

ARTICLES

THE KEY TO SOLVING AGENCY LOCK-IN: PREPUBLICATION REGULATORY DISCUSSIONS (PRE REG)

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Most legally binding administrative rules emerge from the notice-and-comment process, which explicitly requires the agency to consider input from the general public. However, by the time the opportunity for public input occurs, the agency is already substantially locked into its chosen approach and cannot act on new information in the comments. This is true even though its chosen approach was decided upon with input from only those the agency routinely deals with. This process entrenches already established interests and prevents those without existing agency connections from meaningfully contributing earlier in the process.

This problem could be solved by holding public discussions online before the publication of the proposed rule and therefore before the agency is locked in. Employing modern Internet guidelines would ensure that all those who wish to participate can, while preventing bad actors from disrupting the purpose and atmosphere of the discussion. This approach would combine the benefits of current alternative agency practices while avoiding the drawbacks that frequently prevent their use. Agencies that are expected to work on behalf of the public should likewise have an effective method to accept input from that same public before becoming locked into a choice of action.

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INTRODUCTION

The administrative rulemaking system in this country has been “heralded as one of the most successful innovations of administrative law.”¹ And yet it fails to do what it was designed for: enable a federal agency to obtain the necessary information in time to make the best rule selection possible. This is because the primary point selected for broad public input, the comment stage of the notice-and-comment process, occurs at a point in time when the agency is already locked into its current proposal.² Fixing this problem requires creating a method through which broader public input can be easily obtained when the plan is still flexible.

Thanks to the Internet, this is now possible. In fact, agencies could obtain even better information than was possible under previous methods, and early enough in the process to make a difference to the content of the rule before it becomes locked in. This Article describes how.

Part I describes the basic issue underlying the entire problem—the fact that the current system locks agencies into their chosen approach prematurely. Part II describes various administrative practices that each address some, but not all, of the different issues associated with lock-in. Part III introduces the concept of prepublication regulatory discussions, or pre

1. Dow Chem., USA v. Consumer Prod. Safety Comm’n, 459 F. Supp. 378, 391 (W.D. La. 1978), *on reh’g sub nom.* Dow Chem., USA v. Consumer Prod. Safety Comm’n, 464 F. Supp. 904 (W.D. La. 1979).

2. Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589, 597 (2002).

reg, a process designed to allow truly broad public input to the agency before the agency must commit to a proposed rule. Finally, Part IV describes why now is the time to finally implement a major, Internet-based, voluntary expansion to the regulatory process.

I. THE PROBLEM WITH AGENCY LOCK-IN

The most common way that agencies create legally binding regulations (or rules, the two terms are interchangeable here) is through notice-and-comment rulemaking.³ An agency publishes a proposed rule in the Federal Register, accepts comments from the general public for a period of time, makes changes as necessary to the rule in response to those comments, and then issues the final version of the rule.⁴

This form of participatory democracy is lauded for the direct role citizens are able to take in their government.⁵ Indeed, because the agency must consider and respond to all relevant comments when issuing the final rule, it has been argued that this is the most powerful form of direct citizen input.⁶ This response requirement is also enforced.⁷ Failure to adequately address these public comments can and does result in regulations being remanded to the agency during the judicial review process.⁸

But behind this shiny participatory veneer lies a less savory fact. By the time the proposed rule is first published for comment, the agency is already significantly committed to that version. That is, it is already locked in. It is therefore unable to fully take advantage of all the comments. This Part explains in greater detail what lock-in is and why it is such a problem, why it occurs, and why it is an inescapable fact in notice-and-comment rulemaking.

3. TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 1 (2017).

4. *Id.* at 2–3.

5. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027–28 (D.C. Cir. 1978) (“[I]f the Agency, in carrying out its ‘essentially legislative task,’ has infused the administrative process with the degree of openness, explanation, and participatory democracy required by the APA, it will thereby have ‘negate(d) the dangers of arbitrariness and irrationality in the formulation of rules’” (quoting *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968))).

6. Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 759 (1996) (“No citizen can force attention to her views upon her legislature in quite this way; even if she appears at a legislative inquiry”).

7. See GARVEY, *supra* note 3, at 2–3 (explaining the informal rulemaking process and its enforcement mechanisms).

8. *E.g.*, *Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1314 (D.C. Cir. 2014) (remanding an agency rule for failing to adequately address the comment of the petitioner).

A. *Why Agency Lock-In Is so Terrible*

Agency lock-in describes the reluctance of agencies engaged in notice-and-comment rulemaking to deviate significantly from the proposed version of the regulation when issuing the final regulation.⁹ Certainly some change occurs, but it is a well-acknowledged fact that the most effective time to influence the agency regarding a new rule is before that rule is even initially published as a proposed rule,¹⁰ the event that theoretically kickstarts the notice-and-comment process as described at the beginning of this Part.

This reluctance means that the agency is less willing to accept changes to the regulation proposed in the comments than it would have been had they been received earlier, for reasons explained in the following Part.

This is a problem. It means that the agency cannot easily switch to a different type of solution, or otherwise act on comments presenting radically different approaches. “For example, if the agency has chosen a command-and-control approach, it is unlikely that the agency will shift to information disclosure or marketable permits.”¹¹ Foreclosing new and innovative approaches that the agency simply did not think about is itself a problem. It means that the agency is not pursuing what it would have believed to be the “best” possible regulation given all the relevant information.

But the problems go deeper. The comment period is not the first time the agency has heard from many interested parties.¹² The agency often reaches out to groups it knows will be interested in the regulation and solicits their input ahead of time.¹³ Interest groups know this is the most critical time to be in contact with the agency,¹⁴ and those with connections often can be.¹⁵

9. Stern, *supra* note 2, at 591 (defining lock-in as “suboptimal change, through premature commitment to a proposal”).

10. Elliott states as follows:

If the agency is to state the detailed basis for its actions in such a way that its actions will survive judicial review, public input through formal notice-and-comment rulemaking must come relatively close to the end of the agency’s process, when the proposed rule has ‘jelled’ into something fairly close to its final form.

E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1494 (1992).

11. VICE PRESIDENT AL GORE, IMPROVING REGULATORY SYSTEMS, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW 36 (1993).

12. Stern, *supra* note 2, at 597.

13. *See id.* at 596–97 (noting that early in the process the agency has already reached out to selected groups and incorporated their feedback).

14. GORE, *supra* note 11, at 35 (“Without exception, everyone from outside the government whom the National Performance Review (NPR) interviewed on the regulatory process—whether from industry or public interest groups—said they wanted earlier and more frequent opportunities to participate in the rulemaking process.”).

15. Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 454

This is the key issue. The current system creates a division between those with existing agency contacts and relationships, who can work with the agency when the rule is being formulated, and those without, who are left to submit a comment once the plan is already fixed.¹⁶ And individuals are not randomly assigned to one group or the other. Systemic racism¹⁷ and other embedded biases mean that certain groups are less likely to end up in the kinds of jobs leading to these connections, and therefore less likely to contribute meaningfully (in the early stages) in the rulemaking process.¹⁸

So thus, lock-in creates a system where privileged insiders are allowed early, critical access to the agency when regulations are being formulated, regulations that the agency will be unlikely to significantly change later, once everyone else is invited to participate in the official rulemaking process. And these regulations can have major impacts on the lives of many Americans, like the regulations governing the content of the millions of school lunches served each day.¹⁹ Lock-in prevents citizens from effectively influencing regulations that will greatly affect them. But lock-in is an entrenched practice.

1. *Why Lock-In Occurs*

Lock-in is driven by psychological and structural forces. While each of these can be further broken down (and are, in the following sections), at a fundamental level the issues are that (1) rulemaking is done by people, and people behave in predictable ways that can cause them to become fixated on a solution before obtaining all the facts and (2) the process is set up in such a way that flexibility is denied to the agency precisely at the point

(2004) (“Much of this communication between agency officials and the interest group representatives occurs on an informal, ex parte basis before the rule is drafted.”).

16. *Id.* (noting that once the agency plan is fixed, “comments demanding change are likely to be seen as a nuisance”).

17. Joe R. Feagin & Bernice McNair Barnett, *Success and Failure: How Systemic Racism Trumped the Brown v. Board of Education Decision*, 2004 U. ILL. L. REV. 1099, 1100 (2004) (defining systemic racism as “the ‘racialized exploitation and subordination of Americans of color by white Americans’ that ‘encompasses the racial stereotyping, prejudices, and emotions of whites, as well as the discriminatory practices and racialized institutions generated for the long-term domination of African Americans and other people of color’”) (quoting the authors).

18. In 2019, the American Bar Association reported that 15% of all attorneys were minorities, an increase from 12% ten years earlier. However, nearly one quarter (23.4% of the general population) identifies as a minority. AMERICAN BAR ASSOCIATION, ABA PROFILE OF THE LEGAL PROFESSION 8 (2019), <https://www.americanbar.org/content/dam/aba/images/news/2019/08/ProfileOfProfession-total-hi.pdf>. The numbers decrease even more as one moves up the firm ranks. Among partners—the attorneys most likely to have built connections with agency employees—only 9% were minorities. *Id.* at 10.

19. *See infra* note 220.

where the general public is often invited to participate for the first time.²⁰

a. Psychological Causes of Lock-In

A number of related psychological traps likely contribute to agency lock-in. In all of these situations, it is not a legal requirement causing the agency reluctance to veer from the proposed rule, but rather the human inclination of those working at the agency. Stephanie Stern laid the groundwork in this area, connecting various aspects of the psychological concept of cognitive consistency with agency lock-in.²¹ This Part is not intended to provide a comprehensive overview of all the different cognitive traps that could lead agency actors to reinforce agency lock-in, but rather to help illustrate some of the ways in which it can occur.

i. The Disproportionate Value of Early Information

Early information has a greater value in the decisionmaking process than information gained later on. This is referred to as belief perseverance, or “clinging to a belief too tightly and for too long.”²² A well-known example of belief perseverance is the insistence among a large segment of the population that vaccines cause autism, despite the retraction of the original study and the failure of any study since to replicate its findings.²³

Belief perseverance means that the information gathered early (while formulating the proposed rule, with the help of the selected groups the agency has chosen to contact),²⁴ will likely be seen by agency employees as better and more reliable than later contradictory information (such as that obtained from the public comments after publication of the proposed rule).²⁵ In this instance, the agency could refuse to make a change to a rule in response to new information because it simply does not understand that the stance taken initially is incorrect.

20. Stern, *supra* note 2, at 591.

21. See generally *id.* (detailing the effects of cognitive consistency on an agency’s willingness to accept position changes).

22. Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513, 579 (2007).

23. Stephan Lewandowsky et al., *Misinformation and Its Correction: Continued Influence and Successful Debiasing*, 13 PSYCHOL. SCI. PUB. INT. 106, 106–07 (2012).

24. Noveck, *supra* note 15, at 454.

25. MICHAEL J. SAKS & BARBARA A. SPELLMAN, *THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW* 92 (2016) (discussing problems with belief perseverance for jurors). *But see generally*, Stephanie M. Anglin, *Do Beliefs Yield to Evidence? Examining Belief Perseverance vs. Change in Response to Congruent Empirical Findings*, 82 J. EXPERIMENTAL SOC. PSYCHOL., May 2019, at 195 (describing how belief change may be possible when the additional evidence offered is all antithetical to the initial information).

ii. *Confirmation Bias*

Confirmation bias refers to the uneven assimilation of additional information.²⁶ It can include decisions like choosing to watch Fox News or MSNBC based on the viewer's political party.²⁷ While this could be a conscious choice, it need not be.²⁸ A series of experiments with fingerprint examiners, specialists in a profession where expert judgment is considered essential, demonstrate an unconscious version of this bias.²⁹ In one of the early experiments in this area from 2006—this is still a relatively new field—fingerprint examiners believed they had been called in to help with a recent bombing.³⁰ They were shown two prints that—it was implied—were known to be from different people.³¹ They were then told to determine on their own whether the two were a match.³² Of the five examiners, three said that the prints were not a match, one said they were inconclusive, and one said that they did in fact appear to be a match.³³ In reality, the two prints were both taken from a prior case in which that examiner had participated, a case in which that examiner had previously declared those prints to be a match.³⁴

Applying this in the agency context, agency personnel would likely be similarly unaware they were discounting important information. They could instead be selectively interpreting the facts to fit what they genuinely believed to be true.

iii. *Public Statements*

The final trap that will be discussed here is the desire individuals have to present a consistent public image. “Once we have made a choice or taken a stand, we will encounter personal and interpersonal pressures to behave

26. See SAKS & SPELLMAN, *supra* note 25, at 208–09 (“[A]n expert who has become committed to the case will tend to engage in motivated reasoning The expert does not intentionally mislead. Indeed, when this phenomenon occurs, the witness is misleading him- or herself.”).

27. Cynthia M. Ho, *Drugged Out: How Cognitive Bias Hurts Drug Innovation*, 51 SAN DIEGO L. REV. 419, 438 (2014).

28. See Chris Mooney, *The Science of Why We Don't Believe Science*, MOTHER JONES (May/June 2011), <https://www.motherjones.com/politics/2011/04/denial-science-chris-mooney/> (explaining the psychological mechanisms that cause people to form associations).

29. See Itiel E. Dror & Simon A. Cole, *The Vision in “Blind” Justice: Expert Perception, Judgment, and Visual Cognition in Forensic Pattern Recognition*, 17 PSYCHONOMIC BULL. & REV. 161, 161–62 (2010) (discussing the experiment in detail).

30. *Id.* at 165.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

consistently with that commitment.”³⁵ People judge those who do not appear consistent, believing them to be “indecisive, confused, two-faced, or even mentally ill. On the other side, a high degree of consistency is normally associated with personal and intellectual strength.”³⁶ In trials, witnesses are deemed credible in part by determining whether their current statement matches prior statements.³⁷

When an agency publishes a proposed rule, it is making a public statement of what it believes to be the best solution to the problem, a statement from which it may be hard for the agency to reverse course. Significantly changing the public statement could set the agency up for the negative connotations associated with inconsistent individuals. The strength of this drive in the political context more broadly can be seen by the savagery and frequency with which politicians are called out for changes in position on an issue.³⁸

People also have a strong group identity and take behavioral cues and positions from the larger group to which they belong.³⁹ So, individual agency actors could still be expected to feel pressure to conform to the public agency position.

All of the different human factors pointing toward cognitive consistency mean that the agency will struggle to change position from the proposed rule for psychological reasons. However, even eliminating all of these psychological traps would fail to solve the issue of agency lock-in. This is because it is an integral part of the structure of the notice-and-comment process itself, as the next Part explains.

2. *Structural Causes of Lock-In*

Lock-in is a judicially required structural component of the notice-and-comment process. More specifically, lock-in is the result of the logical

35. ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* 57 (2007).

36. *Id.* at 60.

37. See FED. R. EVID. 613(b) (prescribing the requirements to admit extrinsic evidence of the prior inconsistent statement of a witness).

38. See, e.g., Jonah Goldberg, *Federalism Flip-Flop Shows Trump Has No Ideological Framework*, Daily News-Rec., April 20, 2020, at A5 (“To the surprise and perhaps disappointment of many . . . the man who vowed ‘I alone can fix it’ has very much led from behind in his ‘war’ on the pandemic, insisting that federalism required him to let state and local officials lead.”); Editorial, *Hillary’s ‘Illegal’ Flip-Flop*, N.Y. Post (Nov. 29, 2015, 8:56 PM), <https://nypost.com/2015/11/29/hillary-clinton-illegal-flip-flop/> (describing Clinton’s inconsistent policy stances regarding immigration reform as “[s]pinning on a dime, saying what people want to hear—no matter what else she’s said to others”).

39. See Stern, *supra* note 2, at 619 (describing how most of the members of a doomsday cult redoubled their commitment to the group after the date of the supposed end of the world passed).

outgrowth requirement.⁴⁰ “A rule is deemed a logical outgrowth if interested parties ‘should have anticipated’ that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.”⁴¹ Or, conversely, “[n]otice [is] inadequate if ‘the interested parties could not reasonably have ‘anticipated the final rulemaking from the draft rule.’”⁴²

Either way, the idea is that parties should not be blindsided by the final agency action. The essence of notice-and-comment rulemaking, after all, is that one must have notice of the potential agency action to be able to effectively comment on it. When the final rule differs too much from the proposed rule, the public cannot meaningfully engage with the agency or effectively argue against the action.⁴³

The term “logical outgrowth” was first used in a case reviewing an Environmental Protection Agency (EPA) regulation in 1974.⁴⁴ However, it was not until 1978 that an action was remanded to the Agency for violating the logical outgrowth standard. In a case dealing with effluent limitations for paper mills, the EPA changed a critical requirement based on data obtained after the proposed rule was published.⁴⁵ Since the new figures had not been available to the industry to respond to, the regulation was remanded to the EPA to again commence the notice-and-comment process for the rule.⁴⁶

The logical outgrowth standard was viewed as a continuation of the prior foreshadowing requirement.⁴⁷ While it may not be considered a new requirement, it did mark the start of a gradual shift by courts to demand greater procedural protection for affected parties. Shortly after courts began to dramatically clamp down on what constitutes adequate notice. Courts have held that comments alone cannot provide notice (although they can help show that other parties were already alerted to a relevant issue).⁴⁸ At the same time, it is generally understood that agencies need flexibility, and that the purpose of the comment period is to provide additional information

40. See generally *Chocolate Mfrs. Ass’n of U.S. v. Block*, 755 F. 2d 1098, 1105 (4th Cir. 1985) (“[N]otice is adequate if . . . the final rule is a ‘logical outgrowth’ of the notice and comments already given.”) (per curiam).

41. *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004).

42. *Am. Iron & Steel Inst. v. OSHA*, 182 F.3d 1261, 1276 (11th Cir.1999) (quoting *Nat’l Mining Ass’n v. Mine Safety & Health Admin.*, 116 F.3d 520, 531 (D.C. Cir. 1997) (per curiam)).

43. *Chocolate Mfrs. Ass’n of U.S.*, 755 F. 2d at 1103–04.

44. *S. Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974).

45. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1029 (D.C. Cir. 1978).

46. *Id.* at 1031.

47. Phillip M. Kannana, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 217 (1996). Both terms were also used in the initial case. *S. Terminal Corp.*, 504 F.2d at 658–59.

48. *Miami-Dade Cty. v. EPA*, 529 F.3d 1049, 1059 (11th Cir. 2008) (per curiam).

to the agency, which—at least in some cases—it would be expected to act on.⁴⁹ The balance has generally shifted toward greater notice, and notice originating entirely with the agency.⁵⁰ While it seems fairly simple, the logical outgrowth doctrine continues to result in remand to the agency in a surprisingly large number of cases.⁵¹

This is because the logical outgrowth requirement severely restricts potential agency action in response to comments received. When a rule is proposed, the agency may withdraw the rule, proceed with the rule as proposed, or make only slight changes.⁵² Doing anything else will necessitate starting the entire process over with a new proposed rule, a significant regulatory burden.⁵³

This burden is a consequence of the much-decried ossification of the rulemaking process, which places a significant number of requirements on

49. *Id.* (“[A]n agency is not restricted to adopting the position it proposed and on which it sought comment. (citation omitted). Such a restriction would undermine the ‘purpose of notice and comment—to allow an agency to reconsider, and sometimes change, its proposal based on the comments of affected persons.’”). The opinion goes on to quote *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004) (per curiam). *Id.* (“If the EPA were precluded from changing its position, it ‘could learn from the comments on its proposals only at the peril of subjecting itself to rulemaking without end.’”).

50. *Horsehead Res. Dev. Co. v. Browner* states that:

The EPA makes much of the comments submitted on issues that were to become critical parts of the final rule, as well as the meetings it held with industry. While we have noted that insightful comments may be reflective of notice and may be adduced as evidence of its adequacy, (citation omitted) we have rejected bootstrap arguments predicated on public comments alone. Ultimately, notice is the agency’s duty because “comments by members of the public would not in themselves constitute adequate notice. Under the standards of the APA, notice necessarily must come—if at all—from the Agency.”

Horsehead Res. Dev. Co. v. Browner, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (per curiam) (quoting *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991) (per curiam)).

51. *E.g.*, *Ctr. for Sci. in the Pub. Interest v. Perdue*, 438 F. Supp. 3d 546, 558 (D. Md. 2020) (finding that the final rule was not a logical outgrowth of the interim final rule for, among other reasons, giving no clue that the target level for sodium would be eliminated); *Yale New Haven Hosp. v. Azar*, 457 F. Supp. 3d 93, 106 (D. Conn. 2020) (“Here, the [Federal Fiscal Year] (FFY) 2014 Final Rule provided interested parties with their ‘first occasion’ to offer comment on the Secretary’s new policy of excluding data from merged hospitals . . . This opportunity should have been provided in the FFY 2014 Proposed Rule.”).

52. Some agency actions are automatically a logical outgrowth—for instance deciding not to go forward with a rule. *See New York v. EPA*, 413 F.3d 3, 44 (D.C. Cir. 2005) (per curiam). It is generally only changes in the final rule that present problems.

53. *See Chocolate Mfrs. Ass’n of U.S. v. Block*, 755 F. 2d 1098, 1103–04 (4th Cir. 1985) (explaining that when an agency’s final rule differs so much that it appears contrary to the agency’s original proposal, the agency must undergo new notice-and-comment procedures).

agencies before a proposed rule can be issued. Burdens when redoing a rulemaking include not only recreating the rationale for the new rule and going through all of the different analyses required,⁵⁴ but also sending the proposal back through the Office of Management and Budget (OMB), a process the agency does not control and which can take months, if not years, to clear.⁵⁵

There are times an agency may decide that an issue is important enough that starting over makes sense. But the time requirements to restart the process also mean that agencies will often decide to move forward with a suboptimal rule rather than run through the rulemaking gauntlet again. This is particularly true when there is a possibility of a change in party control in the White House and there is a concern that current priorities might not remain so.⁵⁶

The logical outgrowth requirement thus locks agencies into the proposed rule (absent small modifications or total abandonment). Eliminating it would solve the structural lock-in problem. But attempting to do so would be a mistake.

B. *Lock-In Is a Necessary Part of Notice-and-Comment Rulemaking*

Agency lock-in is mandated by the text of the APA. Section 553(c) states “[a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments”⁵⁷ This notice, in turn, must “include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved.”⁵⁸

The opportunity for “interested persons” to participate becomes meaningless if the agency does not give them a sufficient clue what they

54. Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1678 (2012) (“[A]gencies must provide support for scientific and technical conclusions . . . and prepare various analyses of the impact of proposed regulations on the economy and on small businesses . . .”).

55. See Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write A Regulation*, 99 HARV. L. REV. 1059, 1065 (1986); see also Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1432 (1992) (“Significant rulemaking initiatives that matter a great deal to the agencies, regulated industries, and beneficiary groups can take years to clear OMB review.”).

56. This is particularly acute for so called “midnight” rules, issued after a presidential election has occurred when the administration knows the White House will change parties. See Edward H. Stiglitz, *Unaccountable Midnight Rulemaking? A Normatively Informative Assessment*, 17 N.Y.U.J. LEGIS. & PUB. POL’Y 137, 166 (2014) (noting an increase in controversial rulemakings both in the change from the first Bush to Clinton and from Clinton to the second Bush).

57. 5 U.S.C. § 553(c).

58. 5 U.S.C. § 553(b)(3).

should be basing their “written data, views, or arguments” on.⁵⁹ This notice requirement must be tied directly to what was in the agency’s original proposal, rather than information obtained later in the comment process, for the public to know what is actually under consideration.

For comments were able to provide effective notice, those regulated would need to constantly monitor every comment submitted to decide whether that comment contained some new proposal or issue that could change the agency approach, and which should therefore be separately commented on.⁶⁰ This would be difficult in any situation, but absolutely impossible in high-profile rulemakings that generate millions of comments.⁶¹

These difficulties would be compounded because comments are often strategically held—not submitted to the agency—until near the end of the comment period, specifically to prevent others from commenting on them in turn.⁶² And yet, these could supposedly be the basis for notice in a notice-and-comment process without a logical outgrowth requirement that relied entirely on the agency’s original notice.

The agency would also lose out if comments provided sufficient notice, in the sense that the “best” rule (the one that the agency would choose with all relevant information) cannot be used, since a new approach adopted from the comments should likewise be subject to comment to enable the agency to learn about potential problems with the rule.

Because structural agency lock-in is directly attributable to the logical outgrowth rule, it is impossible to retain the logical outgrowth rule and not similarly retain agency lock-in at the proposal stage. There is simply no way to conduct a notice-and-comment rulemaking without violating the

59. 5 U.S.C. § 553(c).

60. This concern would be somewhat attenuated in an oral hearing, where parties were present to hear others speak, but when agencies employ oral hearings, they often do more than one, at different locations, and so again this would be a major barrier. *Cf.* The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 85 Fed. Reg. 24,174, 25,155 (Apr. 30, 2020) (describing prior plans for hearings in California, Michigan, and Pennsylvania).

61. The net neutrality rulemaking, which generated over twenty-two million comments, is a well-known example of the mass comment phenomenon, but far from the only example. Restoring Internet Freedom, 83 Fed. Reg. 7,852, 7,913 (Feb. 22, 2018). *See also* Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date; Correcting Amendments, 84 Fed. Reg. 27,907, 27,911 (June 17, 2019) (1.4 million comments); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,672 (Oct. 23, 2015) (four million comments).

62. *See* Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421, 1446 (2002) (noting the shift from withholding comments with the dynamic of electronic dockets).

statutorily protected right of individuals to meaningfully participate if the logical outgrowth rule is not enforced.⁶³

Therefore, in notice-and-comment rulemaking, the logical outgrowth rule forces agency lock-in, as it must to ensure fairness to those regulated. Even if lock-in were not legally required, the fact that agencies are staffed with humans ensures that lock-in would continue to be a problem due to the need for cognitive consistency (discussed in the Part on psychological causes of lock-in).

This means that traditional notice-and-comment rulemaking will continue to face the issue and consequent problems of lock-in. While nothing completely eliminates the issue, alternatives can have some impact, as discussed in the following Part.

II. INCOMPLETE SOLUTIONS TO AGENCY LOCK-IN

The problems lock-in presents are partly, though not completely, addressed by existing rulemaking practices. These incomplete solutions are discussed in this Part.

A. Formal Rulemaking

Formal rulemaking solves the structural lock-in problem of notice-and-comment rulemaking by using an entirely different structure, one that still starts with a proposed rule but does not lock the agency in at that stage. This Part, like those addressing the other incomplete solutions, traces the history of formal rulemaking before describing the benefits and drawbacks of the process.

1. *The History of Formal Rulemaking*

In the 1940s, when the APA was passed, rules were commonly produced after a hearing involving competing interests.⁶⁴ The frequency and importance of this method, called formal rulemaking, is reflected in the APA itself, which has multiple sections governing the procedures that are applicable to these trial-type adversarial proceedings.⁶⁵

Formal rulemaking was the only method of rulemaking initially included in what would eventually become the APA. Informal (notice-and-comment) rulemaking was added as the result of a compromise during the evolution of the

63. See Stern, *supra* note 2, at 601–02 (discussing the history of notice-and-comment rulemaking procedures).

64. Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1 (2017) (“Formal ‘on the record’ rulemaking is as curious to contemporary minds as it was commonplace to the modern administrative state’s founders.”).

65. 5 U.S.C. §§ 556–57. These sections are applicable to both formal rulemaking and formal adjudication.

bill.⁶⁶ The compromise changed it so that the procedural protections of formal rulemaking would be required “only if another statute—for example, the statute that created the agency—independently required a hearing on the rule.”⁶⁷

And those extra procedural protections are extensive. The hearing is overseen by an administrative law judge (or other agency employee acting in a similar role).⁶⁸ There is a ban on ex parte contacts,⁶⁹ parties to the proceeding present initial and rebuttal evidence and can cross-examine witnesses presented by all the other parties,⁷⁰ and the moving party (the agency) must overcome a burden of proof to prevail.⁷¹ At the conclusion of the hearing, the person overseeing it produces written findings, which are then presented to those higher in the agency for the final decision on the rule.⁷² The evidence presented during the hearing must entirely support the final rule.⁷³

The general wisdom is that these extra requirements proved so onerous in practice⁷⁴ that the Supreme Court severely restricted when they would be required in a pair of cases on railroad ratemaking in the 1960s.⁷⁵ However, recent research has indicated that the result was more likely due to the Court’s hatred of the mandatory review it faced in those cases than an understanding of the condemnation of formal rulemaking by both scholars and practitioners.⁷⁶

Regardless of the actual driving force behind them, and the poor reasoning in the decisions themselves, scholars were in widespread agreement at the time that formal rulemaking was well past its prime⁷⁷ and welcomed the Supreme

66. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1650 (1996).

67. *Id.*

68. 5 U.S.C. § 556(b).

69. 5 U.S.C. § 557(d).

70. 5 U.S.C. § 556(d).

71. *Id.*

72. 5 U.S.C. § 557(b)–(c).

73. 5 U.S.C. § 556(e).

74. *See infra* Part II.A.3.

75. *See generally* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972); United States v. Fla. E. Coast Ry. Co., 410 U.S. 224 (1973).

76. *See* Barnett, *supra* note 64, at 3 (“Justices’ personal files . . . strongly suggest that the Justices hurriedly dispatched the formal rulemaking issue because they had little interest in these . . . cases, which arose under the Court’s mandatory jurisdiction (as opposed to its discretionary certiorari docket).”). This does, indeed, seem a safe conclusion from an excerpt of a (mock) draft opinion quoted later in the article. “Finally, we must confess that we [couldn’t] care less where the box cars of the world go [B]ecause we yearn to ease our docket, we [remand] with directions never to send us another box car case.” *Id.* at 14.

77. *E.g.*, Henry J. Friendly, Book Review, 51 N.Y.U. L. REV. 896, 901 (1976) (noting that despite his agreement with the reasoning of the dissent “it does not follow . . . that

Court's decree that absent the magic words "on the record" in the relevant statute, formal rulemaking procedures would not be required.⁷⁸

However, despite the near death of formal rulemaking, it is worth examining when discussing lock-in. Formal rulemaking does not face the same structural constraints as informal rulemaking since it is not subject to the logical outgrowth requirement.

2. *The Benefits of Formal Rulemaking*

Formal rulemaking has two significant, related benefits over standard notice-and-comment rulemaking. Both benefits rely on the most important (and burdensome) feature of formal rulemaking: the right to cross-examine the other parties.

The first benefit is structural. Since the final rule from a formal rulemaking must be based entirely on evidence presented at the hearing⁷⁹ and all parties to the hearing have an opportunity to cross-examine the witnesses,⁸⁰ a party cannot claim that it was blindsided and unable to respond to information presented.

An agency can therefore move significantly away from the proposed rule without having it overturned on procedural grounds for violating the logical outgrowth standard.⁸¹ This benefit is essential for the second. Not only can the agency move away from the proposed rule, but it can also use the best available evidence when determining whether to do so. Both formal rulemaking and notice-and-comment rulemaking are subject to the same publication requirement under the APA.⁸² Both procedures therefore begin with the publication of a proposed rule.⁸³ It is only after this publication that the two procedures diverge.

The initial arguments made by the parties at the hearing could be considered equivalent to the comments in notice-and-comment rulemaking

the decision was bad policy").

78. *Mobil Oil Corp. v. Fed. Power Comm'n* states as follows:

There is some danger in according too much weight to magic words such as "on the record." However, the Supreme Court's recent opinion in *United States v. Florida East Coast Railway Co.* emphasized the importance of this phrase and virtually established it as a touchstone test of when section 556 and section 557 proceedings are required.

See Mobil Oil Corp. v. Fed. Power Comm'n, 483 F.2d 1238, 1250 (D.C. Cir. 1973).

79. 5 U.S.C. § 556(e).

80. 5 U.S.C. § 556(d).

81. *See* Henry Lifton, *Defining Fair Notice: Logical Outgrowth Doctrine Applied to the Waters of the United States*, 92 NOTRE DAME L. REV. 943, 947 (2016) (noting the procedural intricacies of the logical outgrowth rule).

82. *See* 5 U.S.C. § 553(b).

83. *See id.*

in that they are a one-sided argument prepared in response to the initial proposal.⁸⁴ Things get more interesting during the next phase, however, when other parties are allowed to cross-examine the witnesses.

Cross-examination has, with reason, been referred to as “beyond any doubt the greatest legal engine ever invented for the discovery of truth.”⁸⁵ While cross-examination imposes tremendous costs, as discussed in the following Part, it is the best way for the agency to learn about potential holes in arguments, whether of the agency or the other parties to the hearing. Cross-examination not only finds errors and inconsistencies in the arguments of others; the threat of a potential cross-examination helps prevent them from appearing in the first place.⁸⁶

Through cross-examination, parties can directly challenge the information the agency presented in the proposed rule as the basis for the action as well as the information presented by opposing parties. This allows weaknesses in arguments and data to be teased out, challenged, and potentially defended.⁸⁷ The opportunity to point out possible problems in the solutions put forth by others is what really differentiates cross-examination in formal rulemaking from the comment process.⁸⁸ Flaws in agency logic can be presented in a comment (although the agency is not necessarily going to respond),⁸⁹ but flaws in the arguments of opponents are not so easily addressed. Savvy commentators know to wait until the end of the comment period specifically to ensure that others cannot read and respond to their comments (which are generally made public when received).⁹⁰

84. They can also in some cases be written (even in formal rulemaking) and need not necessarily be structured as question and answer. See 5 U.S.C. § 556(d).

85. Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO STATE L.J. 237, 261 (2014) (quoting 5 JOHN H. WIGMORE, EVIDENCE § 1367, at 32 (3d ed. 1940)).

86. See Nielson, *supra* note 85, at 261 (citing Stephen F. Williams, “Hybrid Rulemaking” *Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 436 (1975)). Hybrid rulemaking itself, a blend of formal and informal rulemaking can, depending on the mix chosen, provide some of the benefits of formal rulemaking but, aside from the possibly reduced timeline, also raises many of the same problems, as well as some of those raised in traditional notice-and-comment rulemaking and is therefore not further addressed.

87. See Nielson, *supra* note 85, at 266 (discussing the benefits on review if an agency is unable to “defend itself in cross-examination”).

88. See *Federal Administrative Law: Rulemaking*, SANTA CLARA SCHOOL OF LAW: LAW GUIDES, <https://lawguides.scu.edu/c.php?g=5765&p=25371> (May 27, 2016, 1:06 PM).

89. *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 333 (D.D.C. 2016) (“An agency ‘need not address every comment, but it must respond in a reasoned manner to those that raise significant problems.’”) (quoting *Reytblatt v. NCR*, 105 F.3d 715, 722 (D.C. Cir. 1997)).

90. See Brandon & Carlitz, *supra* note 62, and accompanying text.

This lack of dialogue can make it hard to differentiate true disagreement from where parties are simply talking past each other. Informal rulemaking provides no incentive for parties to submit their comments early so others can respond.⁹¹ Formal rulemaking, in contrast, forces all parties into the same room (literally) where they are allowed this opportunity.

And it is not simply that the agency has this better information (which, potentially it could also gain through responses to earlier comments), it is that the agency is procedurally free to act on it, because the presence of all the interested parties to the hearing effectively affords them continual actual notice, and eliminates procedural lock-in. Thus, formal rulemaking has the potential to result in qualitatively better rules.

But cross-examination, the primary strength of formal rulemaking, comes at an enormous cost.

3. *The Drawbacks of Formal Rulemaking*

While the benefits of formal rulemaking, particularly cross-examination, are enough to have inspired at least one law review article in the last thirty years,⁹² critics still abound, with good reason.⁹³

The most famous formal rulemaking took place in the 1960s, when the Food and Drug Administration (FDA) began a formal rulemaking to set a standard of identity for peanut butter.⁹⁴ This would specify the minimum percentage required to be peanuts and regulate what other oils could be used.⁹⁵ This level was higher than any peanut butters on the market at the

91. See *id.* at 1446 (discussing that savvy commenters will wait to submit comments to avoid others from responding, though some early comments may be more persuasive).

92. Nielson, *supra* note 85, at 240 (explaining the article was written in response to an APA report that could not find “a single scholarly article written in the past thirty years that expresses regret about the retreat from formal rulemaking”) (quoting Am. Bar Ass’n, Section of Admin. Law & Regul. Prac., *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 619, 651 (2012)).

93. See Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 106–07 (2003) (“In a complex regulatory setting, with multiple parties, multiple issues[,] and assiduous attorneys, the direct, cross, redirect[,] and recross examinations of hundreds of witnesses by dozens of parties on dozens of issues produces interminable and often terminal delay.”).

94. Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1, 6 (2017).

95. The Food and Drug Administration (FDA) initially wanted the product to be 95% peanuts. At the time, Jif was close to 75% peanuts, with much of the remainder the newly popular hydrogenated oils. The FDA wanted these referred to on the label as a “Crisco base.” Angie M. Boyce, “When Does It Stop Being Peanut Butter?: FDA Food Standards of Identity, Ruth Desmond, and the Shifting Politics of Consumer Activism, 1960s–1970s,” 57 TECH. & CULTURE 54, 63 (2016).

time and changing the formula would not only increase the cost, but it would also affect the signature taste of the different peanut butters then on the market. And thus began the “peanut butter war.”⁹⁶ It would be more than a decade from the time the proposed rule was announced until the rule was finally affirmed in court.⁹⁷ This rulemaking was cited later in an American Bar Association (ABA) report detailing the problems with formal rulemaking.⁹⁸ The ABA has remained staunchly opposed to the process ever since.⁹⁹

The peanut butter rulemaking is the quintessential example of how a formal rulemaking can spiral out of control, but it is not the worst. Another rulemaking by the FDA, on food for special dietary purposes, dwarfed peanut butter by almost any measure. The entire first morning of the ten-day prehearing conference was simply each of the “[m]ore than 100 attorneys” and “independent parties” introducing themselves and their clients.¹⁰⁰

The transcript for the peanut butter hearing was over 7,700 pages.¹⁰¹ The transcript for the hearing for foods for special dietary purposes was more than 32,000.¹⁰² The peanut butter hearing itself was over in a matter of months.¹⁰³ The hearing for food for special dietary purposes lasted over two years and would have been even longer had the hearing officer not begun to severely restrict the ability to cross-examine.¹⁰⁴ This decision would eventually lead to the rule being at least partially overturned and sent back to the Agency on remand.¹⁰⁵ This was because the hearing officer did not fully understand that many parties were not only antagonistic to the Agency—in that they did not want the proposed rule to go into effect as

96. See Carole Sugarman, *Veteran of the Peanut-Butter War*, WASH. POST (Jan. 13, 1985), <https://www.washingtonpost.com/archive/lifestyle/food/1985/01/13/veteran-of-the-peanut-butter-war/6e72ac14-c62c-4ca3-9d34-8da4200558c1/>.

97. William D. Dixon, *Rulemaking and the Myth of Cross-Examination*, 34 ADMIN. L. REV. 389, 419 (1982).

98. See generally 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 448–510 (citing Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132 (1972)).

99. See Am. Bar Ass’n Section of Admin. Law & Regul. Prac., *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 619, 652 (2012) (noting the American Bar Association’s (ABA’s) position).

100. Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132, 1148 (1972).

101. Dixon, *supra* note 97, at 413.

102. *Id.* at 421.

103. *Id.* at 420.

104. See *id.* at 421.

105. See Nat’l Nutritional Foods Ass’n v. FDA, 504 F.2d 761, 808 (2d Cir. 1974), *cert. denied*, 420 U.S. 946 (1975).

proposed—they were also antagonistic to each other.¹⁰⁶

This is the extreme, of course, and it is possible to consolidate groups with similar interests together, but this does not necessarily mean that all individuals will really be able to air their concerns. Additionally, it must be done carefully to ensure that there is at least significant overlap in the groups, or a reviewing court can kick the issue back to the agency.

One defense of formal rulemaking is that the problem in these cases is not the process, but the ineffectiveness of the hearing examiner.¹⁰⁷ However, the person making this argument, himself a former hearing examiner, admitted at a different point that “[w]hile a great deal of the [cross-examination] questioning was pure waste, seldom could that judgment be made until after the fact, and much information and clarification which would otherwise have escaped found its way into the record.”¹⁰⁸

Not only do these hearings consume a great deal of time—at great expense for the agency—but they are also expensive for the parties.¹⁰⁹ The sheer number of participants extends the process, and because it is in a trial-like environment and cross-examination is so critical, these hearings are ideally conducted by highly trained (and expensive) trial specialists, who can take advantage of the cross-examination opportunity.¹¹⁰

This cost is not necessarily a concern for the industry itself, which can have its own reasons for wanting a protracted process,¹¹¹ but these costs can be crushing for nonprofits to match. This is particularly so since these highly specialized trial attorneys are likely not who the nonprofits have

106. See Dixon, *supra* note 97, at 422 n.114 (“Plainly, what the examiner was trying to do was force all the parties into the traditional trial-like adversarial role with two sides—the government as the proponent and all others in opposition, when obviously no such sides existed in a rulemaking proceeding.”).

107. *Id.* at 420–21.

108. *Id.* at 400.

109. *Id.* at 411.

110. *Cf., id.* at 408 (describing the importance of experienced cross-examiners at testing preconceived agency beliefs).

111. It has been well established that the companies being regulated have an incentive to do everything possible to drag the process out, since doing so can prolong the period before regulation is imposed, with its inevitable costs. Goulden states:

Why were the peanut butter companies willing to invest so much money in the case? . . . “Economics. There’s enough of a price differential between raw peanuts and hydrogenated oil to make a difference. After all, you are talking about almost half a billion pounds of peanuts a year. Even if you shave the cost only two or three percent, the saving to the manufacturer is tremendous.”

JOSEPH C. GOULDEN, *THE SUPER-LAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS* 188 (2d ed. 1972).

in-house, so they must pay for one or ask for someone willing to act in a pro bono capacity for a hearing that could drag on for years.

It is for these reasons that formal rulemaking is required in statutes today only when the industry has pushed for its inclusion. Not in an attempt to force the agency to undertake a formal rulemaking, but because of the broad understanding that it will not do so. “Every experienced lobbyist knows that the phrase ‘on the record’ [is used by Congress in a statute governing an agency] only when it does not want an agency to be able to issue rules but wants to be able to claim that the agency has the power to issue rules.”¹¹²

Even if agencies somehow streamlined formal rulemaking, with hearing examiners who could magically determine what would be relevant cross-examination testimony and the most efficient way to group participants, formal rulemaking would not solve the lock-in issue because, as described in Part I.A.1, lock-in has two parts—the structural and the psychological components—and lock-in only solves one of them: the structural.¹¹³

In fact, structure of formal rulemaking could lead to even more severe psychological lock-in for the agency. This is because the agency does not start with a blank slate. Instead, it must not only put the time and resources into the proposed rule, as in notice-and-comment rulemaking,¹¹⁴ but it must also then actively defend that rule during the course of the hearing by bringing in witnesses, including expert witnesses, to “prove” the arguments the agency made for the proposed rule.¹¹⁵

While it is true that the hearing officer is distinct from the people presenting the agency position, and that the hearing officer produces written findings, these findings are then reviewed by those higher in the agency who likely pushed for the initial version of the rule that the agency made public with the publication of the proposed rule and reinforced by attempting to defend it during the hearing.¹¹⁶

Formal rulemaking is therefore not the answer to lock-in. Some attempts have also been made to alter the traditional notice-and-comment process as the next Part explains.

B. *Extensions of the Informal Rulemaking Process*

There have been attempts to address various shortcomings of the established notice-and-comment system. Three of these have particular importance to discussions of agency lock-in and are addressed here: advance

112. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.2 (5th ed. 2010).

113. See discussion *supra* Part I.A

114. Both are subject to the same requirements for the proposed rule under 5 U.S.C. § 553.

115. See Nielson, *supra* note 85, at 266.

116. See *id.* at 270.

notices of proposed rulemaking, negotiated rulemaking, and the Unified Agenda. These are collectively referred to here as informal extensions not because there is no legal backing for their use (all are in at least some cases required) but because they build off of the traditional informal rulemaking structure. This Part addresses the three extensions in the order listed.

1. *Advanced Notice of Proposed Rulemaking*

An advance notice of proposed rulemaking (ANPR) is a notice in the Federal Register announcing not a proposed rule, but that an agency is considering proposing a rule in a certain area.¹¹⁷

a. *The History of Advanced Notices of Proposed Rulemaking*

The growth of ANPRs appears to have been agency-driven, since there is a lack of academic commentary on ANPRs in the early stages. In 1968, the Federal Highway Administration (FHA) published an ANPR in response to a petition for a rulemaking on parking brakes received by the agency.¹¹⁸ The FHA chose to use an ANPR “[b]ecause this petition for rulemaking raises vital questions of general applicability affecting motor carrier safety”¹¹⁹ By 1974, when the Federal Aviation Administration published an ANPR regarding the creation of a new restricted air space, the agency already had a policy for the “early institution of public proceedings in actions related to rule making.”¹²⁰

The Carter Administration endorsed the use of ANPRs in 1978, and ANPRs have since been included in a few statutes¹²¹ and regulations.¹²² An

117. See *Glossary of Regulatory Jargon: Advance Notice of Proposed Rulemaking*, REGUL. GRP., <https://www.regulationwriters.com/library/ANPRM.html> (last visited May 3, 2021).

118. Parking Brakes Advance Notice of Proposed Rulemaking, 33 Fed. Reg. 8,349 (June 5, 1968).

119. *Id.* at 8,350.

120. Restricted Area and Continental Operations Range Segments Advanced Notice of Proposed Rulemaking, 39 Fed. Reg. 20,612 (June 12, 1974).

121. See, e.g., 15 U.S.C. § 2058(a) (allowing an advanced notice of proposed rulemaking (ANPR) before commencing a rule regulating the safety of a consumer product); 42 U.S.C. § 18001 (requiring an ANPR for a rule regulating the disclosure requirements for out of pocket costs to patients before they received medical care); 15 U.S.C. § 57a (requiring an ANPR before commencing a rulemaking on unfair or deceptive trade practices); 49 U.S.C. § 31136(g) (allowing a choice of either an ANPR or negotiated rulemaking before commencing a rulemaking on motor vehicle safety).

122. E.g., 16 C.F.R. § 1.10 (requiring an ANPR before “any trade regulation rule” is formally commenced); 40 C.F.R. § 194.61 (requiring an ANPR “[u]pon receipt of a compliance application” from a waste isolation pilot plant); 29 C.F.R. § 1990.141 (requiring an ANPR within thirty days after the Occupation Safety and Health Administration

ANPR can contain the proposed text of a rule, like a traditional notice of proposed rulemaking, or it can simply say that the agency is considering taking action in a given area and ask for general public input.¹²³ An ANPR's flexibility allow its use to be tailored to the particular situation the agency faces.

b. The Benefits of Advanced Notice of Proposed Rulemaking

At first glance, an ANPR seems like the perfect solution to agency lock-in. ANPRs can essentially give the agency one extra round of comments from the public before publishing the proposed rule.¹²⁴ Anything the agency puts in the ANPR is therefore free from structural lock-in, and changes can be made based on the comments received.

ANPRs may also reduce psychological lock-in because the agency has the option to merely identify the issue or present a list of potential alternatives rather than needing to make a specific choice publicly.¹²⁵ Such “[a]n open-ended ANPR mitigates the frontloading effect, forestalling agency staff from analyzing and developing a proposal in detail prior to public comment.”¹²⁶ Preventing effort from going into extensive agency analysis before the public presents alternatives helps prevent psychological lock-in by allowing the agency to see a broader range of options early when minds are more open and by delaying the point at which the agency must make a public declaration of its belief.¹²⁷

Because this request for comments occurs before the official initiation of the rulemaking (and the official start of the record for judicial review), the agency does not need to go through procedural requirements necessary solely for judicial review,¹²⁸ and the parties do not need to make meaningless

initiates a study on setting limits for carcinogens in the workplace).

123. See *Glossary of Regulatory Jargon*, *supra* note 117.

124. See *id.*

125. See Stern, *supra* note 2, at 635 (stating that open-ended ANPRs discourage psychological commitment by presenting an issue and listing alternatives).

126. *Id.*

127. The same effect can occur within the agency as well. Stern states that:

Whether on the level of a working group, an office within an agency, or the agency as a whole, staff state their positions and argue against rival ideas. As a proposal crystallizes, agency members make an increasing number of statements supporting or opposing it. These public commitments encourage consistency, and as a result, increase the tendency towards agency lock-in.

Id. at 627.

128. The initiation of the docket can be required statutorily, as well as through common law. 42 U.S.C. § 7607(d)(2), for example, explicitly requires the establishment of a rulemaking docket “not later than the date of proposal” of the rule.

arguments simply to preserve them for potential judicial review later.¹²⁹ This procedure will free the agency from administrative burdens that helped to lock-in the proposal while the commentators do not need to make weak arguments of relatively little importance to themselves simply to preserve the issues for later judicial review.¹³⁰ This can allow both sides to identify and respond to the issues of true importance more quickly. Avoiding these administrative hurdles also means that it is easier for agencies to request information and data from the public in an ANPR, information that the agency can then use to craft a better rule in ways that would have potentially been unavailable using a traditional notice of proposed rulemaking.¹³¹

The public nature of ANPRs provides a further benefit. ANPRs make it clear to anyone who cares to comment that a matter is under consideration with the agency.¹³² This allows any interested party to submit comments or information to the agency, which has “the potential to reduce the disproportionate influence of insider groups, as well as to mitigate lock-in in circumstances where the agency resists input from interest groups altogether.”¹³³

However, ANPRs are not enough, as the next Part discusses.

c. The Drawbacks of Advanced Notices of Proposed Rulemaking

In many instances, ANPRs will still require the same work from the agency as a traditional notice of proposed rulemaking. Thanks to executive oversight through the OMB, ANPRs can often require the same analysis that traditional proposed rules do.¹³⁴ In some cases, this is partially avoidable. OMB review is relatively straightforward for open-ended ANPRs¹³⁵ (there is little to review if the agency has not yet made any decisions and is merely asking for general feedback from the public). While an open-ended ANPR may have an easier time getting through OMB review, that is not the most useful type of ANPR for commentators. The same lack of specifics that speeds the ANPR through OMB review means

129. See Stern, *supra* note 2, at 595 (stating that there must be an engaging dialogue between participants).

130. See *id.* at 634 (noting that because the ANPR is not final, it is not subject to judicial review).

131. See *id.* (encouraging public discussion of the most genuine concerns).

132. See *id.* at 637 (writing that groups are able to participate during the critical phase of the development period).

133. *Id.*

134. See Executive Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (mandating that all significant regulatory action (including high value ANPRs) go through traditional Office of Information and Regulatory Affairs (OIRA) review).

135. See Stern, *supra* note 2, at 635 (“[W]hen the ANPR is an open-ended announcement of an issue or a list of alternatives, as a practical matter OMB review is limited.”).

that the public will have a difficult time providing meaningful feedback.¹³⁶

This points to the biggest problem with ANPRs. While they can increase general participation by the public earlier in the process, they do not necessarily increase the amount of useful public feedback.¹³⁷ This is due to the catch-22¹³⁸ of rulemaking and agency lock-in. In order for interested parties to be able to comment effectively, they need to know what the agency is currently considering.¹³⁹ However, the more effort the agency has already put into considering different options, the more likely it is that the agency choice is already locked in.¹⁴⁰

An extensive and detailed proposal by the agency will give the public a great deal of specifics to respond to, but it will be much harder to get through OMB and will work to psychologically lock in the agency, making it less receptive to the feedback.¹⁴¹ These types of ANPRs will also be the most labor intensive for the agency, making it less likely to voluntarily undertake them to begin with, as they begin to strongly resemble traditional notices of proposed rulemaking. In such a case, therefore, the agency is simply choosing from the outset to go through all the work of a traditional notice of proposed rulemaking twice, while if the agency had instead started with a notice of proposed rulemaking it could potentially

136. *See id.* For instance, an ANPR focused primarily on data gathering can allow a large number of commentors to provide data, but this data is then used to create a rule subject to all the lock-in effects, rather than presenting possible options for comment by the public.

137. *See* William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC'Y 576, 590 (2009) (“[M]uch of the comment [ANPRs] elicit is reportedly too unfocused to be of much value.”).

138. *See* Heller stating that:

There was only one catch and that was Catch-22 Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to.

JOSEPH HELLER, CATCH-22 46 (1961); *see also* Mathis stating that:

The medical examiner whose opinion the Department of Veterans Affairs (VA) relied on to deny a veteran's claim is presumed competent, absent a specific objection by the veteran. To raise an objection, a veteran needs to know the medical examiner's credentials. And yet, the . . . Board . . . has sometimes required the veteran to have already raised a specific objection to an examiner's competence before ordering the VA to provide the credentials.

Mathis v. Shulkin, 137 S. Ct. 1994, 1994 (2017) (statement of Justice Sotomayor respecting the denial of certiorari).

139. *See* Stern, *supra* note 2, at 636 (stating that interest groups will have a difficult time drafting “responses to notices that lack detail and specificity”).

140. *See* West, *supra* note 137, at 590 (pressuring agencies to issue rules in a timely fashion disincentivizes agencies from open-ended ANPRs).

141. *See* Stern, *supra* note 2, at 635 (writing that ANPRs delay public commitments and after agency staff back a proposal through review processes they are more susceptible to lock-in).

avoid repeating the process.¹⁴²

The fundamental problem with ANPRs, and the true cause of this issue, is that there is no back and forth between commentators, as is possible in formal rulemaking, so there is nothing to build from or to directly comment on absent specifics from the agency. Commentors can themselves suggest solutions (which the agency cannot effectively expose to public scrutiny before lock-in for the same reasons as in traditional notice-and-comment rulemaking) or the public must rely purely on policy ideas, which might help the agency understand the public mood but will not solve the problem of specific issues being presented only at the risk of agency lock-in. This issue is at least partially addressed by the next incomplete solution: negotiated rulemaking.

2. *Negotiated Rulemaking*

Negotiated rulemaking represents a fundamentally different approach to the creation of a proposed rule. Rather than proposing a rule and allowing interested parties to submit comments, negotiated rulemaking puts representatives of different interests in a room together and allows them to determine what the proposed rule should be. This can help address the problems caused by lock-in by allowing the representatives taking part in the process to learn from each other and potentially work together to come up with a better solution than any party acting alone would have.¹⁴³

a. *The History of Negotiated Rulemaking*

Originating in the 1980s, negotiated rulemaking is a process through which the government gathers representatives of different interests who will be affected by a potential regulation (including the agency) and, with the help of a neutral third party, works with all the parties to negotiate an acceptable rule.¹⁴⁴ The consensus rule emerging from the negotiated rulemaking is generally used as the proposed rule, which goes through the traditional notice-and-comment process.¹⁴⁵

142. See West, *supra* note 137, at 577 (stating that the APA of 1946 requires agencies in formal rulemaking to solicit written comments on the merits of their proposal).

143. See DAVID M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK 1 (1995) (recognizing that rules are more easily implemented when negotiators achieve a consensus).

144. See Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 39–40, 70 (1982) [hereinafter Harter, *Negotiating Regulations*] (providing a history of the development of negotiation tactics amongst different parties and neutral decisionmakers).

145. Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENV'T. L.J. 32, 34 (2000) [hereinafter Harter, *Assessing the Assessors*] (stating that the

Negotiated rulemaking helps solve agency lock-in by allowing issues to be aired before the initial rule is published, when the agency could be expected to be more open to alternatives.¹⁴⁶ However, this was not the original purpose of the process. Instead, it was motivated primarily by two factors: the frequency with which new rules were immediately being challenged in litigation and the ossification of the rulemaking process.¹⁴⁷

The hope was that by working with the parties ahead of time and allowing them to reach agreement, there would be greater buy-in to the final rule. The parties would understand the different considerations that had gone into the rule and realize the final rule would likely be the best achievable option.¹⁴⁸

People decried the rulemaking process as ossified due to all the procedural requirements,¹⁴⁹ which were largely intended to prepare for judicial review.¹⁵⁰ Reducing the likelihood of judicial review and allowing issues to

committee makes its decision by consensus, defined as a unanimous agreement among the committee). If the agency disagrees with the approach it is instructed to publish both its preferred version and that of the negotiation, to enable public response to both. Harter, *Negotiation Regulations*, *supra* note 144, at 101 (noting that an agency is instructed to publish its preferred and negotiated version when a disagreement occurs and allow public response to both versions).

146. See Harter, *Assessing the Assessors*, *supra* note 145, at 33 (stating that the negotiating committee determines what factual information is needed to make a decision, develops that information, analyzes and examines that information, and reaches a consensus on the recommendation to make to the agency).

147. See Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENV'T L.J. 386, 386 (2001) (finding that negotiated rulemaking “neither saves time nor reduces litigation”).

148. See Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 1004 (2008) (arguing that even a longer rulemaking process would be worth it if the resulting rule proved “more durable and easier to implement”).

149. Pierce explains that how after *Abbott Labs*:

[C]ourts began to impose increasingly stringent demands on agencies to compile a rulemaking record that includes: (1) the notice of proposed rulemaking, (2) all major studies relevant to the proposed rule, (3) the comments submitted in response to the notice, and (4) an increasingly detailed statement of the basis and purpose of the rule that responds to all well-supported arguments in the comments, all serious data disputes raised by the comments, and all important alternatives to the proposed rule suggested in the comments.

See Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 89 (1995)

150. Pierce argues that:

Parties dissatisfied with one or more aspects of the agency’s rule will devote significant resources to the process of comparing the agency’s several hundred page statement of basis and purpose with the tens of thousands of pages of comments and studies in the rulemaking record. They will search for two things: (1) issues that arguably are of sufficient importance to be within the scope of the duty that the agency did not

be aired ahead of time (when they were not necessarily required to be part of the record for judicial review) would help reduce this problem.¹⁵¹

After a few trial runs, the idea was popular enough that general requirements for the process were federally codified¹⁵² and negotiated rulemaking began to be required in some statutes.¹⁵³

Negotiated rulemaking was never intended to be a panacea for all the problems in the rulemaking process. From the beginning, it was clear that there were instances where it would not be advisable.¹⁵⁴ The different interested parties must be willing to compromise, which means putting aside the “all-or-nothing” posturing common in the traditional comment process.¹⁵⁵ The hoped-for reduction in litigation appears to be true, in the sense that such rules survive substantive judicial review.¹⁵⁶ However, it does not appear that regulatory negotiation speeds the rule development process.¹⁵⁷

discuss at all; and, (2) issues of such importance that the agency arguably should have discussed them more thoroughly or in greater detail.

Id. at 69.

151. Pierce argues that the process described in note 149:

[W]ill always bear fruit. It is impossible for any agency to identify and to discuss explicitly and comprehensively each of the myriad issues, alternatives, and data disputes relevant to a major rulemaking. After the fact, any competent lawyer with access to sufficient resources can identify issues that an agency arguably discussed inadequately.

Id. It is partly in response to these concerns that Lubbers argues that a longer lead time in rulemaking will still be worth it to reduce these challenges. *See also* Lubbers, *supra* note 148, at 1004 (recognizing that “a longer process would be worth it if the resulting rule proved to be more durable and easier to implement . . .”).

152. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended at 5 U.S.C. §§ 561–570 (1994)).

153. *See* 20 U.S.C. § 1022f(c) (exemplifying codified process for negotiated rulemaking); *see also* 15 U.S.C. § 2607(a)(6)(A) (same).

154. Harter, *Negotiating Regulations*, *supra* note 144, at 7 (“Negotiation undoubtedly will not work for all rules.”).

155. Perritt states that:

[S]ome public interest groups may prefer short term litigation victories to negotiation. Greater publicity associated with a dramatic victory and extreme statements made in litigation tend to facilitate fund raising and other facets of membership support. These groups . . . therefore may prefer the all-or-nothing characteristic of litigation rather than accommodation.

Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1641 (1986).

156. Harter, *Assessing the Assessors*, *supra* note 145, at 51–52.

157. *See* Coglianese, *supra* note 147, at 397 (finding that “on average it has taken EPA about three years to develop a rule, regardless of whether the agency used negotiated

b. The Benefits of Negotiated Rulemaking

Negotiated rulemaking, like the other two notice-and-comment extensions discussed here, occurs before publication of the proposed rule. It therefore takes place before the agency is structurally locked into a choice. And, because the rule emerges from the negotiation itself and not by agency decree, the agency is not necessarily locked into a decision at all.

Because negotiated rulemaking consists of a dialogue between different interests, groups other than the agency are able to propose possible solutions (as they could in response to an ANPR). They are also able to identify and examine weaknesses in arguments put forth by others, as they can in formal rulemaking.

Negotiated rulemaking is also the only partial solution where parties can work collaboratively to come up with a rule.¹⁵⁸ They do not need to merely point out the issues with a proposal someone else has made; they can offer a slightly better version of it. As a government report noted: “Solving problems, particularly with innovative approaches, is often an iterative process, i.e., a suggested approach elicits information, which causes a change in or clarification of the approach, which elicits additional information, and so on. A one-or-two shot opportunity for public comment is inconsistent with this type of process.”¹⁵⁹ Of all the incomplete solutions, negotiated rulemaking is the only one that really offers a chance for this type of approach. This means there is the potential not only for a solution that the agency would not have initially chosen but a solution that no one else would have been able to come up with alone—one that came about only because of the process.

Negotiated rulemaking streamlines the process for the agency in other ways. Because it takes place before the APA requirements apply, the agency does not need to go through the tedious regulatory prep work needed with a traditional proposed rule before the process occurs,¹⁶⁰ and the parties do not need to make extraneous arguments simply to preserve the issues for review.¹⁶¹ This also means agencies do not need to spend needless energy counteracting the extraneous arguments of other groups, and can more easily determine what

rulemaking or conventional rulemaking procedures.”).

158. See Lubbers, *supra* note 148, at 991 (arguing that through negotiated rulemaking alone can parties find “constructive, creative solutions to problems”).

159. GORE, *supra* note 11, at 36.

160. The negotiated rulemaking process itself is specifically exempted from judicial review. The Negotiated Rulemaking Act, 5 U.S.C. § 570 (mandating that rules constructed through negotiated rulemaking be treated identically to rules constructed through any other rulemaking procedure).

161. See Stern, *supra* note 2, at 595 (explaining that effective deliberation is compromised by an interest groups’ submission of comments “solely for the purpose of” raising claims to preserve matters for future litigation).

the real issues are, and in the best case scenario, realize that the goals of the groups are not mutually exclusive and find a “win-win” solution.¹⁶²

However, negotiated rulemaking also suffers from some serious structural issues of its own.

c. The Drawbacks of Negotiated Rulemaking

When the negotiated rulemaking process works, it can result in a rule that most parties are happy with, and likely even a rule that none of the parties alone would have created. However, there are also drawbacks.

The first one is simply that the process does not always work. Like a traditional mediation, which requires the consent of both parties,¹⁶³ regulatory negotiation requires that each party agree that they can at least “live with” the rule.¹⁶⁴ If the parties cannot agree, the negotiation has, in a sense, failed.¹⁶⁵

Agreement becomes increasingly difficult as more parties are added to the negotiation.¹⁶⁶ The more groups there are at the table, the harder it will be for all groups to come to a consensus, and negotiated rulemaking requires a consensus. This means that the negotiation group cannot be too large.¹⁶⁷ Size is also constrained by the fact that the group must be able to physically meet together in a room.¹⁶⁸

These physical constraints mean that the group or individual chosen to speak on behalf of an interest does not necessarily agree with the other parties on all factors.¹⁶⁹ Critical feedback and perspective can be lost through

162. Daniel P. Selmi, *The Promise and Limits of Negotiated Rulemaking: Evaluating the Negotiation of a Regional Air Quality Rule*, 35 ENV'T L. 415, 453 (2005).

163. *Mediation: Frequently Asked Questions*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/amc/en/mediation/guide/> (last visited May 3, 2021) (“The non-binding nature of mediation means also that a decision cannot be imposed on the parties. In order for any settlement to be concluded, the parties must voluntarily agree to accept it.”).

164. *See Selmi, supra* note 162, at 441 (explaining that the requirement that parties agree they can “live with” the rule is because parties may fear to affirmatively endorse it for fear it could hurt later litigation. They are therefore asked to merely indicate they will not actively oppose it).

165. Depending on how far along the process got before it was determined that agreement was impossible, the negotiations could still prove useful, and the agency might have learned enough to still come up with an innovative proposed rule that it would not otherwise have used. *See Lubbers, supra* note 148, at 987 (noting that even a failed negotiation can help inform the agency about the “issues and the concerns of the affected interests”).

166. *See Harter, Negotiating Regulations, supra* note 144, at 46 (“Negotiations will clearly not work among an auditorium full of people.”).

167. *See id.* (suggesting fifteen as an approximate max).

168. *See id.* at 46 n.257 (noting that a fifteen-person cap is not absolute, but rather a suggestion based on the number of persons who could comfortably sit at a large table).

169. Funk states that:

selective inclusion.¹⁷⁰ Additionally, compromise might be acceptable to the representative at the negotiation, but not a similarly situated group, particularly when that group has not been party to the negotiations and therefore does not understand how the parties reached that decision.

The agency also generally determines which individuals are invited to participate in the negotiation.¹⁷¹ While an ANPR opens the door to all interested parties, the doors of the negotiation room cannot be open to the general public, and not all interested parties can participate in a negotiated rulemaking.¹⁷²

Negotiations also do not happen quickly or cheaply.¹⁷³ Negotiated rulemaking is inherently an expensive process.¹⁷⁴ Groups do not spend an afternoon in a hotel meeting room noshing on bad sandwiches and cookies and emerge with a proposed rule; the process is protracted. It takes time to even build up the trust necessary for the true negotiation to commence.¹⁷⁵ And it is not cheap to bring people from all around the country to meet in one particular location for a period of time.

Even if the agency pays for the travel and lodging expenses of those participating, which it is far from always able to do,¹⁷⁶ there are significant

[T]he Consumer Federation of America (CFA) was supposed to represent the interests of the consumer, but consumers . . . are hardly a homogenous entity. The CFA may have represented the interests [of some consumers], but it did not appear to lobby on behalf of poor, rural folk for whom the rule will provide little benefit and perhaps significant burden. William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest-EPA's Woodstove Standards*, 18 ENV'T L. 55, 95 (1987).

170. *Id.* at 96 (explaining that a “proposed rule with which the parties are happy but which bears scant resemblance to what was contemplated by the statute” emerged from a process with insufficient full representation).

171. *E.g.*, *The Negotiated Rulemaking Process for Title IV Regulations - Frequently Asked Questions*, U.S. DEP'T EDUC. (last modified Aug. 25, 2008), <https://www2.ed.gov/policy/highered/reg/hearulemaking/hea08/neg-reg-faq.html> (“Negotiators are nominated by the public, and selected by the Department.”). This was not how it was supposed to be, the members were supposed to be selected by the “convenor,” not the agency. Philip J. Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 AM. U. L. REV. 471, 480 (1983) [hereinafter Harter, *The Political Legitimacy*].

172. 5 U.S.C. § 564(b) (setting forth a process to add representation for those who do not believe they are currently adequately represented on the committee).

173. *See* Lubbers, *supra* note 148, at 997 (“There is no question that convening and conducting a reg-neg involves a greater cost than organizing a notice-and-comment process.”).

174. Derek Raymond McDonald, Note, *Judicial Review of Negotiated Rulemaking*, 12 REV. LITIG. 467, 477 (1993) (noting that negotiated rulemaking has additionally transferred regulation cost from the government to the other participants in the process).

175. *See* Selmi, *supra* note 162, at 435 (highlighting the ideological divide between interested nonprofit and industry parties).

176. Lubbers, *supra* note 148, at 998 (quoting PRITZKER & DALTON, *supra* note 143, at 271) (“[M]ost agencies have very tight travel budgets and cannot provide routine access

salary costs for the organization paying the person or people to be there.¹⁷⁷ This means that organizations may be unable to participate, even if asked, due to cost considerations.

A well-documented negotiation in California, which involved only a single air district and therefore did not require cross country travel, asked many local environmental organizations if they wished to be involved in the process.¹⁷⁸ Only one group was able to cover the salary cost to participate for the full duration of the negotiation.¹⁷⁹ This negotiation, which only dealt with the pollution controls used by companies engaged in chrome plating in the local area, involved monthly meetings for an entire year.¹⁸⁰ There is no reason to believe the typical federal process would be faster.

Money is not only a concern for the nonprofits. The agency itself must spend a great deal of money conducting a negotiated rulemaking, including hiring a mediator to run the process.¹⁸¹ While negotiated rulemaking was supposed to save the government money, much of the savings are in reduced litigation expenses that the Department of Justice, rather than the agency involved in the rulemaking, would bear if the rule were later challenged in court.¹⁸² The savings do not benefit the agency, which must nevertheless pay for the process.¹⁸³ And this process may or may not even produce an agreed-upon proposed rule. Effectively, an agency must decide to sacrifice its own funding for the potential benefit of the overall federal budget.

Finally, while the process allows some agency control—since an agency representative participates as a party in the negotiations and therefore must agree, as must the others, that the final agreement is something it can “live with”¹⁸⁴—this does not mean the rule coming out of the negotiations is the one the agency would have preferred after learning everything it did during the process.¹⁸⁵

The agency can change the final rule,¹⁸⁶ but it is then subject to the same

to these budgets for external parties.”).

177. Selmi, *supra* note 162, at 461–62. Participation in the process was equivalent to a part-time job (or the loss thereof) for the organization. *Id.*

178. *Id.* at 427–29.

179. *Id.* at 461. A second organization was brought in later with specific expertise in the topic at issue. *Id.* at 461–62.

180. *Id.* at 419, 427, 437.

181. PRITZKER & DALTON, *supra* note 143, at 267–68.

182. Lubbers, *supra* note 148, at 997.

183. *Id.*

184. Selmi, *supra* note 162, at 441.

185. See Funk, *supra* note 169, at 92–93 (arguing that the agency, as an equal party, must “bargain and trade its ‘interests’ (the public interest) in the same way the other participants may trade their interests”).

186. TODD GARVEY, CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF

lock-in concerns that bedevil any notice-and-comment rulemaking, with the difference that the agency itself did not even choose the lock-in point.

Negotiated rulemaking allows a conversation between groups holding different viewpoints, which can in turn not only discover weaknesses in proposals but also create a dialogue leading to a better overall proposed rule, raising the starting point of the agency rulemaking. However, the high cost and limited participation means that it can also exaggerate one of the primary lock-in concerns—that the rule is locked in before all interested parties have been able to give meaningful feedback to the agency.

3. *Unified Agenda*

The Unified Agenda is a statutorily mandated, twice-yearly publication announcing upcoming agency action.¹⁸⁷ Alerting the public to the areas in which agencies are considering action could allow interested members of the public to contact the agency and provide input before the proposed rule is published, the point of structural lock-in.

a. *The History of the Unified Agenda*

The modern Unified Agenda began with a Carter Administration requirement that each agency publish its own “semiannual agenda of regulations.”¹⁸⁸ Two years later, Congress expanded and mandated the publication, with a statutory requirement in the Regulatory Flexibility Act.¹⁸⁹ This was ostensibly to enable small businesses to better understand upcoming regulatory action because the triggering event requiring publication was the impact on small businesses.¹⁹⁰ Since then, presidents have continued to expand the order to the point that regulatory actions from all agencies (both executive and independent) are to be announced in the Unified Agenda, which is supposed to be published twice a year in October and April.¹⁹¹

RULEMAKING AND JUDICIAL REVIEW 5 (Mar. 27, 2017) (explaining that the process after publication of the proposed rule resulting from negotiated rulemaking is the same as after any other proposed rule).

187. OFF. OF MGMT. & BUDGET, OFF. OF INFO. & REGUL. AFF., ABOUT THE UNIFIED AGENDA (last visited May 4, 2021), https://www.reginfo.gov/public/jsp/eAgenda/UA_About.myjsp.

188. Exec. Order No. 12,044, 43 Fed. Reg. 12,661, 12,662 (Mar. 23, 1978).

189. 5 U.S.C. § 602(a).

190. 5 U.S.C. § 602(a)(1) (requiring publication for “any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities”).

191. 5 U.S.C. § 602(a). This is not necessarily followed. The Spring 2019 version, for instance, was published June 24, 2019. Unified Agenda, 84 Fed. Reg. 29,592 (June 24, 2019).

In addition to basic information about the agency and the priority given to the regulation by the agency (which actually relates to the significance of the action),¹⁹² these announcements are supposed to include “a brief description of the problem the regulation will address; the need for a Federal solution; to the extent available, alternatives that the agency is considering to address the problem; and potential costs and benefits of the action.”¹⁹³ These announcements should also include “the name and phone number of at least one person in the agency who is knowledgeable about the rulemaking action.”¹⁹⁴

b. The Benefits of the Unified Agenda

On its face, the Unified Agenda would appear to present an excellent solution for agency lock-in. Knowing ahead of time what action the agency was considering, what alternatives were considered, and even whom to contact at the agency,¹⁹⁵ a concerned individual could directly contact that person and share thoughts or concerns about upcoming action, something larger players are already able to do.¹⁹⁶ An individual without agency connections could thus not only learn about a potential rule early, but effectively submit a comment before the proposed rule was published, and thus before the initiation of the official comment period, at a point in the process where it would be easier for the agency to change details of the proposal or even the general direction.

However, things do not work out that way in practice.

c. The Drawbacks of the Unified Agenda

The problem is that the scenario described in the prior Part is not the reality. In reality, the “agenda has some utility to casual watchers of the agencies, but the traditional constituencies still rely on personal contacts and on trade press ‘leaks’ about agency rules to remain aware of the progress of rulemaking projects inside the agency.”¹⁹⁷ This is likely due to more than simply unresponsiveness from the designated agency contact.¹⁹⁸

192. Introduction to the Fall 2019 Regulatory Plan, 84 Fed. Reg. 71,086, 71,095–96 (Dec. 26, 2019).

193. *Id.* at 71,096.

194. *Id.*

195. *Id.*

196. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1775 (1975) (discussing the “preponderant influence” enjoyed by “organized interests” in the early formation stages of a regulation before the regular public has a chance to provide input).

197. JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING § 4:6 (2020 ed.).

198. West, *supra* note 137, at 589 (“[A]lthough agency officials indicate that they make

One problem is that not every forthcoming regulation is published in the Unified Agenda, and there is nothing any affected party can do about it. While Congress claimed it passed the Act to protect small businesses, it did not include any private right of action or other mechanism of enforcement for regulations that agencies failed to mention in the Unified Agenda.¹⁹⁹ It therefore seems more likely that the statutory mandate instead grew out of a desire on the part of Congress to get a better sense of what agencies were doing before the publication of a proposed rule.²⁰⁰

The absence of any enforcement mechanism is problematic. Certainly, there are times when changed circumstances could necessitate previously unimaginable necessary regulatory changes, one possible reason for the lack of enforcement mechanism. The speed with which the COVID-19 crisis unfolded in 2020 is an example of a situation where an agency could not have seen any potential need for action in November of 2019.²⁰¹ But changed circumstances could have been allowed as an affirmative defense for the agency. Instead, agencies merely face potential congressional oversight—including forced testimony—and can use their “‘budget’ for noncompliance” to choose which rules to publish.²⁰² And choose they do. A recent study found that “about 25 percent of OIRA-designated significant rules are . . . likely to go unreported.”²⁰³

Therefore, the Unified Agenda could theoretically help ameliorate the problems caused by agency lock-in by enabling the general public to reach out to the agency about forthcoming rules before the finalization and publication of the proposed rule. However, this would require both

assiduous efforts to consider all relevant data and viewpoints, most participation in proposal development occurs at their specific invitation.”).

199. Regulatory Flexibility Act, Pub. L. No. 96-354, § 3(a), 94 Stat. 1164, 1169–70 (1980) (codified at 5 U.S.C. § 611). While the statute has been amended since then, judicial review of the decision to publish is still specifically excluded. 5 U.S.C. § 611(a)(1).

200. See CURTIS W. COPELAND, THE UNIFIED AGENDA: PROPOSALS FOR REFORM 97 (Mar. 10, 2015), <https://www.acus.gov/sites/default/files/documents/Unified%20Agenda%20Report%20031015.pdf> (describing how one senior agency employee “said her agency is asked about the schedule of their rules ‘all the time’ by congressional staff and others”).

201. E.g., Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326 (Apr. 6, 2020) (describing a temporary rule created under COVID-19 related legislation). Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES, <https://www.nytimes.com/article/coronavirus-timeline.html> (Mar. 17, 2021) (reporting that China announced the first death from COVID-19 in January 2020).

202. Jennifer Nou & Edward H. Stiglitz, *Strategic Rulemaking Disclosure*, 89 S. CAL. L. REV. 733, 751 (2016).

203. *Id.* at 776.

coordination on the part of the agency to truly respond to and accommodate the members of the public as well as an accurate and reliable United Agenda, which does not exist. In addition, the Uniform Agenda suffers from the same problem as an ANPR: the more detail the agency provides or has already determined, the easier it will be to offer feedback, but also the more likely the agency will have become psychologically locked into the current plan.²⁰⁴

The Unified Agenda therefore does not function as an effective means of allowing regulatory participation before the proposed rule from those traditionally excluded. The next Part of this Article describes what should be done instead.

III. THE SOLUTION TO THE PROBLEMS CAUSED BY AGENCY LOCK-IN: CONVERSATIONAL REGULATORY DISCUSSIONS (PRE REG)

Agency lock-in is a major concern and nothing has so far emerged as a complete solution. This is probably because, until now, there was no way to fully address these issues. Today, thanks to the modern Internet, we can. The solution is what this Article refers to here as a prepublication regulatory discussion, or pre reg.

Pre reg would be an online discussion taking place early in the rulemaking process, before the proposed rule is published. Like an ANPR, it could be done when the agency is only initially beginning to think about an issue and it would allow different interests—whoever was interested, not simply those selected by the agency—to provide feedback on different ideas and offer improvements, all while leaving ultimate control of the final decision on wording and choice of approach to the agency. This Part begins by describing pre reg in greater detail, both what the process would look like as well as some of the tenets that, together, would solve many of the concerns raised by lock-in.

It then explains how pre reg combines the benefits of each of the incomplete solutions mentioned earlier, helping address the different problems that lock-in causes. The final Part takes the opposite approach, and explains why the drawbacks of each partial solution would not apply to pre reg.

A. *An Overview of the Logistics of Pre Reg*

Because lock-in is an inextricable part of the notice-and-comment process—and must be if the very concept of notice and an opportunity to respond is to be maintained—the solution cannot come after publication of the proposed rule but must, like the other notice-and-comment extensions, occur before the rule is initially proposed. This could be accomplished with a broad community discussion before the rule is issued.

204. See HELLER, *supra* note 138, and accompanying text.

This discussion would take place entirely online and include anyone who wished to participate. It could be as simple as a web page with discussion threads started by the agency or participants. As discussed in the Part about benefits, bringing a broader range of the public in early would enable the agency to see a variety of solutions—and challenges to those solutions—before ever needing to publicly commit to a decision, and therefore begin the lock-in process.

By opening the doors of the discussion to all interested parties, agencies would open up a process that has traditionally relied heavily on networks and connections. Opening it up in this way allows broader access both geographically and professionally, beyond the local players the agency is most accustomed to dealing with.²⁰⁵ This, in turn, could help address some of the inherent and systematic biases in the current system.

Verifying the identities of participants and having them use their real names on the site would help minimize disruptive behavior and enable the discussion to more closely resemble the cooperative environment aimed for in negotiated rulemaking. Finally, because the point of the process is not only to provide the agency with options early in the process, but also to build off of the ideas of others and point out potential pitfalls, deadlines would be enforced regarding when initial posts and responses would be required, and the process would be closed to new participants before the conclusion to allow those taking part to get to know each other and work together.

The plan, as envisioned, is designed to allow those currently participating in the notice-and-comment process at the comment stage an opportunity to intervene earlier, when they would be more likely to impact the agency's chosen approach. The process could also be made even more broadly inclusive by pushing the agency to include individuals who would not normally participate in such a process. Each of these ideas is discussed in greater detail below.

1. *The First Tenet: An Open-Door to a Controlled Environment*

The first basic principle for pre reg is that the process should be open to all who wish to take part. In the current system, the agency is only in contact with a few select groups before drafting the initial version of the regulation.²⁰⁶ Even if the agency makes an effort to look for representatives of what it believes the various interests are who will be affected by the rule, those are still the individuals chosen by the agency.²⁰⁷ This process does not give the general public (those outside the agency sphere of influence who would not otherwise be

205. See Brandon & Carlitz, *supra* note 62, at 1426 (discussing the issues online rulemaking could solve for groups outside of Washington).

206. See Noveck, *supra* note 15, at 454 (explaining obstacles to widespread public participation).

207. See West, *supra* note 137, at 589 (“[M]ost participation in proposal development occurs at [the agency officials’] specific invitation.”).

contacted) the ability to weigh in. This becomes a particular concern as systemic racism (and other systemic inequalities) have an impact on the people and groups the agency reaches out to, even absent any malicious intent.²⁰⁸

Opening the door in this manner to the general public immediately eliminates one of the major problems of agency lock-in, that the rule is locked in before the broader public has been given an opportunity to provide feedback to the agency.

However, opening the process to the general public does not have to mean that the discussion would be an unmanageable free-for-all, akin to the unregulated comment section in an online article. Instead, the idea would be to allow anyone who wished to take part in the discussion to do so, but to have in place appropriate rules of conduct and to remove anyone violating those rules. Just as courtrooms (and agency hearings) have expected rules of behavior and those failing to observe the rules can be removed, so too would this discussion.²⁰⁹

This would be particularly important as the discussion was opened beyond attorneys and others who have been habituated to dealing with the agency and other formal settings. Even attorneys, who should understand proper courtroom behavior, are occasionally held in contempt or otherwise removed from a proceeding.²¹⁰

Doing so would not pose any free speech problems, since this would be a nonpublic forum, analogous to the discussion in a negotiated rulemaking or courthouse.²¹¹ The right to speak to the agency does not guarantee the right to scream at or otherwise berate the agency or any participants.²¹² It is always acceptable to remove someone causing problems from such circumscribed environments. This point has needed to be made in the formal rulemaking and agency hearing contexts as well.²¹³

208. See Feagin & Barnett, *supra* note 17 (showcasing the systemic nature of racism in America as it exists within and is perpetuated by institutions); see also AMERICAN BAR ASSOCIATION, *supra* note 18, at 8, 10 (juxtaposing the percentage of minorities in the legal profession with the general population to highlight the 9% disparity).

209. Behavioral requirements are addressed in Part IV.C.1.

210. See, e.g., *United States v. Bush*, No. CR 12-92, 2016 WL 491712, at *2 (W.D. Pa. Feb. 9, 2016) (enforcing criminal contempt in a case in which the court found that the attorney's "conduct far exceeded 'the limits of proper advocacy'").

211. *Verlo v. Martinez*, 820 F.3d 1113, 1142 (10th Cir. 2016) (citing numerous cases all holding that a "courtroom is a nonpublic forum").

212. Cf. DIANE RASMUSSEN NEAL, *SOCIAL MEDIA FOR ACADEMICS: A PRACTICAL GUIDE* 206 (2012) ("Developing comment moderation policies does not mean that the library is practicing censorship; the policies ensure that the library's social media presence is respectful and (mostly) on topic."). The rules for how to accomplish this are those discussed further in Part IV.C.1.

213. *Dixon*, *supra* note 97, at 427 ("[Presiding officers at hearings] can always have contumacious counsel ejected from the hearing room if they cannot be controlled.").

This would not require someone moderating every comment before it could be posted. Instead, when signing up, participants would simply need to acknowledge an understanding of these requirements. After that, a community reporting system would be effective in controlling behavior, as explained in Part IV.C.

2. *The Second Tenet: Participants Would Use Their Real Names in the Discussion*

The second basic principle is that to further encourage appropriate behavior, the names used in the forum should be individuals' real names rather than usernames that would be difficult to trace back to the true user. This would help add legitimacy to the arguments and information presented, because it would be possible for other members to check stated qualifications. It would, more importantly, provide a strong incentive for participants to behave appropriately.

The mass comments and spam comments that plague the traditional notice-and-comment process in high profile rulemakings caution against placing no barrier to participation.²¹⁴ Even employing any kind of registration, and thereby raising the bar to participation above zero, would likely be enough to head off a good deal of the spam.

As discussed further in Part IV.C.2, verifying identity during registration with credentials that effectively allow each person only one shot at registration, regardless of the number of IP addresses used or spoofed, would further prevent false commentors from participating. This would not be possible if only e-mails were used, even validated e-mail addresses. It would also prevent someone from reengaging with the system after removal. This protection could be easily accomplished by integrating the registration into other federal certification procedures, as is already recommended for government applications.

Identification information is already routinely collected in the current comment process,²¹⁵ and so most participants are already comfortable disclosing this information. While some agencies allow anonymous comments,²¹⁶ anonymity would not be expected or possible in a negotiated rulemaking, formal rulemaking, or informal discussion with the agency early in the process, situations to which this is intended to be more analogous than the traditional comment process.

214. *See infra* notes 284–289, and accompanying text (describing instances when allowing mass comments opened up the opportunity for “trolls” to undermine the comment process with uninformed or vulgar comments).

215. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-483, FEDERAL RULEMAKING SELECTED AGENCIES SHOULD CLEARLY COMMUNICATE PRACTICES ASSOCIATED WITH IDENTITY INFORMATION IN THE PUBLIC COMMENT PROCESS 16 (2019) (discussing various approaches agencies have taken to identifying commentors).

216. *Id.* at 18.

Being able to track the individual behind objectionable behavior and ensure they cannot return if removed will help the community better police itself, discourage behavior that would negatively affect someone's reputation, and discourage any organization from recruiting people simply to cause problems, since that would also hurt the reputation of the organization behind it.

3. *The Third Tenet: Enforceable Deadlines to Ensure a True Dialogue Occurs*

The final required component would be enforceable rolling deadlines. Registration by a certain date could allow a user to post an original idea (start a thread). Registration in an intermediate phase, some period after the initial deadline for starting threads, could allow the participants to respond but not start any original threads. Registration would then be entirely closed at some point before the conclusion of the process. This would ensure that individuals did not come in at the last minute to cause problems and that the participants were part of the process long enough to engage in a true back and forth discussion.

To ensure that there was indeed a discussion, rolling deadlines would also be required for the discussion threads. Deadlines would need to be in place to ensure that options were put forth early enough for discussion and debate. These deadlines would also need a method of enforcement. While an open door is necessary to invite broad participation, as discussed in the prior Part, this door need not be kept open indefinitely.

The posting deadlines are necessary to ensure that participants cannot game the system, as they can and do currently, by waiting to submit a comment until it is too late for anyone to respond to it.²¹⁷ Instead, pre reg would set an initial deadline for participants to post their original ideas. This would force all participants who wanted to offer options or approaches to do so early enough in the process that others would be able to respond. Preventing participants from posting additional threads after the initial deadline would create an incentive for participants to adhere to the set deadline.

Thereafter, to ensure a dialogue occurred, rather than the same game-playing by participants with any concerns, alternative solutions, or expansions of the original idea, rolling deadlines would be imposed. For instance, the agency could require participants to post a response within one week. This would make it impossible to game the system by waiting to respond to someone's objections until they would have no opportunity for rebuttal. Locking threads when no response had occurred within a time limit could effectively enforce this deadline, penalizing this failure to respond by ensuring that the message without the response remained the final word on the issue.

217. See Brandon & Carlitz, *supra* note 62, at 1446 (describing the process where comments are strategically held for review until closer to the end of the comment period to prevent such gaming).

Many threads would be expected to generate more than one response, so a response to every comment would not necessarily be required to keep the thread alive, but a complete failure to refute an objection would provide strong ammunition for the other side, which would be clear in the materials available to the agency when it determines the best course of action at the end of the process.

4. *Expansion Options to Further Broaden Participation in the Rulemaking Process*

The system as envisioned and described in the previous Parts is designed to enable those who would otherwise have been engaging with the traditional notice-and-comment process only during the public comment phase an opportunity to join in the conversation earlier. This purpose would not require any modification of the current notice requirement: publication in the Federal Register.²¹⁸

However, two additional changes would help open the discussion to a wider audience. First, broader notice would make it more likely that citizens would receive actual notice of the agency action and have the opportunity to participate. Second, creating a separate track or page in the discussion process with a limited word count could help simplify the discussion to enable participation by those who might traditionally be put off by the dense legalese used in many rulemaking publications.

a. *Broader Notice*

This first option would expand the universe of people aware that the agency action was occurring. As has been mentioned elsewhere, the current method of official notice of agency action—publication in the Federal Register—operates under the legal fiction that the Federal Register is a meaningful way to notify the general public of agency action.²¹⁹ The general population is not regularly reading the Federal Register or otherwise aware of agency action, even action that will profoundly influence aspects of their lives.²²⁰

218. 44 U.S.C. § 1507 (stating that publication in the Federal Register provides adequate “notice of the contents . . . to [any] person subject thereto or affected by it”).

219. Gwendolyn McKee, *Noticing Notice*, NOTICE & COMMENT (Aug. 3, 2020), <https://www.yalejreg.com/nc/noticing-notice-by-gwendolyn-mckee/>.

220. *E.g.*, Simplifying Meal Service and Monitoring Requirements in the National School Lunch and School Breakfast Programs, 85 Fed. Reg. 4,094 (Jan. 23, 2020). This rule as proposed would gut “Michelle Obama’s signature achievement . . .” Laura Reiley, *More Pizza, Fewer Vegetables: Trump Administration Further Undercuts Obama School-Lunch Rules*, WASH. POST (Jan. 17, 2020), <https://www.washingtonpost.com/business/2020/01/17/usda-proposes-changing-school-menus-allow-more-fries-pizza-fewer-vegetables-fruits-reversing-michelle-obama-effort/>.

To broaden the responses beyond those who would have previously participated in the comments, the agency could also make an effort to better broadcast notice of agency activity. Posting not only in the Federal Register but on social media and placing a prominent link to agency action (and the pre reg process itself) on the homepage of the participating agency²²¹ or other actions, could help ensure that new participants were included in the process.

b. Broader Target Audience

Bringing in additional people will do little good if they cannot meaningfully participate. In the method generally envisioned in this proposal, participants would still need to decipher the dense language used in many agency documents (including submissions to the agency). Creating a section of the pre reg website where word count was strictly limited (such as to 500 or 1000 words per post) would force those participating in the discussion to drill down to their core points, translating them into something more closely resembling plain English. This would allow those without backgrounds in agency legal work an opportunity to be part of the discussion, providing a voice that is often not part of meaningful agency dialogue.²²²

B. Pre Reg Combines the Benefits of Each of the Incomplete Solutions

Pre reg combines the benefits of each of the incomplete solutions discussed in Part II, thereby effectively addressing each of the problems raised by agency lock-in.

1. Formal Rulemaking

Formal rulemaking helps prevent agency lock-in because (1) the design of the process eliminates the structural lock-in concerns and (2) the information the agency is using at the end of the process to determine the final rule benefits from the potential for cross-examination during the hearing.²²³ This process allows agencies to discover and fix weaknesses before the rule is finalized.

Similarly, pre reg occurs before publication of the proposed rule, and

221. Transcript of Nuclear Regulatory Commission Meeting with Advisory Committee on Reactor Safeguards (ACRS) 71–72 (1996), <https://www.nrc.gov/reading-rm/doc-collections/commission/tr/1996/19961206a.pdf> (Testimony of William Shack) (describing his disappointment at not seeing a link to RuleNet on the Nuclear Regulatory Commission's (NRC's) webpage while the experiment was ongoing).

222. See Nina A. Mendelson, *Should Mass Comments Count?*, 2 MICH. J. ENV'T. & ADMIN. L. 173, 173–74 (2012) (arguing for greater consideration of policy-based mass comments “since agencies must often answer value-laden questions”).

223. For the discussion of formal rulemaking, see *supra* Part II.A.

therefore, before structural lock-in occurs. Pre reg also allows parties to point out potential problems with solutions proposed by other parties, problems to which the first party can then respond. This can therefore identify problems, and allow responses to them, just as cross-examination in a traditional hearing would do.

Formal rulemaking also leaves entire control of the wording of the rule with the agency because it is the agency that determines what the final rule should be after going through all the evidence obtained from the hearing.²²⁴ Similarly, in pre reg it is the agency that decides what the proposed (locked in) rule should be after reviewing all the evidence from the pre reg process. Finally, both methods allow any interested party to participate. Pre reg goes even further in making the process accessible due to the online nature of the process, which allows more people to participate.

2. *Advanced Notices of Proposed Rulemaking*

Like ANPRs,²²⁵ pre reg takes place before publication of the proposed rule and therefore before structural lock-in has occurred. Pre reg, like ANPRs also allows the general public to contribute input—anyone who wants to can join the process. This helps prevent the exclusivity issues possible in negotiated rulemaking²²⁶ and the representation concerns in both negotiated rulemaking and formal rulemaking.²²⁷

3. *Negotiated Rulemaking*

Negotiated Rulemaking has a number of possible benefits. Because it takes place before publication of the proposed rule, the parties can only present the most important arguments. This can then let the other side more easily realize where there is the possibility of compromise in areas of greater concern to one side than the other and find solutions that would be preferable to all parties.²²⁸

Indeed, the most impressive possibility with negotiated rulemaking is to use the opportunity for dialogue to generate a collaborative environment

224. *See generally Formal Rulemaking*, JUSTIA (Apr. 2018) <https://www.justia.com/administrative-law/rulemaking-writing-agency-regulations/formal-rulemaking/> (outlining the formal rulemaking process).

225. For the discussion of ANPRs, *see supra* Part II.B.1.

226. *See supra* Part II.B.2.c.

227. *See supra* Parts II.A.3 & II.B.2.c.

228. *See Harter, supra* note 144, at 29–30 (proposing that without this dialogue an agency might respond to complaints from industry that quick compliance with environmental standards would be too costly by keeping the timeframe but relaxing the standards, when in fact both the industry and the public might prefer the higher standards with a longer lead time).

where solutions are refined in an iterative process as the participants point out additional problems.

An adversarial process, like formal rulemaking, is effective at identifying potential areas of weakness and defending those areas, but it is true collaboration that enables the parties to come up with even better solutions than any would have originally.

Pre reg replicates this opportunity. When responding to comments, parties need not only point out weaknesses; they can also offer slightly different and potentially improved versions of an initial plan. They are further likely to focus their effort on the issues of greatest importance, not only helping the agency to better understand the true concerns of the regulated parties but helping the parties understand each other better.

4. *The Unified Agenda*

The primary benefit of the Unified Agenda is that it can potentially put the broader public on notice that the agency is considering action in a particular area, thus inviting the public to attempt to contact the agency to share views early in the process.²²⁹ In pre reg the public is similarly on notice that the agency is considering acting in a particular area and can take part in the process early on before the agency is locked in.

C. *Pre Reg Avoids the Drawbacks of Each of the Incomplete Solutions*

What distinguishes pre reg, in particular, is that the proposal also avoids each of the problems the incomplete solutions present.

1. *Formal Rulemaking*

Formal rulemaking has the potential to provide the agency with very detailed information since any party can potentially cross-examine any other party.²³⁰ However, this means that participants must also be present for the duration of the process.²³¹ For many organizations, this is not feasible due to cost considerations. The time and cost of the process have led to near unanimous agreement among both scholars and practitioners that formal rulemaking is not a viable option in real life.

Pre reg retains the primary benefit of formal rulemaking—cross-

229. See Noveck, *supra* note 15, at 454 (discussing the traditional method through which agencies gather information before publication of a rule).

230. For a general discussion of the drawbacks of formal rulemaking, see *supra* Part II.A.3.

231. See Dixon, *supra* note 97, at 393 (pointing out that relevant parties must be present during cross-examination).

examination—while eliminating virtually all of the downsides. Unlike formal rulemaking, pre reg can be accomplished entirely in written form. This eliminates the need for specialized trial lawyers to participate in the process, making it more accessible to organizations that lack the funds to hire expensive specialists. The process is also more efficient. Oral cross-examination, with the required question and answer format, is not the most efficient way to get to the heart of an argument.²³² Pre reg allows objections to be stated and responded to as efficient points, rather than through a series of questions in a hearing. And pre reg does not force parties into groups with individuals they may or may not actually agree with on all relevant points.²³³

Even when beliefs are similar, the willingness to compromise or evaluate other solutions will not necessarily be the same. By allowing multiple parties to represent a single general view, it is more likely that some of the parties will be willing to seek compromise or other alternatives, even if others continue to cling stubbornly to the group's ideal solution.

Pre reg also reduces the time required due to several efficiencies. People can read faster than they can speak, so even if the entirety of the formal rulemaking process were reproduced in written form, it would still be more efficient for the participants to read through the material than to listen to the material.²³⁴ And because participants in pre reg can submit single coherent arguments, rather than the back and forth of a cross-examination, the material under review could be less voluminous than the equivalent content from a hearing.

The agency can also set a firm limit on the time allotted. Unlike a hearing, which should go on as long as necessary for the points to be made on both sides,²³⁵ and which the agency can only partially control by trying to group like-minded parties or restrict the time allotted for cross,²³⁶ pre reg can proceed on a preset schedule, where initial arguments must be presented by a certain date and any comments responded to within a certain time limit.

Another efficiency of pre reg is everyone does not need to be in the same room at the same time. The potentially asynchronous nature of pre reg does not merely reduce the time spent by all participants in the hearing; it enables participants to take part in the hearing when it is convenient for them, even

232. *Id.* at 419–20.

233. Although, the parties would be free to form their own voluntary groups.

234. MARK SEIDENBERG, LANGUAGE AT THE SPEED OF SIGHT: HOW WE READ, WHY SO MANY CAN'T, AND WHAT CAN BE DONE ABOUT IT 61 (2017) (comparing an average speaking rate of 120–180 words per minute with an average “skilled reading rate” of 240–300 words per minute).

235. *Cf.* GOULDEN, *supra* note 111, at 185.

236. *See* Dixon, *supra* note 97, at 400 (1982) (arguing that hearings could be run efficiently and successfully by giving the parties a limited period of time for cross-examination).

if the ideal time is not during standard business hours, saving on travel costs. Not requiring the participants to be physically located in one location for weeks or even months of testimony saves the organizations money on travel expenses and minimizes the life burdens faced by the participants.

Formal rulemaking also does not help to address the psychological lock-in faced by the agency; it even exacerbates. Not only does the agency need to publish a proposed rule, with the attendant psychological lock-in consequences, it must then participate in a prolonged hearing defending the decisions made in that proposed rule.

Pre reg avoids this issue entirely. An agency need not take a stand on any issue before beginning the process. Instead, it can allow the participants to set forth the first round of ideas and ask questions, potentially further refining the ideas.

2. *Advanced Notices of Proposed Rulemaking*

The greatest problem with ANPRs is the catch-22 inherent in the system. If the agency merely requests thoughts on a general topic, the agency is less likely to be psychologically locked into a potential regulation. But at the same time, the public will have a difficult time pointing out problems without a presented solution. This may work well for generating basic ideas, but it cannot move beyond that to the types of comments submitted in a traditional comment period, at which point the agency is locked in.

On the other hand, if the agency offers the type of detailed possible regulation it would traditionally have published as a proposed regulation, the public will more easily be able to spot problems or present alternative solutions, but the agency has begun to lock itself into the proposal psychologically.

Pre reg avoids this by not requiring the agency to start the discussion. Instead, the agency can begin with a completely open mind and merely ask for suggestions, running all submissions through potential rounds of comments and refining the ideas as needed, without having to decide on one particular course of action. This is possible because it is easy for the agency to institute time limitations and allow later commenting only from those who previously participated without having to worry about potentially getting the final rule overturned because this is all occurring before the official APA process for the regulation has begun.²³⁷

237. *But see* Beck, stating that:

Material considered in the formulation of an ANPRM *may* form the beginning of a rulemaking record. If an ANPRM is followed by a proposed and final rule on the same subject, it would seem logical that the material considered in formulating the ANPRM would constitute part of the rulemaking record.

LELAND E. BECK, ADMIN. CONF. OF THE U.S., AGENCY PRACTICES AND JUDICIAL REVIEW OF ADMINISTRATIVE RECORDS IN INFORMAL RULEMAKING 15 n.74 (May 14,

The second problem with ANPRs, and comments in general, is that they function as a one-way street. The agency publishes materials and members of the public comment on those materials. There is no opportunity to build off of others' comments or to respond to them (since interested parties can specifically wait until the last moment to submit comments).²³⁸

Pre reg solves this. Not only can the agency ask clarifying questions, something not possible with the traditional comment process, but commentors can build off of the submissions of others. There can thus be a true dialogue.

Pre reg is not merely a more technically savvy version of an ANPR; it is a fundamental rethinking of how best to achieve the public participation that is so widely acknowledged as one of the great intentions and accomplishments of the APA.

3. *Negotiated Rulemaking*

Like formal rulemaking, negotiated rulemaking requires all parties to be in the same physical location for an extended period of time. For rules with a national scope, not only does this require the time of those involved during the meetings, but also the time and expense of traveling to a single location to take part in the meetings. Moving the discussion online eliminates the cost of travel and reduces the total time required.²³⁹

Formal rulemaking and negotiated rulemaking also suffer from increasing complications as the group size grows larger, with an increased time requirement and, in negotiated rulemaking, additional complications getting complete agreement on any plan.²⁴⁰

In contrast, in pre reg the time requirement does not inherently scale with the number of participants. Further, because unanimity is not required, those parties willing to compromise will be more likely to see their concerns reflected in the eventual proposed rule,²⁴¹ but a failure on the part

2013). Even if the material were voluntarily included, the critical logical progression is that from the proposed to the final rule.

238. Brandon & Carlitz, *supra* note 62, at 1446.

239. While it may initially appear that a good solution would be to move negotiated rulemaking online, negotiated rulemaking likely benefits tremendously from physical proximity. Because the group must come to a consensus the rapport benefits from in-person exchanges are likely a critical component of the process. Pre reg, in contrast, does not require agreement from the participants, as the final decision remains entirely with the agency.

240. See Dixon, *supra* note 97, at 393 (stating that groups with similar interests must select one representative for purpose of cross-examination); see also USDA, WHAT IS NEGOTIATED RULEMAKING? 4–5 <https://www.ams.usda.gov/sites/default/files/media/Feb82011IntrotoNR.pdf> (stating that it may be difficult to reach consensus).

241. The set-up also helps ensure that the greater variety of people makes it more likely

of others to compromise will not prevent potential negotiations from continuing among other willing participants.

The lack of restrictions on participation also means that the agency does not control who will be allowed to participate; any interested party can make their views known. This prevents entrenched power connections from dictating the parties allowed in at the early stages of policy creation. Pre reg lets additional people, without D.C. connections, share their views as well.

Finally, in negotiated rulemaking, the agency is merely one of the parties. As such, the agency, like all other parties, must agree at the end that it can “live with” the proposed rule that the group has adopted.²⁴² This means that the proposed (and locked in) rule is not necessarily one that the agency would have chosen on its own, after learning everything it did in the negotiations.²⁴³ In pre reg, in contrast, the final decision and control remain entirely with the agency. It is the agency alone, after reviewing all the material produced during the pre reg session, that determines what the proposed rule should be.

4. *The Unified Agenda*

Many rules are simply never included in the Unified Agenda, particularly rules that seem politically problematic. And there is nothing a member of the public can do about it. Even for those rules published in the Unified Agenda, it will be very difficult for most parties without a preexisting network of connections to be able to actually talk to someone at the agency, learn what is considering, and offer meaningful feedback.

The frequency with which proposed rules of consequence are published without a meaningful opportunity for feedback from the general public is part of the driving force behind pre reg.

Additionally, even in a best-case scenario, the party is only interacting with the agency, and responding to the current views of the agency, much in the same way as an ANPR. This does not offer the opportunity to build on the ideas of others to create an even better idea before lock-in occurs. Pre reg, in contrast, not only publicly informs the entire country that a potential regulation is being considered but also enables any interested person to provide this critical feedback to the agency, and it does so in a way where problems can be identified quickly and solutions improved incrementally. With no need for political connections or concerns about premature agency lock-in, a party who has never before interacted with an agency can still

that individuals will be included who are willing to work toward a compromise.

242. See Selmi, *supra* note 162, at 441.

243. See generally USDA, WHAT IS NEGOTIATED RULEMAKING?, *supra* note 240, at 1 (outlining the negotiated rulemaking process).

engage in meaningful dialogue and offer feedback in time to make a difference in the proposed regulation.

IV. NOW IS FINALLY THE TIME TO USE THE INTERNET TO FUNDAMENTALLY ADVANCE AGENCY RULEMAKING

The Internet was recognized very early on as providing unique opportunities for interactive two-way communication between agencies and the public. There were even experiments early on to use the Internet in this manner.²⁴⁴ And yet, nearly twenty-five years after one of these early experiments, the rulemaking process is virtually identical to the process from the pre-Internet days.²⁴⁵

So, why is this the time to finally take greater advantage of the Internet's capabilities to make this supposedly democratic process more democratic? The original Internet did not have the technological capacity to carry it out. Now we not only have the technology, both for the discussion itself as well as the data networks to carry it, but we better understand what is necessary to contain online behavior. Internet penetration in the general population is also far greater, making this a significantly more democratic process than it would have been early on, when the Internet was accessible to only a small portion of the population.

This Part begins by describing the high hopes scholars had for the Internet, including one early attempt at something similar to pre reg. It then describes how little has actually changed in the rulemaking process, why we finally have the technological and societal know-how to pull this off, and finally why it makes sense to experiment with online rulemaking in a way that will not jeopardize the final rule coming out of that process.

A. *The Early Expectations for Agency Rulemaking on the Internet*

The potential impact the Internet could have on administrative law was recognized early on.²⁴⁶

1. *The Internet Was Supposed to Completely Revolutionize Rulemaking*

In the early days of the Internet, the sky was the limit, particularly very early on, when Internet use was doubling annually.²⁴⁷ Agencies, it was thought,

244. See *infra* Part IV.A.2.

245. See *infra* Part IV.B.

246. See Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 279–80 (1998) (outlining the ways the author believes the Internet could be utilized in rulemaking).

247. See STEPHANIE RICKER SCHULTE, *CACHED: DECODING THE INTERNET IN*

would take advantage of this technology by providing “on-line worksheets and tutorials that help [people] interpret the law . . . as it applies to them.”²⁴⁸

Agencies would also work with the public in crafting rules through online dialogues.²⁴⁹ They would finally start translating agency action into plain English to enable average citizens to take part in agency deliberation.²⁵⁰ And they would “hold question and answer sessions” online to respond to questions from the public to learn “whether the agency is relying on inaccurate social assumptions.”²⁵¹ Agencies could even conduct “electronic town [hall] meetings.”²⁵² These interactions between citizens and the agency would increase trust between the two, leading to greater citizen buy-in, even for unfavorable agency action.²⁵³

The Federal Register itself would be reimagined and organized by topic. Agencies would then publish proposed action under the appropriate topic and restructure the proposal “so as to identify discrete issues on which comments are to be received, and the database would be organized accordingly.”²⁵⁴ These agency questions could be set up as multiple choice or yes/no answers, and the public commentators would vote on each discrete issue.²⁵⁵ As comments come in, the agency would rethink positions and pose new questions, creating a running dialogue.²⁵⁶

2. *RuleNet: An Early Internet Experiment in Rulemaking*

It was not merely talk. Some agencies experimented with online changes to the rulemaking process. The most notable example was RuleNet, a project of

GLOBAL POPULAR CULTURE 87 (2013) (noting that Internet use doubled between 1995 and 1996 and nearly again by 1997).

248. Johnson, *supra* note 246, at 301.

249. *E.g.*, Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 899–900 (2006) (describing how the agency would benefit from converting traditional online comments to a dialogue).

250. *See* Johnson, *supra* note 246, at 304 (arguing that one of the strengths of the Internet is that it is a “democratizing force”).

251. *Id.*

252. *See* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 189 (1997). *See also* Brandon & Carlitz, *supra* note 62, at 1469 (explaining the potential benefits of an electronic town hall meeting).

253. *See* Johnson, *supra* note 246, at 304 (“An informed public can educate the agency as much as the agency educates the public.”); *see also* Rossi, *supra* note 252, at 187 (stating that when citizens participate, the agency can more easily rationalize its decisions than without public participation).

254. Henry H. Perritt, Jr., *The Electronic Agency and the Traditional Paradigms of Administrative Law*, 44 ADMIN. L. REV. 79, 84 (1992).

255. *Id.*

256. *Id.*

the Nuclear Regulatory Commission (NRC) that took place in 1996.²⁵⁷ RuleNet was an online forum for discussing a potential regulation changing the requirements for fire protection at nuclear power plants.²⁵⁸ The forum was conducted while the rule was still in the prepublication stage.²⁵⁹

In the Federal Register announcement of the project, the agency hinted at a concern about potential lock-in.²⁶⁰ And the project itself had some resemblance to pre reg. It had threaded discussions, and the agency even listed a few general questions it had to start the discussion.²⁶¹ However, the experiment was regarded as having mixed results.²⁶² This could be because the NRC was likely ahead of the technology of its time in this attempt. The Internet in 1996 was a very different world from today and was noticeably different from even a couple years later.²⁶³ Pages were clunky and each RuleNet comment was displayed on its own page.²⁶⁴ It was therefore necessary to click a link to the next comment to travel within a given thread.

Likely in response to these technological limitations, respondents also had the option of having comments emailed to them and responding by email.²⁶⁵

257. RuleNet Communication Program; Fire Protection Regulations, 60 Fed. Reg. 57,370 (Nov. 15, 1995) (to be codified at 10 C.F.R. pt. 50).

258. Johnson, *supra* note 246, at 321–22.

259. RuleNet Communication Program; Fire Protection Regulations, 60 Fed. Reg. at 57,371.

260. 60 Fed. Reg. at 57,371 states that:

In the classic model of APA rulemaking, the agency . . . issues a proposed rule. [This creates] a risk that the agency may be too wedded to the proposed approach to be able to rethink the issue from the ground up if a wholly new proposal is submitted by a commenter.

Id. at 57,370–71.

261. Although it appears to have been intended to be more analogous to a regulatory negotiation session. Michele Ferenz & Colin Rule, *RuleNet: An Experiment in Online Consensus Building*, in THE CONSENSUS BUILDING HANDBOOK 887, 896 (Lawrence Susskind et al. eds., 1999) (“RuleNet’s aspirations were more modest: a ‘baby step’ as Olmstead called it, in the direction of revolutionizing negotiated rulemaking through the introduction of new, computer-based collaborative tools.”).

262. *Id.* at 895.

263. *Id.* at 896 (“[W]hat is available only two years later makes the NetForum software used in 1996 look very primitive.”). Improvements in technology are discussed further in Part IV.C.2.

264. While the site itself does not appear to have been preserved by the agency, archives can be found on the Wayback Machine. Wade Larson, *Using the Web as a Regulatory*, RULENET ELECTRONIC FORUM (Jan. 17, 1996, 5:10 PM), https://web.archive.org/web/19980520023750/http://nssc.llnl.gov/RuleNet/Discussions/RuleNet_Commons/0026.html. This would have been particularly problematic at a time when each Internet page took thirty seconds to load. Farhad Manjoo, *Jurassic Web: The Internet of 1996 is Almost Unrecognizable Compared with What We Have Today*, SLATE (Feb. 24, 2009), <https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html>.

265. Ferenz & Rule, *supra* note 261, at 886.

These responses were then added to the thread.²⁶⁶ In reality, therefore, for many participants, RuleNet was probably closer to a tediously long email conversation than a functional online discussion.

But perhaps the most significant problem was simply that “[t]he subject of RuleNet was such that the lay public had neither the expertise nor the interest to contribute. Instead, its target audience was the usual cast of highly trained specialists.”²⁶⁷ In effect, the one agency apparently willing to take action in an attempt to avoid lock-in was an agency that actually knew all the people interested in contributing, and that pool was small enough that it could already interact and obtain feedback from all of them. Pre reg is not for every situation. In situations where the agency is already conversant with all the interested parties, it can already obtain their feedback informally before the initial rule is promulgated. This type of information gathering does not have the benefit of providing feedback or probing holes in arguments, but with a sufficiently small group that could still be done informally.

An agency would have a good idea whether a particular regulation or problem would be a good candidate for such a process based on the types of comments submitted to the agency in the notice-and-comment sessions for prior rules. If these comments have all been from those the agency was in contact with from the beginning, relatively little is to be gained. In contrast, if new voices are heard from only in the traditional comment period, that would indicate that the current methods are not effectively reaching out to all interested parties. Using the comments previously received (and common sense on how controversial a proposal is likely to be) would help the agency determine whether, like the NRC, it is effectively only working with “the usual cast of highly trained specialists.”²⁶⁸ This method of determining the likelihood of additional outside engagement does not necessarily involve an affirmative attempt to bring people into the discussion who would not otherwise have wanted to be there; it merely opens the door to those who do want to be part of the discussion.

This does not mean that the agency could not go beyond that in search of a more inclusive policy goal. That would involve affirmative outreach by that agency to groups that did not normally participate during the comment period but could potentially be affected. This would indeed be a laudable act, but even merely allowing those who have been commenting but not commenting at the right time a chance to come to the table earlier would be beneficial and is the primary aim of pre reg.

266. *Id.* at 887.

267. *Id.* at 896.

268. *Id.*

B. The Actual Impact of the Internet, So Far, on Rulemaking

After all the fanfare, what has actually changed since the introduction of the Internet?

The Federal Register and the Code of Federal Regulations moved online very early, in 1994 and 1995,²⁶⁹ and have been online longer than RuleNet—since June 8, 1994. Moving these information sources online was called in 2004 both “an extraordinary achievement and a necessary precursor to enhancing participation.”²⁷⁰ While today it seems hardly noteworthy that important changes by government agencies would be available online, this was nevertheless a dramatic change in accessibility.

The Federal Register, the official form of notice for agency action since the 1930s,²⁷¹ was virtually inaccessible to the average citizen for most of its history. Today there are major questions about the extent to which the Federal Register provides effective actual notice of important agency action,²⁷² but there is no doubt that online availability is light-years ahead of the previous format, in which individuals would need to find a library housing a physical copy of the Federal Register, travel to that location, and know where in the volume to look.²⁷³

The significantly increased access offered by the Internet made it possible for far more people to keep track of agency action. In practice, however, administrative action was, and continues to be, monitored only by a select group of attorneys and organizations.

The biggest change the Internet has brought to rulemaking is the significant increase in the number of comments being submitted to high profile rulemakings.²⁷⁴ This is due to the shift allowing comments to be submitted

269. OFF. OF THE FED. REG., NAT'L ARCHIVES & RECORDS ADMIN., A BRIEF HISTORY COMMEMORATING THE 70TH ANNIVERSARY OF THE PUBLICATION OF THE FIRST ISSUE OF THE FEDERAL REGISTER 15 (2006) <https://www.archives.gov/files/federal-register/the-federal-register/history.pdf>. The Federal Register was moved to a revamped website, federalregister.gov, in 2010. See Tom Lee, *Meet the New Federal Register*, SUNLIGHT FOUNDATION (July 26, 2010, 11:23 PM), <https://sunlightfoundation.com/2010/07/26/meet-the-new-federal-register/> (explaining what the Federal Register is and why its move to the Internet is a positive development).

270. Noveck, *supra* note 15, at 470 n.182.

271. OFF. OF THE FED. REG., *supra* note 269, at 2.

272. McKee, *supra* note 219.

273. *Cf.* Former Emps. of Bass Enter. Prod. Co. v. United States, 688 F. Supp. 625, 628 (Ct. Int'l Trade 1988) (“Plaintiffs state that they live in an area of west Texas where there are two law libraries, one county library, and one junior college with a library, but that none of the four libraries subscribe to the Federal Register.”).

274. Such as the net neutrality rulemaking in 2017, which received nearly twenty-two

online as opposed to having to mail in a physical letter. And even this innovation was slow to arrive. When agencies initially began accepting comments by e-mail, the agency would print out a physical copy of each e-mail to review it.²⁷⁵ Much of the final transition to online action was facilitated by the creation of a general website for agency comments—[regulations.gov](https://www.regulations.gov).²⁷⁶

One change that has not and will not be made to the rulemaking process is some sort of submission deadline for initial comments in order to allow responses. This will not be done because agencies would be concerned that excluding even a single initial comment in the second round when replies were expected could result in the final rule being overturned.²⁷⁷

Since there would be no effective way to enforce a submission deadline, the same entities currently submitting comments right before the deadline would instead submit them during the response phase, preventing anyone from effectively replying to them. This would hurt only those choosing to play by the agency's rules, who would then be the only ones providing comments that could be responded to.

C. *Why Things Are Different Now*

The Internet is riddled with stories of ideas that failed simply because they appeared before their time. Blockbuster, for instance, ventured into streaming video in 2000,²⁷⁸ seven years before Netflix tried the same.²⁷⁹ But

million comments. Vanessa Duguay, *Views or Votes: The Challenge of Mass Comments in Rulemaking*, 26 GEO. MASON L. REV. 625, 642 (2018).

275. Shulman states that:

[A]ll of the comments . . . were printed on paper (the legal record at EPA) and reportedly sorted by the shape of the words on the page by a team of 15 staffers making piles. When distinctive comments were discovered, they were scanned in for inclusion as a PDF in the EPA's E-Docket system.

Stuart W. Shulman, *The Case Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 POL'Y & INTERNET 23, 46 (2009).

276. *About, REGULATIONS.GOV*, <https://beta.regulations.gov/about> (last visited May 4, 2021).

277. This became a major issue during the net neutrality rulemaking in 2017. Individuals whose identities had been used without their permission asked the Federal Communications Commission (FCC) to remove the fake comments, but the agency refused to do so, claiming that doing so could risk having the final result overturned on appeal. Letter from G. Patrick Webre, Acting Chief, Consumer & Governmental Affairs Bureau, Federal Communications Commission to Karl Bode, DSL Reports (July 10, 2017), <https://assets.documentcloud.org/documents/3891550/FCC.pdf> (noting that deleting comments could undermine the FCC's ability to respond to all significant issues raised during rulemaking).

278. David Lieberman, *Blockbuster to Offer Movies Via DSL 20-Year Deal with Enron; Service Could Rival In-Store Rentals*, USA TODAY MONEY (July 20, 2000).

279. Miguel Helft, *Netflix to Deliver Movies to the PC*, N.Y. TIMES (Jan. 16, 2007),

for various reasons, including last mile connectivity and a reluctance on the part of movie studios to license movies for streaming, the Internet of 2000 was not ready for video streaming.²⁸⁰ That does not mean the idea itself was wrong—history has proven otherwise.²⁸¹ It just came too early.

So it was with RuleNet.²⁸² The idea was not wrong. But we did not have the same understanding of how individuals behave online or the same technological capabilities that we do now.²⁸³ In short, we now know what to do and we have the technology to do it, as this Part explains, so we should take advantage of it to solve a problem that has bedeviled the rulemaking process for years.

1. *We Have a Better Understanding of Online Culture and How to Police It*

Just as the psychological causes of lock-in seem to be due to virtually immutable human characteristics, so does the certainty that some percentage of the people online will be jerks. Trolling was already a named phenomenon by 1996,²⁸⁴ the year RuleNet was launched.

And precautions were built into RuleNet. An elaborate filtering system was set up to ensure a “courteous and professional” tone.²⁸⁵ And this was

<https://www.nytimes.com/2007/01/16/technology/16netflix.html#:~:text=Netflix%20is%20introducing%20a%20service,not%20retained%20in%20computer%20memory.>

280. See Gary Gentile, Enron, *Blockbuster End Their Movies-On-Demand Pact*, ST. LOUIS POST-DISPATCH (Mo.), Mar. 13, 2001, at C9 (relating the prediction of a consulting firm that video on demand would not become widespread for another few years).

281. See Steven Zeitchik, *Netflix Adds a Whopping 16 Million Subscribers Worldwide as Coronavirus Keeps People Home*, WASH. POST (Apr. 21, 2020, 7:02 PM), <https://www.washingtonpost.com/business/2020/04/21/netflix-adds-whopping-16-million-subscribers-worldwide-coronavirus-keeps-people-home/> (noting the surge of Netflix users during the 2020 global pandemic).

282. NRC ran RuleNet beginning November 20, 1995 and replaced it approximately a year later with LSSNet (Licensing Support System). See RuleNet Communication Program; Fire Protection Regulations, 60 Fed. Reg. 57,370, 57,370 (Nov. 15, 1995) (to be codified at 10 C.F.R. pt. 50) (announcing the launch of RuleNet on November 20, 1995); LSSNet Communication Program: Licensing Support System Regulations, 61 Fed. Reg. 59,031, 59,031 (proposed Nov. 20, 1996) (to be codified at 10 C.F.R. pt. 2) (announcing the launch of LSSNet on November 2, 1996). The NRC stated the RuleNet “represented a further step toward melding early public comment . . . with communications technology[.]” LSS Net Communication Program, 61 Fed. Reg. 59,031.

283. LSS Net Communication Program, 61 Fed. Reg. 59,031, 59,032 (“The NRC fully expects that all participants will recognize that certain norms of civility will be observed. (In the event that a participant’s conduct [required their removal from the discussion, they could still submit comments] but it seems unlikely that this issue would ever arise.)”).

284. WHITNEY PHILLIPS, THIS IS WHY WE CAN’T HAVE NICE THINGS: MAPPING THE RELATIONSHIP BETWEEN ONLINE TROLLING AND MAINSTREAM CULTURE 15–16 (2015).

285. Ferenz & Rule state the following:

with the relatively restricted group of individuals capable of participating in RuleNet,²⁸⁶ the “highly trained specialists.”²⁸⁷ Individuals already used to interacting with the agency on a regular basis would be expected to have a better understanding of the appropriate behavior in this type of situation than a randomly selected member of a typical online community.

Opening up the rulemaking process to enable broader community participation would also therefore open the door to participation by individuals with less experience in the type of formal conversation typical of agency interactions.²⁸⁸ Some flavor of this can be seen in the comments submitted to agency rulemakings. A recent Senate report, for instance, noted that comments to the Federal Communications Commission have included “[t]he ‘F-Word’ . . . one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language” more than 23,000 times.²⁸⁹

But, as the Internet has grown, and negative behavior online has followed, so has our understanding of what is necessary to prevent it from

When a comment was received from a participant during a real time chat session, it immediately went through . . . a ‘Bozo filter,’ that checked it for certain words. The postings that cleared the automatic filtering were forwarded to the moderators, who acted as the final line of defense Although there was some grumbling about First Amendment rights, participants generally agree that the filtering mechanism was very successful

Ferenz & Rule, *supra* note 261, at 891.

286. *But see* Johnson, *supra* note 246, at 321–24 (1998) (discussing aspects of RuleNet that were meant to increase accessibility to not only industry professionals, but citizens with little to no experience either with rulemaking or nuclear energy).

287. Ferenz & Rule, *supra* note 261, at 896.

288. Creating public accessibility to the rulemaking progress has been a long process, and not without difficulty. *See* Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, 1 I/S: J. L. & POL’Y, 33, 40–46 (2004) (discussing aspects of digitizing rulemaking which would lead to increased citizen engagement and accessibility); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 952–55 (2005) (analyzing evidence which suggests that efforts by the federal government to improve citizen access through the creation of Regulations.gov had no substantial impact on public participation in rulemaking). *See generally* Cary Coglianese, *Enhancing Public Access to Online Rulemaking Information*, 2 MICH. J. ENV’T & ADMIN. L. 1 (2012) (providing extensive recommendations for increasing public access and engagement in the rulemaking process).

289. UNITED STATES SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS 32–33 (2019) (internal quotation marks omitted) (quoting *In re Complaints Against Various Broad. Licenses Regarding the Airing of the “Golden Globe Awards” Program*, 19 F.C.C. Rcd. 4975, 4979 (2004)). The complaint quoted was the one in which the FCC had “sanctioned NBC for a single use of the word” during a live broadcast. *Id.* at 32.

happening.²⁹⁰ “This is a solved problem.”²⁹¹ We know what to do, but that does not always mean it is done. This is partly because the solution requires humans to be part of the discussion, both to moderate behavior and to enforce rule violations.²⁹²

This behavioral control starts with a community policy that is ideally, “short, written in plain language, easily accessible, and phrased in flexible terms so people aren’t trying to nitpick the details of the rules when they break them.”²⁹³ Next, are administrators²⁹⁴ with “the power to delete comments and ban users.”²⁹⁵ Because the administrators cannot be everywhere,²⁹⁶ users must also be able to flag posts that violate the guidelines to bring them to the attention of the administrator.²⁹⁷

Finally, those participating need “accountable identities” including, “if appropriate . . . real names.”²⁹⁸ While there are many instances online where real names are not important, they would be of particular benefit in pre reg. First, in the situations to which this is most analogous, formal rulemaking and negotiated rulemaking, all individuals taking part are using their real names. Those with relationships with the agency would likely continue to do so, making it important that the additional parties joining the

290. Brian X. Chen, *The Internet Trolls Have Won. Sorry, There’s Not Much You Can Do*, N.Y. TIMES (Aug. 8, 2018), at B7 (explaining that curtailing negative behavior by a specific user can only be done by those in charge of the forum).

291. Anil Dash, *If Your Website’s Full of Assholes, It’s Your Fault*, ANIL DASH (July 20, 2011), http://anildash.com/2011/07/20/if_your_websites_full_of_assholes_its_your_fault-2/.

292. *Id.*

293. *Id.*

294. The original site uses the term moderator, which could be interpreted someone who is actively taking part in the discussion. *Id.* While that would be possible, and the agency may well have clarifying questions to ask, the person enforcing violations need not be commenting personally in the forum. *Id.*

295. *Id.*

296. The human element of behavior regulation has been an issue since RuleNet’s initial foray into electronic rulemaking. One of the more recent efforts, the Regulation Room, was created by the Cornell eRulemaking Initiative in 2013 and aimed to create a space for effective civic engagement that is properly supported by administrators. See Cynthia R. Farina, et al., *Regulation Room: Getting “Move, Better” Civic Participation in Complex Government Policymaking*, 7 TRANSFORMING GOV’T: PEOPLE, PROCESS AND POL’Y 501, 501 (2013) (discussing the specifics of the proposal). The Administrative Conference of the United States cited the Regulation Room as an option for agencies looking for a platform made to enhance average citizens’ ability to contribute to rulemaking. MICHAEL SANT’AMBROGIO & GLEN STASZEWSKI, ADMIN. CONF. OF THE UNITED STATES, PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING 109–11 (2018).

297. Dash, *supra* note 291.

298. *Id.*

conversation do likewise.²⁹⁹ This is because of the second factor, that individuals are much more protective of their real name and the reputation attached to it.³⁰⁰ Better behavior would be expected when behavior can be directly linked back to the name. If only those unaccustomed to agency interaction are using pseudonyms, those already least likely to follow the community norms would have further protection from them. Third, doing this is necessary to truly make the identity accountable. The original article reassured readers that it was not necessary to make commentors “log in with Google or Facebook or Twitter unless you want them to[.]”³⁰¹ but even that would not prevent the easy creation of multiple identities. One need only spend ten seconds creating a second Google account to have created a new identity with which to again wreak havoc when the first account is banned. In contrast, by tying identification to a person’s real name—and using existing government technology to verify and validate this identity—an individual really will only have one possible account. Banning an individual for unacceptable behavior will therefore actually prevent them from returning.

As the next Part explains, we have the technology to accomplish all of this, as well as the Internet capabilities required for a functional interactive conversation.

2. *We Now Have the Technological Capability to Pull this Off*

It would not be difficult to implement the behavioral requirements discussed in the previous Section. The community policy could be a short document that participants were required to read and acknowledge as part of the sign-up process.³⁰² Similarly, forums where individuals can flag comments by others are commonplace, and the design of the forum itself could include administrators with removal privileges. Doing so in this context would be no different than removing someone from a trial or

299. Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts*, 44 ENV’T L. REV. 10,670, 10,671–72 (2014).

300. If a situation were to arise where a participant is too fearful to use their real name, their secured identity could instead be linked to a consistent pseudonym for pre reg. Cf. Wendy M. Rosenberger, *Anonymity in Civil Litigation: The “Doe” Plaintiff*, 57 NOTRE DAME L. REV. 580, 593 (1982) (“When disclosure of identity would endanger the plaintiff’s personal safety or physical well-being, courts should customarily permit plaintiff pseudonyms.”).

301. Dash, *supra* note 291.

302. Ground rules are similarly used in other similar contexts, like negotiated rulemaking. See, e.g., Selmi, *supra* note 162, at 430 (“Ground rules may, for example, particularly emphasize civility among the negotiating parties by requiring each party to commit to listening to the other parties and to adhere to various other rules designed to prevent adversarial behavior.”).

agency hearing for inappropriate behavior.³⁰³

The remaining requirement, an accountable identity—in this instance one based on the user’s verified real name—would also be possible based on technology that has only recently been implemented at the federal level.³⁰⁴

Not only will the conversation itself be civil, thanks to these enforcement mechanisms, but technology has also improved connection speeds—the backbone of the Internet itself. Modern Internet speeds mean that a conversation can be viewed in its entirety, with real time updates and easy sharing of any relevant files; it is easy to collapse and view entire conversations, and it takes seconds to share documents that would have taken minutes if not hours to transfer in 1996, the era of RuleNet.³⁰⁵ Internet use is also much more widespread than it was 1996.³⁰⁶ And it is not merely that adoption is far greater, the nature of Internet use and access are also fundamentally different than they were twenty-five years ago.

In 1996, AOL was the dominant Internet service provider, and the Internet was accessed through dial-up modems.³⁰⁷ Usage was charged based on time spent online on a per minute basis (as were telephone calls outside a local area).³⁰⁸ Once online, the Internet of 1996 was composed largely of walled gardens.³⁰⁹ Within AOL itself users could check their AOL e-mail,

303. And it is not merely these formal settings where disruptive behavior can result in removal. Removal can be justified in settings implicating the First Amendment as well. Cutler states that:

The First Amendment requires that the onus be placed on the government to protect the speaker from violent reactions of a hostile audience, rather than permit hecklers to ‘veto’ the First Amendment rights of the speaker by preventing the speech from continuing. When a member of the audience disrupts the flow of communication, that person—not the initial speaker—should ordinarily be removed.

SarahAnne L. Cutler & Leslie L. Lipps, *Expressive Conduct*, 1 GEO. J. GENDER & L. 285, 290 (2000).

304. *How to Verify My Identity*, LOGIN.GOV, <https://login.gov/help/verifying-your-identity/how-to-verify-my-identity/>.

305. As an example, the maximum file size allowed in comments on regulations.gov is 10MB. *Frequently Asked Questions*, REGULATIONS.GOV, <https://www.regulations.gov/faq>. Downloading such a file on a 28.8 kbps modem (standard at the time of RuleNet) would take around fifty minutes, assuming everything was operating at full speed. In contrast, downloading such a file today on any modern connection would be less than a minute. Download Time Calculator, <https://individual.utoronto.ca/dtsang/download/>.

306. Internet access reaches a new high every year. Currently, it is around 86% of the adult U.S. population. J. Clement, *Internet Usage in the United States—Statistics & Facts*, STATISTA (Aug. 31, 2020), <https://www.statista.com/topics/2237/internet-usage-in-the-united-states/>.

307. Manjoo, *supra* note 264.

308. See Ernie Smith, *The Original Internet Bottleneck*, TEDIUM (Apr. 9, 2020), <https://tedium.co/2020/04/09/dial-up-internet-access-history/> (discussing the issues and financial barriers to accessing the Internet in the mid-1990s).

309. Manjoo, *supra* note 264.

read the AOL news, or engage in AOL specific chats.³¹⁰

Leaving the walled garden required an affirmative act, such as choosing to search the full Internet using the search engine provided by the garden itself. Or by going to Yahoo!, which was a collection of sites curated by actual people.³¹¹ This was particularly valuable at the time. Since sites took thirty seconds to load (and charged per minute) finding the correct site quickly was important both to save time and money.³¹²

As the percentage of the population with Internet access increased significantly, so has the percentage of the online population with the understanding and ability to interact with an agency website. An advanced computer user in the RuleNet forum browsed the world wide web.³¹³ Today, society lives on the world wide web but would never refer to it as such.³¹⁴ The fact remains that Internet users today are far savvier and more comfortable in an online forum than they would have been in 1996. This means that not only would pre reg be available to a much larger percentage of the population, but those people would also be far more comfortable interacting with it. The final reason pre reg should happen now is that it makes sense to experiment with the process when that experiment will not risk a remand of the final rule.

D. Pre Reg Is an Ideal Internet Rulemaking Experiment Because It Does Not Risk the Final Rule Being Overturned

Agency concern about a rule being overturned on appeal has led to seemingly ridiculous results, like refusing to remove comments fraudulently submitted on someone's behalf.³¹⁵ This is a product of the hard look review that first arose in the 1970s.³¹⁶ But the record that a reviewing court subjects

310. *Id.*

311. *Id.* Google would not exist for another two years. *From the Garage to the Googleplex*, GOOGLE, https://about.google/intl/en_us/our-story/.

312. Manjoo, *supra* note 264.

313. RuleNet Electronic Forum Registration, <https://web.archive.org/web/19980520013043/http://nssc.llnl.gov/RuleNet/RegForm.html> (captured May 20, 1998) (asking registrants to select their level of computer experience. The top level, "Advanced computer communications", was described as "e.g., dial-up access or world wide web browsing using Mosaic, Win/MacWeb, or other tools.").

314. A word frequency chart shows that use of the term world wide web began to slowly take off around 1992, peaked in 1999, and was basically back down to zero by 2010. Google Books Ngram Viewer, https://books.google.com/ngrams/graph?content=world+wide+web&year_start=1985&year_end=2015&corpus=15&smoothing=0.

315. See Letter from G. Patrick Webre to Karl Bode, *supra* note 277.

316. See Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference's Effects on*

to this hard look begins with the proposed rule. Before a proposed rule is published the agency has free rein.³¹⁷ This is, after all, the point in the process where the agency is currently meeting with selected parties that it has reached out to. It is also the point at which negotiated rulemaking is introduced, a similar design intended to not disrupt the traditional judicial review process.³¹⁸

Agencies will be extraordinarily reluctant to experiment with alternatives, even those aimed at greater inclusivity, if that action could potentially threaten the final result of the rulemaking. Because pre reg occurs before the proposed rule is first published, it also occurs before any heightened potential for reversal kicks in.

In contrast, any attempt to impose additional requirements during the comment period itself, including some attempt at an interactive conversation, as early scholars have asked for,³¹⁹ could be far riskier for agencies to undertake.³²⁰ Such a proposal would therefore be much less likely to be adopted or experimented with, even if lock-in were not a concern at that point. If an agency experimented during the comment phase, it could put extra effort into trying to make the rulemaking process broader and more equitable only to watch the process backfire, sending the final rule back to the agency. Pre reg makes sense, therefore, not only because it occurs at the only possible time to solve lock-in, but because agencies do not need to fear reversal for experimenting with it.

CONCLUSION

Agency lock-in is a major problem. A problem that results from both human nature and the logical outgrowth rule. Human nature is not easily changeable, and the logical outgrowth rule is both statutorily required and mandated by policy. The solution, therefore, is not to try to change the nature of lock-in once it has occurred, but to go back before the moment of lock-in, before a proposed rule is first published.

Agency Rules, 119 COLUM. L. REV. 85, 155–56 (2019) (describing the origins of the hard look review).

317. Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the “Hard Look”*, 92 NOTRE DAME L. REV. 331, 340 (2016).

318. *But see* Robert Choo, *Judicial Review of Negotiated Rulemaking: Should Chevron Deference Apply?*, 52 RUTGERS L. REV. 1069, 1117 (2000) (complaining that although a rule promulgated using negotiated rulemaking “may comport with the formal requirements of the APA,” it should nevertheless be subject to different judicial review because the major changes would be expected to come before the published rule).

319. *E.g.*, Noveck, *supra* note 15, at 489 (arguing for the ability to reply to the comments of another person during the comment period).

320. This is particularly true when the idea would not simply be a free-for-all discussion that anyone could join at any time but something closer to that argued for here, where participation is restricted at a certain point to allow for greater dialogue.

Allowing broader public input before the agency proposes the initial rule makes it more likely that the rule inevitably subject to lock-in later will be as close as possible to the rule the agency would have chosen with all relevant information and ideas available. Allowing a conversation between different interested parties early on ensures that the agency will be exposed to the broadest array of ideas, and see the potential problems with those ideas, before psychological lock-in occurs.

The way to do that is through pre reg, an interactive online discussion forum that allows those who have traditionally been locked out of these early discussions to take part in them and share their input with the agency when it is most likely to have a true impact on the regulation.