319 F.3d 398, 450 (9th Cir. 2003) ("Any hypothetical noncompliance [with the RFA] would thus have been harmless, since the available remedy would simply require performance of the economic assessments that EPA actually made. . . . [T]he analyses required by RFA are essentially procedural hurdles; after considering the relevant impacts and alternatives, an administrative agency remains free to regulate as it sees fit").

167. *Aeronautical Repair Station Ass'n*, 494 F.3d at 178; *U.S. Telecom Ass'n*, 400 F.3d at 43 (leaving the rule in effect but staying enforcement against small entities as defined by the RFA); *Nat'l Ass'n of Psychiatric Health Sys.*, 120 F. Supp. 2d at 45; *S. Offshore Fishing Ass'n*, 995 F. Supp. at 1437; *N.C. Fisheries Ass'n*, 16 F. Supp. 2d at 658.

168. *Am. Fed. Of Labor*, 552 F. Supp. 2d at 1015; *see* Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis, 73 Fed. Reg. 63,843, 63,844 (Oct. 28, 2008) (codified at 8 C.F.R. pt. 274a) ("[T]his final rule reaffirms the text of the August 2007 Final Rule without substantive change"); *U.S. Air Tour Ass'n*, 298 F.3d at 1019. FAA later adopted an air noise standard that differed somewhat from the 2002 standard, but this change appeared related to other issues. *See* Clarifying the Definition of "Substantial Restoration of Natural Quiet" at Grand Canyon National Park, AZ, 73 Fed. Reg. 55,130 (Sept. 24, 2008); *Harlan Land Co.*, 186 F. Supp. 2d at 1099 (USDA did not reissue a substantially similar rule after this case); *S. Offshore Fishing Ass'n*, 55 F. Supp. 2d at 1347 (the Department of Commerce did not reissue a substantially similar rule, perhaps due to timing issues because the rule concerned an annual quota); *N.C. Fisheries Ass'n, Inc.*, 27 F. Supp. 2d at 668 (same); *Nw. Mining Ass'n*, 5 F. Supp. 2d at 16 (noting that the Bureau of Land Management did not reissue the rule invalidated by the court); *see also* Mining Claims Under the General Mining Laws; Surface Management, 64 Fed. Reg. 53,218, 53,218 (Oct. 1, 1999) (codified at 43 C.F.R. pt. 3800) ("The purpose of this final rule is to remove from the CFR the judicially invalidated regulatory provisions").

169. A 2012 GAO study confirmed this result, showing that agencies did a regulatory flexibility analysis on only 3% of non-major rules studied from 2003 to 2010. U.S. GOV'T

with respect to the APA notice-and-comment process.[170] For roughly half of the rules not accompanied by an RFA analysis, agencies relied on the RFA exemption for rules not required to undergo the APA notice-and-comment process. In most of the remaining cases, agencies concluded that the rule would not have a significant economic impact on a substantial number of small entities. This pattern was not confined to non-major rules. *Unified Agenda* data show that agencies did not prepare an RFA analysis for 62% (605 of 972) of major rules[171] issued from 1996 to 2012, including the proposed Credit Risk Retention Rule.[172]

The GAO has reported repeated agency avoidance of the RFA.[173] These findings have not prompted a decrease in agency avoidance, as the GAO has continued to find widespread avoidance despite earlier reports documenting a similar rate of such avoidance.[174] The CRS has also pointed to numerous examples of avoidance.[175] The SBA, too, has repeatedly reported significant agency avoidance of the RFA.[176]

The 1996 SBREFA amendments to the RFA present an additional

ACCOUNTABILITY OFFICE, *supra* note 84, at 38.

170. This analysis began one year later than the APA analysis because the SBREFA amendments to the RFA did not become effective until 1996.

171. The Congressional Review Act defines the term "major rule." *See* 5 U.S.C. § 804(2) (2012) (defining a "major rule" as "any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more").

172. *See* Credit Risk Retention, 76 Fed. Reg. 24,090, 24,143–46 (Apr. 29, 2011) (codified at 24 C.F.R. pt. 267) (indicating RFA exemptions by the Office of the Comptroller of the Currency, Treasury (OCC), Federal Reserve Board (FRB), Federal Deposit Insurance Corporation (FDIC), SEC, Federal Housing Finance Agency (FHFA), and Department of Housing and Urban Development (HUD)).

173. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-998T, REGULATORY FLEXIBILITY ACT: CONGRESS SHOULD REVISIT AND CLARIFY ELEMENTS OF THE ACT TO IMPROVE ITS EFFECTIVENESS 4–5 (2006) (statement of J. Christopher Mihm) (noting repeated agency avoidance of the RFA).

174. *Id.* ("We examined 12 years of annual reports from the Office of Advocacy and concluded that the reports indicated variable compliance with RFA across agencies, within agencies, and over time . . . . We noted that some agencies had been repeatedly characterized as satisfying RFA requirements, but other agencies were consistently viewed as recalcitrant.").

175. *See Regulatory Reform: Are Regulations Hindering Our Competitiveness?: Hearing Before the Subcomm. on Regulatory Affairs of the H. Comm. on Gov't Reform*, 109th Cong. 42–44 (2005) (statement of Curtis W. Copeland, Specialist in American National Government, Congressional Research Service).

176. SMALL BUS. ADMIN., REPORT ON THE REGULATORY FLEXIBILITY ACT 1 (2009) ("Overall agency compliance with the RFA continues to develop."). For a summary of these reports, see COPELAND, *supra* note 143, at 1.

opportunity to analyze agency avoidance of the RFA. The amendments made two major changes to the RFA. First, they authorized judicial review of agency determinations that a rule did not require a regulatory flexibility analysis.[177] This change increased the litigation risk of exempting rules. Interestingly, the average agency avoidance rate dropped to 78% in the year following this change, but it moved back toward the average avoidance rate of 92% in subsequent years.

Second, the amendments required two agencies—EPA and Occupational Safety & Health Administration (OSHA)—to formulate and participate on special "review panels" for all rules expected to have a "significant economic impact on a substantial number of small entities."[178] The panel process requires a meaningful investment of agency time and resources. The agencies are required to: notify the SBA; prepare a summary of the rule and potential impacts on small entities; recruit small entities to consult on the rule; hold a meeting with small entities; discuss the rule with the SBA and OIRA; draft a panel report; and, seek to obtain the concurrence of SBA and OIRA.[179] EPA and OSHA experience has shown that this process typically requires approximately sixty days but sometimes more.[180] In short, the SBREFA amendments significantly increased the cost of issuing a rule subject to the RFA requirements.

The 1996 SBREFA amendments to the RFA create a unique opportunity to analyze the impact of increasing procedural requirements on agency avoidance in a context with low litigation risk. In most cases, evaluating the causal relationship between a procedural change (such as the SBREFA amendments) and agency behavior (such as the rate at which agencies exempt their rules from the RFA) is complicated by a simulteneity problem. Under the SBREFA amendments, only EPA and OSHA face an additional cost if their rules are subject to these new procedural requirements.[181] This permits use of the difference-in-differences statistical estimation method[182] to compare the difference in RFA avoidance rates

177. Small Business Regulatory Enforcement Fairness Act of 1996 § 242, 5 U.S.C. § 611 (2012).

178. *See* 5 U.S.C. § 609(b) (2012) (illustrating that the Dodd-Frank Act, passed in 2010, added the Consumer Financial Protection Bureau (CFPB) to the list of agencies).

179. *Id.*

180. For a list of times required to complete panels, see Small Bus. Admin., *EPA SBREFA Panels*, http://www.sba.gov/category/advocacy-navigation-structure/regulatory-affairs/small-business-statutes/sbrefa/epa-sbrefa-panels (last visited Jan. 5, 2015); Small Bus. Admin., *OSHA SBREFA Panels*, http://www.sba.gov/category/advocacy-navigation-structure/regulatory-affairs/small-business-statutes/sbrefa/osha-sbrefa-panels (last visited Jan. 5, 2015).

181. 5 U.S.C. § 609(b), (d) (2012).

182. This is sometimes expressed as inquiring whether the change over time for the

between EPA and OSHA and all other agencies before the amendments became effective with this same difference afterwards. If EPA and OSHA increased their rate of avoidance more than the agencies that were not subject to SBREFA, this would provide compelling evidence that EPA and OSHA felt free to avoid the more burdensome SBREFA requirements.

This analysis considers the SBREFA requirement to convene a special "review panel" as the "treatment" condition. EPA and OSHA are, therefore, in the treatment group and the other agencies are in the control group. By isolating the change over time between the treatment and control groups, the difference-in-differences method distinguishes between the true effect of the treatment and other reasons that the treatment and control groups may differ. The critical assumption is that the RFA avoidance over time would have been the same between EPA and OSHA and all other agencies absent passage of the 1996 SBREFA amendments. Put differently, the key assumption is that nothing else changed at roughly the same time as the imposition of the 1996 SBREFA amendments that altered the rate at which EPA and OSHA avoided the RFA analyses relative to all the other agencies.

The analysis raises the question: was the passage of SBREFA in 1996 accompanied by any other changes that might make EPA and OSHA more or less responsive to the SBREFA changes than other agencies would have been? One such argument is that the politics of the mid-1990s that led the newly elected Republican Congress to impose the review panel requirement on EPA and OSHA also increased scrutiny of the rulemaking activity of the EPA and OSHA in other ways. This story is plausible, as these agencies were longstanding targets of critics of regulation. Such criticism probably motivated Congress to single out EPA and OSHA for the review panel requirement. But, if anything, this heightened scrutiny would actually decrease EPA and OSHA avoidance of the RFA, thereby attenuating the difference-in-differences with respect to the other agencies. Another such argument is that these same political forces also motivated Congress to use its oversight powers to deter the two agencies from issuing rules that burdened small businesses. The data in this Article cannot not exclude the possibility that EPA and OSHA responded to this oversight by issuing fewer rules that burdened small businesses, thereby increasing the rate at which these agencies avoided the RFA. (*See* Tables 2–4; *see* Figure 1).

The results show that relative to other agencies, EPA and OSHA began

agencies not affected by the treatment (all agencies except EPA and OSHA) provides a valid counterfactual for the treatment group (EPA and OSHA). That is, did the agencies except EPA and OSHA respond in the way that EPA and OSHA would have had these two agencies not been subjected to the SBREFA panel requirement?

avoiding the RFA at a higher rate after the 1996 SBREFA amendments became effective. Prior to 1996, EPA and OSHA completed RFA analyses on 19% of rules and avoided the RFA on the remaining 79%. After 1996, the rate of completion fell to 12%, a 30% decline. By contrast, the rate at which all other agencies provided such analyses remained constant at 14% before and after the 1996 SBREFA amendments. The rate at which EPA and OSHA provided RFA analyses fell by 7% relative to agencies not subject to SBREFA amendments. As the estimated standard errors in Table 3 show, this difference between EPA and OSHA and all other agencies is statistically significant.

Additional data are consistent with this result. First, consider an analysis restricting the time window to a period of three years before and three years after the 1996 SBREFA amendments that yields similar results (see Table 4). Evaluating a narrower time period provides a check against the possibility that the difference between EPA and OSHA's average rate of completion of RFA analyses and that of other agencies is the result of an unrelated variable. Second, consider an analysis restricting the control group to agencies that issue politically salient rules along the lines of EPA and OSHA that also yields similar results (see Table 5). This analysis arguably provides a more accurate counterfactual for EPA and OSHA than it does for the general population of agencies. This provides a check against the possibility that some characteristic of rules issued by agencies that issue politically salient rules changed in a way that altered the average rate at which EPA and OSHA completed RFA analyses relative to all the other agencies. The results are consistent across each of these different specifications.

In all cases, EPA and OSHA prepared RFA analyses less frequently after passage of the 1996 SBREFA amendments. These results suggest that EPA and OSHA chose to avoid the RFA at a higher rate following the 1996 SBREFA amendments to avoid heightened requirements. As noted above, the SBREFA panel process requires a significant investment of agency time and resources. It may also reduce agency policymaking autonomy by requiring agencies to seek the concurrences of SBA and OIRA on the SBREFA panel report. Absent litigation risk, EPA and OSHA chose to skirt these costs by avoiding the RFA more frequently.[183]

183. *See supra* notes 145–168 and accompanying text.

C. UMRA Written Statements: Little Litigation Risk, Widespread Avoidance

The UMRA requires agencies to assess the impact of their rules on state, local, and tribal governments as well as the private sector.[184] For rules that require these entity classes to spend more than $100 million in aggregate annual expenditures (adjusted for inflation), agencies must prepare and receive comment on a "written statement" assessing the costs and benefits of the mandate.[185] Agencies must also consult with state, local, and tribal governments and describe such consultation in the written statement.[186] The UMRA further requires agencies to consider alternative policies; the agencies must select the least burdensome and most cost-effective alternative that is consistent with the underlying policy goal or explain why it did not do so.[187] These written statements are required at both the proposed and final rule stages.[188]

Similar to the APA and RFA, the UMRA is vague at a number of key junctures. Perhaps most importantly, the UMRA allows agencies to self-determine whether their rules trigger the $100 million threshold, and it does not provide for judicial review of that determination.[189] Courts may hear suits claiming that an agency failed to provide an adequate UMRA statement, but as the discussion below shows, courts have not closely scrutinized agency analyses.[190] The UMRA also includes a number of broad exemptions, exclusions, and restrictions.[191] Consider just two examples. First, agencies can avoid the Act when providing an analysis is not "reasonably feasible," which is undefined.[192] Second, agencies can avoid completing an UMRA assessment by issuing the rule pursuant to an exception from the APA notice-and-comment process.[193]

184. The UMRA exempts independent regulatory agencies. *See* 2 U.S.C. § 1532 (2012) (incorporating definitions provided in 2 U.S.C. § 658 (2012), which in turn provides that "[t]he term 'agency' has the same meaning as defined in section 551(1) of Title 5, but does not include independent regulatory agencies").

185. 2 U.S.C. § 1532(a).

186. *Id.*

187. *Id.* § 1535(a)–(b).

188. 5 U.S.C. §§ 603–604.

189. 2 U.S.C. § 1532(a). Legislation introduced in 2011 would subject this determination to judicial review. See Unfunded Mandates Accountability Act, S. 1189, 112th Cong. (2011).

190. *See infra* notes 200–202 and accompanying text.

191. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-637, UNFUNDED MANDATES: ANALYSIS OF REFORM ACT COVERAGE 36–37 (2004) (observing that rules published by independent regulatory agencies were the major exception because they are not covered by Executive Order 12,866).

192. 2 U.S.C. § 1532(a).

193. Legislation introduced in 2011 would close this loophole. *See* Unfunded Mandates

1. Monitoring and Litigation Risk

Congress appears to have done little to monitor agency avoidance of the UMRA. Each chamber tasked its governmental affairs committee with monitoring agency implementation of the UMRA and required OIRA to submit annual reports to these committees assessing agency efforts under the UMRA.[194] On occasion, Congress has also instructed the GAO to report on agency compliance, which may include providing information on agency compliance.[195] A review of committee hearings suggests that Congress has not engaged in responsive public oversight efforts.[196]

White House monitoring has been similarly ineffectual. The UMRA requires OIRA to compile agency UMRA written statements.[197] OIRA must then forward these statements to the Congressional Budget Office.[198] The UMRA also requires that OIRA file annual reports with Congress documenting agency compliance with the UMRA.[199] Critically, OIRA lacks the power to block rules where the agency avoided the UMRA. Instead, OIRA only has the power to evaluate *ex post* agency procedural compliance with UMRA. Agencies that run afoul of OIRA risk only a negative report to Congress.

Like Congress and the White House, the courts have done little to monitor agency avoidance of the UMRA. Again, consider the litigation risk framework. Unlike the RFA, a broad base of potential plaintiffs exists because the UMRA analyses include impacts on the "private sector."[200] Yet few plaintiffs have filed suit because they have little to gain from

Information and Transparency Act of 2011, H.R. 373, 112th Cong. (2011).

194. 2 U.S.C. § 1538:

> No later than 1 year after March 22, 1995, and annually thereafter, the Director of the Office of Management and Budget shall submit to the Congress, including the Committee on Governmental Affairs of the Senate and the Committee on Government Reform and Oversight of the House of Representatives, a written report detailing compliance by each agency during the preceding reporting period with the requirements of this subchapter.

195. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-94-105, REGULATORY FLEXIBILITY ACT: STATUS OF AGENCIES' COMPLIANCE 2 (1994); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-98-30, UNFUNDED MANDATES: REFORM ACT HAS HAD LITTLE EFFECT ON AGENCIES' RULEMAKING ACTIONS 2 (1998).

196. Survey of all hearings in the Lexis-Nexis Congressional Hearings Database with the phrase "Unfunded Mandates Reform Act" as of March 13, 2013. Finding is on file with the author.

197. OIRA acts pursuant to OMB's authority. 2 U.S.C. § 1536.

198. *Id.*

199. *Id.* § 1538.

200. *Id.* § 1532(a) (requiring "a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including the costs and benefits to State, local, and tribal governments *or the private sector*") (emphasis added).

winning. A court may require the agency to prepare an UMRA statement[201] but may not stay, enjoin, invalidate, or otherwise impact the rule.[202] From 1995 to 2013, the courts noted challenges to rules for failure to complete an UMRA written statement in only four written opinions. The agency prevailed in all four of these cases, and none of the opinions clarified or otherwise expanded the UMRA.[203]

2. Extent of Agency Avoidance

Agencies frequently avoid the UMRA. The GAO reported to Congress that agencies have openly failed to comply with the UMRA: "Our review demonstrated that many statutes and final rules with potentially significant financial effects on nonfederal parties were enacted or published without being identified as federal mandates at or above UMRA's thresholds."[204] These are not isolated examples. Excluding independent agencies, which are exempt from the UMRA, agencies completed the UMRA written statements for less than 1% of rules (only 235 rules of the 24,212) that appeared in the *Unified Agenda* from 1995 to 2012 (see Table 1).[205] The same set of non-independent agencies avoided the UMRA in over 78% (179 of 815) of major rules such as the proposed Credit Risk Retention Rule.[206] This result is notable given that OIRA had determined under the

201. *Id.* § 1571(a)(2)(B) ("If an agency fails to prepare the written statement . . . a court may compel the agency to prepare such written statement").

202. *Id.* § 1571(a)(3) ("[T]he inadequacy or failure to prepare such statement . . . shall not be used as a basis for staying, enjoining, invalidating or otherwise affecting such agency rule").

203. Allied Local & Reg'l Mfrs. Caucus v. EPA, 215 F.3d 61, 80–81 (D.C. Cir. 2000) (rejecting a claim that EPA improperly failed to provide an UMRA written statement on the grounds that EPA provided evidence that the rule would not have a $100 million annual impact); Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1043 (D.C. Cir. 1999) (rejecting a claim that EPA's failure to provide an UMRA written statement rendered the rule arbitrary or capricious under the APA); Valentine Props. Assocs. v. HUD, 785 F. Supp. 2d 357, 369–70 (S.D.N.Y. 2011) (rejecting a claim in part because compliance with the rule was voluntary and therefore outside the scope of an "unfunded mandate" under UMRA); Associated Builders & Contractors, Inc. v. Herman, 976 F. Supp. 1, 15 (D.D.C. 1997) (rejecting a claim that a failure to complete UMRA written statement provided a basis to invalidate the rule on the grounds that the statute prohibits such a remedy).

204. U.S. GEN. ACCOUNTING OFFICE, *supra* note 191, at 36; *see also* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 236 (5th ed. 2012) (noting that "UMRA is not very prescriptive with respect to the review of agency statements prepared under the Act" and that a "GAO study found decidedly mixed review of . . . [the] rulemaking review provisions").

205. Data were drawn from the *Unified Agenda* from Fall 1995 through Fall 2012.

206. The 2012 GAO study of 1311 rules issued from 2003 to 2010 confirmed this result, showing that agencies avoided the UMRA on 90% of major rules studied. *See* U.S. GOV'T

Congressional Review Act that most major rules would have a $100 million annual economic impact. Because the scope of the UMRA is quite broad, it is reasonable to expect that a number of rules with an annual economic impact exceeding $100 million would also impose $100 million in unfunded mandates on the private sector as well as state, local, and tribal governments.[207]

III. IMPLICATIONS

Thus far, this Article has analyzed when and why administrative agencies avoid rulemaking procedural requirements such as the APA's notice-and-comment process. Original empirical analysis shows that agency avoidance of rulemaking procedures increases as litigation risk decreases. To control for the impact of litigation risk from other variables such as congressional oversight, this Article analyzed variations in agency avoidance of the APA, RFA, and UMRA on the same sample of rules. Litigation risk is low for the RFA and UMRA, and avoidance is high. Litigation risk is higher for the APA, and agency avoidance of the APA is significantly lower than avoidance of the RFA or UMRA. This Part now turns to the implications of these results.

A. Benefits and Costs of Rulemaking Procedures

This Article argues that the enduring debate over whether the benefits of imposing rulemaking procedures outweigh the costs has missed an important issue: the fact that agencies often avoid rulemaking procedures altogether. On one hand, a number of influential scholars have argued that rulemaking procedures promote important values including public deliberation, reasoned agency decisionmaking, agency accountability to both the public and to Congress, and agency expertise.[208] On the other hand, a number of influential scholars have argued that rulemaking procedures unduly delay the rulemaking process, leaving salient policy

ACCOUNTABILITY OFFICE, *supra* note 84, at 39; *see also* CURTIS W. COPELAND, ECONOMIC ANALYSIS AND INDEPENDENT REGULATORY AGENCIES 20 (2013) (reporting that agencies prepared an UMRA written statement for only four of 100 major rules issued by agencies in calendar year 2010).

207. Because the $100 million UMRA threshold is adjusted annually for inflation whereas the $100 million threshold for major rule designation is not, the gap between the requirements has grown over time. *Compare* 2 U.S.C. § 1532(a) (Supp. I 1994) (providing a threshold of "$100,000,000 or more (adjusted annually for inflation) in any 1 year"), *with* 5 U.S.C. § 804(2)(A) (2012) (defining a major rule as having "an annual effect on the economy of $100,000,000 or more").

208. *Supra* notes 2–5.

considerations unaddressed for long time periods.[209] In some cases, such scholars have argued, rulemaking procedures may prompt agencies to make policy via alternative means such as adjudicatory orders and informal guidance.[210]

This Article sharpens the contours of this debate by analyzing how its stakes have been overstated, particularly for rules where litigation risk is low. Because agencies frequently avoid rulemaking procedures absent litigation risk, they neither further important values such as public deliberation nor contribute to ossification to the extent commonly assumed. Rather than speaking of rulemaking procedural requirements generally, both sides of this debate should recognize that most costs and benefits derive from cases where an agency faces substantial litigation risk.

The argument that the rulemaking process has become "ossified" generally involves two claims about the state of the rulemaking process.[211] The first claim is that the rulemaking process has become overly difficult due to additional procedural and analytic requirements imposed on agencies by Congress, the White House, and the courts. The second claim is that the rulemaking process is sufficiently burdensome that it causes

209. *See* McGarity, *supra* note 6, at 1391 ("To some extent, the fact that the air and waters of the United States are still polluted, workplaces still dangerous, motor vehicles still unsafe, and consumers still being deceived is attributable to the expense and burdensomeness of the informal rulemaking process.").

210. *See id.* at 1386 (noting that because "[t]he informal rulemaking process of the 1990s is so heavily laden with additional procedures, analytic requirements, and external review mechanisms . . . agencies are beginning to seek out alternative, less participatory regulatory vehicles to circumvent the increasingly stiff and formalized structures of the informal rulemaking process"); MASHAW & HARFST, *supra* note 6, at 10–11 ("Established as a rulemaking agency to force the technology of automobile safety design, . . . NHTSA [the National Highway Traffic Safety Administration] has instead concentrated on its statutory power to force the recall of motor vehicles . . . [a technique that] requires little, if any, technological sophistication and which has no known effects on vehicle safety."); Terrence M. Scanlon & Robert A. Rogowsky, *Back-Door Rulemaking: A View From the CPSC*, 8 REG. 27, 28 (1984) ("[T]he informal consensus in the Agency is that rulemaking is dead; it simply takes too much effort.").

211. For an overview of the ossification debate, see MASHAW & HARFST, *supra* note 6, at 10– 25 (analyzing ossification in the context of the NHTSA); McGarity, *supra* note 6; Wald, *supra* note 6; Paul R. Verkuil, *Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453 (1995); Pierce, *supra* note 6; Strauss, *supra* note 4; Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 489–90, 514 (1997); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997); Jordan, *supra* note 123; Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1125–31 (2002); Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001–2005*, 38 ENVTL. L. 767 (2008); Yackee & Yackee, *Administrative Procedures*, *supra* note 77; Yackee & Yackee, *supra* note 6.

agencies to make policy via other means such as guidance documents or adjudication. The consensus is that rulemaking has important benefits relative to such other forms of policymaking.[212]

The "ossification" literature has generally speculated that both manifestations of ossification are the result of some combination of the following four problems: 1) analytic requirements imposed by Congress, the subject of this Article; 2) analytic requirements imposed by the White House; 3) congressional review; and 4) judicial review.[213] A significant body of literature has debated the extent of ossification. A recent wave of scholarship has responded that claims of ossification lack systematic empirical support and that claims of substantial ossification are overstated.[214]

This is a difficult issue to resolve empirically. Existing large scale empirical studies of ossification have evaluated the correlation between the number of rulemaking procedures applicable to an agency and either the average time an agency required to complete rulemakings or the number of

212. A full discussion of the tradeoffs between rulemaking and adjudication is beyond the scope of this Article. For an overview of the costs and benefits of rulemaking, see generally Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 402–09 (1985); *see also* LUBBERS, *supra* note 203204, at 113–28 (analyzing the advantages and drawbacks of rulemaking relative to adjudication); Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149, 163–64 (1986) (discussing the merits of rulemaking); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965). For a seminal argument in favor of rulemaking, see KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 283 (1970) (asserting that "[t]he procedure of administrative rule making is one of the greatest inventions of modern government"); *see also* Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1026 (2000) ("There is broad, if not universal, recognition that rulemaking is a sagacious approach to policymaking."); Richard J. Pierce Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 309 (1988).

213. For an influential discussion of different sources of ossification, see McGarity, *supra* note 6, at 1404–05 ("[T]he task of assembling the database and technical expertise necessary to meet statutory analytical requirements [such as the RFA and NEPA] can be quite burdensome"); *id.* at 1405–07 (arguing that OIRA review and other Executive Orders governing rulemaking contribute to ossification); *id.* at 1412 (observing that judicial review causes agencies to be "constantly 'looking over their shoulders' at the reviewing courts in preparing supporting documents, in writing preambles, in responding to public comments, and in assembling the rulemaking 'record'"); *see also* Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process—For Better or Worse*, 34 OHIO N.U. L. REV. 469 (2008); Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012).

214. *See also* Richard J. Pierce, Jr., *Rulemaking Ossification is Real: A Response to* Testing the Ossification Thesis, 80 GEO. WASH. L. REV. 1493 (2012). *See generally* Johnson, *supra* note 210; Yackee & Yackee, *supra* note 77; Yackee & Yackee, *supra* note 6.

rules issued by an agency.[215] This approach has two major drawbacks. First, the counterfactual—how many rules would have been issued and at what pace absent the rulemaking procedures—is unknown. This problem is particularly pronounced because omitted variables that influence rulemaking output may be correlated with imposition of requirements.[216] Second, this method of analysis does not evaluate whether ossification caused agencies to eschew rulemaking in favor of other forms of policymaking, a claim of ossification proponents.[217] By analyzing agency avoidance, this Article circumvents these issues and provides a more nuanced empirical analysis of how rulemaking procedures may plausibly contribute to ossification.

The results in this Article provide a mixed picture. On one hand, the RFA and UMRA are unlikely to contribute to ossification because agencies avoid these requirements quite frequently and because these statutes do not seem to delay rulemaking.[218] On the other hand, the APA presents a more complicated story. The APA notice-and-comment process may contribute to ossification given that agency avoidance of that requirement is significantly lower, particularly for rules with greater litigation risk.[219] Debate over the costs and benefits of rulemaking procedures should recognize these results. Proposals to streamline procedural requirements such as the RFA and UMRA are likely to bear little fruit given frequent agency avoidance of these requirements.[220] Proposals to streamline the APA are likely to bear greater fruit in the subset of rules with greater litigation risk.

The literature has long debated the extent to which administrative procedures advance important values. Such values include promoting public deliberation in the rulemaking process, fostering agency expertise, guarding against agency arbitrariness, and making agencies accountable to

215. *Supra* note 210.

216. For instance, Congress may be more apt to impose rulemaking procedures on an agency that recently issued unpopular rules. At the same time, Congress may push the agency to issue fewer rules and take greater care with respect to the rules that are issued by cutting its budget and exerting informal pressure.

217. *See, e.g.*, McGarity, *supra* note 6, at 1440–41; Pierce, *supra* note 6; Yackee & Yackee, *supra* note 6, at 1440 (noting that the ossification literature predicts that "because notice and comment rulemaking has become more costly since the mid-1970s, agencies will fail to utilize notice and comment as much as they should").

218. *Supra* Part II (discussing analysis of agency implementation of rulemaking procedures).

219. *Supra* note 125 (noting that from 1995 to 2012, agencies exempted almost 52% of rules on which final action was taken).

220. McGarity, *supra* note 6, at 1444–47.

the public.[221] Kenneth Culp Davis is likely the best-known proponent of the view that rulemaking procedures promote such values, arguing administrative discretion is desirable, provided that it is "guided by administrative rules adopted through procedure like that prescribed by the Federal Administrative Procedure Act."[222] Other scholars have taken a more modest view of administrative procedures. To illustrate this view, consider Richard Stewart's conclusion that the "requirement that agencies articulate and consistently pursue policy choices may have only a modest effect on outcomes, but it can serve as a useful, selective judicial tool to force agency reconsideration of questionable decisions and to direct attention to factors that may have been disregarded."[223] This Article argues that for rules with little litigation risk, both Davis and Stewart overstate the value of rulemaking procedures. Agencies are likely to avoid procedural requirements when litigation risk is low. In such cases, rulemaking procedures are unlikely to have even a modest effect on the rulemaking process, much less act as "one of the greatest inventions of modern government."[224]

B. Judicial Interpretation and Oversight of Rulemaking Procedures

1. The Judicial Challenge in Reviewing Rulemaking Procedures

Are courts well equipped to interpret and enforce rulemaking procedures?[225] At first glance, strong reasons exist to suspect so. Many observers of judicial behavior have argued that courts are particularly adept at reviewing compliance with procedural requirements.[226] Such observers have noted that judges develop expertise in the Federal Rules of Civil or Criminal Procedure, which they heed routinely. While most judges may not deal with administrative procedure as frequently, many administrative law cases arise in the D.C. Circuit, thereby allowing judges on that court to develop expertise.[227] Notwithstanding jurisprudence from the D.C. Circuit,

221. *Supra* notes 2–5 (outlining examples of articles describing these important values).

222. DAVIS, *supra* note 4, at 219.

223. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1702 (1975).

224. DAVIS, *supra* note 211, at 283.

225. Establishing a baseline against which to base the following discussion is quite challenging given the difficulty of selecting a "comparable" area of law and characterizing that area of law with respect to the issues discussed below. The following discussion is therefore presented in absolute rather than relative terms.

226. *Infra* note 257.

227. *See* U.S. Courts, *Statistics* at Table B-1, http://www.uscourts.gov/Statistics.aspx (noting that in 2012, over 29% of D.C. Circuit cases terminated on the merits were

this Article suggests that courts struggle to formulate a consistent and coherent body of case law with respect to rulemaking procedures.

Consider the standard for when agencies may avoid rulemaking procedures along a continuum ranging from vague standards to bright-line rules.[228] While the literature has defined the rules-standards continuum in somewhat divergent ways, Louis Kaplow notes that "definitions of rules and standards commonly emphasize the distinction between whether the law is given content *ex ante* or *ex post*."[229] Rules, of course, provide greater legal guidance *ex ante* than standards. Judge Richard Posner provides an illuminating description of how rules and standards differ: "A rule singles out one or a few facts and makes it or them conclusive of legal liability; a standard permits consideration of all or at least most facts that are relevant to the standard's rationale. A speed limit is a rule; negligence is a standard."[230] Courts often may have little choice but to interpret rulemaking procedures as standards rather than as rules. Formulating a body of case law with respect to administrative rulemaking procedure that is "rule"-like and producing sensible outcomes is extremely difficult because courts may struggle to anticipate the multiple factual issues and combinations thereof raised in rulemaking procedure cases.

Return to the good cause exception to the APA notice-and-comment process, which is described in detail in Part III.A. Courts appear to consider at least ten different issues when evaluating whether an agency validly invoked this exception.[231] While courts may choose to focus their analysis on a subset of these issues in particular cases, they are often implicitly evaluating other factors. For instance, a decision focusing on two such issues may imply that those two factors were sufficient to decide the

administrative appeals as compared with under 10% for courts of appeals as a whole).

228. *See* Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 25–30 (2000) (noting that standards and rules are not distinct categories but rather fall along a continuum).

229. Louis Kaplow, *Rules vs. Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559 (1992).

230. MindGames, Inc. v. W. Publ'g Co., 218 F.3d 652, 657 (7th Cir. 2000).

231. *Supra* notes 96–106 (noting that courts consider 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, and whether the agency provided a contemporaneous justification for invoking good cause).

case irrespective of the other factors. Enormous complexity results. Even if each of the factors can be simplified to either "yes" or "no," there are still many different potential combinations of case facts. The complexity increases further if courts attempt to maintain consistency in how they rank each of the issues when determining whether an agency validly invoked the good cause exception.

To develop rule-like case law in this context, courts would have no choice but to restrict judicial attention to only a few of the issues courts apparently weigh when determining whether an agency validly invoked the good cause exception. As Judge Posner notes, restricting the inquiry in this manner may lead to arbitrary outcomes.[232] This concern may lead courts to interpret rulemaking procedures as standards rather than as rules. Yet the standards approach may cause another problem: complexity in the case law created by inconsistency in applying the standard. Returning to the good cause example, even the most diligent courts may struggle to treat each of the many different combinations of case facts consistently. Even if many of these factors are not relevant in some circumstances, the number of combinations of case facts is still substantial.

In addition, judges may be tempted in some cases to veer from precedent with respect to rulemaking procedures for two reasons.[233] First, administrative procedural challenges typically arise as one of several issues in a case. In some such cases, the plaintiff, the agency, and the court devote most attention to other policy issues and legal issues. On policy, judges may be tempted in some cases to apply rulemaking procedures

232. *MindGames, Inc.*, 218 F.3d at 657 (describing that the rules also have "the disadvantage of being inflexible, even arbitrary, and thus overinclusive, or of being underinclusive and thus opening up loopholes (or of being *both* over- and underinclusive!)").

233. For an overview of the stare decisis doctrine, see Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001). Appeals court judges may be tempted to stray from precedents established by their colleagues ("horizontal" stare decisis) and district court judges may be tempted to stray from binding circuit precedent ("vertical" stare decisis). For a discussion of instances where judges may stray from rulemaking procedure precedent, see Matt Spitzer & Eric Talley, *Judicial Auditing*, 29 J. LEGAL STUD. 649 (2000); Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755 (2002) (demonstrating "that 'legalist' features of judicial decisionmaking are consistent with an assumption of policy-oriented judges").

Recent research explores additional mechanisms by which legal doctrine may constrain judges. *See, e.g.*, Michael A. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POL. SCI. REV. 369 (2008); Tom S. Clark & Benjamin Lauderdale, *Locating Supreme Court Opinions in Doctrine Space*, 54 AM. J. POL. SCI. 871 (2010); Lewis A. Kornhauser, *Modeling Collegial Courts. II. Legal Doctrine*, 8 J.L. ECON. & ORG. 441 (1992).

strictly on rules they dislike and more leniently on rules they favor.[234] On law, they may be tempted to manipulate a procedural issue to either decide or to skirt another legal issue raised by the rule. The potential for such manipulation does not have a consistent ideological bias. This may be one reason why, on aggregate, conservative and liberal judges appeared to rule in favor of agencies at similar rates in the RFA cases studied in Part III.[235]

Second, reliance interests are generally less important for procedural issues than for substantive issues. Strong reason exists to suspect that courts consider the impact of upsetting reliance interests by failing to follow precedent. Concern with such reliance interests may hold somewhat less sway in the rulemaking context because judicial review of agency avoidance of such procedures may precede agency enforcement of the rule.[236] In the APA context, for instance, a court often hears suits challenging rules before the rule takes effect.[237] Invalidating the rule before it takes effect is less disruptive than would be the case if private parties had already begun to comply.

To further explore why courts inconsistently interpret and apply rulemaking procedures, consider the continued confusion regarding the proper standard of review for agency compliance with statutory rulemaking procedural requirements.[238] Some circuits have reviewed procedural issues de novo.[239] Other circuits have reviewed such issues for arbitrariness.[240]

234. In the Supreme Court context, see Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010). It is nonetheless important to note that an impressive body of empirical research concludes that judges interpret the law contrary to their ideological preferences in a number of contexts. *See, e.g.*, Joseph A. Ignagni, *Explaining and Predicting Supreme Court Decision Making: The Burger Court's Establishment Clause Decisions*, 36 J. CHURCH & ST. 301, 304–05, 314, 323 (1994) (religious establishment); Kevin T. McGuire, *Obscenity, Libertarian Values, and Decision Making in the Supreme Court*, 18 AM. POL. Q. 47, 47–49 (1990) (free speech and obscenity).

235. *Supra* notes 157–173.

236. Abbott Labs. v. Gardner, 387 U.S. 136, 144–45 (1967) (providing for pre-enforcement review under the APA).

237. *See, e.g.*, *id.*

238. *See* United States v. Reynolds, 710 F.3d 498, 507–08 (3d Cir. 2013) (noting "ambiguity" regarding the correct standard for reviewing agency invocation of good cause given a circuit split and the "absence of an expressed standard in many . . . good cause decisions by courts of appeals").

239. *See, e.g.*, United States v. Hacker, 565 F.3d 522, 524 (8th Cir. 2009) (evaluating the invocation of the APA good cause exception under § 706(2)(D) as "a question of law, which we review de novo"); Reno-Sparks Indian Colony v. EPA, 336 F.3d 899, 909 n.11 (9th Cir. 2003) (reviewing "de novo the agency's decision not to follow the APA's notice and comment procedures . . . because complying with the notice and comment provisions when required by the APA 'is not a matter of agency choice'") (citation omitted); Mid-Tex Elec. Coop., Inc. v. FERC, 822 F.2d 1123, 1132 (D.C. Cir. 1987) (finding that an agency

Yet other circuits have resolved cases without stating the standard of review.[241] This lack of clarity may partially be a product of conflicting judicial impulses.[242] On one hand, a claim that an agency failed to comply with a rulemaking procedure squarely presents a question of law. On the other hand, procedural issues sometimes hinge on complicated factual issues about which agencies hold greater expertise than courts.[243] For instance, a claim of good cause may involve a claim about the harm of delaying a complex rulemaking to an equally complex and rapidly evolving policy problem. To take one example, a court may hesitate to review de novo the Federal Reserve's claim that implementation of capital adequacy

determination of good cause is subject to close judicial examination). For commentary supporting this position, see, for example, Charles H. Koch, Jr., *Confining Judicial Authority Over Administrative Action*, 49 MO. L. REV. 183, 244 (1984); Carl E. McGowan, *Reflections on Rulemaking Review*, 53 TUL. L. REV. 681, 691 (1979) (advocating that procedural determinations call for "the most intense level of [judicial] scrutiny").

240. *See, e.g.*, Phila. Citizens in Action v. Schweiker, 669 F.2d 877, 886 (3d Cir. 1982) (holding that the agency finding of impracticability was not arbitrary); United States v. Johnson, 632 F.3d 912, 928 (5th Cir. 2011) (arbitrary and capricious); United States v. Dean, 604 F.3d 1275, 1278 (11th Cir. 2010) (same).

241. *See Reynolds*, 710 F.3d at 524 (declining to decide appropriate standard of review); United States v. Valverde, 628 F.3d 1159, 1162 (9th Cir. 2010) (same). For instance, the Eighth Circuit did not clarify the standard of review until 2013. *See* Iowa League of Cities v. EPA, 711 F.3d 844, 872 (8th Cir. 2013) ("[O]ur prior decisions have not clearly announced a standard of review"). For examples of cases deciding APA procedural issues without determining a standard of review, see Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Donovan, 757 F.2d 330, 338 (D.C. Cir. 1985); Career Coll. Ass'n v. Riley, 74 F.3d 1265, 1276 (D.C. Cir. 1996) (adequate notice); Nuvio Corp. v. FCC, 473 F.3d 302, 309–10 (D.C. Cir. 2006) (adequate notice); Career Coll. Ass'n v. Duncan, 796 F. Supp. 2d 108, 134–35 (D.D.C. 2011) (inadequate notice).

242. The APA does not resolve this issue. On one hand, § 706(2)(D) provides for de novo review of procedural issues. 5 U.S.C. § 706(2)(D) (2012) (directing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be—without observance of procedure required by law"). On the other hand, § 706(2)(A) provides for arbitrary or capricious review for actions "not accordance with the law." 5 U.S.C. § 706(2)(A) (directing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, *or otherwise not in accordance with law*) (emphasis added). Because an agency violation of a procedural issue is "not in accordance with law," procedural issues may also be reviewed pursuant to § 706(2)(D).

243. *See, e.g.*, Meister v. USDA, 623 F.3d 363, 370–71 (6th Cir. 2010) (citations omitted) (stating that plaintiffs' "claims arise in part under § 706(2)(D), since he contends that the Service failed to follow certain procedures in implementing the Plan. Under that subsection we review agency action *de novo*. But even in cases arising under § 706(2)(D), our review as a practical matter is often more deferential than that. The reason is that the question *whether* a certain procedure is required in a particular circumstance, or whether a certain methodology satisfies the procedure, is often left to the agency's discretion. So even in cases arising under § 706(2)(D), the arbitrary-and-capricious standard frequently governs").

rules as part of the 2008 financial bailout could not be delayed for notice-and-comment.[244] The result is that some courts either apply a more deferential standard of review[245] or skirt the issue by not discussing the standard.[246]

2. Judicial Imposition of Additional Rulemaking Procedures?

To summarize, courts struggle to interpret and consistently apply the law with respect to vague rulemaking procedural standards. This result bears on the abiding debate over the proper scope of judicial review of rulemaking procedure. This debate reached its most fevered pitch[247] in the few years before and after the Supreme Court's *Vermont Yankee* decision.[248] While *Vermont Yankee* directed courts to refrain from imposing procedural requirements beyond those mandated by statute or regulation, the matter was not entirely resolved. The line between judicial "interpretation" of the APA and common law development remains unclear.[249] For example, some judges and commentators have argued that the line of cases interpreting the obligation of agencies to provide an adequate NPRM

244. *See* Capital Adequacy Guidelines: Treatment of Perpetual Preferred Stock Issued to the United States Treasury Under the Emergency Economic Stabilization Act of 2008, 73 Fed. Reg. 62,851 (Oct. 22, 2008) (codified at 12 C.F.R. pt. 225).

245. *Supra* note 239 (providing cases).

246. *Supra* note 240 (providing cases).

247. *See, e.g.*, Ethyl Corp. v. EPA, 541 F.2d 1, 33–37 (D.C. Cir. 1976); Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, J., concurring); J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 380 (1974) (finding the § 553 scope of review adequate); David L. Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 832 (1977) [hereinafter Bazelon, *Coping with Technology*] (placing a burden on Congress to determine scope of review); David L. Bazelon, *The Impact of the Courts on Public Administration*, 52 IND. L.J. 101, 107 (1976) [hereinafter Bazelon, *Impact of the Courts*] (placing burden on the administrative process); Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 403 (1978) (placing burden on the APA).

248. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 524 (1978) (concluding that APA § 553 "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures" and adding that circumstances under which courts might add procedures "if they exist, are extremely rare"). Courts have applied this beyond the APA to other procedural statutes as well. *See, e.g.*, Sequoia Orange Co. v. Yeutter, 973 F.2d 752, 756 (9th Cir. 1992).

249. *See* PIERCE, *supra* note 4, at 661 ("It would be easy to overstate the effect of *Vermont Yankee*, however . . . [r]eviewing courts . . . remain free to engage in creative interpretation of statutory requirements"); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1310 (2012) (noting "the lack of any clear divide between administrative common law and administrative statutory law").

constitutes a mere interpretation of the APA,[250] while others have contended that it constitutes judicial common law.[251] A number of commentators have argued that courts have effectively engaged in common law development of procedural requirements in the wake of *Vermont Yankee*, but such commentators have come to hold differing views over the legitimacy of this practice.[252]

This debate remains important given that courts continue to interpret the APA in ways that alter the extent and scope of procedural requirements.[253] This debate covers a number of issues that are beyond the scope of this Article, but for a sense of this debate, consider just a few key questions. First, are cases expanding agency procedural obligations proper interpretations of the APA, or are they at odds with *Vermont Yankee*? Second, are judicially imposed administrative law requirements inevitable or at least necessary given that Congress rarely updates administrative procedural statutes?[254] Third, are procedural requirements (as opposed to substantive review) capable of furthering values such as transparency and deliberation?[255] If so, are the procedures provided by the APA adequate to achieve these goals?[256] If not, are courts capable of selecting procedural

250. *See* Wright, *supra* note 246, at 380.

251. Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 245–47 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part) (arguing that cases establishing standards for agency notice of rulemaking extend beyond the APA § 553).

252. For opponents, see, for example, Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 859–60, 882–900 (2007) (arguing that limits on agency ex parte contacts, limits on prejudgment of rulemaking, and an expansive conception of the requirement to provide a notice of proposed rulemaking violate *Vermont Yankee*); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998) (arguing that the APA displaced administrative common law). For supporters, see, for example, Metzger, *supra* note 248, at 1296–97 (arguing that administrative common development is both inevitable and legitimate).

253. Metzger, *supra* note 248, at 1320 ("Notwithstanding occasional stern rhetoric condemning administrative common law and no express judicial defense, the judicial practice of creating administrative law remains very much alive.").

254. *Id.* at 1297 ("Although in theory courts could forego administrative common law, in practice any such result is both highly unlikely and quite undesirable.").

255. *See* Wright, *supra* note 246, at 379–81 (arguing that substantive review is necessary to attain desired goals such as fair and rational administrative outcomes).

256. *See* Richard Stewart, Vermont Yankee *and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1805 (1978) ("In freezing most administrative procedures in the obsolescent model established by the APA in 1946, [*Vermont Yankee*] ignores the recent shift by agencies from adjudication to rulemaking in deciding policy, and the corresponding need for developing new procedures that will generate an adequate evidentiary record enabling courts to review the substantive validity of agency decisions."); Cooley R. Howarth, Jr., *Informal Agency Rulemaking and the Courts: A Theory for Procedural Review*, 61 WASH. U. L. Q. 891, 909 (1984) (arguing that the APA did not contemplate scope of rulemaking, requiring

requirements that will achieve these goals?[257]

Studies debating these and other questions have not analyzed the ability and willingness of courts to enforce procedural requirements consistently. Instead, both sides of the debate over the proper scope of judicial review of rulemaking procedure have accepted the premise that courts are well equipped to review agency avoidance of procedural requirements.[258] This Article provides reasons and evidence for why this is often untrue in the context of rulemaking procedures such as those found in the APA, RFA, and UMRA. If these issues also apply in the context of judicially imposed procedural requirements, then this provides an important additional argument against allowing courts to impose additional procedural requirements, as such frequently avoided procedures will have few benefits.

C. Congressional Control of Agencies

A substantial literature in the positive political theory (PPT) tradition argues that Congress uses procedural requirements to control agencies.[259]

additional procedures from courts).

257. For the view the courts are not the experts on procedural fairness, see, for example, Clark Byse, Vermont Yankee *and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978); Wright, *supra* note 246 (arguing that courts are not well equipped to select appropriate procedures). For the contrary view, see Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 59 (1985); McGowan, *supra* note 238, at 692.

258. *See* Bazelon, *Coping with Technology*, *supra* note 246, at 823 ("What courts and judges can do, however—and do well when conscious of their role and limitations—is scrutinize and monitor the decisionmaking process to make sure that it is thorough, complete, and rational; that all relevant information has been considered; and that insofar as possible, those who will be affected by a decision have had an opportunity to participate in it."); Wright, *supra* note 246, at 397 (expressing optimism regarding ability of courts to effectively review agency action under the APA notice-and-comment process).

259. For an overview of this literature, see Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 175–76 (1984); Mathew D. McCubbins, *The Legislative Design of Regulatory Structure*, 29 AM. J. POL. SCI. 721 (1985) (predicting that Congress will impose more constraints as total delegation increases to mitigate the loss of authority posed by delegation); McCubbins et al., *supra* note 33, at 258; McCubbins et al., *supra* note 4; Hill & Brazier, *supra* note 16; Arthur Lupia & Mathew D. McCubbins, *Learning From Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 J.L. ECON. & ORG. 96 (1994); Arthur Lupia & Mathew D. McCubbins, *Designing Bureaucratic Accountability*, 57 LAW & CONTEMP. PROBS. 91, 91 (1994); David B. Spence, *Administrative Law and Agency Policymaking: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407 (1997); David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413 (1999); DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS 31 (1999). For a recent overview of the literature on procedural requirements, see Terry M. Moe, *Delegation, Control, and the Study of Public Bureaucracy*, FORUM, vol. 10, art. 4 (2012).

The rulemaking procedures examined in this Article are an important subset of such procedural requirements analyzed by this PPT literature.[260] Consider three important means by which the PPT literature has argued that administrative procedures foster congressional control of agencies. First, this literature has argued that Congress uses administrative procedures to gather information about agency activity. Congressional oversight in response to the proposed Credit Risk Retention Rule illustrates this strategy.[261] Second, this literature has argued that administrative procedures better enable interest groups to monitor agencies and report back to Congress, thereby saving congressional committees from investing the already scarce time and resources to monitor in the first instance.[262] Third, the PPT literature has argued that administrative procedures influence agency behavior directly by requiring agencies to consider particular issues specified by Congress (e.g., the impact of rules on small businesses).[263]

Agency avoidance of administrative procedures undermines each of these mechanisms of congressional control. McCubbins, Noll, and Weingast argue that "courts are the key, for without them political actors could not rely on decentralized enforcement."[264] This Article shows that courts are indeed "the key" because they are the only entity that has exercised meaningful (albeit imperfect) oversight over agency avoidance of procedural requirements. Congress cannot count on the White House, which for the reasons explored in the next section takes little interest in monitoring agency avoidance of procedural requirements. Congress cannot count on itself, either. This section now explores why this is the case.

260. For a description of different forms of such administrative procedural requirements, see McCubbins & Schwartz, *supra* note 258, at 166; EPSTEIN & O'HALLORAN, *supra* note 258, at 100–01 (describing fourteen categories of procedural requirements. Examples of such requirements include mandating agency consultation with interest groups, requiring agencies to publicize particular information used to justify a draft rule, or mandating agencies to receive approval from another federal agency or from a state agency).

261. *See supra* note 55 (noting the controversy in the proposed Credit Risk Retention Rule).

262. McCubbins & Schwartz, *supra* note 258, at 166 (arguing that Congress uses procedures to empower interest groups to assist in monitoring bureaucracy, which in turn report to Congress). As noted above, Congress can then use this information to conduct oversight hearings, adjust agency budgets, and engage in other forms of oversight.

263. *See* McGarity, *supra* note6, at 1405 ("With the demise of the legislative veto, telling agencies how to think about regulatory problems is one of the few remaining congressional controls on agency output. Congress is therefore not likely to reduce the burdensomeness of rulemaking by granting agencies greater discretion to ignore statutory decisionmaking criteria.").

264. McCubbins et al., *supra* note 33, at 255.

Members of Congress certainly have a number of strategies to monitor agency avoidance of rulemaking procedures.[265] Among other strategies, they could hold oversight hearings, request audits and documentation, and commission GAO investigations.[266] Members of Congress may leverage the resources of interest groups to identify when to engage in such monitoring.[267] Members have used all of these strategies to influence the proposed Credit Risk Retention Rule.[268]

Yet these monitoring strategies have a number of shortcomings. First, each consumes valuable time and staff resources. Congressional committees have relatively small staffs with which to monitor the Executive Branch and have limited time to conduct hearings, requiring careful prioritization and focus on the largest rules such as the proposed Credit Risk Retention Rule.[269] Even if the committees care about the rules, they may focus on issues other than rulemaking procedures.[270] Second, these strategies may be undermined if congressional committees do not act as faithful agents of the full Congress when monitoring administrative agencies.[271] Third, these strategies may be undermined if the sitting Congress has different policy views than the enacting Congress.[272] For

265. *See, e.g.*, William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165 (1992) (analyzing congressional use of *ex post* sanctions); McCubbins & Schwartz, *supra* note 258, at 166 (1984) (terming *ex post* sanctions imposed by Congress as "police patrols").

266. For an extensive description of these strategies, see JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (1990); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006).

267. *See, e.g.*, McCubbins & Schwartz, *supra* note 258, at 166.

268. *Supra* note 55; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-656, MORTGAGE REFORM: POTENTIAL IMPACTS OF PROVISIONS IN THE DODD-FRANK ACT ON HOMEBUYERS AND THE MORTGAGE MARKET 33–49 (2011) (analyzing impact of proposed Credit Risk Retention Rule on housing market).

269. *See* McGarity, *supra* note 6, at 1385, 1449 ("Congress is incapable of monitoring the rulemaking process closely enough to keep agencies accountable").

270. For a discussion as to why this may be the case, see WILSON, *supra* note 52, at 131–32 (arguing that congressional committees will monitor agency implementation of *ex ante* constraints such as rulemaking procedures because they are "defended by powerful interests or by individuals and groups with access to important centers of power").

271. *See, e.g.*, J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1457–59 (2003) (noting that agencies often respond to multiple voices from Congress).

272. Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 503–04 (1989) (noting the problem of "legislative drift" and discussing how one Congress can seek to influence the proceedings of future Congresses); *see also* Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? 267 (John E. Chubb & Paul E. Peterson eds., 1989). These

instance, the House of Representatives likely lost interest in ensuring agency compliance with the Dodd-Frank Act after the Republican victories in the 2010 election.

One could also reasonably ask why Congress has not imposed more prescriptive rulemaking procedures that leave agencies with less discretion than they currently have under existing rulemaking procedures.[273] This Article argues that that is a tall order for a number of reasons. Most fundamentally, inevitable imprecision embedded in language may render even the most comprehensive and carefully drafted statute ambiguous at some points.[274] Further, even if such ambiguity could be eliminated entirely, Congress would struggle to specify all contingencies to which the statute could apply.[275] While Congress may be able to foresee many factual contingencies, it will almost inevitably fail to foresee many others. As Edward Levi famously noted, Congress is not designed to undertake this exceedingly difficult task.[276]

While Congress's inability to foresee factual contingencies in a comprehensive manner is a general problem, the issue may have particular significance with respect to statutes imposing rulemaking procedures. Writing a comprehensive and prescriptive statutory definition of when agencies may permissibly avoid a rulemaking procedure requirement is

challenges in passing legislation may have motivated the House to pass the Regulations From the Executive in Need of Scrutiny Act twice. *See* H.R. 10, 112th Cong. (2011); Regulations From the Executive in Need of Scrutiny Act of 2013, H.R. 367, 113th Cong. (2013). Both of these Acts would require Congress to affirmatively vote in favor of a joint resolution for major rules to become effective.

273. For instance, Congress could have written the APA to require a more prescriptive notice-and-comment rulemaking process that specified key issues including: 1) the level of required detail for a NPRM; 2) the minimum length of the comment process, and 3) the detail with which agencies must respond to comments.

274. *See, e.g.*, FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 44 (2009) ("Some ambiguity is inevitable in language").

275. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 811 (1983): ("The basic reason why statutes are so frequently ambiguous in application is not that they are poorly drafted—though many are—and not that the legislators failed to agree on just what they wanted to accomplish in the statute—though often they do fail—but that a statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered in, its application").

276. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 30–31 (1949) ("Despite much gospel to the contrary, a legislature is not a fact-finding body. There is no mechanism, as there is with a court, to require the legislature to sift facts and to make a decision about specific situations. There need be no agreement about what the situation is. The members of the legislative body will be talking about different things; they cannot force each other to accept even a hypothetical set of facts. The result is that even in a non-controversial atmosphere just exactly what has been decided will not be clear.").

difficult.[277] The proper scope of procedural requirements is often contingent on a complicated combination of factual issues. To take the APA as an illustrative example, the question of whether a rule requires notice-and-comment or qualifies for the amorphous exception for good cause depends on a number of facts.[278] This problem is especially difficult for rulemaking procedures such as that of the APA that apply to over fifty different agencies.

In addition to issues of feasibility, members of Congress may struggle to reach political agreement to pass prescriptive procedural requirements, which may have unpredictable consequences. Unlike most legislation, the rulemaking procedures studied in this Article apply across the federal government. Prescriptive rulemaking procedures may therefore hamstring agencies from writing both favored and disfavored rules.[279] While regulation is unpopular in the abstract, members of Congress often support specific rules. Rulemaking is often used to respond to a rapidly developing problem that requires action faster than the legislative process may provide.[280] Members of Congress rely on rulemaking in such situations where the legislative process may be backlogged. Members of Congress may also prefer that agencies make policy via rulemaking than via adjudication, particularly when policy clarity and stability are important in many cases.[281] Members may also be concerned that prescriptive rulemaking procedures will discourage agencies from using rulemaking as a policymaking tool. All of these issues may complicate efforts in Congress to

277. Lisa Schultz Bressman, *Procedures As Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1752 (2007) (arguing that administrative procedures "are not susceptible to precise codification"). This problem has been primarily discussed with respect to a related issue, namely, the standard for judicial review of agency actions. *See, e.g.*, Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 484 (1986) ("It is notoriously difficult for Congress to find statutory language to instruct courts on the precise level of review desired.").

278. *Supra* notes 96–106 and accompanying text.

279. *See* Gary J. Miller, *The Political Evolution of Principal-Agent Models*, ANNUAL REV. POL. SCI., 2005, at 23 (noting that specific statutes may reduce the net benefit of delegation to the principal because an agent with little discretion will be less able to use his expertise on behalf of the principal).

280. For instance, after the September 11 attacks the FAA issued a series of rules to distribute funding to the struggling airline industry. *See* Procedures for Compensation of Air Carriers, 66 Fed. Reg. 54,616 (Oct. 29, 2001) (codified at 14 C.F.R. pt. 330) (request for comments); Procedures for Compensation of Air Carriers, 67 Fed. Reg. 250 (Jan. 2, 2002) (codified at 14 C.F.R. pt. 330) (response to comments); Procedures for Compensation of Air Carriers, 67 Fed. Reg. 18,468 (Apr. 16, 2002) (codified at 14 C.F.R. pt. 330); Procedures for Compensation of Air Carriers, 67 Fed. Reg. 54,058 (Aug. 20, 2002) (codified at 14 C.F.R. pt. 330) (final rule).

281. For sources reviewing the costs and benefits of rulemaking, see *supra* note 211.

agree on prescriptive rulemaking procedures.

Members of Congress may also struggle to reach agreement on prescriptive rulemaking procedures because of disagreement over the proper procedures. For instance, a majority of the House may prefer one procedural model while a majority of the Senate prefers a different model. The need to overcome such disagreement may result in either a relatively specific compromise requirement that includes structural choices undermining the effectiveness of the requirement or a vague requirement that effectively delegates interpretive authority to agencies and courts.[282]

All of the rulemaking procedures studied in this Article were compromises that ultimately attracted broad support at least in part by being vague at key junctures. The compromise that created the APA is an illustrative example. [283] Conservative Republicans and Southern Democrats who opposed the New Deal growth of the administrative state preferred more restrictive procedural requirements and more stringent judicial review. These preferences were reflected in early drafts of the APA, which would have required agencies to complete a lengthy series of trial-

282. Several studies of congressional delegation have noted this possibility with respect to legislation generally. In the face of disagreement, legislators may delegate powers to agencies in a way that creates a set of potential outcomes and associated probabilities, or a "regulatory lottery." *See* EPSTEIN & O'HALLORAN, *supra* note 258 at 31; Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 55, 60–61 (1982); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, PUB. CHOICE, 1982, at 33; Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L & ECON. 217, 218 (1992). For an application of this idea in the context of administrative procedures, see Hill & Brazier, *supra* note 16, at 380 (noting that with respect to some procedural requirements, "ambiguity and contradiction is deliberate, and reflects problems in conflict resolution. . . . Incomplete resolution thus becomes a reasonable way to compromise"). For a prominent criticism of this congressional delegation in the face of difficult legislative bargaining, see then-Justice Rehnquist's concurrence in what was commonly been termed the "Benzene Case." Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring) ("It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge. . . . If Congress wishes to legislate in an area which it has not previously sought to enter, it will in today's political world undoubtedly run into opposition no matter how the legislation is formulated. But that is the very essence of legislative authority under our system. It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people.").

283. McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996). *But see* JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL (2012) (arguing that the APA largely represented a codification of the pre-1945 practice).

like proceedings for all rules and then subjected rules to de novo judicial review. By contrast, most non-southern Democrats favored weaker agency procedural requirements and more deferential judicial review of New Deal agencies.[284]

This conflict between supporters and opponents came to a head in 1941, when President Roosevelt vetoed the Walter-Logan Act, an early draft of the APA.[285] This bill would have imposed many of the procedural restrictions favored by Republicans and conservative Democrats. Notably, the bill would have imposed much stricter judicial review of agency action. The D.C. Circuit would have received expansive new jurisdiction to hear challenges to rules, and the courts would have reviewed agency decisions under the stringent "substantial evidence" review standard. Finally, the bill exempted most agencies created before the New Deal; these agencies had much greater Republican support than their New Deal counterparts.[286] Congress was unable to overcome Roosevelt's veto, however. The final APA, promulgated in 1945, was a compromise that ultimately attracted unanimous support because it was an agreement "that all could at least tolerate."[287] The result of this compromise was a relatively vague notice-and-comment requirement along with more specific adjudicatory provisions. Supporters and opponents lamented concessions necessary to pass the bill in both public[288] and private[289] statements.

Given these practical and political challenges, Congress should rely more extensively on agency-specific requirements than on generally applicable requirements like the APA.[290] As noted above, Congress has required agencies such as OSHA to complete specific rulemaking procedures before issuing rules. Because these agency-specific requirements generally apply to a narrower set of fact patterns than overarching statutes like the APA, the challenge of anticipating different situations to which the provisions apply is reduced. Political agreement may also be easier to muster in Congress when the requirement is narrowed to a specific policy area. Future work may examine whether such agency-specific procedures are in fact more

284. GRISINGER, *supra* note 282.

285. 86 CONG. REC. H13,942–43 (daily ed. Dec. 18, 1940), *reprinted in* H.R. DOC. NO. 986, 76th Cong. (3d Sess. 1940).

286. For a full list of agency exemptions, see Shepherd, *supra* note 282, at 1618–19.

287. *Id.* at 1675.

288. *Id.* at 1670–71 (summarizing comments from Republican members: "Although conservatives indicated their grudging support for the bill, they noted that they would have preferred stricter controls on agencies. . . . The bill's most favorable characteristic was that Truman would sign it.").

289. *Id.* at 1674 (finding corroborating evidence in private statements from members).

290. *Supra* note 40 (listing examples of such agency specific requirements).

prescriptive. Relatedly, at what rate do agencies avoid such requirements relative to general rulemaking procedures?

D. White House Disinterest

Why does the White House expend little effort monitoring agency avoidance of rulemaking procedures? It clearly has a formidable arsenal of monitoring strategies.[291] The White House may indirectly monitor such agencies through political appointees, who communicate with White House staff. It may require multiple agencies to coordinate on policy decisions, thereby generating additional information with which to monitor agency activity.[292] White House staff may directly monitor agencies.

Each of these monitoring strategies is subject to constraints, however. These monitoring strategies are generally less effective with respect to independent agencies, which may seek to guard their independence from the White House. Like Congress, the White House has limited staff resources.[293] Most policy work is done in the Domestic Policy Council, National Economic Council, Council on Environmental Quality, and the OMB. Together these entities have approximately 2,500 employees,[294] and only a fraction of these employees are tasked with policy work, of which rulemaking is only one type. These institutions therefore lag behind agencies in staff capacity and in expertise.[295] Even OIRA, which focuses on rulemaking, must prioritize carefully given its small size relative to executive agencies.[296] Each White House also faces meaningful time constraints, requiring prioritization of policy agenda, of which rulemaking is only a

291. For an overview, see David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095 (2008); TERRY M. MOE, *The Politicized Presidency*, *in* THE NEW DIRECTION IN AMERICAN POLITICS 235, 244–45 (John E. Chubb & Paul E. Peterson eds., 1985) [hereinafter MOE, *The Politicized Presidency*]; Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance,'* 12 LEGIS. STUD. Q. 475 (1987) [hereinafter Moe, *Congressional Dominance*].

292. *See* Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745 (2011).

293. For a description of the White House apparatus, see DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE (2008); *see also* Moe, *supra* note 272, at 267, 291; William West, The Administrative Presidency as Reactive Oversight: Implications for Positive and Normative Theory (2012) (unpublished manuscript) (on file with author).

294. WHITE HOUSE, *2012 Annual Report to Congress on White House Staff*, http://www.whitehouse.gov/briefing-room/disclosures/annual-records/2012.

295. *See* WILSON, *supra* note 52, at 273.

296. *See, e.g.*, Barron, *supra* note 290, at 1110 (noting that "problems of capacity . . . necessarily establish an upper bound on the extent to which the routine of agency decisionmaking may be subjected to meaningful OIRA scrutiny").

part.[297]

To the extent that the White House focuses these limited resources on rulemaking, it may choose to focus on substantive issues, which generally attract greater interest than procedure. Consider that accounts of White House efforts to influence rulemaking focus on substance. As Justice Kagan has emphasized, the White House has increasingly sought to influence rulemaking activity by issuing written directives to agencies to consider initiating rulemaking on particular issues.[298] Relatedly, OIRA has occasionally issued a "prompt letter" encouraging agencies to begin work on particular rules.[299] Other White House offices may also encourage executive agencies to initiate particular rules.[300] Each of these efforts is focused on substance rather than procedure.

To the extent that the White House focuses on procedures governing the rulemaking, it may devote greater attention to exective orders, which more directly reflect White House priorities than statutory requirements.[301] To

297. James P. Pfiffner, *Can the President Manage the Government?*, *in* THE MANAGERIAL PRESIDENCY 17 (James P. Pfiffner, ed., 1999) (arguing that "[t]he only way for the White House to be in control [of the bureaucracy] is through great selectivity"); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006); Joel D. Aberbach & Bert A. Rockman, *Mandates or Mandarins: Control and Discretion in the Modern Administrative State*, *in* THE MANAGERIAL PRESIDENCY 162–63 (James P. Pfiffner ed., 1999); Patricia W. Ingraham, *Building Bridges or Burning Them?: The President, the Appointees, and the Bureaucracy*, 47 PUB. ADMIN. REV. 425 (1987); MOE, *The Politicized Presidnecy*, *supra* note 290, at 235; Kagan, *supra* note 90.

298. *See* Kagan, *supra* note 90, at 2249 (noting that President Clinton "regularly issued formal directives to the heads of executive agencies to set the terms of administrative action"). For specific examples of the Clinton directives, see *id.* at 2282–84.

299. John Graham, President George W. Bush's first OIRA administrator, introduced prompt letters. This program remained active through 2006. In unveiling prompt letters, Graham stated, "In addition to OIRA's traditional role of providing regulatory oversight, we're going to work more closely with the agencies at the beginning and throughout the rulemaking process." OFFICE OF MGMT. & BUD., *OMB Encourages Lifesaving Actions by Regulators*, http://www.whitehouse.gov/sites/default/files/omb/assets/omb/pubpress/2001-35.html (Sept. 18, 2001). For a list of prompt letters, see OFFICE OF INFO. & REGULATORY AFFAIRS & OFFICE OF MGMT. & BUD., http://www.reginfo.gov/ public/jsp/EO/promptLetters.jsp (last visited Jan. 16, 2015). *But see* William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda?*, 23 J. PUB. ADMIN. RES. & THEORY 495, 510–11 (2012) (analyzing the origins of 276 agency rules and determining that the White House pushed agencies to initiate only seven of these rules. West and Raso conclude that "although presidents have the ability to influence agency agendas when they so choose, therefore, and although they do so on occasion, this does not appear to be an important or at least a systematic means of shaping policy.").

300. For a description of different methods and institutions through which the White House may influence agency rulemaking, see Bressman & Vandenbergh, *supra* note 296.

301. *See, e.g.*, Exec. Order No. 13,563, 3 C.F.R. 215–17 (2012) (directing agencies to engage in retrospective review of rulemaking); Exec. Order No. 13,132, 3 C.F.R. 206–11

take the most prominent example, potential agency avoidance of the Executive Order providing for OIRA review of rulemaking[302] likely receives significantly more White House attention than agency avoidance of the APA notice-and-comment process.[303] The White House has imposed a number of other orders governing rulemaking.[304] Focus on such Executive Orders pushes rulemaking procedure further down the list of priorities, reducing White House monitoring.

CONCLUSION

This Article has argued that the literature has largely overlooked agency avoidance of rulemaking procedures. Because agencies generally prefer to avoid rulemaking procedures to increase their policymaking autonomy and to preserve their scarce resources, they do not construct internal processes and norms to implement rulemaking procedures. External enforcement is therefore necessary. Although the results of this Article's original empirical analysis suggest that litigation risk reduces agency avoidance of such procedural requirements, this Article also argues that judicial enforcement is an inconsistent and highly imperfect enforcement mechanism. The extent of agency avoidance discussed in this Article suggests that contrary to the prevailing account, rulemaking procedures are unlikely in many situations to unduly delay rulemaking or to encourage agencies to make policy via alternative means such as guidance or adjudication. Such extensive avoidance also suggests that rulemaking procedures do less to promote public deliberation in the rulemaking process, foster agency expertise, guard against agency arbitrariness, and make agencies accountable to the Congress and to the public. Agency avoidance therefore has benefits as well as many costs. Future accounts of the administrative process would therefore be remiss to neglect agency avoidance of rulemaking procedures.

(2000) (reflecting assessment of federalism implications of policy decisions).

302. Exec. Order No. 12,866, 3 C.F.R. 638–49 (1994).

303. For an examination of how agencies seek to increase autonomy by avoiding OIRA review of their rules, see Nou, *supra* note 53; Note, *supra* note 53.

304. *See, e.g.*, Exec. Order No. 13,563, 3 C.F.R. 215–17 (2012) (directing agencies to engage in retrospective review of rulemaking); Exec. Order 13,132, 3 C.F.R. 206–11 (reflecting assessment of federalism implications of policy decisions).

APPENDIX

Table 1: Avoidance of Procedural Requirements and OIRA Review, 1983–2008

Rulemaking Procedure	Agencies subject to OIRA review	Agencies exempt from OIRA review
APA: Rule subjected to APA notice-and-comment	51.6%	48.9%
RFA: Regulatory Flexibility Act analysis provided	5.8%	10.7%

Table 2: Rate of NPRM Issuance: 1995–2012[305]

Agency	Total rules on which final action taken	Number of rules exempted from notice-and-comment	Percent exempt from notice-and-comment
FCC	261	40	15.33%
Commodity Futures Trading Commission	223	59	26.46%
Education	230	81	35.22%
National Credit Union Administration	221	82	37.10%
Federal Deposit Insurance Corporation	231	94	40.69%
FERC	276	113	40.94%
Interior	2045	877	42.89%
EPA	1844	831	45.07%
Energy	341	156	45.75%
Treasury	2704	1287	47.60%
Transportation	2402	1180	49.13%
Labor	501	252	50.30%
SBA	270	140	51.85%
Commerce	2715	1408	51.86%
Social Security Administration	321	178	55.45%
Agriculture	2026	1136	56.07%
Health & Human Services	1743	981	56.28%
Office of Personal Management	551	312	56.62%
Defense	1172	681	58.11%
Justice	703	433	61.59%
Housing & Urban Development	655	407	62.14%
Veterans Affairs	746	477	63.94%
Homeland Security	554	401	72.38%
General Services Administration	367	270	73.57%
State	220	170	77.27%
Average	**23,322**	**12,046**	**51.65%**

305. Data were drawn from the *Unified Agenda* from Fall 1995 through Fall 2012. Agencies that took final action on 200 or more rules during this period were included.

Table 3: Rate at which Agencies Complete RFA Analyses on Rules, 1989–2002

	EPA/OSHA	**All other agencies**
Fall 1996–Fall 2002 (post-treatment)	Average (Standard Error) .12 (.015)	Average (Standard error) .14 (.0050)
Fall 1989–Spring 1996 (pre-treatment)	.19 (.017)	.14 (.0042)
Difference	-.07	0
Difference-in-difference = -.07 – 0 = -.07		

Table 4: Rate at which Agencies Complete RFA Analyses on Rules, 1993–1999

	EPA/OSHA	**All other agencies**
	Average (Standard error)	Average (Standard error)
Fall 1996–Fall 1999 (post-treatment)	.10 (.013)	.14 (.0045)
Fall 1993–Spring 1996 (pre-treatment)	.20 (.024)	.15 (.0057)
Difference	-.10	-.01
Difference-in-difference = -.10 – -.01 = -.09		

Table 5: Rate at which Agencies Complete RFA Analyses on Rules, 1989–2002

	EPA/OSHA	**Comparable Agencies**[306]
	Average (Standard error)	Average (Standard error)
Fall 1996–Fall 2002 (post-treatment)	.12 (.015)	.17 (.0080)
Fall 1989–Spring 1996 (pre-treatment)	.19 (.017)	.13 (.0059)
Difference	-.07	.04
Difference-in-difference = -.07 – .04 = -.11		

Table 6: Rate of RFA Avoidance Before and After 1996 SBREFA Amendments

Year	**EPA/OSHA**	**All other agencies**
1989	10.53%	12.16%
1990	16.28%	13.68%
1991	17.39%	15.50%
1992	27.78%	14.99%
1993	16.00%	14.66%
1994	14.44%	14.62%
1995	27.91%	12.28%
1996	**22.22%**	**22.43%**
1997	29.17%	21.67%
1998	8.20%	13.25%
1999	3.80%	12.43%
2000	5.45%	13.35%
2001	9.09%	12.37%
2002	1.82%	10.54%

306. This includes agencies: Health and Human Services, Interior, Labor, Education, Energy, Transportation, HUD, CPSC, FCC, FTC, SEC, U.S. Commodity Futures Trading Commission (CFTC), and FERC.

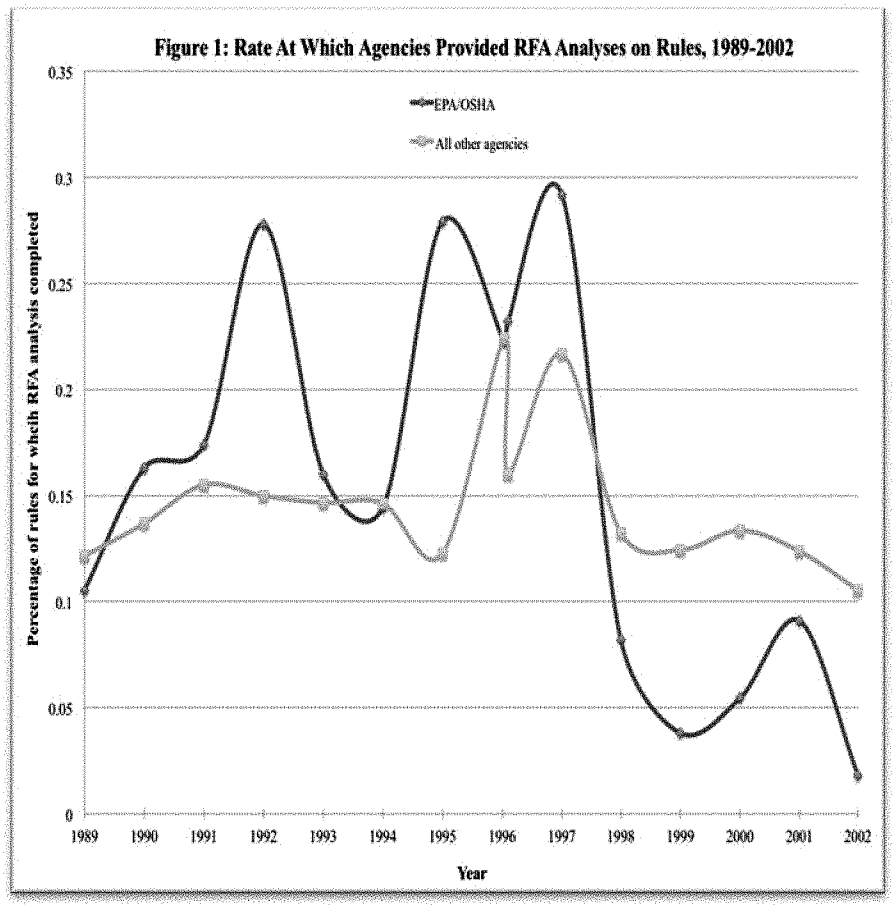
Figure 1: Rate At Which Agencies Provided RFA Analyses on Rules, 1989-2002
EPA/OSHA
All other agencies
Percentage of rules for wheih RFA analysis completed
0.35
0.3
0.25
0.2
0.15
0.1
0.05
0
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
Year